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"Who is a Negro?"* Revisited: Determining Individual Racial Status for Purposes of Affirmative Action

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NOTES

"WHO IS A NEGRO?"* REVISITED: DETERMINING INDIVIDUAL RACIAL STATUS FOR PURPOSES OF AFFIRMATIVE ACTION

"The idea of race represents one of the greatest, if not the greatest, error of our time . . . ."[1]

INTRODUCTION

American law has long differentiated among individuals on the basis of race.[2] Legislative, judicial, and administrative attempts to define race have been varied and inconsistent. Paradoxically, the Supreme Court has approved race conscious affirmative action, yet the legal system has failed to develop workable guidelines to determine eligibility for such programs. This note examines the existing racial criteria for affirmative action programs and analyzes alternative methods of classification. This analysis reflects the inherent problems in differentiating individuals on the basis of race and suggests that affirmative action eligibility should not be based on racial criteria alone.

THE CONSTITUTIONALITY OF RACIAL CLASSIFICATION

Over the years, the United States Supreme Court has ruled on the constitutionality of many classifications based on race.[3] Under the "separate but equal" doctrine, the Court declared separation of the races was constitutional provided equal facilities were available.[4] The Supreme Court later ruled contrariwise that segregation was inherently unequal because it stigmatized certain racial groups with a badge of inferiority.[5] Finding segregative racial classifications constitutionally suspect, the Court subjected statutes using these classifications to strict scrutiny[6] and routinely found them violative of

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See Note, *Who is a Negro*, 11 U. FLA. L. REV. 235, 235 (1958).

1. A. MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 1 (1945).

2. *See generally* J. GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959); STATES' LAWS ON RACE AND COLOR (P. Murray ed. 1950); G. STEPHENSON, RACE DISTINCTION IN AMERICAN LAW (1910).

3. *See, e.g.*, Loving v. Virginia, 338 U.S. 1 (1967) (statute forbade racial intermarriages); Shelley v. Kraemer, 334 U.S. 1 (1947) (restrictive covenant allowed only whites to own land); Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance established residential districts exclusive to blacks or whites); McCabe v. Atchison, Topeka & S.F. Ry., 235 U.S. 151 (1914) (state law required separation of races in public facilities). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 551-56 (1978).

4. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (state law required segregation of black and white train passengers).

5. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (legally sanctioned segregated schools generate a feeling of inferiority among blacks).

6. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944).

the fourteenth amendment equal protection clause.[7] By the mid-1970s many commentators thought the constitution "color blind"[8] and therefore intolerant of any classifications based on race.[9] Recent Supreme Court decisions, however, have revitalized racial classifications by upholding affirmative action programs which afford preferential treatment solely on the basis of race.

In *Board of Regents v. Bakke*,[10] a divided Supreme Court held race can be used to determine an individual's eligibility for admission to professional school.[11] Benign racial classifications designed to remedy the present effects of past discrimination were found constitutional.[12] The Court concluded the equal protection clause does not forbid considering racial factors in allocating substantive benefits, but noted that affirmative action programs may not depend solely on racial quotas.[13]

In *United Steelworkers v. Weber*,[14] the Supreme Court nevertheless upheld an affirmative action plan which allocated fifty percent of all job openings to

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7. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (statute forbidding racial intermarriages found unconstitutional); Anderson v. Martin, 375 U.S. 399 (1964) (state law requiring election ballots to designate candidate's race found violative of the equal protection clause). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 560-61 (1978) (discussing the Court's summary invalidation of segregative racial classifications).

8. The doctrine of the "color blind constitution" was developed by the elder Justice Harlan in his eloquent dissent in Plessy v. Ferguson, 163 U.S. 537, (1896):

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559. *See also* Fullilove v. Klutznik, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 564-66 (1947) (Rutledge, J., dissenting).

9. *See, e.g.*, Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976), Cohen, *Race and the Equal Protection of the Laws*, 10 LINCOLN L. REV. 117, 126-34 (1977); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 74 HARV. L. REV. 564, 566-76 (1965).

10. 438 U.S. 265 (1978).

11. *Id.* at 320. Justice Powell refused to allow the establishment of strict quotas based solely on racial criteria because he considered any classification based on race inherently suspect and thus subject to strict scrutiny. *Id.* 319-20. Justices Brennan, White, Marshall and Blackmun believed a less stringent standard of review should be applied to benign racial classifications which are substantially related to the achievement of important governmental objectives. *Id.* at 359-62. Under this standard, they concluded race could be a basis for university admissions. *Id.* at 379. Chief Justice Burger and Justices Stevens, Rehnquist and Stewart refused to address the constitutional issues and limited their review to the Title VI statutory challenge. *Id.* at 411-12.

12. Justice Powell required a specific finding of past discrimination at the institution involved before such classifications would be valid. *Id.* at 307-10. Justices Brennan, White, Marshall and Blackmun found general societal discrimination sufficient to justify using benign racial classifications. *Id.* at 362-69.

13. *Id.* at 320. Justice Powell's opinion concluded: "[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.*

14. 443 U.S. 193 (1979).

blacks.[15] The Court found the Title VII[16] prohibition against employment discrimination did not forbid private employers from voluntarily implementing race conscious affirmative action programs.[17] The majority noted that Congress did not intend to preclude attempts to remove vestiges of past discrimination.[18]

The next year, the Supreme Court further expanded the scope of constitutionally permissible affirmative action plans. Although *Weber* sustained only the private use of racial quotas, *Fullilove v. Klutznick*[19] upheld a provision requiring that ten percent of federal funds allocated for local public works projects be used to procure services of minority-owned businesses.[20] The Court thus upheld the granting of benefits on the basis of race alone.

These decisions implicitly require the existence of legal criteria for determining racial status and eligibility for benefits under affirmative action programs. To assure such benefits are bestowed upon appropriate recipients, some objective method is necessary for differentiating individuals on the basis of race. Attempts to objectively define race, however, have been largely unsuccessful.

Existing Racial Criteria For Affirmative Action Purposes

The federal district court in *Montana Contractors Association v. Secretary of Commerce*[21] struggled with the criteria for determining eligibility under the Minority Business Enterprise provision of the Public Works Employment Act

15. *Id.* at 197.

16. 42 U.S.C. § 2000e-2(a) (1976) provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

17. 443 U.S. at 209.

18. *Id.* at 208.

19. 448 U.S. 448 (1980).

