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Who's Black, Who's White, and Who Cares: Reconceptualizing the United States Definition of Race and Racial Classifications

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Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications

> How much would it be worth to a young man entering upon the practice of law, to be regarded as a white man rather than a colored one? . . . Probably most white persons if given a choice, would prefer death to life in the United States as a colored person. . . . Indeed, [being white] is the master-key that unlocks the golden door of opportunity.
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> There is no law of the United States, or of the state of Louisiana defining the limits of race—who are white and who are "colored"? By what rule then shall any tribunal be guided in determining racial character? It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice? Why not count everyone as white in whom is visible any trace of white blood? There is but one reason to wit, the domination of the white race.[1]

I. INTRODUCTION

Philip and Paul Malone, twin brothers from Boston, applied to be firefighters in 1975, but were not hired because of low civil service test scores.[2] The brothers reapplied in 1977, changing their racial classifications from "white" to "black."[3] Due to a court mandate requiring Boston to hire more minority firefighters and police,[4] the Malones were hired in 1978, even though their civil service test scores remained the same.[5] Had the Malones listed their race as white in 1977, they most likely would have been denied employment a second time.[6] In 1988, ten years after being hired, the Malone brothers' racial classifications were questioned by a Boston Fire Commissioner when the twins applied for promotion to lieutenant.[7] The commissioner, who knew the twins personally, was puzzled when he saw that

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1. See Cheryl I. Harris, *Whiteness As Property*, 106 Harv. L. Rev. 1709, 1747 (1993) (quoting Brief of Plaintiff in *Plessy v. Ferguson*, 163 U.S. 537 (1896)) (discussing the property value of the reputation of belonging to the dominant race).

2. Peggy Hernandez, *Firemen Who Claimed to be Black Lose Appeal*, Boston Globe 13 (July 26, 1989).

3. Id. The twins claimed that between 1975 and 1977 they learned that their great grandmother was a light-skinned black woman. This Note will use "black" rather than "Black" to address any suspicion of bias on the part of the Author and to promote consistency throughout this Note.

4. For a history of the court mandate to hire minorities in the Boston firefighting and police departments, see *Boston Chapter NAACP v. Beecher*, 679 F.2d 965 (5th Cir. 1982).

5. Peggy Hernandez and John Ellement, *Two Fight Firing Over Disputed Claim That They are Black*, Boston Globe 29 (Sept. 29, 1988).

6. Id. at 32.

7. Id. at 29. Boston Fire Commissioner Leo Stapleton sparked the investigation when he received a list of candidates for a promotion and noticed that the Malones were listed as black. Ironically, both men scored exceptionally high on the civil service test for lieutenant. Hernandez, Boston Globe at 14 (cited in note 2).

they listed their race as black.[8] After a state hearing, Philip and Paul Malone were fired for committing "racial fraud."[9]

Hispanic and black organizations in Boston criticized the city government for allowing the Malones to work for ten years before questioning their racial identity.[10] These organizations called for a full investigation of the Malones' case and for prompt investigation of other allegations of racial fraud.[11] One Boston official claimed that as many as sixty other firefighters had engaged in racial fraud to obtain jobs,[12] but other officials estimated that the actual number was closer to ten.[13] Shortly after the Malones' hearing, eleven Boston firefighters classifying themselves as Hispanic were investigated; two resigned.[14]

In the mid-1980s, allegations of racial fraud also surfaced in the political arena. In 1984, Stockton, California, City Councilman Mark Stebbins survived a recall election organized by a black councilman he defeated in November of 1983.[15] Stebbins, described as a man with a "broad nose, light complexion, blue eyes and curly brown hair. . . [worn] in a short Afro style,"[16] had run as a black

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8. Hernandez and Ellement, Boston Globe at 32 (cited in note 5). One fire official said, "If they did not take the test for lieutenant, they wouldn't have come to our attention." Id.

9. Id. Affirming the decision of the State Department of Personnel Administration, Justice Wilkins of the State Supreme Judicial Court asserted that the Malones "had a powerful incentive to seize on any means to enhance their chances of appointment as firefighters." Id. The term "racial fraud" is used in this Note to characterize situations in which individuals racially misclassify themselves in order te obtain some tangible benefit. In the black community, "racial fraud" has heen called "passing" (i.e., blacks misclassifying themselves as white). See Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 683-86 (Harper, 1944). The term "soulmaning" is used in this Note to characterize situations in which whites misclassify themselves as minorities. "Racial fraud" is the term used to encompass all situatious of intentional racial misclassification. For a more in-depth discussion of "passing" and "soulmaning," see Parts II.B.2 and III.D.2.

10. Hernandez and Ellement, Boston Globe at 32. This Note will use the term "Hispanic" instead of "Latino" to retain consistency with the majority of the literature cited in this Note and because it is the only term that the Equal Employment Opportunity commission defines. See note 150.

11. Id.

12. Id. at 29.

13. Id. These officials reportedly were closer to the actual hiring process. Id.

14. Hernandez, Boston Globe at 14 (cited in note 2). The city upheld the ethnicity claims of seven officers. The others were still under investigation at the time the Hernandez article appeared in the Boston Globe.

15. *City Council Member Survives Recall Vote,* Wash. Post A6 (May 15, 1984).

16. United Press Int'l, *Black or White? Race Becomes Political Issue* (April 19, 1984) (available on LEXIS/NEXIS in "News" library, "UPI" file) ("*Black or White?*"). For a legal definition of the term "Afro," see *Williams v. Batton,* 342 F. Supp. 1110, 1111 (E.D. N.C. 1972):

> An "Afro" would appear to be a moderately long to long haircut, most commouly worn by Black Americans. It is bushy in appearance, and appears to extend outward from the wearer's head in a symmetrical fashion, often taking the shape of a hemisphere. The resulting haircut appears to be very thick and dense in nature, and because

candidate in the Stockton, California City Council Election.[17] While the birth certificates of Stebbins's parents and grandparents listed their race as white, and Stebbins acknowledged that his siblings were white, he contended that he was black.[18] At the time of the election, Stebbins's council district was forty-six percent Latino and thirty-seven percent black.[19] Accused of lying about his race to get votes, Stebbins argued that he first *believed* he was black when he was growing up and other children referred to him as "niggerhead."[20] Stebbins also hinted that his claim was premised on the belief that he had a black ancestor who had passed as white.[21] Despite this somewhat tenuous assertion, many of the black leaders in the community accepted him as black, apparently to gain more minority influence on the council.[22]

American society has long differentiated among individuals on the basis of race.[23] Yet, as Professor Paul Finkelman recently noted, "[t]he word 'race' defies precise definition in American Law."[24] No physical attribute or collection of physical attributes adequately defines "race."[25] It was this lack of a precise definition of race that led to accusations of racial fraud in the Malones and Stebbins cases. The make-shift definition of race used during the Malones' hearing encompassed appearance, self-identification of the family in the com-

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of the way it stands up away from the wearer's head, often makes the wearer appear to be taller than his actual height.

17. *Black or White?* (cited in note 16).

18. Id.

19. Id. Stebbins claimed that the fact that Latinos outnumbered blacks in the district meant that lying about his race would not have been very beneficial. Id. Interestingly enough, Stebbins won 39% of the vote in a district that was only 17% white. Id. If groups in the district had voted along strict racial lines, a white candidate would have had no chance to be elected.

20. Id. This derogatory term apparently referred to his Afro.

21. Id. Note that Stebbins relied on the presence of only one black ancestor to support his claim.

22. Id. The president of the Stockton chapter of the Black American Political Association of California stated: "I think he is a black, . . . I've had people in my family the same hue and they're still black." Id. For a discussion of minorities intentionally broadening their racial classifications for political purposes, see generally Alex M. Saragoza, et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 La Raza L. J. 1 (1992).

23. See generally Jack Greenberg, *Race Relations and American Law* (Columbia U., 1959); Gilbert Stephenson, *Race Distinctions in American Law* (AMS, 1969); Ronald Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America* (Knopf, 1979).

24. Paul Finkelman, *The Color of Law*, 87 Nw. U. L. Rev. 937, 937 n.3 (1993) (book review).

25. Id. Professor Finkelman used the term "race" in a rather imprecise, popular way in his essay. Currently, he is working on a long-term, book-length study of the definition of race in American legal history. Id.

munity, and ancestry.[26] In the Stebbins election, California voters and leaders created a definition of race premised on physical features and personal self-identification, but paid absolutely no attention to Stebbins's obviously white ancestry.[27] Finkelman argues, and the Malones and Stebbins cases support the assertion, that the American definition of race is much like Justice Potter Stewart's definition of obscenity—"I know it when I see it."[28] The problem with race, as with pornography, is that people "see it" differently.[29]

Because race is such a significant factor in American life, society's failure to define race substantively is one of the most compelling legal problems currently facing this nation.[30] Lawmakers have enacted federal statutes designed to stop racial discrimination in such major facets of life as employment,[31] housing,[32] voting,[33] education,[34] and the enforcement of contracts.[35] Other important activities such as adoption,[36] home buying,[37] and the conviction of criminals[38] are also tied to race. There is also reason to believe that

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26. Hernandez and Ellement, Boston Globe at 32 (cited in note 5). The hearing investigator reported that the Malones had fair skin, fair hair coloring, and Caucasian facial features. She also found that the Malones were not considered black in their community. This fact went toward proving ethnicity. A photograph of the Malones' light-skinned great grandmother, offered as evidence by the Malones, was inconclusive. Id.

27. *Black or White?* (cited in note 16). As mentioned earlier, Stebbins freely admitted that all his relatives are white and claimed that one of his ancestors was able to pass as white. Yet, his afro, tanned skin, and broad nose were enough for the Stockton community to embrace him as a black man. See notes 16-21 and accompanying text.

28. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); Finkelman, 87 Nw. U. L. Rev. at 937 n.3 (cited in note 24). This standardless conception of race is particularly troubling since race, unlike hard-core pornography, has broad significance in American society. See note 44.

29. See generally Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994) (analyzing the definitions of race offered by a myriad of sources).

30. See W. E. B. Dubois, *The Souls of Black Folks*, (Dodd, Mead and Co., 1961) (asserting that the problem of the twentieth century is that of the color line).

31. See The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1988).

32. See The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1988).

33. See The Voting Rights Act of 1965, 42 U.S.C. § 1973 (1988).

34. See The Civil Rights Act of 1964, 42 U.S.C. § 2000c (1988).

35. See 42 U.S.C. § 1981 (1988).

36. See generally Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163 (1991) (discussing the dominant role of race in domestic and international adoptions).

37. See Joel G. Brenner and Liz Spayd, *A Pattern of Bias in Mortgage Loans*, Wash. Post A1 (June 6, 1993) (discussing discrimination based on the race of the applicants).

38. See Comment, *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1595-1641 (1988) (discussing the correlation between race and criminal law); Charles J. Ogletree, *Commentary: The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1958 (1988) (arguing that factors which disparately impact

much of the United States's environmental waste policy is influenced by race and racial discrimination.[39] Yet, amid all of the evidence that racial classification is of great significance in American society, the law has provided no consistent definition of race and no logical way to distinguish members of different races from one another.[40] The reality that race is hopelessly intertwined with significant social opportunities and legal protections raises some very serious concerns about racial classification, particularly because society routinely adopts race-conscious solutions to solve incidents of past and present racial discrimination.[41] The lack of a consistent racial definition in the law is exacerbated as individuals from different races inter-marry with increasing frequency,[42] and as individuals intentionally blur racial lines for economic and social purposes.[43]

This Note will address the problem of defining race by examining past and present conceptions of race and racial classifications. Part II of this Note will examine the historical origins of the need to define race by analyzing pre- and post-Civil War statutes and court decisions, and by noting how these statutes and decisions governed the intentionally race-conscious distribution of rights. Part III of this Note will analyze the modern need to define race, along with the statutes, practices, and court decisions of the post-*Brown* era. Part III will discuss the uniquely modern problems

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minorities, such as poverty, educational deprivation, and prior unemployment, should be mitigating factors in sentencing).

39. See generally Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 Vand. L. Rev. 937 (1993); Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combating the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. Rev. 366 (1992).

40. See Lopez, 29 Harv. C.R.-C.L. L. Rev. at 1 (cited in note 29).

41. See notes 31-35 and accompanying text.

42. See Isabel Wilkerson, *Black-White Marriages Rise, But Couples Still Face Scorn*, N. Y. Times A1 (Dec. 2, 1991) (reporting that the number of black-white marriages has tripled since the 1970s, yet continues to be less common than other white-minority unions). See also *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (holding that when plaintiff brings a Title VII action based upon an interracial marriage or association, he or she has by definition alleged discrimination because of his or her race). With the growing number of interracial marriages and the recognition that marriage and/or association can support a Title VII claim, what kind of claim can be brought by the children of these marriages? If there are no rules governing racial classifications, judges, employers, and society will simply continue to adopt diverse conceptions of race denying and granting significant race-based claims with virtually no legal guidance.

43. See generally Eileen R. Kaufman, *A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 Ariz. L. Rev. 259, 265-69 (1986) (discussing the reasons why a plaintiff would prefer to bring a race rather than a national origin claim). See Part I and Part III.A.2 of this Note.

of distinguishing race from national origin, the problems presented by the Hispanic racial classification, and the problems associated with the increased presence of biracial individuals in American society. Part III will also deal with the seldom-discussed phenomenon of white people claiming minority status in order to obtain significant opportunities. Finally, Part IV of this Note suggests a new sociopolitical racial classification system with standards that will make racial classification simple and verifiable. This Author contends that the United States's approach to racial classification must be altered substantially to recognize effectively the permanent importance of racial classification in modern American society.[44] American courts must develop new perspectives on race and culture, or run the risk of losing legitimacy in a crucial arena of social reality.[45]

II. HISTORICAL ORIGINS OF THE NEED TO DEFINE RACE

Many legal scholars have examined the obvious connection between questions of race and the institution of slavery.[46] Generally, these authors have explored the motivations behind the adoption of racial rules, but have not significantly commented on the racial rules themselves, other than to acknowledge their existence.[47] Strict racial classification rules, however, were at the very core of maintaining the

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44. For some thoughts on the permanent importance of race in American society, see generally, Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books, 1992); Richard Delgado, *Recasting the American Race Problem*, 79 Cal. L. Rev. 1389 (1991) (review essay); Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (Charles Scribner's Sons, 1992); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Joel Kovel, *White Racism: A Psychohistory* (Columbia U., 1984).

45. Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind'*, 44 Stan. L. Rev. 1, 68 (1991).

46. See generally Harris, 106 Harv. L Rev. 1709 (cited in note 1); Barbara K. Kopytoff and A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Goorgetown L. J. 1967 (1989).

47. Professor Harris, Kopytoff, and Judge Higginbotham assert theories concerning the motivation behind racially restrictive statutes and practices. Professor Harris asserts that these rules and practices can be explained by the desire to make whiteness a property right. Harris, 106 Harv. L. Rev. at 1710. Judge Higginbotham and his law clerk, Barbara Kopytoff, analyze racial laws and practices as a way of discouraging sexual relations between black men and white women while maintaining a system of white male dominance. See generally Kopytoff and Higginbotham, 77 Georgetown L. J. 1967. Both pieces make very compelling arguments about the motivations of the rulemaker without critically analyzing the rules themselves. This Author, however, will focus on the rules spawned by these motivations and the legitimate need for legal rules that define race.

institution of slavery and the system of white dominance.[48] One problem with the existence of indentured servants and slaves in a free society was the ease with which slaves or servants could escape if they were not distinguishable from free citizens.[49] By linking slavery to race, an immediately distinguishable physical characteristic, servant and slave escape became much more difficult, particularly once all blacks were presumed to be slaves.[50] Suddenly, racial classification became of critical importance in American society—it could be the difference between freedom and slavery and later, the difference between privilege and disenfranchisement. As more people began to claim the benefits of whiteness, the racial classifications became more strict, illustrating the important role of racial classification in the United States.[51]

A good faith analysis of this period in American history leads to the conclusion that the need for the adoption of rules defining race grew out of two phenomena: (1) the decision to deny blacks and Indians the same treatment as whites under the law;[52] and (2) the birth of children who had only one white parent or who had ancestors who were not white.[53] The presence of both of these factors in

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48. See notes 53-59 and accompanying text.

49. See generally Hilary Beckles, *White Servitude and Black Slavery in Barbados* (U. of Tenn., 1989).

50. See note 83 and accompanying text.

51. See discussion in Part II.A. The racial rules gradually became more restrictive when the existing rules would have allowed more people to be labeled white.

52. In a 1772 case, a lawyer for a slave owner argued:

> That societies of men could not subsist unless there were a subordination of one to another, and that from the highest to the lowest degree. That this was comfortable with the general scheme of the Creator, observable in other parts of his great work, where no chasm was to be discovered, but the several links run imperceptibility into one another. That in this subordination the department of slaves must be filled by some, or there would be a defect in the scale of order.

Kopytoff and Higginbotham, 77 Georgetown L. J. at 1969 (cited in note 46) (quoting *Robin v. Hairdaway*, 1 Va. (Jeff.) 58, 62-63 (1772)). This argument illustrates the belief that subordination of people is a necessary part of social order. In the United States, it was clear that blacks and Indians were chosen to be legally and socially subordinated. See note 54. Note that the torm "Indian" is used in this context, as opposed to Native American, because it is the term that was used in this historical period.

53. Kopytoff and Higginbotbam, 77 Georgetown L. J. at 1975-76 (discussing the classification of mixed-race offspring); Paul Finkelman, *The Crime of Color*, 67 Tulane L. Rev. 2063, 2071 (1993) (discussing the importance of racial distinctions when slavery first began). See Harris, 106 Harv. L. Rev. at 1737-40 (cited in note 1) (discussing the legal definition of race as "blood borne"). The racial classification of individuals of white and Indian origin was somewhat more permissive in Virginia, apparently due to the historical union between John Rolfe and Pocohontas. Under Virginia statute, some people with Indian "blood" were deemed to be white by virtue of statutory exceptions. Kopytoff and Higginbotham, 77 Georgetown L. J. at

American society created the significance of racial classifications.[54] Consider a brief illustration of this point: If the United States treats everyone the same under the law regardless of race—there is no need to have racial classifications since race is irrelevant; If the United States distinguished treatment under the law on the basis of race—but the races never mix—there is no problem classifying people because races remain distinct.[55] This illustrates why a society committed to distributing rights based on race has always frowned on miscegenation.[56]

A. Early Statutory Attempts to Define Race

Virginia was the first state in the Union to offer a statutory definition of race.[57] The first statute, written in 1662, however, only purported to determine the legal status of children born to negro women by Englishmen, rather than to statutorily define race.[58] The

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2028; Finkelman, 87 Nw. U. L. Rev. at 991 n.98 (cited in note 24). The Pocohontas exception supports the notion that race is a social construct.

It is important to note that only one of the factors necessitating a definition of race is no longer feasible. American society has eradicated all laws calling for discrimination against minorities. See notes 31-35 and accompanying text. However, the likelihood that individuals have parents of different races or ancestors who were not white is actually much greater now than it would have been during the formative years of this nation. See Wilkerson, N.Y. Times at 41 (cited in note 42) (noting the rise in minority-white and black-white unions since the 1970s).

54. See Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 Law and Ineq. 183, 190 (1993). Gilanshah states:

> After emancipation, this line had to be drawn more brightly because light-skinned mulattoes blurred and threatened the color line: a line necessary te continue separation of "inferior" and "superior" peoples. While legislators and judges frequently justified their actious with pseudo-scientific theories or fears of violating the natural order, subversion of racial divisions may have been their true fear.

Id. See also D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 Georgetown L. J. 437, 470 (1993) (stating that "[t]he belief that races must not mix is based on a notion of black racial identity as something so opposite te whiteness—to order and reason—that it must be kept at a distance").

55. See note 54. The interplay between miscegenation and white racial dominance is an undeniable part of this nation's racial heritage and, as the illustrations indicate, was an indispensable part of the concern with racial classification.

56. For a discussion of American society's aversion to race mixing, see generally John David Smith, *Racial Determinism and the Fear of Miscegenation, Post-1900* (Garland, 1993).

57. The first statute read in relevant part:

> Whereas some doubts have arisen whether children got by an Englishman upon a negro woman should be slave or free. Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother. . . .

Act XII, 2 Laws of Va. 170 (Hening 1823) (enacted Dec. 1662).

58. While slavery had become a black experience by 1662, the first statutes did not link blackness to slavery statutorily. Kopytoff and Higginbotham contend, however, that these early

statute was, according to some scholars, a rough definition of race, attempting to deal with the uncertain status of the children born of slavemasters and female slaves.[59] The Virginia rule declared that the status of a child's mother determined the status of the child, clearly breaking away from the English rule of determining inheritance status from the paternal line, and resolving the status of most mixed race children by declaring them black, like their mothers.[60] This definition of race was rough because there were many free blacks in Virginia at the time and, as the "freedom cases"[61] would later illustrate, it was often difficult to tell whether a person's maternal or paternal line was black.[62] The clear language of Virginia's statute shows that the presence of children of white males and black females led te the need to define race. Because the early Virginia statute would have allowed the child of a black man (even if a slave) and a white or Indian woman to assume the free status of its mother, it is not surprising that such children and their parents were banished from the colony.[63] Later, statutes in Virginia and other Southern states would define race directly, rather than in the roundabout fashion of the 1662 statute.[64]

The later statutory definitions of race illustrate the extent to which the people of various states thought differently about the issue of racial classification. Early statutes in Virginia and Arkansas used a physical appearance approach,[65] defining negroes as those who had

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statutes were the first attempts to deal with "mulattoes"—the children of one black and one white parent. The correspondence between this statute and the definition of race was somewhat rough because there were free blacks present in Virginia at this time. It is significant, however, because it represents the beginnings of classifications based primarily on race, and the rights associatod with that classification. Kopytoff and Higginbotham, 77 Georgetown L. J. at 1970-75 (cited in note 46).

59. Id.

60. Id.; Finkelman, 67 Tulane L. Rev. at 2071 (cited in note 53). Professor Finkelman suggests that this result was largely due to the frequent incidents of black slave women bearing children by their white slave masters and infrequent incidents of white women bearing children by black male slaves. Finkelman argues that the law purposely condoned enslaving the mulatto child because of the slave master's economic benefit. In effect, a slave master eager to increase the number of slaves he owned could impregnate as many of his female slaves as possible because all of his children would also become slaves.

61. "Freedom cases" is the title given to those cases in which slaves sued slave owners for their freedom, or claimed that they had been wrongfully enslaved. For a discussion of the "freedom cases," see Part II.B.1.

62. It is virtually impossible to look at someone and determine tbe race of the person's mother when the parents are of different races.

63. See Finkelman, 67 Tulane L. Rev. at 2081-86 (cited in note 53).

64. See generally id.

65. This approach was tantamount to a "look and see" test. If a person looked white, that person was white. This test, obviously, was not very restrictive.

"a visible and distinct admixture of African blood."[66] Later, other states defining race would adopt one-fourth, one-sixteenth, and one-thirty-second rules which declared that people with these fractional quantities of black ancestry were black under the law.[67] The majority of states classified people who were one-eighth black as negro, meaning that these individuals had at least one black great-grandparent.[68] Formula-based definitions of race, known as "hypodescent rules,"[69] were the law of the land for many years and are still relied upon in some instances today.[70]

By 1910, almost all southern states had adopted the "one-drop rule."[71] Under the one drop rule, individuals with any African or black blood in their veins were black under the law.[72] A very large number of states, predominately those which were non-slaveholding, disallowed interracial marriages, but did not define race.[73] It is important to note that as the likelihood that more biracial people could be classified as white under existing laws increased, the laws became more restrictive, often progressing from one-fourth to one-eighth to one-sixteenth to one-thirty-second, and finally culminating in the one-drop rule.[74]

Even though approaches to defining race varied, one consistent theme ran throughout: Although some individuals had as much as

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66. Id. at 2109.

67. Id. at 2110.

68. Id. These states included South Carolina, Florida, Missouri, Nebraska, and North Carolina. Indiana adopted a one-eighth rule for marriages only.

69. "Hypodescent" is the term used by anthropologist Marvin Harris to describe the American system of racial classification in which the subordinate classification is assigned to the offspring if there is one "superordinate" and one "subordinate" parent. Under this system, the child of a black parent and a white parent is black. Harris, 106 Harv. L. Rev. at 1738 n.137 (cited in note 1) (citing Marvin Harris, *Patterns of Race in the Americas* 37, 56 (Walker, 1964).

70. See Finkelman, 67 Tulane L. Rev. at 2111 (cited in note 53) (discussing the fact that Louisiana had a one-thirty-second hypodescent rule until 1983). These definitions explain the Malones' and Stebbins' claims that they were black. Each claimed to have one ancestor who was black, thereby making each of them black.

71. See Pauli Murray, *States' Laws on Race and Color* (Woman's Division of Christian Service, 1950). In the years preceding *Brown v. Board of Education*, 347 U.S. 483 (1954), a number of states had adopted the one-drop rule, under which an individual with any African or black ancestry was classified as black. These states included Tennessee, Arkansas, Texas, and Alabama. A number of other states used similar definitions for specific purposes like marriage or school attendance, but did not adopt a general rule. Louisiana enforced a one-drop rule in the post-*Brown* era until 1970. Finkelman, 87 Nw. L. Rev. at 955 n.96 (cited in note 24).

72. Finkelman, 67 Tulane L. Rev. at 2110 (cited in note 53).

73. These states included California, Colorado, Delaware, Idaho, Nevada, South Dakota, West Virginia, and Wyoming. Finkelman, 87 Nw. L. Rev. at 955 n.96 (cited in note 24).