20. The statute at issue was the Minority Business Enterprise provision of the 1977 Public Employment Act, 42 U.S.C. § 6705 (f)(2) (Supp. II 1978):

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 percentum of which is owned by minority group members or, in case of a publicly owned business, at least 51 percentum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

21. 460 F. Supp. 1174 (D. Mont. 1978).

of 1977.[22] The court found the provision unconstitutional because it failed to establish specific objective standards for determining racial categorization.[23] Although the Supreme Court later upheld the provision's constitutionality,[24] it did not directly address whether the statute affords a workable method for differentiating individuals on the basis of race.[25] The Court thus failed to consider the practical difficulties in implementing this legislation.

In contrast to the Minority Business Enterprise provision,[26] regulations promulgated under Title VII[27] establish criteria for determining individual racial status.[28] These Equal Employment Opportunity Commission (EEOC) regulations recognize five racial categories: "White," "Black," "Hispanic," "Asian or Pacific Islander," and "American Indian or Alaska Native."[29] These

22. 42 U.S.C. § 6705(f)(2) (Supp. II 1978). *See supra* note 20.

23. 460 F. Supp. at 1176. The Act accords preferential treatment to Negroes, Orientals, Indians, Eskimos, and Aleuts. *See supra* note 20. Under applicable guidelines, any fraction of minority ancestry was sufficient to bring one within a favored class. *See* U.S. DEPT. OF COMMERCE, ECONOMIC DEVELOPMENT ADMINISTRATION, MINORITY ENTERPRISE TECHNICAL BULLETIN (1977) (defining a minority member as a person with any amount of minority blood regardless of the percentage). The district court therefore found the racial quota in the MBE provision violative of principles set forth in *Bakke*. 460 F. Supp. at 1176.

24. Fullilove v. Klutznick, 448 U.S. 448 (1980). *See also supra* note 19 and accompanying text.

25. This issue of a workable method was, however, presented to the court. *See* Brief for Petitioner at 16-17, Fullilove v. Klutznick, 448 U.S. 448 (1980). Additionally one *amicus curiae* brief was entirely dedicated to the argument that all racial classifications violate the equal protection clause because it is impossible to differentiate individuals on the basis of race. *See* Brief of the Anti-Defamation League of B'nai B'rith, Fullilove v. Klutznick, 448 U.S. 448 (1980). The dissenting opinions of Justices Stewart and Stevens alluded to the difficulties in individual racial designation. Justice Stewart predicted that the majority decision would require that statutes once again "reflect the odious practice of delineating the qualities that make one person a Negro and make another white." *Id.* at 531. Justice Stevens thought that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." Additionally, in referring to the guidelines that had been developed, Justice Stevens said they "are so general as to be fairly innocuous; as a consequence they are too vague to be useful." *Id.* at 534, n.5.

26. *See* 13 C.F.R. § 317.2 (1983) (Economic Development Administration guidelines define a minority group member as one who is Negro, Spanish-speaking, Indian, Oriental, Eskimo, or Aleut).

27. 42 U.S.C. § 2000e (1976) forbids discrimination in all areas of the employer-employee relationship on the basis of race, color, sex, religion or national origin. *See supra* note 16.

28. *See* EEOC State and Local Government Information Report, EEOC Form 164, app. § 2 Race/Ethnic Identification 1 EMPL. PRAC. GUIDE (CCH) ¶ 1889 (1981); EEOC Apprenticeship Information Report EEO-2 and Instructions, EEOC Form 272, § 8, 1 EMPL. PRAC. GUIDE (CCH) ¶ 1883 (1981); EEOC Employer Information Report EEO-1 and Instructions, Standard Form 100, app. § 4 Race/Ethnic Identification, 1 EMPL. PRAC. GUIDE (CCH) ¶ 1881 (1981) [hereinafter cited as EEOC Report]; Civil Rights — Racial or Ethnic Identity, 1 EMPL. PRAC. GUIDE (CCH) ¶ 1710 (1981).

29. EEOC Report, *supra* note 28, at 1322. These categories are currently defined as follows:

> White (not of Hispanic origin) — All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East.
>
> Black (not of Hispanic origin) — All persons having origins in any of the Black racial groups of Africa.
>
> Hispanic — All persons of Mexican, Puerto Rican, Cuban, Central or South American,

designations are not based on scientific definitions or anthropological norms, but rather on nationality, geographic origin, ethnicity, and race.[30] Each category places differing degrees of emphasis on each of the relevant variables. For example, the "Black" category focuses on racial characteristics, the "White" and "Asian or Pacific Islander" categories emphasize geographic origin, and the "Hispanic" and "American Indian or Alaska Native" categories stress cultural affiliation.[31]

While these EEOC categories do not clearly delineate racial groupings, the recommended methods for classifying individuals are even less precise. The EEOC suggests an individual's race be determined through records, visual surveys, personal knowledge or by self-identification.[32] Additionally, the guidelines provide that an individual may be included in the group in which "he appears to belong, identifies with, or is regarded in the community as belonging."[33]

These guidelines determine racial status on the basis of an individual's identification and association with a racial group. The lack of precision required by the EEOC for determining racial classification is relatively inconsequential in light of the purpose behind the relevant legislation.[34] EEOC regulations require employers to keep records reflecting the races of their employees.[35] These requirements are intended to aid in the enforcement of Title VII which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[36]

The EEOC criteria, however, are now commonly used to determine racial status for purposes of state affirmative action programs.[37] Thus, the broad

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or other Spanish culture or origin regardless of race.

Asian or Pacific Islander—All persons 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, Japan, Korea, the Philippine Islands, and Samoa.

American Indian or Alaska Native—All persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.

Id.

30. *Id.*

31. *Id.*

32. 1 EMPL. PRAC. GUIDE (CCH) ¶ 1710, at 1270 (1981).

33. EEOC Report, *supra* note 28, at 1322.

34. The record keeping requirements are intended to aid in the enforcement of Title VII. *See, e.g.*, Equal Empl. Opportunity Comm'n v. American Nat'l Bank, 652 F.2d 1176, 1195-96 (1981). Title VII is designed to protect against employment discrimination on the basis of race, color, religion, sex, or national origin. *See supra* note 16. The right to bring a Title VII suit is not premised on actual membership in any particular racial group. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976). Therefore, the actual race of an individual filing a discrimination charge may be insignificant. *See, e.g.*, 427 U.S. at 278-79; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

35. 29 C.F.R. § 1602.1 (1982).

36. *See supra* note 16.