74. See Gilanshah, 12 Law and Ineq. at 195 (cited in note 54) (tracing the increasing exclusivity of the definition of mulatto in Virginia from 1785 to 1924).

ninety-three percent or more white ancestry, they would be considered black under the race statutes of many states. This illustrates the early statutory favoritism for white racial purity and a belief that at some point in history there were pure white, black, and Indian races.[75] Individuals were often considered tainted with black or Indian blood at a remote generational level, denying them the right to be classified white.[76] Early statutes permitted courts to delve deep into an individual's genealogy to show that a great-great-great-grandparent, or an even more remote ancestor, was black.[77] The primary flaw with the more restrictive racial definitions was their enforceability. To the extent that racial perceptions flowed from appearances, it was highly unlikely that individuals with "one-drop" of African blood would be readily distinguishable from so-called pure white persons.[78]

B. Early Attempts by Courts to Interpret Race Statutes

1. In the Slavery Era

One of the most often cited early cases on the issue of racial definition is *Hudgins v. Wright*.[79] In *Hudgins*, three generations of slave women sued for their freedom arguing that they were the descendants of a free female ancestor.[80] Faced with the women's apparent mixture of Indian and black ancestry, the court was forced to decide the burden of proof in freedom suits.[81] The Virginia Supreme Court created a set of legal presumptions tied to the

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75. See Kopytoff and Higginbotham, 77 Georgetown L. J. at 1969 (cited in note 46) (describing the meeting of Europeans, sub-Saharan Africans, and American Indians after years of separation and visible appearance differences).

76. See, for example, Finkelman, 67 Tulane L. Rev. at 2107 (cited in note 53) (discussing race intermingling and classifications); Harris, 106 Harv. L. Rev. at 1739 (cited in note 1) (discussing the fractional black heritage of Plessy); Kopytoff and Higginbotham, 77 Georgetown L. J. at 1975-76 (discussing the classification problems arising from mixed heritage).

77. See, for example, *Sunseri v. Cassagne*, 191 La. 209, 185 S. 1, 5 (1938) (holding a marriage was annulled because the wife's great-great grandmother was black); *Johnson v. Board of Education*, 209 N.C. 83, 82 S.E. 832, 835 (1914) (holding that the child of a "pure white" male and a woman of less than one-eighth Negro heritage was not allowed to attend a white school).

78. See the discussion of "passing" in Part II.B.

79. 11 Va. 134 (1806).

80. Id. at 134.

81. See Kopytoff and Higginbotham, 77 Georgetown L. J. at 1975 (cited in note 46) (asserting that *Hudgins* was the first formal opinion on race presumptions).

appearance of a person seeking freedom.[82] These presumptions were laid out in Judge Roane's concurring opinion: Negroes had the burden of proving that they were free; whites and Indians were presumed free unless their accusers could prove their slave status.[83] The more difficult question, as noted by Judge Tucker in the majority opinion, concerned where to place the burden when presumptions based on appearances were weakened because races had been intermingled.[84]

In *Gregory v. Baugh*[85] the court was confronted with a biracial slave seeking freedom. His maternal grandmother had the appearance of an Indian but, according to the court, was too dark to be a full-blooded Indian.[86] The critical issue in the case was whether the plaintiff's dark color came from his maternal or paternal line.[87] In attempting to establish the legal status of the plaintiff as a slave or a free man, the court permitted the introduction of hearsay and general reputation testimony to prove the freedom of the plaintiff's ancestors as far back as his great-grandparents' generation.[88] In *Baugh*, the Virginia court imposed upon the mixed-race plaintiff the additional burden of proving the status of his maternal ancestors.

Attempting to uphold contemporary racial statutes, early courts were forced to twist and bend traditional legal notions such as hearsay, the allocation of burdens of proof, and other standards of admissibility to incorporate the societal significance of race, particu-

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82. *Hudgins*, 11 Va. at 141 (Roane, J., concurring).

83. Id. Judge Roane wrote specifically:

> In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to show that he is a slave.

Id. (Roane, J., concurring). Two things are important to note here. First, even in a time when there were free negroes, the burden attached to their skin color forced them to prove that they were not slaves. Free negroes could very easily have been taken into slavery via the presumption favoring their enslavement. Second, as mentioned earlier, the statutes and rules concerning slavery seem to be mere subterfuge for statutes regulating and defining race. During this pre-Civil War period, the institution of slavery was essentially an institution of white legal and social superiority.

84. Id. at 139-40. Judge Tucker wrote of the presumptions that went along with individuals who were mixed, examining such features as the prominence or flatness of the nose, the texture of the hair, and the skin complexion of the accused slave. Id. Without more, curly hair and a flat nose could have caused one to be declared a slave. See Stephenson, *Race Distinctions* at 12-14 (cited in note 23) (discussing blurring of the color line and physical distinctions).

85. 25 Va. 611 (1827).

86. Id. at 613.

87. Id. at 617.

88. Id. at 621. This type of evidence, however, was not admissible as to freedom. Id. The notion that race could trigger special hearsay rules is astonishing nonetheless.

larly when the litigants were of mixed lineage.[89] As noted in *Baugh*, the racial appearance of a party seeking freedom could invoke early American legal presumptions and special rules. While this appearance standard probably allowed many free blacks to be enslaved, it undoubtedly allowed some enslaved blacks who looked white to be set free.[90] Even during the era when race was linked to the significant social institution of slavery, courts relied on appearance to enforce racial classifications. As the phenomenon of passing clearly indicates, however, appearance was not a reliable method of enforcement.

2. In the "Separate but Equal" Era

In the landmark case of *Plessy v. Ferguson*,[91] Homer Plessy attacked the "separate but equal" doctrine under which the United States operated dual social systems; one for blacks, and one for whites.[92] Plessy was arrested when he attempted to board a coach reserved for whites only.[93] Plessy challenged as unconstitutional a Louisiana law which required racial segregation in the state's railway system.[94] Another substantial issue raised in the case concerned Plessy's race. He claimed to be seven-eighths white.[95] According to the plea filed on Plessy's behalf, "the mixture of African blood was not discernible," strongly suggesting that Plessy's case was posited specifically to address this issue.[96] Plessy's argument challenged Louisiana's racial classification system, but the argument was summarily dismissed.[97] The Supreme Court's refusal to address the

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89. The legal status of mixed-race individuals was the motivating factor for establishing a set of legal presumptions to aid in racial classifications. Indeed, the appearance of individuals during this era made their legal status a fact in controversy. See *Baugh*, 25 Va. at 629-32 (explaining the presumptions for mixed race persons).

90. Since blacks were not allowed to testify in court, the testimony of white citizens ultimatoly detormined who was and who was not free. See Finkelman, 67 Tulane L. Rev. at 2090-91 (cited in note 53) (explaining the rules governing the testimony of blacks in the South). The presumptions outlined by the court in *Hudgins*, therefore, relied solely on white citizens when the court could not readily determine the race of the defendant.

91. 163 U.S. 537 (1896).

92. For a discussion of the doctrine of "separate but equal," see generally *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Plessy*, 163 U.S. 537.

93. *Plessy*, 163 U.S. at 538.

94. Id. at 540.

95. Charles Lofgren, *The Plessy Case* 41 (Oxford U., 1987).

96. See Harris, 106 Harv. L. Rev. at 1746 (cited in note 1) (quoting Lofgren, *The Plessy Case* at 41).

97. *Plessy*, 163 U.S. at 549. See note 1 and accompanying text. Plessy's petition for writs of prohibition had alleged that he was seven-eighths white, but this issue was not given substantial treatment. See Lofgren, *The Plessy Case* at 55.

issue of racial classification is indicative of the racial policy of the time: avoidance.[98] The Court avoided responding to allegations of unfair, racially-based distribution of rights and of racial classifications clearly premised on white purity.[99] Early courts seemed unwilling to concede that such racial rules were too difficult to enforce.

By the turn of the century, the free status of blacks and the growing difficulty in distinguishing blacks from whites exacerbated the nation's need to define race.[100] It was during this period that states began to establish more restrictive definitions of race.[101] It was also during this period that courts began speaking more forthrightly about racial classification. In *State v. Treadway*,[102] the court laid out the sub-classification of "colored" in very specific terms.[103] The court's categories of griffe, octoroon, quadroon, and mulatto betray a society so concerned with racial purity, that it began to name and define distinct categories by which to delineate the degree of "taint."[104] In

98. Virginia, for example, had difficulty defining the status of those people who had some Negro blood that was not ascertainable or did not meet the statutory definition. Finkelman, 67 Tulane L. Rev. at 2110 (cited in note 53).

99. As a practical matter, it seems that the Court's only response to the arguments advanced by Plessy's counsel would be that this society and racial classifications are based on white racial purity. *Plessy*, 163 U.S. at 551-52.

100. See Ray Stannard Baker, *Following The Color Line* 151 (Harper & Row, 1964). Baker writes:

> I have seen blue-eyed Negroes and golden-haired Negroes; one Negro girl I met had an abundance of soft, straight red hair. I have seen Negroes I could not easily distinguish from the Jewish or French types; . . . And I have met several people, passing everywhere for white, who, I knew, had Negro blood.

Id.

101. See Finkelman, 67 Tulane L. Rev. at 2110 (cited in note 53) (stating that sometime after 1910, a majority of the Southern states, like Virginia and Tennessee, had adopted the restrictive one-drop rule).

102. 126 La. 300, 52 S. 500 (1910).

103. Id. at 508. The court wrote:

> We do not think there could be any serious denial of the fact that in Louisiana the words "mulatto," "quadroon," and "octoroon" are of as definite meaning as the word "man" or "child;" and that, among educated people at least, they are as well and widely known. . . . Nor can there be, we think, any serious denial of the fact that in Louisiana, and, indeed, throughout the United States (except on the Pacific slope), the word "colored," when applied to race, has the definite and well-known meaning of a person having Negro blood in his veins.

Id.

104. Terms like "mulatte" are directly correlated to the degree of "blackness" in one's ancestry. Id.

some instances, a person's racial category could mean the difference in what rights the person could claim.[105]

According to the court's classifications, a "mulatto was the child of one black and one white person."[106] The person too black to be a mulatto and too pale in color to be a negro was a griffe, the child of a mulatto and a negro.[107] The quadroon, the child of a white and a mulatto, was thought to be "distinctively whiter than the mulatto."[108] The octoroon, the child of a white and a quadroon, was thought to be somehow "whiter" than the fairskinned quadroon.[109] The court in *Treadway* asserted that there was not much, if any, difficulty in distinguishing between these different shades of blackness.[110] Although *Treadway's* rules were based on mere physical characteristics, its attempt to give race a working legal meaning was clear, if unrealistic.[111] When the last hypodescent statute was struck down in 1983,[112] the kind of categorization evidenced in *Treadway* was finally removed from our society.

It was during this period that the need to define race became extremely significant. After the abolishment of slavery, the doctrine of "separate but equal" replaced the class definitions that slavery had once provided.[113] As racial classification grew in importance, so did incidents of "passing."[114] Much literature exists on the phenomenon of

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105. For example, in some limited instances, mulattoes, quadroons and octoroons would be allowed to tostify, but their credibility would still be at issue. See Finkelman, 67 Tulane L. Rev. at 2089-92 (cited in note 53).

106. *Treadway*, 52 S. at 508.

107. Id. "Griffe" is a somewhat unusual term that seems to have been primarily used in Louisiana. See generally Kenneth A. Davis, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 Hastings Const. L. Q. 199 (1976).

108. *Treadway*, 52 S. at 508. The prefix "quad" in quadroon refers to the one-fourth black ancestry present in the individual's appearance.

109. Id. "Octo" refers to the one-eighth black ancestry present in the octoroon.

110. Id.

111. In 1944 Gunnar Myrdal concluded that the "definition of the 'Negro race' is thus a social and conventional, not a biological concept because the social and not the biological facts actually determine an individual's racial designation." Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 115 (Harper & Brothers, 1944). Finkelman contonds that this definition was also a legal definition. Finkelman, 67 Tulane L. Rev. at 2109 (cited in note 53).

112. See note 186.

113. See Gotanda, 44 Stan. L. Rev. at 38 (cited in note 45) (discussing how racial categories survived the end of slavery to legitimate and justify segregation and intentional racial discrimination).

114. See Myrdal, *An American Dilemma* at 683-86 (cited in note 111). "For all practical purposes, 'passing' means that a Negro becomes a white man. . . . [T]his can be accomplished only by the deception of the white people with whom the passer comes to associate and by a conspiracy of silence on the part of other Negroes who might know about it." Id. at 683.

passing,[115] supporting Professor Cheryl Harris's assertion that passing was common during the restrictive period of "separate but equal."[116] The passing phenomenon illustrates the extent to which physical characteristics provided an unreliable standard of racial classification. With apparent ease, many people who were black under the racial statutes fooled the white citizenry into believing they were white.[117]

The fact that passing was so common during the "separate but equal" era leads to but one conclusion: There were great societal benefits, even after slavery, to being classified as a white person.[118] While this point seems obvious, the connection between rights and opportunities must be illuminated more clearly to ensure that the importance of racial classification is understood fully. The ability to exist as a white person during the "separate but equal" period was undeniably related to all facets of life. Race often determined where one lived, worked, attended school, and who one could marry.[119] With a premium on racial purity, the courts and society relied primarily on distinctions in physical appearance to enforce restrictive racial statutes, even though physical appearance was often unreliable.[120] To

115. See generally Wilma Dykeman and James Stokeley, *Neither Black Nor White* (Rhinehart, 1957); James Kenney, *Amalgamation!* (Greenwood, 1985); Mark Twain, *Pudd'nhead Wilson* (Chatto & Windus, 1894).

116. See Harris, 106 Harv. L. Rev. at 1712 (cited in note 1). Professor Harris notes that many of her black friends indicated that they had uncles, aunts, and great uncles who had passed for white. Id.

117. See Patricia J. Williams, *The Alchemy of Race and Rights* 223 (Harv. U., 1991) (discussing incidents of passing); Harris, 106 Harv. L. Rev. at 1712 (citing Gregory H. Williams, *Neither Black or White: A Childhood on the Color Line* (unpublished manuscript, on file at the Harvard Law School Library) (describing the childhood of a law professor whose father passed for white)).

118. See Myrdal, *An American Dilemna* at 683 (cited in note 111) (stating that passing, becoming a white man, means moving from the lower to the higher caste). Passing was almost always linked to enhanced employment opportunities. It was common, particularly among black females, who often passed te get jobs as stenographers and social workers and the like. Blacks who passed "professionally" most often interacted socially as a black. Id. at 685.

119. See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (overturning statute that forbade interracial marriage); *Shelley v. Kramer*, 334 U.S. 1 (1947) (discussing restrictive covenant that allowed only whites to own land); *Buchanan v. Warley*, 245 U.S. 60 (1917) (discussing ordinance that established residential districts exclusive to blacks and whites).

120. Since the major premise for passing was looking white, whites were presumably fooled by individuals who appeared to be white. Consequently this system of racial classifications based on physical appearance could only work when people who looked white, but were black according to the race statutes, identified themselves as being black. This probably never happened when these individuals attempted to pass. For an interesting discussion of presumptions and physical appearance, see generally John Griffin, *Black Like Me* (Houghton Mifflin, 1961) (describing the experiences of a white man who altered his appearance to experience life as a black man).

admit that there were some blacks who could pass for white would mean that the ideal of a pure "white" race was not ascertainable. In much the same way that no one wanted to admit that the emperor was naked, no court wanted to admit that some blacks looked white.[121] The pre- and post-Civil War treatment of race displays a rather futile attempt to establish a system of white racial dominance premised on the concept of a discernible, pure white race.[122]

C. Limits Placed Upon Individuals Because of Race

1. During the Pre-Civil War Era

Slavery was not the only legal and social disability associated with race before the Civil War. In fact, a host of other legal and social disadvantages were intertwined with race in the pre-war era.[123] Indentured servants who were black, for example, were punished more severely for running away than were their white counterparts.[124] White indentured servants were generally sentenced to extended terms of indenture, while blacks were usually sentenced to a life of servitude.[125] In 1705, Virginia made it a crime for blacks and Indians to hold public office.[126] Throughout the South, blacks could not testify in court, which arguably allowed whites to perpetrate crimes upon blacks as long as no other whites witnessed the crime.[127] In Virginia, any white marrying a non-white was banished from the colony within

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121. In Wilhelm Grimm's classic fairy tale "The Emperor's New Clothes," none of the townspeople wanted to admit that they could not see the clothes that ouly the intolligent could see. Consequently, many, including the emperor, pretended that they could see the fine garments. Compare this to the court's assertion in *State v. Treadway* that the differences among mulattos, quadroons, octoroons, and whites were well known among "educated" people. See *Treadway*, 52 S. at 508. It appears that "educated" whites, just like Grimm's "educated" townspeople, were unable to admit the truth.

122. Anthropologists estimate that the average American white has 5% black ancestry and the average American black has 25% white racial background. See Chris Ballentine, Note, *"Who is a Negro?" Revisited: Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. Fla. L. Rev. 683, 688 n.40 (1983). The goal of white racial purity also explains the tough laws on interracial marriage that existed until 1967.

123. See generally C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford U., 1955).

124. Finkelman, 67 Tulane L. Rev. at 2100-06 (cited in note 53).

125. Id.

126. Id. at 2087-88.

127. Id. at 2091. In some situations, the race of an individual called to testify became a side issue at the trial. Occasionally, mulattoes and quadroons were allowed to testify, but their designations impaired their credibility. Id.

three months.[128] Such statutes forbidding marriage between the races, known as anti-miscegenation laws, remained the law of most southern states for many years after the demise of slavery.[129]

There were also many restrictions on freedom of movement attached to race in the North as well as in the South. By 1860, every southern state prohibited the immigration of free blacks.[130] Rhode Island prohibited free blacks from being out after nine o'clock at night without a lawful excuse.[131] Laws in Pennsylvania prohibited blacks from congregating in groups larger than four.[132] In pre-Civil War America, race went hand-in-hand with freedom. Blacks were not free to come and go as they pleased, to run for office, or to associate amongst themselves. The connection between rights and race was very clear during this era. One's racial classification determined, to a large extent, the quality of life one could lead.[133]

2. During the Post-Civil War Era

Affording blacks free status challenged whites to confront the issue of race directly. The racial distinctions inherent in the free and slave categories were no longer viable in a society in which all were free. This situation forced legislators and courts to fashion laws and theories that replaced the obsolete slave/free dichotomy with rules based solely on race.[134] Whites could no longer have the psychological comfort of knowing they would enjoy a status not all could share. The abolition of slavery and the notion of equality premised on freedom altered the white experience and stripped whites of a significant property right. In effect, the laws of the "separate but equal" era gave

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128. Id. at 2100-06.

129. Robert J. Sickels, *Race, Marriage, and the Law* 64 (U. New Mexico, 1972). The last antimiscegenation laws were invalidated in 1967 in Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Tennessee, Texas, Virginia, and West Virginia when the Supreme Court ruled the laws unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). Id.

130. Finkelman, 67 Tulane L. Rov. at 2099 (cited in note 53).

131. See An Act to Restrict Negros and Indians, Acts of 1703-04, in *Laws And Acts of Rhode Island, And Providence, Plantations Made From The First Settlement in 1636 to 1705* (Providence, 1896), reprinted in John D. Cushing, ed., *The Earliest Acts and Laws of The Colony of Rhode Island and Providence Plantations, 1647-1719* at 116 (Glazier, 1977).

132. See An Act for the Trial of Negroes, Act of Nov. 27, 1700 in James T. Mitchell, et al., eds., 2 *Statutes at Large of Pennsylvania from 1682-1801* at 79 (Harrisburg, 1913).

133. See Jones, 82 Georgetown L. J. at 462-63 (cited in note 54) (explaining the slave/black/subhuman trilogy that was an important part of the racial classification scheme).

134. See Kepytoff and Higginbotham, 77 Georgetown L. J. at 2020 (cited in note 46) (noting that "[a]fter emancipation, there was no special status of slave and oppression became entirely racial").

white citizens a substitute property interest in their whiteness itself to replace the property interest lost through abolition.[135]

The benefits of whiteness during the "separate but equal" era illuminate the actual and psychological disabilities attached to being black. For many, being white automatically ensured higher economic returns in the short term, as well as greater economic, political, and social security in the long run.[136] Being white meant gaining access to a set of public and private privileges that materially and permanently guaranteed basic subsistence needs and survival.[137] Being white increased the possibility of controlling critical aspects of one's life rather than being the object of another's domination.[138] These societal benefits connected to whiteness were the result of statutes and court holdings that determined who was, and who was not, white. The legislatures and courts were at the center of a system that routinely and purposefully distributed rights and opportunities along racial lines.

III. THE NEED TO DEFINE RACE TODAY

After the dismantling of the "separate but equal" doctrine many civil rights advocates began to envision a "color-blind" society.[139] Supreme Court Justices Rehnquist, Scalia, and O'Connor have all advocated a color-blind view of the Constitution, as is clearly evidenced by opinions they have written.[140] Arguing that race should not matter, the civil rights movement has fought vigorously to remove

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135. See generally, Harris, 106 Harv. L. Rev. 1709 (cited in note 1). Professor Harris's article analyzes whiteness in the traditional rubric of ownership. While she analyzes this notion from its origins until the present, her article clearly can be read as supporting the idea that whiteness became more deeply entrenched as a property interest after slavery was abolished.

136. Id. at 1713. Professor Harris analyzes the experience of her grandmother who passed as white to support her family during the early 1900s. Id. at 1710-13.

137. Id. at 1745.

138. Id.

139. See Finkelman, 87 Nw. L. Rev. at 938-39 (cited in note 24) (noting that since *Plessy v. Ferguson*, until the mid 1960s, every major civil rights organization advocated a "color-blind" reading of the Constitution). Finkelman adds, however, that a notion of color-blindness has been around since *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

140. See, for example, *City of Richmond v. Croson*, 488 U.S. 469, 528 (1989) (Scalia, J., dissenting) (advocating a color-blind approach to remedial cases); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (advocating color-blindness in discrimination cases, with Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joining). See Gotanda, 44 Stan. L. Rev. at 51-52 (cited in note 45) (discussing the color-blind position advocated by these Justices).

race as a factor in the distribution of rights.[141] This ideal has dominated legal discussions for so long that discussions of racial issues rarely attempt to define race itself.[142] Ironically, many authors who have written extensively about racial discrimination have not recognized the profound absurdity of discussing race without defining it.[143] The abuse of the color-blind doctrine during the Reagan/Bush era has forced many legal scholars and social critics to rethink the color-blind ideal.[144]

More recently, however, critical race scholars have equated the modern manifestation of "color-blindness" with white racial dominance and cultural genocide.[145] Even those who support the "color-blind" ideal are forced to admit that modern practices such as affirmative action necessitate a workable definition of race.[146] On a broader note, it seems evident that American society has failed to pursue "color-blind" jurisprudence, given the significance of race in both statutory schemes and constitutional review.[147] Regardless of one's position on the "color-blind" issue, the modern need to remedy

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141. Finkelman, 87 Nw. L. Rev. at 939 (cited in note 24). Finkelman characterizes the "color-blind" notion as "a vessel that has served advocates of racial fairness and equality for more than a century."

142. See Lopez, 29 Harv. C.R.-C.L. L. Rev. at 5 n.21 (cited in note 29) (asserting that many scholars talk about race without defining it).

143. See Jones, 82 Georgetown L. J. at 444 (cited in note 54) (discussing how the critical race theorists "give cursory attention to the critical and primary question 'What is race in and of itself?'").

144. See generally Richard Delgado, *Recasting the American Race Problem*, 79 Calif. L. Rev. 1389 (1991) (review essay); Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. Rev. 401, 415 (1994) (stating that "[o]ne of the central problems anyone seeking a color-blind principle in American Constitutional tradition confronts is thus to distinguish the 'circling smoke of many words' that betokens racial evasion from the pure fire of anti-racist passion"); Athornia Steele, *The Myth Of A Color-Blind Nation: An Affirmation of Professor Derreck Bell's Insight Into the Permanence of Racism in Society*, 22 Cap. U. L. Rev. 589 (1993) (arguing that color-blindness is non-existent and an attempt to hide racism and deny black heritage); Roberta L. Steele, *All Things Not Being Equal: The Case For Race Separate Schools*, 43 Case W. Res. L. Rev. 591, 601 (1993) (stating that "[r]acial parity cannot be achieved through the application of color-blind principles in an atmosphere of racism"); Patricia Williams, *Tho Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rov. 2128, 2142 (1989) (stating that "[t]he rules may be color-blind but people are not").

145. See generally Gotanda, 44 Stan. L. Rev. 1 (cited in note 45). The anti-color-blind scholars routinely argue that the lack of a standard definition of race makes the term color-blind highly subjective and easily manipulative. See note 144.

146. See, for example, Finkelman, 87 Nw. U. L. Rov. at 991 (cited in note 24). Finkelman writes: "From 1619 until the 1960s . . . [color consciousness and affirmative action] were used to protect one class of people; now they are sometimes used to proteot another class." Id. See generally Ballentine, 35 U. Fla. L. Rev. 683 (cited in note 122) (supporting the notion that affirmative action demands some racial definition to be workable).

147. See notes 31-35 and accompanying text.

past and present discrimination compels society to develop a consistent system of racial classification.