37. The EEOC guidelines are used in determining racial status for purposes of state administered affirmative action programs in Maine, Rhode Island, Washington, and Washington, D.C. The District of Columbia's employment affirmative action program calls for government employment of Blacks, Whites, Spanish-speaking Americans, Native Americans,

criteria originally developed to enable enforcing anti-discrimination legislation, are now used to determine eligibility for preferential treatment. These comprehensive guidelines arguably fail to meet the Supreme Court's requirement that benign racial legislation be "narrowly tailored."[38]

In addition to their doubtful constitutionality, the guidelines' broad and uncertain nature will render their practical application difficult. Courts will have to pick and choose among potentially contradictory geographic, ancestral, objective and subjective criteria.[39] For example, an individual may identify and associate with the Hispanic race without having any ancestral ties to the designated geographic areas included within the Hispanic category. Because of the mixed racial and ethnic heritage of many Americans,[40] an individual could fall within several of the designated categories.[41] The guidelines additionally indicate that any percentage of ancestral ties to a geographic region suffices for membership in one of the designated groups.[42] Because the ancestors of most Americans come from many different regions,[43] almost every American would be technically eligible for an affirmative action program based on EEOC criteria.

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and Asian Americans in accordance with their proportional representation in the area work force, but does not prescribe guidelines for determining individual racial status. In validating racial status under this legislation, the D.C. Office of Human Rights uses the EEOC State and Local Government Information Report, *supra* note 28. Letter from John L. Watkins, Executive Assistant, D.C. Office of Human Rights, to Chris Ballentine (Dec. 23, 1982). Washington's employment affirmative action program similarly fails to define individual racial status, *see* Exec. Order No. 81-02, 3 EMPL. PRAC. GUIDE (CCH) ¶ 28,614 (1981), and the Washington Human Rights Commission also uses EEOC Employer Information Report EEO-1. Letter from Frank Trevino, Jr., Acting Director of Compliance, Washington Human Rights Commission, to Chris Ballentine (Jan. 14, 1983). The Rhode Island Commission for Human Rights has adopted guidelines for determining individual racial status for purposes of affirmative action which are identical to EEOC guidelines, *see* Guidelines on Recordkeeping and Reporting for Affirmative Action Programs, § 6 (Mar. 30, 1978) (available from the Commission for Human Rights, Providence, Rhode Island). In Maine, the State Department of Personnel provides assistance in the preparation of affirmative action programs. *See* ME. REV. STAT. ANN. tit. 5, § 788 (1982). The state affirmative action coordinator, who is part of the Department of Personnel, relies on EEOC criteria in determining individual racial status. Letter from Kenneth A. Newsome, Affirmative Action Coordinator, Maine Department of Personnel, to Chris Ballentine (Jan. 18, 1983).

38. Fullilove v. Klutznick, 448 U.S. 448, 480 (1980). *See also* Dunn v. Blumstein, 405 U.S. 330, 343 (1971) (statutes affecting constitutional rights must be drawn with precision and tailored to serve legitimate objectives); Small v. American Sugar Ref. Co., 267 U.S. 233, 240 (1925) (a prohibition so indefinite as to be unintelligible is not a rule at all).

39. *See supra* notes 28-33 and accompanying text.

40. M. OLIEN, THE HUMAN MYTH 128 (1978). One noted anthropologist claims that the average American White has 5% Negro ancestry and the typical Black has 25% White racial background. Testimony of Dr. Munro Edmonson, Smith v. Louisiana, No. 78-9513 *consol. with* No. 81-4201 (La. Civ. Dist. Ct., Orleans Parish, 1983).

41. The EEOC guidelines merely provide that no one should be classified in more than one racial group. EEOC Report, *supra* note 28. They provide no specific guidance for determining the racial classification for an individual of mixed racial ancestry.

42. *See supra* note 29. Such an interpretation would be in accordance with Department of Commerce directives. *See supra* note 23.

43. *See generally* U.S. Dept. of Commerce & Bureau of Census Statistical Abstract of the U.S. Foreign Stock by Country of Origin 36 (1982-83 ed.) (showing the mixed geographic ancestry of United States citizens).

Additional uncertainties arise in applying EEOC guidelines to determine eligibility for affirmative action programs because EEOC classifications have shifted over time. For example, in 1977, the EEOC reclassified natives of India from the "White" category to the "Asian or Pacific Islander" category.[44] This change resulted not from a determination that the prior racial categorization was incorrect[45] but from an attempt to standardize inter-agency recordkeeping.[46] Several courts have demonstrated deference to the EEOC guidelines by finding them presumptively correct.[47] Under such judicial deference substantive rights directly linked to an individual's racial status are subject to change by the stroke of an administrative pen.[48]

Federal agencies may use an even more subjective procedure than the EEOC's to determine race for affirmative action programs. The Department of Commerce (DOC) requires federal agencies to use a uniform method of racial categorization for recordkeeping and reporting.[49] The DOC guidelines are based on the same five racial categories as those of the EEOC, but the methodology used to ascertain individual racial status is quite different. Whereas the EEOC determines races by group association or identification,[50] the DOC guidelines allow each individual to choose his own racial status.[51]

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44. EEOC, Government-Wide Standard Race/Ethnic Categories, 42 Fed. Reg. 17,900 (1977).

45. *See* Young, *Racial Classification in Employment Discrimination Cases: The Fifth Circuit's Refusal to Prescribe Standards,* 11 CUM. L. REV. 347, 356 (1980).

46. *See* 5 C.F.R. § 720.901 (1982). The change was made to comply with office of Management and Budget guidelines which establish minority groups in order to maintain employment statistics in the United States. *Id.*

47. *See, e.g.,* Rodrigues v. Pacific Tel. & Tel. Co., 70 F.R.D. 414 (N.D. Cal. 1976) (EEOC race guidelines are clearly compelling in the absence of substantial evidence to the contrary).

48. In Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd,* 614 F.2d 1295 (5th Cir. 1980), *cert. denied,* 449 U.S. 862 (1980), a class action suit claiming racial discrimination against whites was brought against Alabama State University. The trial court concluded that the university administration had "engaged in a pattern and practice of discrimination against whites." *Id.* at 1208. A class including all white employees and applicants was certified. *Id.* at 1208 n.1. A faculty member born in India and tracing his ancestry to the Indian subcontinent sought to intervene as a member of the white class. Young, *supra* note 45, at 360-61. However, the Court ruled that great deference must be given to EEOC guidelines. *Id.* at 361. Since natives of India are not classified white under current EEOC guidelines, intervention was denied. *Id.* at 361-62. The Court made this decision despite the fact natives of India were classified as white by the EEOC when the discrimination occurred. *See* EEOC, Standard Form 100, Employer Information Booklet, Race/Ethnic Identification 5 (1976).

49. Department of Commerce Statistical Policy Directive 15, Race and Ethnic Standards for Reporting Statistics and Administrative Reporting 37 (1978) [hereinafter cited as Policy Directive 15].

50. *See supra* notes 29-31 and accompanying text.

51. Office of Personnel Management, Federal Personnel Letter 298-10 (1980) (implementing Policy Directive 15, *supra* note 49) provides:

> Agencies must accept the race and national origin data submitted by employees as being correct. In those unusual cases where the agency feels that the code which the employee has provided is manifestly inaccurate (e.g., employee identifies self as Asian or Pacific Islander, American Indian, or Black, when it seems obvious to an untrained observor that said individual is clearly white, or vice versa), the employee should be counselled as to the purpose for which the data are being collected. . . .

Whether the DOC guidelines are widely used for affirmative action purposes is unclear. While the DOC maintains these guidelines should not be "viewed as determinants of eligibility for participation in any Federal program,"[52] it has also stated the guidelines will be used in compiling statistics for affirmative action programs.[53] Additionally, the Office of Personnel Management uses these DOC guidelines to determine individual racial status in administering its affirmative action programs.[54] It is uncertain whether these uses encompass the granting of substantive benefits, or are merely a procedural device for recordkeeping purposes.

Irrespective of the federal agencies, at least two states base eligibility for race conscious affirmative action programs on racial self-designation.[55] The theory underlying this view is that racial status is a subjective determination that only the individual can properly make.[56] Yet the self-designation standard invites fraud and perversion of affirmative action programs.[57] Affirmative action is intended to provide a remedy for the present effects of past discrimination.[58] Individual racial self-classification undermines this goal because it does not necessarily correlate with past or present discriminatory practices.

ALTERNATIVE METHODS OF RACIAL CLASSIFICATION

Because guidelines currently used for affirmative action programs do not provide objective workable techniques for determining an individual's race,[59]

If after counselling, the employee still declines to change the categorization that was selected, the agency must accept the categorization provided by the employee.

Id. at 3.

52. Policy Directive 15, *supra* note 49, at 37.

53. *See* Office of Personnel Management, Std. Form 181, Race and National Origin Identification (1980).

54. Letter from A. Diane Graham, Ass't Dir. for Affirmative Employment Programs, Office of Personnel Management, to Chris Ballentine (Feb. 8, 1983).

55. Self-designation currently determines individual racial status in Delaware and South Dakota state affirmative action programs. Delaware's employment affirmative action program is monitored by the State Affirmative Action Coordinator, under the auspices of the State Human Relations Commission. *See* Exec. Order No. 74, 3 EMPL. PRAC. GUIDE (CCH) ¶21503.03 (1981). The State Affirmative Action Coordinator relies solely on self-designation for determining individual racial status. Telephone interview with Steve Macaulister, Delaware State Affirmative Action Coordinator (Feb. 1983). Racial self-designation is likewise used by South Dakota's Bureau of Personnel in overseeing the state affirmative action program. S.D. CODIFIED LAWS ANN. § 1-33-9 (1980).

56. Telephone interview with Steve Macaulister, Del. State Affirmative Action Coordinator (Feb. 1983).

57. The abuse of affirmative action programs is well-documented. *See, e.g.*, J. WILKINSON, FROM *Brown* TO *Bakke* THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 292 (1979) (53 self-proclaimed American Indian police officers reclassified as white by the EEOC). *See also* REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, Jan. 16, 1979 (discussing the possibility of fraud within the MBE program). *See generally* Note, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 HASTINGS CONST. L.Q. 199, 222-26 (1976); Note, *Impermissible Reverse Discrimination v. Allowable Affirmative Action: The Supreme Court Upholds Racial Classification*, 14 J. MAR. L. REV. 491, 513-14 (1981).

58. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979).

59. *See generally* Alexander & Alexander, *The New Racism: An Analysis of the Use of*

consideration of alternative methods is appropriate. Race is fundamentally a scientific and social concept, and legal definitions of race are often derived from these disciplines. The following sections examine attempts to racially categorize groups and individuals based on various scientific and social criteria.

Scientific Classification

The scientific study of race seeks to classify individuals according to physical differences.[60] Ethnologists, however, have never agreed on a uniform method of dividing mankind into races. Indeed, race is the least precise of the scientific criteria used to define man zoologically.[61] One nineteenth century system identified twenty-nine distinct races,[62] but most earlier scholars divided humanity into five races on the basis of skin color.[63] Today, anthropologists agree skin pigmentation is inconclusive in identifying racial groups[64] and is relevant only to the extent that it is a genetic trait shared by a large body of individuals.[65] Ethnologists currently consider a combination of taxonomic characteristics[66] to divide humans into the primary races of Caucasoid, Negroid, and Mongoloid.[67] Under this system, fair skinned Scandinavians and brown skinned Hindus are both designated Caucasians due to their common physical characteristics and ancestry.[68]

Despite scientific attempts to create static classifications, *homo sapiens* were probably never divided into pure races.[69] Constant migration and cross fertilization account for the mixed racial heritage of most individuals. For example, approximately twenty-one percent of all whites in the United States have African ancestry and seventy-three percent of all blacks have non-African ancestry.[70] Empirical data supports the conclusion that similarities among the races overshadow all relevant differences.[71] Race is accordingly recognized as an arbitrary classification based on whatever characteristics the classifier wishes

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Racial and Ethnic Criteria in Decision-Making, 9 SAN DIEGO L. REV. 190 (1972); Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 676-94 (1975); Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 HOUS. L. REV. 641 (1973); Young, *supra* note 45, at 347.

60. L. HOLMES, ANTHROPOLOGY: AN INTRODUCTION 8 (1969). *See also* J. BIRDSHELL, HUMAN EVOLUTION 487 (1972).

61. Lundsgaard, *supra* note 59, at 648.

62. *See* Greenfield & Kates, *supra* note 59, at 676.

63. *Id.* The five races were Mongolian (yellow), Negro (black), Caucasian (white), Indians of North and South America (red), and Malay (brown). *Id.*

64. G. LASKER, PHYSICAL ANTHROPOLOGY 358 (1973).

65. R. BENEDICT, RACE: SCIENCE AND POLITICS 25-26 (rev. ed. 1959).

66. L. HOLMES, *supra* note 60, at 10. The characteristics utilized in differentiating races include stature, head form, facial structure, hair color and texture, eye color and presence of eye fold, form of nose, body build and skin color. *Id.*

67. *Id. See also* A. MONTAGU, *supra* note 1, at 9.