A. *Modern Statutes and Policies Concerning Racial Classification*

1. The Civil Rights Racial Classifications

With no clear definition for the term "race" in this country, the Equal Employment Opportunity Commission (EEOC)[148] was given the responsibility of defining racial classifications for set-aside and affirmative action programs of the government.[149] The EEOC promulgated definitions of white, black, Hispanic, Asian, Pacific Islanders, and American Indian or Alaskan Native.[150] Without more, these definitions support the claims of the Malones and Stebbins, provided that they show "origins" in the original peoples of Africa.[151] If the Malones actually have a black great grandmother, and Stebbins actually has an ancestor who was a black "passing" for white, they could, in good faith, list themselves as black without stepping outside of these defi-

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148. The EEOO is an executive agency which receives, files, and investigates complaints of discrimination from individuals and negetiates voluntary settlements. 42 U.S.C. §§ 2000e-4 to 2000e-5(b) (1988 and Supp. 1993).

149. See Employer Information Report EEO-1 and Standard Form 100, Appendix § 4, Race/Ethnic Identification, 1 Empl. Prac. Guide (CCH) § 1881, 2065-66 (1981) ("EEOC Report") (setting forth guidelines for classification of workers' racial/ethnic origin).

150. Whito (not of Hispanic origiu)—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, or other Spanish culture or origin regardless of race.

Asian or Pacific Islanders—All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

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 cemmunity recoguition.

Id. at 1625.

151. The EEOC's definitions do not qualify the term "origin." Would one ancestor of the appropriate "origiu" be enough? There is no reference to physical appearance, yet physical appearance has a great deal to do with how most people perceive race. See notes 83-84 and accompanying text. There is virtually no mention of culture with the exception of the Hispanic and American Indian/Alaska Native classifications, and even there, the reference to culture is minimal at best. In short, the vagueness of these EEOC defimitions would allow anyone to claim to be whatever race she wanted, provided she has the appropriate origin. The perceptional reality of racial classifications, however, is much different. See note 153 and accompanying text.

nitions.[152] This result, however, seems intuitively wrong in that the EEOC's definitions do not comport with how race is generally viewed in this society.[153] Perhaps the most troubling part of the EEOC's lackluster definitions is the profound impact that they have on racial classifications used in other societal contexts, given the EEOC's position as the enforcer of major civil rights laws.[154]

In fashioning definitions to be used in minority programs, the EEOC illustrates many of the problems that consistently plague the promulgation of a precise definition of race. Not only did the EEOC make the somewhat typical (and often intentional) mistake of blurring the line between race and national origin,[155] it made three other glaring errors: (1) The racial classifications lack internal consistency;[156] (2) There is no treatment of mixed race individuals;[157] and (3) There is no provision for racial verification.[158] While the blurring of race and national origin will be dealt with at some length in Part III.B, the other definitional problems are addressed here.

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152. Exploitation of the EEOC's definitions would actually seem justified given their failure to provide any meaningful contribution to the racial classification issue.

153. While this Note does not suggest that there is a common understanding of the term "race" in society, it does argue that there is a common understanding of what "race" is not. Most people would probably agree, for example, that people are members of whatever race they appear to be, even if it is inconsistent with how they define themselves. For a discussion of race as a "common sense" construction, see Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity and Common Sense*, 21 Socialist Rev. No. 3-4, 37 (1991).

154. For an idea of the impact of the EEOC's definitions, consider the agencies that have adopted the EEOC's classifications almost verbatim. See, for example, 10 C.F.R. § 1040.3 (1994) (Dept. of Energy); 46 C.F.R. § 280.4 (1994) (Office of Elementary and Secondary Education); 40 C.F.R. § 7.25 (1993) (Environmental Protection Agency). While this list is not exhaustive, it is important to note that the EEOC's classifications are being used in a variety of government agencies and situations.

155. See generally EEOC Report (cited in note 149). Each of the definitions contain elements of national origin within their definitions. Id. at 1625. The Hispanic definition clearly looks to a person's place of origin te make a classification decision. This theme is carried into the definitions of black and white by adding the Hispanic exception language and making persons from the northern part of Africa and the Middle East a part of the white classification. Similarly, the definitions of Native Americans and Asians include specific references to particular continents and islands of origin. See note 150 and accompanying text.

156. One major problem in the racial debate is the lack of parallel racial classifications. The EEOC classifications are not premised on a consistent racial theme. See notes 150 and 151.

157. Recall that the discussion in Part II identified mixed-race individuals as one of two contributing factors in the need to define race in this society. Consequently, modern thought should be cognizant of this fact in creating a racial classification scheme.

158. Even if there are well-defined classifications, the absence of a verification process makes even well-reasoned definitions virtually meaningless. Currently, there is nothing to stop racial fraud, absent accidental discoveries as in the Malones' case. See Part I.

a. Lack of Internal Consistency

Under the EEOC guidelines, it is immediately apparent that the notion of what constitutes race is unclear. The EEOC defines white, black, and Asian based on origins in the "original peoples" from specific geographical areas, but defines Hispanic based on culture or origin with no reference to "original peoples," and adds a tribal identification prong to the American Indian classification.[159] White, black, and Asian/Pacific Islander, therefore, are racial classifications based solely on ancestry, Hispanic is a racial classification based on Spanish culture or national origin regardless of ancestry (i.e. race), and American Indian/Alaska native is a racial classification based on ancestry and tribe affiliation.[160] In short, racial definition seems to vary with the group being defined. Notions of culture, ancestry, and self-identification are found within the definitional scheme, but are not present in each definition.[161] The EEOC's definitions suggest, for example, that people of American Indian ancestry born in Cuba could be Hispanic, but could not be American Indian if they do not affiliate with a tribe.[162] This result can only be described as bizarre.

Another instance of internal inconsistency is the treatment of the black, white, and Hispanic classifications. When the EEOC uses the language "white (not of Hispanic origin)" and "black (not of Hispanic origin)," it clearly asserts that some Hispanics are also white or black.[163] This assertion is carried through in the Hispanic classification since a person can be Hispanic "regardless of race."[164] The notion that the Hispanic classification can be defined "regardless of race" overtly threatens its validity as a racial classification. While this Note in no way seeks to suggest that the Hispanic culture is not a vital and distinct part of this nation's "melting pot," the Note does contend that the current EEOC "Hispanic" classification causes unnecessary confusion and inconsistency, and impedes progress toward consistent definitions of race. The EEOC definitions suggest

159. See EEOC Report at 2066 (cited in note 149).

160. See id. No consistent notion of race can be found in the EEOC's definitions.

161. Under the EEOC framework, Asians, blacks, and whites are defined by ancestry only. Hispanics are defined by national origin and culture only. American Indians are defined by culture and self-identification through tribal affiliation. See note 150.

162. This resnlt flows from the Hispanic classification's basis in national origin and culture, regardless of race. See note 150.

163. See note 150.

164. See id.

that the black, white, and Hispanic classifications were not intended to be entirely distinct, and are thus hopelessly intertwined.[165]

The last inconsistency in the EEOC definitions stems from the inclusion of North Africans and Middle Easterners in the "white" racial classification.[166] This inconsistency gives rise to a significant amount of litigation regarding the extent to which the vast majority of North Africans and Middle Easterners are not thought of as "white" in American society.[167] Some scholars argue that attempts to have North Africans and Middle Easterners classified as white are actually attempts to have the achievements of ancient Egyptians and the origins of man credited to the white race in support of the notion of white racial supremacy.[168] The inclusion of North Africans in the white classification forced the EEOC to use the term "origins in the *black* racial groups of Africa" to define the *black* classification.[169] Using the term black to define the black race itself evidences a lack of understanding on the part of the persons defining the term, and further confuses attempts to create a working definition of race.[170]

b. No Treatment of Mixed Race

The EEOC classifications give no guidance on how to classify mixed-race individuals. What happens when individuals who each fit neatly into one of the five racial classifications inter-marry? When blacks and whites inter-marry, for example, children born of that union could claim "origins" in either race. Society, however, generally perceives children of black and white parentage as black.[171] The

165. See id. This point is much more than semantic. The connection between the black, Hispanic, and white racial classifications will be addressed in more detail in Part III.A.3.

166. See EEOC Report at 2066 (cited in note 149); note 150.

167. For a detailed discussion of this point, see Eileen R. Kaufman, *A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 Ariz. L. Rev. 259, 260-61 (1986) (listing Syrians, Iraqis, Iranians, Israelis, Egyptians, Arabians, Hebrews from Palestine, and Ethiopians among those seeking protection from race discrimination under Section 1981).

168. See generally Frances Cress Welsing, *The Isis Papers* (Third World, 1991); G. Elliott Smitb, *The Ancient Egyptians and the Origin of Civilization* (Harper, 1923).

169. See EEOC Report at 2066 (cited in note 149). Since the EEOC deems some Africans to be white, to define all Africans as black would have been problematic. The term "black racial groups" was apparently added to avoid this problem. Id.

170. The drafters of the EEOC classifications did not learn the golden rule of definitions: a term cannot be used to define itself.

171. *Reisman v. State of Tenn. Dept. of Human Services*, 843 F. Supp. 356, 358 (W.D. Tenn. 1993) (discussing expert testimony that it is in the best interest of a bi-racial child to be defined as black because that is how society will typically define the child).

EEOC's racial classifications, therefore, are ineffective since most biracial individuals in reality will be classified based on how society perceives them, forcing them into the black classification when, under the EEOC scheme, they have just as much right to be deemed white.[172] Any competent system of racial classification must address the status of mixed-race persons, particularly because the status of such individuals has been the very core of the racial classification problem.[173] In light of the above problems with the EEOC's racial classifications, professor Finkelman's assertion that race has an "I'll know it when I see it" definition[174] makes more and more sense. To the extent that society routinely assigns minority status to mixed-race children, the EEOC's classifications perpetuate notions of white racial purity that have plagued this country's past.[175]

c. The Lack of Verification

The EEOC classifications also provide no hint of how racial classifications are to be verified or enforced.[176] While racial classifications are not routinely thought of as something that must be verified or enforced, the lack of any enforcement mechanism leads to cases

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172. This fact supports the notion that race is primarily sociopolitical. A key factor in racial classification is the perception of those making the determination. See generally Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to 1980s* (Routledge and Kegan Paul, 1986) (discussing the social, political, and economic forces shaping racial classifications).

173. See Part II.A.

174. See notes 25-28 and accompanying text.

175. Any notion that the presence of a minority ancestor classifies a person as that minority is directly akin to white racial purity. See Part II.

176. For an example of a verification process gone too far, see *Price v. Civil Serv. Comm'n of Sacramento Cty*, 26 Cal. 3d 257, 604 P.2d 1365, 1389 (1980) (Mosk, J., dissenting). In *Price*, Judge Mosk recounts a modern day verification nightmare:

> Verification of confusing and false ethnic claims for purposes of teacher assignment plagued the Los Angeles Unified School District in 1976 and 1977. To avoid being included in a compulsory program involving transfer to a distant school, some white teachers were declaring themselves black, some black teachers insisted they were white, others were asserting they were of American Indian origin.
>
> The district thereupon created an Ethnic Designation Committee which promulgated a precise series of proof requirements to establish the ethnicity of teachers. The criteria employed by the district to determine the ethnic makeup of individual teachers included: verification of racial or ethnic ancestry to the grandparent's generation; birth certificates of the individual and his parents and grandparents; affidavits by a school administrator and a clergyman attesting to the teacher's racial identity.

Id. at 1390 n.8. While this verification process is extreme, the experience of the Los Angeles Unified School District shows the need for some form of verification when racially-based decisions are being made.

like those of the Malones and Stebbins.[177] While the EEOC's regulations ban the misuse of the promulgated classifications,[178] they offer no guidance as to how an abuse is to be discovered or proven.[179]

To avoid racial fraud, some system of verification must be in place. For many years, birth certificates listing the race of an individual were used as a means of racial verification.[180] Since many states no longer include race on birth certificates,[181] this method of verification is no longer consistently available. In the modern era, most racial information is verified only by the self-definition of the individual.[182] Such a system easily can be abused without anyone realizing the extent to which abuse occurs. Even the most logical system of racial classification will be useless if not properly enforced. In rethinking the American notion of race, therefore, verification and enforcement are of crucial concern. The EEOC's failure to promulgate an enforcement or verification mechanism greatly contributes to the definitional problem.