68. L. HOLMES, *supra* note 60, at 10-11.

69. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1421 (1962).

70. *See supra* note 40.

71. Lundsgaarde, *supra* note 59, at 648.

to emphasize.[72] Many modern scientists therefore shun using race as a scientific term[73] or use it only to describe general characteristics of populations, not individuals.[74]

Ancestry and Bloodline Criteria

Despite the lack of accepted scientific classifications of race, American courts have been compelled to define race in interpreting laws based on racial categories.[75] Because the Supreme Court held determination of racial status a matter of state law,[76] state statutes proposed several methods for ascertaining an individual's race.[77] Many state laws based racial status on the "proportion of blood" of a particular race an individual had "in his veins."[78] For example, in Florida a Negro was anyone having one-eighth or more "Negro blood."[79] Other states defined a Negro as anyone with African ancestry.[80] Currently, every state has repealed its legal definitions of racial categories.[81] Until recently, however, Louisiana had a statute designating anyone having one thirty-second or more Negro blood a "Negro,"[82] thus requiring precise and detailed genealogical data. Case law construing this statute demonstrated the difficulties inherent in racial definitions based on bloodline and ancestry.[83]

The three appellate cases construing Louisiana's statute involved an individual seeking to invalidate a racial redesignation instituted by the Louisiana Bureau of Vital Records.[84] In each case, plaintiff's original racial designation was white. However, a subsequent study of genealogical records led the Bureau

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72. *Id. See also* A. MONTAGU, *supra* note 21, at 8.

73. F. Livingston, *On the Nonexistence of Human Races,* THE CONCEPT OF RACE 46 (1967).

74. L. DUNN & T. DOBZHANSKY, HEREDITY, RACE, AND SOCIETY 198 (1952).

75. *See, e.g., Legal Definitions of Race,* 3 RACE REL. L. REP. 571, 577-79 (1958) [hereinafter cited as *Legal Definitions*]; G. STEPHENSON, *supra* note 2. *See also* 42 U.S.C. § 1981 (1976) (statute affords the same rights as enjoyed by "white citizens").

76. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

77. The majority of those laws focused on defining Negroes, *see, e.g.,* ALA. CODE tit. I § 2 (1940) (person of color is one descended from a Negro to the third generation); FLA. STAT. § 1.01(6) (1967) (Negroes are people with one-eighth or more African blood); TENN. CODE ANN. § 1-305(11) (1956) (persons having any African blood are Negroes). *See generally* G. STEPHENSON, *supra* note 2, at 12-25; Note, *Who is a Negro?,* 11 U. FLA. L. REV. 235 (1958). Sometimes, racial groups other than Negroes were specified. *See, e.g.,* NEV. REV. STAT. § 122.180 (1957) (repealed 1959) (miscegenation statute which applied to Ethiopian or black race, Malay or brown race, and Mongolian or yellow race).

78. *See, e.g.,* IND. CODE § 44-104 (1952) (amended 1965); NEB. REV. STAT. § 42-103 (1943).

79. FLA. STAT. 1.01(6) (1967) (repealed 1969).

80. *See, e.g.,* MD. ANN. CODE art. 27, § 398 (1957) (repealed 1967).

81. *See, e.g.,* 1969 FLA. LAWS 195, § 1 (repealed definition of Negro).

82. LA. REV. STAT. ANN. § 42:267 (Supp. 23A, West 1982), *repealed* by 1983 La. Sess. Law Serv. Act No. 441 (West).

83. Although the Louisiana statute was not, by its terms, based on ancestry, determining whether an individual has one thirty-second or more Negro blood necessarily requires an examination of genealogical data and ancestral records. *See Legal Definitions, supra* note 75, at 572-75.

84. *See* Messina v. Ciaccio, 290 So. 2d 339 (La. App. 1974); Thomas v. Louisiana Bd. of Health, 278 So. 2d 915 (La. App. 1973); State *ex. rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201 (La. App. 1973), *aff'd,* 296 So. 2d 809 (1974).

to conclude plaintiff was greater than one thirty-second Negro.[85] The Bureau consequently reclassified each plaintiff as black.

The Louisiana Fourth Circuit Court of Appeal reversed the Bureau's action in each case.[86] The court found the genealogical data inconclusive because the records did not reflect the percentage of Negro blood in a given ancestor.[87] For example, the amount of "Negro blood" in an individual designated as mulatto or colored was never precisely stipulated.[88] While the Bureau had assigned fixed percentages to such designations,[89] the court found these guidelines totally arbitrary.[90] The court concluded the one thirty-second law required exact genealogical data on each ancestor of the individual whose race was at issue.[91] Because such exacting evidence was unavailable, the court ordered each plaintiff's race redesignated as white.[92]

Past attempts to apply Louisiana's fixed percentage statute demonstrate the practical infeasibility of basing racial definitions on antiquated genealogical data. Individuals with only a few nonwhite ancestors have been traditionally designated nonwhite in official records.[93] Additionally, the common practice is still to classify an individual as nonwhite if either parent is nonwhite.[94] Application of these practices over several generations can arbitrarily result in nonwhite racial designations for individuals whom society recognizes as white.[95]

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85. Messina v. Ciaccio, 290 So. 2d 339, 340 (La. App. 1974); Thomas v. Louisiana Bd. of Health, 278 So. 2d 915, 916 (La. App. 1973); State *ex.rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201, 202-03 (La. App. 1973), *aff'd*, 296 So. 2d 809 (1974). These determinations were based on genealogical charts and records which designated plaintiff's ancestors as Negro, octoroon, mulatto, F.M.C., colored, F.W.C., and White. *See, e.g., Thomas*, 278 So. 2d at 915, in which 77 exhibits were admitted into evidence. They consisted of suit records, succession records, various decennial census records, and birth, baptismal, marriage and death certificates, all spanning at least six generations. *Id.* at 916.

86. Messina v. Ciaccio, 290 So. 2d 339, 341 (La. App. 1974); Thomas v. Louisiana Bd. of Health, 278 So. 2d 915, 916 (La. App. 1973); State *ex. rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201, 203-05 (La. App. 1973), *aff'd*, 296 So. 2d 809 (1974).

87. *Id.*

88. *See, e.g.*, State v. Treadaway, 126 La. 300, 52 So. 500 (1910).

89. The Bureau of Vital Records defined a mulatto as an individual with one-half Negro ancestry and a quadroon as anyone have one-quarter Negro blood. Thomas v. Louisiana Bd. of Health, 278 So. 2d 915, 916-17 (La. App. 1973). Additionally, an octoroon was defined as having 12.5% Negro ancestry. Messina v. Ciaccio, 290 So. 2d 339, 341 (La. App. 1974).

90. *See, e.g.*, Thomas v. Louisiana Bd. of Health, 278 So. 2d 915, 917 (La. App. 1973).

91. Messina v. Ciaccio, 290 So. 2d 339, 341-42 (La. App. 1974).

92. Because the Bureau of Vital Records had changed each plaintiff's original racial designation from White to Black, it bore the burden of proof to show there was "no room for doubt" that each plaintiff was Negro. State *ex. rel.* Treadaway v. Louisiana Bd., of Health, 221 La. 1048, 61 So. 2d 735 (1952).

93. *See* Morrison v. California, 291 U.S. 82 (1934) in which the Supreme Court said "[M]en are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less. . . ." *Id.* at 86. *See also* U.S. DEPT. OF COMM. ECONOMIC DEVELOPMENT ADMINISTRATION, MINORITY ENTERPRISE TECHNICAL BULLETIN (1977) (defining a minority member as a person with any amount of minority blood, regardless of the percentage).

94. *See, e.g.*, NATIONAL CENTER FOR HEALTH STATISTICS, RECOMMENDED PROCEDURES FOR LIVE BIRTHS § 7 (1982).

95. The Louisiana Supreme Court upheld the constitutionality of the state's one thirty-second law, however, in State *ex rel.* Plaia v. Louisiana Bd. of Health, 296 So. 2d 809 (La.

Social Race Criteria

While some courts struggle to define race based on scientific or genealogical criteria, the general American societal perception of race is based on social, not ethnological, factors.[96] Within this social race perception, factors such as nationality, religion, language, and culture differentiate various races.[97] While there is some agreement as to conventional racial classifications, a general societal consensus does not exist.[98] The social concept of race ultimately depends on each individual's changing and subjective perception.[99] Empirical reality is often replaced by symbolism and preconceived notions about racial groups.[100] Definitions of race premised on social precepts are therefore subject to ad hoc and arbitrary application.

The Common Understanding Approach

Prior to 1952, the only individuals who could be naturalized were "white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere."[101] In *United States v. Bhagat Singh Thind*,[102] the Supreme Court adopted a common understanding test to determine eligibility under this statute. In that case, a high caste Hindu from India was found to be Caucasian, yet denied naturalization because he was not a "white person."[103] The Court refused to base racial classification on ancestral descent or scientific concepts because such methods did not provide workable criteria for defining racial categories.[104] Under the common understanding test, however, "white person" would be interpreted in accordance with the popular understanding of the common man.[105]

Although the *Bhagat* Court avoided the problems associated with applying ancestry and bloodline tests, the difficulty with applying the common understanding test is that it is largely subjective and varies with the perceiver's social

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1974). The statute survived challenges asserting it is void for vagueness and constitutes invidious racial discrimination. *Id.* at 810. The court concluded the statute imposes no affirmative duties of racial classification, but merely prohibits use of racial terms unless the person has more than one thirty-second Negro blood. *Id.* For a critical analysis of this finding, see *Racial Designation in Louisiana, supra* note 57, at 202-22. The Louisiana one thirty-second law is again being challenged on constitutional grounds in the highly publicized case Smith v. Louisiana. No. 78-9513 *consol, with* No. 81-4201 (La. Civ. Dist. Ct., Orleans Parish, 1983). *See generally What Makes You Black,* EBONY 115 (Jan., 1983); *Raised White, A Louisiana Belle Challenges Race Records That Call Her Colored,* 18 PEOPLE 156 (Dec. 6, 1982).

96. *See* A. MONTAGU, STATEMENT OF RACE 8 (3d ed. 1972); M. OLIEN, *supra* note 40, at 127-29; Lundsgaarde, *supra* note 59, at 6.

97. *R. Benedict, supra* note 65, at 9-18. *See also* A. MONTAGU, *supra* note 96, at 8.

98. *See, e.g., Legal Definitions, supra* note 75.

99. *See, e.g.,* Alexander & Alexander, *supra* note 59, at 198-203.

100. *See, e.g.,* C. MARDEN & G. MEYER, MINORITIES IN AMERICAN SOCIETY (2d ed. 1962).

101. Act of Oct. 14, 1940, ch. 876, § 303, 54 Stat. 1137, 1140, *repealed by* Immigration and Nationality Act of 1952, ch. 477, § 403(42), 66 Stat. 239, 280.

102. 261 U.S. 204 (1923).

103. *Id.* at 214-15.

104. *Id.* at 208-09.

105. *Id.* at 214-15.

location.[106] For example, after *Bhagat*, lower federal courts reached conflicting results on the racial status of individuals of the same nationality.[107] The common understanding test has thus been criticized as being nothing more than a "I-know-one-when-I-see-one" standard which is incapable of uniform application.[108]

The Color Test

The repeal of racially restrictive naturalization laws in 1952[109] might appear to have mooted the Supreme Court's common understanding approach to individual racial status. In recent years, however, a growing number of discrimination cases have been brought under 42 U.S.C. § 1981, which provides that all persons shall enjoy the same rights as white citizens.[110] The Supreme Court has emphasized that section 1981 pertains only to rights against racial discrimination.[111] Claims of religious,[112] sex,[113] and national origin[114] discrimination are not actionable under the statute. To determine whether the alleged discrimination is racial in character, the federal courts must inquire as to the plaintiff's racial status. In applying section 1981, courts have not agreed on workable criteria for differentiating racial categories. They have adopted instead a myriad of social race standards which have led to different racial labels for similarly situated individuals.[115]

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106. P. BERGER, INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE 157, 157-58 (1963).

107. *Compare Ex parte* Mohriez, 54 F. Supp. 941 (D. Mass. 1944) (Arab admitted to citizenship) *with In re* Ahmed Hassan, 48 F. Supp. 843 (E.D. Mich. 1942) (Arab found nonwhite and therefore denied naturalization).

108. Brief of the Anti-Defamation League of B'nai B'rith at 11, Fullilove v. Klutznick, 448 U.S. 448 (1980).

109. Act of Oct. 14, 1940, ch. 876, § 303, 54 Stat. 1137, 1140, *repealed by* Immigration and Nationality Act of 1952, ch. 477, § 403(42), 66 Stat. 239, 280. 8 U.S.C. § 1422 (1976) currently reads: "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race."