2. Birth Certificate Designations

In 1983, Susie Phipps' five-year, $49,000 legal battle to have her birth certificate's "erroneous" racial classification changed ended with the court denying her petition.[183] Six years later, Mary Walker's fight to have her racial classification changed on her birth certificate ended with the court granting the change she sought.[184] Why did these two cases, seemingly very similar, have totally opposite outcomes? There are probably two reasons. First, Susie Phipps sought to have her racial classification changed from "black" to "white," while Mary Walker sought a change from "white" to "black."[185] Second, and

177. See generally Part I.
178. 29 C.F.R. § 1607.4(B) (1994).
179. See id.
180. See note 192 and accompanying text.
181. See note 190.
182. See note 191.
183. Art Harris, *Louisiana Court Sees No Shades of Gray In Woman's Request*, Wash. Post A3 (May 21, 1983) (recounting how a woman whose birth record declared her to be "black" was classified as such under Louisiana law, even though only her great-great-great-great-grandmother was black).
184. See *Rewriting Her Story*, Nat'l L. J. 51 (Sept. 18, 1989). Mary Christine Walker's birth certificate was issued in the state of Kansas. Years after her birth, the state began issuing birth certificates that did not indicate race. In the end, Walker was allowed to have a new birth certificate issued that did not designate her race. Id.
185. All of the racial statutes favored the notion of white racial purity. See note 71. Consequently, a person's admission of black ancestry would probably be enough to have that

perhaps more importantly, in 1983, Mary Phipps' home state, Louisiana, was the only state with a statute legally defining the "black" racial classification.[186] Mary Walker's claim, brought in Colorado, was not subject to any statutory definition. Importantly, neither woman challenged the "erroneous" classifications on their birth certificates until both faced some tangible loss because of their racial classifications: jobs and social status.[187]

Even though the Louisiana statute was highly biased toward white purity,[188] it was the last rule in the modern era with some notion of a bright-line definition.[189] All states, however, still require racial data at birth for statistical purposes such as monitoring population migration, disease, and fertility among racial groups.[190] If nothing else, these statutory requirements mandate that a racial classification be selected at the time of birth. There are no standards,

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person declared black. Conversely, the notion of white racial purity would make it much harder to prove that a person was white instead of black.

186. See Harris, Wash. Post at A3 (cited in note 183). While many states had statutes defining race, Louisiana was the last state to repeal the statute. Under the Louisiana statute, a person was black if she was one-thirty-second black. If an individual's great-great-great-grandparent had two all-black parents of African ancestry, then that individual would have been considered "black" under Louisiana law, even if all of the other ancestors were "white." While very restrictive, this statute was more progressive than the statute it replaced, which considered a person black if there was "one drop" of black blood in the person's ancestry. For a description of the statute, see *Doe v. State Dept. of Health and Human Res.*, 479 S.2d 369, 371 (La. Ct. App. 1985). For a discussion of the "one drop" rule, see notes 66-72 and accompanying text.

187. See *Rewriting Her Story*, Nat'l L. J. at 51 (cited in note 184). In the Louisiana case, Susie Phipps did not question the classification on her birth certificate until she needed a copy te receive her passport. Apparently fearful of her wealthy husband's reaction to her racial classification (black), she skipped the trip and spent $20,000 of her "allowance" to have her birth certificate changed. She paid her lawyer with cashier's checks so that her husband would not find out about her birth certificate. See Harris, Wash. Post at A3.

Mary Walker did not challenge her racial classification until her prospective employer accused her of falsely listing her race as black to take advantage of minority-hiring policies. Ms. Walker apparently knew that her parents (one black, one mixed heritage) had listed her race as white on her birth certificate so that she could "make it." See *Rewriting Her Story*, Nat'l L. J. at 51.

188. See notes 71-78 and accompanying text.

189. See *Doe*, 479 S.2d at 371 (stating that the plaintiffs were asking the court to mandate that their birth record be changed so that their parents were designated white instead of black). *Doe* was decided after the Louisiana statute was repealed. The court, forced to adopt a new standard after the Phipps case, denied the plaintiffs' petition to change their parents' racial designation because they could not prove that their parents were "white" by a "preponderance of the evidence." Id. at 372. This standard, quite clearly, does not provide the definiteness of a bright-line rule.

190. Harris, Wash. Post at A3 (cited in note 183) (quoting Bob Heuser, chief of natality statistics for the National Center for Health Statistics). Birth certificates, however, currently do not list the race of the child, but do list the race of the parents. Many people currently have birth certificates that were issued before the rule change. See id.

however, to oversee this classification procedure. These birth statistic statutes essentially allow parents to choose the race of their children based on how they classify themselves.[191] Since birth certificates and other state documents are often used as proof of race,[192] the current standard for racial classification seems to be self-definition.

B. The Modern Court's Approach to Race

1. The Court's Ebb and Flow Between Different Definitions of Race: A Matter of Restrictive Convenience

Professor Neil Gotanda offers four types of racial doctrines that track how society and the courts have viewed race: (1) status-race; (2) formal-race; (3) historical-race; and (4) cultural-race.[193] Under the status-race doctrine, the notion that the black race is inferior allows private individuals to discriminate on the basis of this belief.[194] The formal-race doctrine employs a definition of race that removes all social and historical experiences and views race in isolation, as merely a difference in appearance.[195] The historical-race doctrine defines race in terms of its relationship to oppression and

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191. Id. Virginia Sachs of the Columbia Hospital for Women put this point in its proper perspective: "If a mother says she's 'green,' we put down 'green' on the birth certificate. . . . We have no way of checking or verifying it." Id.

192. See *Rewriting Her Story*, Nat'l L. J. at 51 (cited in note 184) (noting that Mary Walker's race was called into question by her birth certificate); *Cunningham v. Cunningham*, 1990 Conn. Super. LEXIS 1945, *4 (ordering black designation on mixed-raced child's birth certificate to assure "minority rights"); *Araha v. U.S. Congress*, 1991 U.S. App. LEXIS 2960, *1 (alleging plaintiff's Mississippi birth certificate erroneously lists his race as "black" when he is actually a Cree Indian, causing him to suffer racial ostracism).

193. See Gotanda, 44 Stan. L. Rev. at 36 (cited in note 45).

194. Id. at 39. See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171 (1972) (allowing private club te discriminate on the basis of race in serving alcohol). This notion of status race is alive and well in conntry clubs across this nation. See, for example, *Group to Picket U.S. Open Coalition Protecting Lack of Blacks at Club*, Atlanta Journal F9 (July 14, 1990) (discussing golf clubs with racially exclusive policies); Times Wire Services, *U. of Tenn Urged to Demand Country Club Admission for Coach*, L.A. Times A8 (April 10, 1989) (discussing the denial of membership at an all white country club to Coach Wade Houston, the University of Tennessee's first black head basketball coach).

195. Gotanda, 44 Stan. L. Rev. at 38 (cited in note 45). Gotanda points to *Plessy v. Ferguson* in which the Court viewed the "separate but equal" doctrine as racially neutral, and saw no equal protection problem. Id. This approach differs from the status race definition in that race is viewed in terms of physical differences only. Id. This theory is evidenced in cases such as *City of Richmond v. Croson*, 488 U.S. 469, 527 (1988) (Scalia, J., concurring) (calling for a color-blind approach to remedial cases rather than accepting claims based on historical discrimination).

unequal power.[196] Finally, the cultural-race doctrine incorporates all aspects of culture, community, and consciousness.[197] For the black race, for example, a cultural race definition includes the customs, beliefs, and intellectual contributions of black America, and institutions such as black churches and colleges.[198]

The significance of these four doctrinal orientations cannot be overemphasized. The Court routinely uses all of these doctrines at its convenience. In the private sector, the Court allows a status-race definition to control. Private individuals are welcome to use an inferiority-based definition of race.[199] In the remedial cases, the Court seems to use the formal race definition, requiring particularized proof of intentional discrimination on the basis of differences in appearance.[200] The historical approach has been referred to in the jury selection process, but only after a clear showing of bias in selection, converting the historical approach into a well-proven formal race

196. Gotanda, 44 Stan. L. Rev. at 39. Modern use of this definitional approach is present, to some extent in *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court paid a great deal of attention te the histerical significance of race in the jury selection process. Id. at 84-85. In fashioning a remedy, the Court examined race in a histerical context. Id. at 86-88.

197. Gotanda, 44 Stan. L. Rev. at 56. Gotanda asserts that two cases embrace the cultural definition. Id. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court upheld an FCC policy to enhance racial diversity. Id. at 567-68. In *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the Court upheld a University's right to consider race as a factor in the admissions procoss for diversity purposes. Id. at 311-12.

198. Gotanda, 44 Stan. L. Rev. at 56. Recent support for this idea subsequent te Gotanda's article can be found in *United States v. Fordice*, 112 S. Ct. 2727 (1992). In *Fordice*, the Court held that the racial make-up of an institution is irrelevant unless it is traceable to de jure segregation. Id. at 2735. This opinion allows historically black institutions to remain black, unlike cases such as *Geier v. Alexander*, 593 F. Supp. 1263, 1267 (M.D. Tenn. 1984) (ordering the desegregation of historically black Tennessee State University to 50% white). For an in-depth discussion of integration in higher education see generally Alex M. Johnson, Jr., *Bid Whist, Tonk and* United States v. Fordice: *Why Integrationism Fails African-Americans Again*, 81 Calif. L. Rev. 1401 (1993).

199. See note 194. This approach to race approves of the "status" definition of race. By adopting this definition in these types of cases, the Court maintains the notion that minorities are inferior with a judicial stamp of approval.

200. See note 195. In his dissent in *Bakke*, Justice Thurgood Marshall wrote:

> It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the histery of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.

Bakke, 438 U.S. at 400 (Marshall, J., dissenting). Viewing race from this historical perspective would most likely change the outcome in the remedial cases. For support of the intentional discrimination theory see James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 644 and n.56 (1983) (stating that the intent standard offers a "bottom line" for the finder of fact).

case.[201] Lastly, the cultural approach seems to have application in diversity cases only, usually not the kind of cases that will affect the rights of the masses.[202] These approaches are problematic because viewing race outside of its historical and cultural context will almost always lead to negative results. As a policy matter, the Court has seemingly decided that definitions of race must depend on the context in which they are used.[203] The Court, however, determines what the context is and, therefore, determines the outcome based on how it frames issues.[204] This lack of consistency simply adds to the confusion in the struggle to define race.

2. The Court's Attempt to Substantively Define Race: The Problem of Legislative Intent and National Origin

a. What is National Origin?

In *St. Francis College v. Al-Khazraji*[205] a United States citizen born in Iraq brought a claim under Title VII, 42 U.S.C. § 1981.[206] At

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201. See generally *Batson*, 476 U.S. 79 (1986). In *Batson* and other cases, many of the jury selection statutes were facially discriminatory or blatantly discriminatory in their enforcement. See id. at 84-88 (discussing the case in which jury discrimination had occurred). Discrimination obviously had denied blacks the right to serve on juries. The fact that the Court chose to examine this history is not impressive, but merely common sense.

202. See note 197. The vast majority of blacks will never own a radio station, so while the *Metro Broadcasting* decision is noteworthy, it has only a cosmetic impact on racial opportunities. The university cases can also be read as asserting that historically white state colleges can remain white and have the opportunity to diversify at their leisure. While there is some protection for historically black state institutions, the inadequacy in funding and threat of mergers with white institutions nearly guts the offered protection. While these cases may have broader implications, the Court's usage of more limiting doctrines in cases that have a broader impact suggests that this cultural race definition will not be recognized often.

203. See, for example, *Oritz v. Bank of America*, 547 F. Supp. 550, 565 (E.D. Cal. 1982) (stating that "[j]ust what constitutes a race is a hard question to answer, since one's classification usually depends on the purpose of the classification").

204. As the discussion of the definitional approaches to race in Part III.B.1 clearly indicates, the Court routinely uses racial definitions based on the kind of case before it. This type of inconsistency is dangerous in that it gives the Court the power to either always uphold or never uphold racial claims based on the context of the case.

205. 481 U.S. 604 (1987).

206. Id. at 606. Section 1981 provides:

> 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 proceedings 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 exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988).

issue was whether Arabs, who are taxonomically considered Caucasians, are permitted to bring race discrimination claims under Section 1981.[207] The lower court ruled that an action based on the plaintiff's Arabian race could be maintained under Section 1981.[208] After the case was remanded, a different judge ruled that Section 1981 did not reach claims based on Arabian ancestry.[209] The Court of Appeals for the Third Circuit held that although Arabs are part of the Caucasian race, this claim was viable under Section 1981.[210] The Court reasoned that section 1981 prohibits discrimination against individuals because they are "genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens."[211] This result, the Court opined, is allowable even if the discrimination at issue would not be considered racial discrimination under modern scientific theory.[212] In a rather confusing passage, the Court held that if the respondent could prove on remand that he was discriminated against because "he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under Section 1981."[213] This passage is confusing because, while the Court implied that being born an Arab is clearly distinguishable from national origin, as a practical matter, the distinction is not clear.[214]

Implicitly, the Court decided that modern statutes only recognize Caucasoid, Mongoloid, and Negroid as racial categories.[215] The

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207. *St. Francis College*, 481 U.S. at 607.

208. Id.; *Al-Kazraji v. St. Francis College*, 784 F.2d 505, 514 (3rd Cir. 1986).

209. *St. Francis College*, 481 U.S. at 606.

210. Id. at 607. In a footnote, the Court acknowledged that the common popular theory is that there are only three major human races—Caucasoid, Mongoloid, and Negroid. It also indicated that racial classifications are for the most part sociopolitical, rather than biological in nature. Id. at 610 n.4.