110. 42 U.S.C. § 1981 (1976) provides in full:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind and no other.

111. *See* Georgia v. Rachel, 384 U.S. 780, 791 (1966). *See also* Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (§ 1981 affords a federal remedy against discrimination in private employment on the basis of race).

112. Runyon v. McCrary, 427 U.S. 160, 167 (1976). *See also* Turner v. Unification Church, 473 F. Supp. 367, 372 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979).

113. Runyon v. McCrary, 427 U.S. 160, 167 (1975). *See also* Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235, 1278 (7th Cir. 1980).

114. *See, e.g.*, Patel v. Holley House Motels, 483 F. Supp. 374 (S.D. Ala. 1979); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D.C. Md. 1977); Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975). *But see* Enriquez v. Honeywell, Inc., 431 F. Supp. 901 (D.C. Okla. 1977); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (D.C. Pa. 1976).

115. *Compare* Gomez v. Pima County, 426 F. Supp. 816 (D. Ariz. 1976) (many Mexican-American/Spanish-surnamed individuals are members of the brown race or color) *with* Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975) (Spanish-surnamed

Some federal courts have developed a color test which affords section 1981 standing to individuals whose physical appearance is other than white.[116] For example, one district court held that the only Hispanics who may sue under section 1981 are those of a "brown race or color."[117] The color test attempts to use an objective criterion, skin color, for what is essentially a social race standard. Because it requires a case-by-case analysis of individual racial status,[118] the color test fails to create certainty within the law. Furthermore, this test is an oversimplistic method of defining race. Individual racial status should not be based solely on skin color, but also on a myriad of social, political, and economic factors.[119]

The Properly Drawn Pleadings Rule

Rather than apply a color based test, some federal courts grant section 1981 standing whenever the plaintiff alleges he is generally perceived as nonwhite and is a victim of racial discrimination.[120] Under this approach, the question whether racial discrimination has occurred and the underlying conclusion as to individual racial status are matters of fact rather than law.[121] Because courts following this "properly drawn pleadings rule" have failed to establish guidelines for distinguishing racial categories, factfinders must apply their own ad hoc definitions of race. Consequently, this rule, like the color test and the common understanding approach,[122] permits inconsistent rulings on the racial status of similarly situated individuals.

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individuals do not constitute a racial group). *Compare* Maldonado v. Broadcast Plaza, Inc., 10 F.E.P. Cases (BNA) 839 (D. Conn. 1974) (Puerto Ricans constitute a "nonwhite" racial group) *with* Vera v. Bethlehem Steel Corp., 448 F. Supp. 610 (M.D. Pa. 1978) (Puerto Ricans are a national origin group, not a race). *Compare* Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) (en banc) (an individual from the Indian sub-continent can represent a nonwhite class) *with* Patel v. Holley House Motels, 483 F. Supp. 374 (S.D. Ala. 1979) (plaintiff of East Indian descent denied the right to bring a racial discrimination suit).

116. *See, e.g.*, Gonzalez v. Stanford Applied Eng'g, 597 F.2d 1298, 1300 (9th Cir. 1979) (individuals of Mexican descent having a skin color not characteristically Caucasian may bring a § 1981 suit).

117. Carrillo v. Illinois Bell Tel., 538 F. Supp. 793, 796-97 (N.D. Ill. 1982).

118. *Id.* at 796.

119. *See, e.g.*, Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 584-87 (1977). *But see* Sowell, Weber *and* Bakke, *and the Presuppositions of "Affirmative Action,"* 26 WAYNE L. REV. 1309, 1318-21 (1980) (discussing the lack of correlation between income and individual racial/ethnic status).

120. *See, e.g.*, Petrone v. City of Reading, 541 F. Supp. 735, 738-39 (E.D. Pa. 1982) (plaintiff could have brought a § 1981 suit by alleging he is generally perceived as nonwhite); Madrigal v. Certainteed Corp., 508 F. Supp. 310, 311 (W.D. Mo. 1981) (§ 1981 construed to protect persons who are the objects of discrimination because prejudiced persons perceive them to be nonwhite); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801, 807 (D. Md. 1980) (Hispanic permitted to bring a § 1981 suit after alleging discrimination based on his brown race).

121. *See* Apodaca v. General Elec. Co., 445 F. Supp. 821 (D.N.M. 1978), wherein the court stated: "If a Spanish-surnamed plaintiff alleges discrimination on the basis of race, the issues as to the defendant's perception and animus are factual. . . ." *Id.* at 823.

122. *See supra* notes 102-119 and accompanying text.

The Pragmatic Approach

Still another subjective social race test is the pragmatic approach of *Budinsky v. Corning Glass Works.*[123] The *Budinsky* court recognized the term race cannot be scientifically defined, but noted it does have a generally understood meaning.[124] Since society perceives groups such as Hispanics, Blacks, and Indians as racial in character, both practical need and a logical reason exist to acknowledge these groups as distinct races. The court concluded, however, that Slavs, Italians, and Jews are not commonly identified as races and therefore should not be treated as such.[125]

Because the pragmatic approach relies on general societal perceptions, it does not define races with certainty. Ethnic groups drift in and out of racial categories as historical circumstances vary.[126] The pragmatic test additionally fails to provide objective criteria for determining individual racial status. This approach may define the racial nature of broad societal groups, but it provides no guidance for determining the racial status of individuals.[127] For example, courts applying the pragmatic test have categorized Hispanics as a racial group.[128] Yet all Hispanic individuals are not generally perceived as members of a distinct "Hispanic race."[129] Thus, the pragmatic approach could be overinclusive.[130] It classifies an individual with an Hispanic name as a noncaucasian, even if such person has always been perceived as white.

The pragmatic test could also prove to be underinclusive.[131] While a broad societal group may not be generally recognized as a race, an individual within that group may nevertheless be perceived as belonging to a different race. For example, the majority of society no longer considers Jews a distinct race, but those who do may therefore discriminate against Jews.[132] In employing broad

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123. 425 F. Supp. 786 (W.D. Pa. 1977). *See also* Ridgeway v. International Bhd. of Elec. Workers, 466 F. Supp. 595 (N.D. Ill. 1979); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254 (N.D. Ill. 1978).

124. 425 F. Supp. at 788.

125. *Id.*

126. Ortega v. Merit Ins. Co., 433 F. Supp. 135, 139 (N.D. Ill. 1977).

127. *See, e.g., Budinsky,* 425 F. Supp. at 788 (court discusses application of pragmatic test to Hispanic, Black, Indian, Slavic, Italian, and Jewish groups, but not individuals).

128. *See, e.g.,* Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254 (N.D. Ill. 1978).

129. *See, e.g.,* Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186, 188 (D. Md. 1977).

130. The Supreme Court has recognized that legislation conferring benefits on the basis of racial status could prove to be overinclusive in individual application. *See* Fullilove v. Klutznick, 448 U.S. 448, 486 (1980). The Court, however, declined to rule on the constitutionality of such an overinclusive effect. *Id.* The Chief Justice stated: "It is also contended that the MBE program is overinclusive . . . . It is conceivable that a particular application of the program may have this effect . . . . [S]uch questions of specific application must await future cases." *Id.*

131. The Supreme Court has left open the possibility that legislation basing eligibility for benefits on racial status could prove to be underinclusive in specific cases. *See* Fullilove v. Klutznick, 448 U.S. 448, 486 (1980). The Court stated: "It is not inconceivable that on very special facts a case might be made to challenge the congressional decision to limit MBE eligibility to the particular minority groups identified in the Act." *Id.*

132. *See generally* H. QUINLEY & C. GLOCK, ANTI-SEMITISM IN AMERICA (1979).

societal standards, the pragmatic test fails to acknowledge the discriminating treatment experienced by some groups which are not generally understood as races.

The Favored Group Approach

The inherent problems of the pragmatic approach have led some courts[133] to develop another approach for classifying races — the favored group method.[134] Under this test, courts determine the racial categorization of a group by comparing it to society's most favored class.[135] All groups which the court perceives as outside a favored class are treated as racial groups.[136] For example, courts have labeled Hispanics a distinct race because they are not a favored societal class.[137]

Despite judicial claims to the contrary,[138] the favored class test is very similar to the pragmatic approach. Both tests rely on amorphous societal perceptions to classify races, and both methods fail to provide objective criteria for determining an individual's racial status.[139] A further criticism of the favored group test is that designation of society's most favored class is a highly subjective, inconsistent process. Whereas broad conceptions of such a group are easily imagined, individual applications prove extremely difficult. For example, a black ghetto youth is clearly not a member of a favored class, while a white individual of rich parentage is. It is entirely unclear, however, how the favored group test would categorize a poor white Appalachian coal miner or a wealthy black living on Park Avenue.

The Purely Racial Approach

In contrast to the favored class approach, some federal courts have sought to distinguish race, ethnicity and national origin.[140] These courts classify a

133. *See* Lafore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978) (court finds pragmatic theory to be analytically obscure).

134. *See, e.g.*, Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 972 (10th Cir. 1979) (statutory phrase "white citizen" in section 1981 refers to a standard group or control group).

135. *See* Lafore v. Emblem Tape & Label Co., 448 F. Supp. 824 (D. Colo. 1978) wherein the court stated:

> § 1981 is intended to prohibit the maintenance of favored class. Historically a class called "white citizens" received more favorable treatment than other classes. If we understand the term "white citizen" in the statute to mean that group which is most favored, the rule becomes understandable. All persons are entitled to the same rights and benefits as the most favored class.

Id. at 826.

136. *See also* Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (a group which is discriminated against because it is different from "white citizens" is a racial group).

137. *See id.* at 972.

138. Lafore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978) (court rejects pragmatic test and adopts the favored class approach).

139. *Compare Budinsky*, 425 F. Supp. 786 *with* Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).

140. *But see* Lafore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978) (an analysis based only on questionable racial concepts would prove to be unproductive).

societal group as a race only if it more closely resembles a racial category than an ethnic or national origin group.[141] Under this approach, Puerto Rican,[142] Spanish-speaking,[143] Hispanic,[144] and Indian[145] individuals do not constitute distinct races, but simply national origin groups. As with the pragmatic approach and favored group method, the purely racial test does not specify guidelines for delineating racial categories.[146] Moreover, this method of racial classification requires courts to draw distinct lines despite the frequent overlap between race, ethnicity, and national origin.[147]

CONCLUSION

Social race criteria provide the groundwork for the federal courts' racial classification tests. Because social race standards depend on the subjective determinations of the decisionmaker, conflicting decisions often result. While one court may find it perfectly logical to view Hispanics, Puerto Ricans, and Indians as distinct racial groups, another is just as reasonable in reaching the opposite conclusion.[148] Thus, the social race tests employed by federal courts generate varied precedent for determining individual racial status.

To avoid arbitrary distribution of affirmative action benefits, such programs should not be based solely on racial considerations. The *Bakke* prohibition against racial quotas[149] should be extended to all affirmative action programs, with race as only one of many factors considered in determining eligibility. An example of such a program is that conducted by the Minority Business Development Agency (MBDA) in defining a minority business enterprise for purposes of allocating preferential treatment.[150] Unlike provisions which define a minority business only in terms of racial criteria,[151] the MBDA considers a range of cultural, social, and economic factors in defining a

141. *See, e.g.,* Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975) (Spanish-surnamed individuals constitute a national origin group, not a racial category).

142. Vera v. Bethlehem Steel Corp., 448 F. Supp. 610 (M.D. Pa. 1978).

143. Jones v. United Gas Improvement Corp., 68 F.R.D. at 1.

144. Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125 (E.D. Pa. 1978).

145. Patel v. Holley House Hotels, 483 F. Supp. 374 (S.D. Ala. 1979).

146. *See, e.g.,* Jones v. United Gas Improvement Corp., 68 F.R.D. at 15 (court concludes Spanish-surnamed individuals are not a racial group, but provides no rationale for this decision).

147. *See, e.g.,* Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980) (plaintiff permitted to offer evidence that Pakistani-Americans constitute both a racial and a national origin group).

148. *See supra* note 115.

149. *See supra* notes 10-13 and accompanying text.

150. Exec. Order No. 11625, 3 C.F.R. 213 (1971) states in part:

> "Minority business enterprise" means a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons include but are not limited to, Negroes, Puerto Ricans, Spanish-speaking American, American Indians, Eskimos, and Aleuts.

Id. at 217. *See also* 13 C.F.R. § 124.1-1(c)(3) (1981) (Small Business Administration guidelines defining eligibility for preferential treatment in terms of social disadvantage).

151. *See supra* notes 26-31 and accompanying text.

minority business enterprise.[152] An approach such as this, which determines eligibility by examining the individual's social and economic disadvantages, better assures fair and just results in allocation of affirmative action benefits.

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152. *See supra* note 150.