211. Id. at 613. The Court reached this result on the basis that "all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law." Id. at 610.

212. Id. at 613. The Court seemed to assert that this claim would not be cognizable under Title VII or more recent laws as a race discrimination case. The Court explicitly stated that the definition of "race" has changed substantially since the 19th century. More significantly, the modern definition of "race," as cited by the court, does not include Hispanic or Native American as racial classifications.

213. Id.

214. It seems as if, in the 19th century, races, such as the German race or Swedish race, were clearly linked to the notion of national origin. See Part IV.A. It also seems that a simpler solution would have been to hold that § 1981 treats national origin and race the same because that was the prevailing notion in the 1860s, or simply to decide, as a matter of public policy, that § 1981 only applies to the three recognized races. See notes 210-12 and accompanying text.

215. See note 210. If the Court uses the doctrinal approach of *St. Francis College* in modern cases, it is forced to examine the definition of race at the time of the statute's passage.

Court, however, failed to define these three terms to the extent that they are distinguishable from national origin.[216] On more than one occasion, courts have claimed that race cannot be defined in meaningful contradistinction from national origin.[217] Often, the inquiry under Section 1981 is the extent to which a plaintiff is different from white persons.[218] This standard, however, assumes that a white person is easily distinguishable from the rest of society. While this issue is not usually problematic under Title VII,[219] it may be significant in terms of the theory of discrimination available to many plaintiffs,[220] and the procedural requirements of the action in question.[221]

Modern definitions of national origin display a significant amount of confusion and inconsistency. The U.S. Department of Defense and the EEOC define national origin as an individual's or ancestor's place of origin and the "physical, cultural, or linguistic characteristics" an individual possesses which are associated with a

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See notes 211-12 and accompanying text. If this is true, Title VII only recognizes these three races for racial discrimination purposes. See note 210.

216. See *Ortiz*, 547 F. Supp. at 559-65 (analyzing the Court's failure to effectively distinguish race from national origin).

217. See id. at 559 (recognizing that the distinction between race and national origin is a difficult one); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901, 904-906 (W.D. Okla. 1977) (observing that "the line between discrimination on account of race . . . [or] national origin may be so thin as to be indiscernible").

218. See Comment, *Developments in the Law-Section 1981*, 15 Harv. C.R.-C.L. L. Rev. 29, 82-90 (1980) (discussing the non-white standard under § 1981 claims).

219. Since Title VII provides protection on the basis of race, color, or national origin, the need to distinguish between these three is usually unnecessary because a plaintiff can allege all three and let the court decide. See, for example, 42 U.S.C. §§ 2000e-2 et seq. (1988) (including national origin among protected classifications).

220. Under the disparate impact theory first noted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), whether an individual is alleging discrimination on the basis of race or national origin may determine whether the claim can be heard, and which individuals can be used in the statistical evidence. If, for example, Hispanics can bring a race claim, but Mexican Americans and Cubans can only bring national origin claims, neither group could count the other in disparate impact claims. This result could severely lessen the significance of the statistics, or prohibit the plaintiff's claim altogether.

The "disparate impact" theory of discrimination "holds that facially neutral employment practices that have a substantial adverse effect on the employment opportunities of racial minorities and women violate Title VII, unless justified by business necessity." Rebert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 Yale L. & Policy Rev. 223, 224 n.4 (1990). For a discussion of the significance of statistical evidence in the "disparate impact" theory, see Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 Rutgers L. Rev. 921, 927-29 (1993) (discussing evidentiary requirements of statistical evidence under Title VII).

221. For example, "A plaintiff may claim discrimination under Section 1981 and not be bound by the severe time constraints imposed under Title VII, nor be subject to Title VII's exhaustion requirements. . . ." Eileen R. Kaufman, *A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 Ariz. L. Rev. 259, 267 (1986).

"national group."[222] Attempting to clear up confusion surrounding the definition of national origin, U.S. Congressmen Roosevelt and Dent defined national origin as the country from which a person's forbears came, having nothing to do with color, religion, or race.[223] The scarcity of clear legislative intent concerning what is meant by "national origin" has bred a dearth of understanding the term, particularly with regard to the distinction between national origin and race. This confusion further complicates attempts to substantively define race.

b. The Impact of the Confusion Surrounding National Origin

The definitional problem of equating race and national origin has broad implications. In 1991 more than half of all prisoners in state and federal jails whose race was known were African American, American Indian, or Asian-Pacific Islander.[224] Notably absent from the 1991 survey were figures for Hispanic prisoners. The vast majority of Hispanics were included in the white category.[225] Furthermore, the term "white," under modern theory, typically encompasses individuals of Middle Eastern and North African descent.[226] It is possible, therefore, that the number of white inmates thought to be in jail has been inflated by including Hispanics and those of foreign national origin hiding the true racial disparity of people incarcerated by the criminal justice system.[227] This practice may have implications in other areas as well, and the ramifications of such inaccuracies in census taking, voting rights cases, and school desegregation are obvious. It is difficult, however, to quantify how many people are being

222. See 32 C.F.R. § 51.3(e) (1993); 29 C.F.R. § 1601.1 (1994) (defining national origin implicitly by defining national origin discrimination).

223. See James Harvey Domengeaux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151, 1157 (1986) (quoting 110 Cong. Rec. 2549 (1964)). The Congressmen argued that a man may have migrated from Great Britain and still be considered a colored person in America. Id.

224. In 1991 the total prison population in prisons was 774,375. This figure breaks down as follows: white–369,485; black–367,122; American Indian/Alaska Native–6,251; Asian or Pacific Islander–2,806; not known–28,711. Timothy J. Flanagan and Kathleen Maguire, eds., *Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1991*, Table 6.75 at 641 (1992) ("Bureau Statistics").

225. See Finkelman, 67 Tulane L. Rev. at 2064 n.1 (cited in note 53). "For most states the 'white' inmate category also included persons of Hispanic origin." Id. Many of the individuals in the unknown category were also Hispanic. Id.

226. See EEOC Report at 2066 (cited in note 149).

227. See Finkelman, 67 Tulane L. Rev. at 2064 n.1 (cited in note 53). While Finkelman speaks only to the issue of Hispanic inclusion, his argument seems to also support the inclusion of people of color in the white category.

misclassified to the service and disservice of various racial groups.[228] The absence of a meaningful distinction between national origin and race is significant in the distribution of rights whenever race is a factor.

3. The Hispanic Classification: A Biracial Classification?

The Hispanic racial classification gives rise to much debate. Complexities arise because many persons of Spanish origin are mixtures of Caucasoid unions, or partially Mongoloid to the extent that they are partially Indian.[229] Many Hispanics of Caribbean Spanish origin are partially Negroid.[230] Interestingly, although the unifying factor is origins in a Spanish speaking culture,[231] many Hispanics disfavor including Spaniards in the Hispanic classification.[232]

The Hispanic classification also includes the same national origin error discussed above. The term Hispanic routinely encompasses persons from Spain, Cuba, Mexico, Central America, South America, and on occasion, Italy and Portugal.[233] It also encompasses Spanish surnamed individuals.[234] One legislator finally concluded that the Hispanic group is so scattered across the land and disparate in its origins that it has the same problems defining itself as the government has attempting to define it.[235]

At a very basic level, the Hispanic category is a multiracial classification, tied to Spanish heritage.[236] But for the Spanish coloni-

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228. While much of the focus has been on individuals using race to the detriment of others, there are some situations in which racial groups would seek racial misclassification when it helps their numbers for group rights. This practice is a double-edged sword that allows some blatant forms of discrimination to continue. See generally Saragoza, et al., 5 La Raza L. J. 1 (cited in note 22).

229. See generally Leo Estrada, *Racial/Ethnic Classification in U.S. Census*, 4 Intercom 8 (1976).

230. Id.

231. See EEOC Report at 2065-66 (cited in note 149) (defining Hispanic with reference to origin in Spanish culture).

232. See Saragoza, et al., 5 La Raza L. J. at 1 (cited in note 22) (noting some Hispanics' arguments te exclude Spaniards from the Hispanic classification).

233. See id. at 8 (discussing the nations from which Hispanics are thought to originate).

234. See id. at 7. Note that throughout this article, the authors use the term "Latino." Id.

235. 113 Cong. Rec. 16101 (June 15, 1967) (statement of Rep. Gonzalez).

236. While perhaps a controversial assertion, the definition of the categories in the EEOC Report, supports this point. See notes 149-62 and accompanying text. If, for example, the Hispanic restrictions were removed from the definitious of white and black, many Hispanics would fit into one of these categories. The Hispanic category would then be populated by individuals who were mixtures of the white, black, and Indian populations that intermingled during colonization.

zation of Central and South America, individuals in this part of the world would never have become Spanish-speaking persons.[237] In fact, racial categorization in Latin America depends on degrees of white or black ancestry, permanently perpetuating the societal impact of colonization and the multiracial character of the population.[238] The recognition that there are white Hispanics and black Hispanics implies that the rest of the Hispanic population is, in large part, a mixture of these groups.[239] Mexicans routinely make distinctions based on skin color, claiming that there are differences in how Mexicans with white skin and Mexicans with brown skin are treated.[240] The Hispanic racial classification is akin to uniting black, biracial, and white Americans under one racial category simply because they speak the same language. Just like the Hispanic classification, an "American" racial classification would not take into account the stark differences among the individuals it encompasses. The Hispanic classification, as currently structured, is simply not workable as a racial classification.[241]

The Court's decision to defer to the 19th century definition of race in Section 1981 cases keeps the racial attitudes of the 1800s alive and well in modern society.[242] Title VII's broad protection based upon

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237. See generally Magnus Morner, *Race Mixture in the History of Latin America* (Little Brown, 1967). While this assertion is primarily based on simple common sense, it is very profound. Viewing Latin America out of its historical context one could forget the significant Spanish influence on this region of the world, and the undeniable mixing of the races. Thus, the historical definition of race must be encompassed within a modern definition of race in order for this country to truly understand its cultural and racial origins.

238. See Gotanda, 44 Stan. L. Rev. at 25 (cited in note 45) (noting that social status also plays an important role in these categories). A study of Latin American culture reveals a system in which whites are at the top and Indians and blacks at the bottom. Those with mixed blood were held in higher esteem than blacks and Indians, but lower than whites. See Morner, *Race Mixture in the History of Latin America.*

239. In a recent conversation with a classmate of mixed-parentage (black and white), she revealed that she is often thought to be Hispanic when in New York. Her brother often refers to himself as Hispanic when introducing himself.

240. See *Gonzalez v. Stanford Applied Engineering, Inc.*, 597 F.2d 1298, 1300 (9th Cir. 1979) (accepting plaintiff's position distinguishing between Mexican-Americans with brown, as opposed to white, skin); *Gomez v. Pima County*, 426 F. Supp. 816, 818-19 (D. Ariz. 1976) (asserting that Mexican-Americans of brown race or color can sue under § 1981, but white skinned plaintiffs cannot).

241. This assertion is in no way an indictment of Hispanic traditions. The United States has benefited greatly from the past and present contributions of its Hispanic population. This Note simply contends that a Hispanic racial classification ignores the sociopolitical aspects of race by paying no attention to color and historical realities. This proposal merely suggests changes in how Hispanics should be racially classified, but does not seek to change or invalidate the unique Hispanic culture. See Part II.

242. See notos 207-17 and accompanying text.

race, color, and national origin allows the judiciary to equivocate about the definition of race without making any hard and fast legal rules.[243] Particularly in the case of Hispanics, the Court seems comfortable with the status quo until there is a need to change its approach.[244] The Hispanic classification, based on the proposition that whites, blacks, and biracial individuals from different countries may form a single "racial minority," allows many diverse individuals to receive aggregate group rights despite their racial differences.[245] The fairness and soundness of this notion, however, calls the entire racial classification scheme into question.

C. Limitations Based on Race in the Modern Era

While American society may like to believe that limitations and disabilities based on race no longer exist, the reality is otherwise. Studies reveal that criminals who perpetrate crimes against white victims are frequently punished more severely than those who victimize blacks, suggesting that the lives and rights of white victims are valued more highly than the lives of victims of other races.[246] Parentless black children are far less likely to be adopted than their white counterparts.[247] Minorities are discriminated against in jury selection, often depriving minority group members of one of their most significant Constitutional rights.[248] Blacks are still routinely discriminated against in obtaining mortgage loans,[249] and in other

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243. Since the protection of Title VII is so broad, the prohibitions against race, color, and national origin discrimination will usually encompass a plaintiff's claim. Section 1981 claims are, quite often, merely one of many claims a plaintiff may bring. Since the Court's ruling in national origin cases does not usually make the difference between recovery and no recovery, the need for a clear distinction between national origin and race is not as significant as it may otherwise have been.

244. Title VII gives the Court a great deal of leeway in this area because the coverage is so broad. See Part III.B of this Note.

245. See generally Saragoza, et al., 5 La Raza L. J. at 1 (cited in note 22) (discussing the collective rights strategy of Hispanic advocacy groups).

246. See *McClesky v. Zant*, 499 U.S. 467, 503-06 (1991) (alleging race discrimination in death penalty sentencing); *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (upholding sentence of black defendant punished more severely for attacking a white victim pursuant to a state statute stiffening penalties for racially motivated crimes).

247. See Charisse Jones, *Role of Race and Adoptions is Being Reborn*, N.Y. Times A1 (Oct. 24, 1993).

248. See *Batson*, 476 U.S. at 84-88. See also William Booth and Joan Biskupic, *Balancing Race and Rights in the Jury Box*, Wash. Post A1 (May 11, 1993) (discussing race discrimination in jury selection).

249. Joel Glenn Brenner and Liz Spayd, *A Pattern of Bias in Mortgage Loans*, Wash. Post A1 (June 6, 1993).

significant economic situations such as the purchase of an automobile.[250] In Florida, a white woman was awarded full worker's compensation disability for her phobia of black men after she was attacked by someone she believed to be black.[251] This century's efforts to achieve voting rights and school desegregation illustrate the continued presence of racial limitations in modern society, and the need to remove them.[252]

Perhaps the most profound statement of the modern significance of race appears in a recent article by Professor Ian Lopez. Professor Lopez asserts that race dominates our personal lives because it manifests itself in our speech, dance, neighbors, and friends, and in our ways of talking, walking, eating, and dreaming.[253] He writes that race determines our economic prospects, screening and selecting us for manual jobs and professional careers, red-lining financing for real estate, and green-lining access to insurance.[254] Race permeates politics by altering electoral boundaries, shaping the disbursement of local, state, and federal funds, fueling the creation and collapse of political alliances, and affecting efforts of law enforcement.[255] In short, race permeates every aspect of our lives.[256]

Such examples notwithstanding, there seems to be a broad-based belief that all racial classifications have limitations in the modern era.[257] Whites like the Malone twins seemingly feel that their white racial status limits their employment opportunities.[258] Many blacks, like Mary Walker and her family, believe that a black designation would limit them in the same way.[259] Inherent in both views is the notion that race has some quantifiable value in society. The pre-

250. See generally Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

251. William Booth, *Phobia About Blacks Brings Workers' Compensation Award*, Wash. Post A3 (Aug. 13, 1992).

252. See generally *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (discussing voting rights); *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (discussing school desegregation).

253. Lopez, 29 Harv. C.R.-C.L. L. Rev. at 3 (cited in note 29).

254. Id.

255. Id. See Thomas Byrne Edsall and Mary D. Edsall, *When the Official Subject is Presidential Politics, Taxes, Welfare, Crime, Rights, or Values . . . The Real Subject is Race*, The Atlantic 53 (May 1991) (discussing the significant impact of race on every presidential election from the 1960s to 1988).

256. Id. at 53; Lopez, 29 Harv. C.R.-C.L. L. Rev. at 3.

257. See Timur Kuran, *Seeds of Racial Explosion*, Society 55 (Sept./Oct. 1993) (discussing disenfranchised blacks and the white backlash to affirmative action). According to Kuran, many whites now feel that affirmative action programs give them a disadvantage in efforts to obtain jobs. Id. at 56, 63.

258. See discussion of the Malones' case in Part I.

259. See discussion of Walker's case in Part III.A.1.

dominance of this belief is perhaps the greatest inhibitor to the creation of a consistent and functional modern approach to race. To the extent that everyone feels like a victim, society cannot discuss the significance of race objectively.

1. The Continuing Legal Significance of Race

a. Jurisdictional Issues Involving Indians

One of the most obscure yet profound manifestations of the legal significance of race appears in the context of Indian reservation jurisprudence. To determine whether federal or state law applies in criminal cases arising in Indian territory, courts must first decide whether a defendant is legally an Indian.[260] In *State v. Piper*,[261] Kenneth Piper (a.k.a. Moonface Bear) moved to dismiss several criminal counts related to his alleged illegal sale of unstamped cigarettes.[262] Piper argued that the state court did not have jurisdiction over the case because the federal government has sole jurisdiction over crimes committed by Indians in Indian country.[263] Consequently, whether a defendant is an Indian can become a significant legal inquiry in criminal cases.[264]

The courts have adopted a two-pronged test to determine whether a defendant is *legally* an Indian.[265] The first prong of the test seeks to determine whether or not the defendant has "some Indian blood."[266] The second prong of the test prompts an inquiry into

260. See *St. Cloud v. United States*, 702 F. Supp. 1456, 1460-61 (D. S.D. 1988) (creating a two-prong test to decide whether the defendant was an Indian); *United States v. Driver*, 755 F. Supp. 885, 888 (D. S.D. 1991) (adopting the test used in *St. Cloud*).

261. 1994 WL 450226 (Conn. Super. 1994).

262. Id. at *1.

263. Id. at *3. This argument was advanced pursuant to Article I, Section 8 of the United Statos Constitution and 18 U.S.C. § 1153 (1988) granting the federal government exclusive criminal jurisdiction over Indians and reservations. Id.

264. See *Piper*, 1994 WL 450226 at *1 (determining defendant's status as an Indian as a threshold matter); *Driver*, 755 F. Supp. at 888-89 (adopting test to determine Indian status for jurisdictional purposes); *St. Cloud*, 702 F. Supp. at 1459-60 (creating the two-prong test to determine Indian status due to its significance). For a discussion of why the term "Indian" is used in this context rather than "Native American," see *La Pier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (asserting that Indians are members of a socio-political group and not primarily a particular race).

265. *Piper*, 1994 WL 450226 at *1. Whether someone is legally recognized as an Indian is a somewhat different question than whether that person is culturally or ethnically considered to be an Indian. See id. at *4.

266. Id. at *2.

whether the defendant is recognized as an Indian by examining: (1) whether the defendant has directly or indirectly received benefits reserved for Indians; (2) tribal affiliation; and (3) societal recognition as an Indian.[267] In *Piper*, the court found that even though the defendant may have been an Indian culturally and ethnically, he was not legally an Indian under federal or state law.[268] Since the defendant was not legally considered an Indian, state law applied.[269]

Piper and similar cases are significant in the racial arena for several reasons. First, these cases illustrate the extent to which racial designations can impact the legal system, in the case of *Piper*, determining jurisdictional limits of federal and state courts. Second, in at least this one area in which race is important, courts have outlined a bright-line test that provides consistent guidelines. Finally, courts have recognized that a sociopolitical analysis may provide the only legally significant definition of a race. Cases involving American Indians are becoming significant in other areas of jurisprudence, helping to determine the modern legal significance of racial classifications and the courts' attempts to develop a sensible jurisprudence of race.[270]

b. Title VII Jurisprudence

In *Perkins v. Lake County Dept. of Utilities*[271] an employer charged with racial discrimination challenged the plaintiff's racial status as a Native American.[272] The United States District Court for the Northern District of Ohio, considering what it thought to be a question of first impression, addressed the extent to which proven genetic/hereditary classification controls a person's inclusion in a protected class within the meaning of Title VII.[273] After reviewing the problems of defining the term "race" and the history of racial classifi-

267. Id. Courts may also look to state law to determine Indian status under the relevant statutes. There was no significant evidence of tribal affiliation pursuant to state law in *Piper*. Id.

268. Id. The court was careful to construct a legal definition of race devoid of any reference to culture or ethnicity. Id.

269. Id. The court held, "Since the defendant has failed to establish his status as an Indian in Indian country it cannot be found that the state lacks criminal jurisdiction over him because of the provisions of federal law." Id. at *3.

270. See notes 271 and 276 and accompanying text.

271. 860 F. Supp. 1262 (N.D. Ohio 1994).

272. Id. at 1263.

273. Id.

cations,[274] the court held that an employer's reasonable belief that a person is a member of a protected class controls the issue.[275] Even though the employer produced evidence showing that the plaintiff and his immediate family members were not members of an Indian tribe, had never lived in an Indian community, nor participated in Indian cultural events,[276] the court held that the plaintiff's appearance, self-identification, and the employer's initial belief and concession that the plaintiff had some Native American ancestry was enough to prove membership within a protected class under Title VII.[277]

In *Perkins*, the court decided that the biological question of race is pertinent, but not conclusive.[278] The *Perkins* court would consider both biological and societal factors in determining a person's legal status.[279] Even though the case dealt specifically with the classification of Native Americans, the principles it outlined have much broader application. The decision seems to establish clearly that an employer can legitimately challenge a plaintiff's status as a member of a protected class. Consequently, because it has the power to defeat the plaintiff's prima facie case, and result in summary judgment for the defendant, the racial classification issue may become very significant in Title VII jurisprudence.[280] As noted in *Perkins*, the plaintiff has the burden of proof in the prima facie case, and therefore, the burden of proof on the issue of membership in a protected class.[281] The issue of racial classification, therefore, could become a major barrier to the claims of many future plaintiffs, particularly if employers are able to produce compelling evidence of a perception different than that of the employee.

c. Fourth Amendment Analysis

Although the courts have never explicitly held that race is a relevant factor in Fourth Amendment search and seizure jurispru-

274. Id. at 1265-77.

275. Id. at 1277-78.

276. Id. The employer hired an expert to trace the plaintiff's ancestry back to the early 1800s and to determine how the plaintiff's ancestors had been racially designated for census purposes. This analysis led to the conclusion that the plaintiff was less than one-sixteenth Native American. Id. at 1266-70.

277. Id. at 1276-77.

278. Id. at 1277-78.

279. Id.

280. See *Bennun v. Rutgers State University*, 941 F.2d 154, 176 (3d Cir. 1991) (holding that the plaintiff made out a prima facie case of discrimination based on a Hispanic classification).

281. *Perkins*, 860 F. Supp. at 1276 n.14.

dence,[282] the legal significance of race in the search and seizure context is undeniable.[283] Even the police admit that race is an independently significant, if not determinative, factor in deciding who to follow, detain, search, or arrest.[284] Judges have noted that there is a nationwide tendency to stop minority drivers and airport passengers primarily because of their race.[285] While the cases only track searches and seizures leading to convictions, at least one study found that blacks are disproportionately the victims of arrests unsupported by probable cause.[286] Once again, to the degree that Fourth Amendment protections apply less favorably to minorities, even when minorities are innocent, the legal significance of race is apparent.[287]

Another aspect of Fourth Amendment analysis is the notion of "racial incongruity"[288] as a means of raising suspicion.[289] While police may not use race as the sole factor in determining incongruity, some courts have recognized the legitimacy of using race as an extremely

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282. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (holding that ethnicity alone cannot supply reasonable suspicion); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L. J. 214, 225 (1983) (asserting that race may not be the sole basis for a suspect stop although it may be used to tip the scales of probable cause or reasonable suspicion).

283. See *United States v. Coleman*, 450 F. Supp. 433, 439 n.7 (E.D. Mich. 1978) (explaining that race is a factor which may be taken into account to justify a stop if a credible rationale explains how race is significant).

284. Comment, *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1496 (1988).

285. See, for example, *United States v. Place*, 660 F.2d 44, 48 (2d. Cir. 1981) (discussing airport stops); *United States v. Taylor*, 956 F.2d 572, 590-91 (6th Cir. 1992) (Martin, J., dissenting) (discussing airport stops); *United States v. Carrizoza-Gayiola*, 523 F.2d 239, 241 (9th Cir. 1975) (discussing automobile stops); *State v. Rodriguez*, 1993 WL 525095 at *4 (Mo. App. S.D.) (Prewitt, J., concurring) (discussing automobile stops).

286. John R. Hepburn, *Race and the Decision to Arrest: An Analysis of Warrants Issued*, 15 J. Research Crime and Delinq. 54, 59-66 (1978).

287. See Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 Am. Crim. L. Rev. 327, 344 n.102 (1994). Susskind recounts the experiences of several black professional athletes, including 1984 Olympic gold-medalist Al Joyner, Boston Celtic star Dee Brown, and two members of the world famous Harlem Globetrotters, who were stopped by police solely because of their race. Joyner was stopped twice within a twenty minute period by ten police officers. Id. While being a professional athlete does not lead to an expectation of special treatment, it is significant that they were all well-built black men driving nice cars in predominately white neighborhoods, apparently a cause for suspicion by the police. The racial discrimination demonstrated by these stops impacts how law enforcement officers are assigned to jobs. See *Perez v. Federal Bureau of Investigation*, 707 F. Supp. 891 (W. D. Tex. 1989) (examining racial discrimination charges brought by Hispanic special agents against the FBI for the failure to give Hispanic agents proper credit for their race-conscious undercover assignments).

288. The "incongruity" notion stems from police officers being trained to recognize individuals who are out of place when they are patrolling their beats, making sure to question those who do not belong. When race is the factor that makes a person appear out of place, there is "racial incongruity." See Johnson, 93 Yale L. J. at 226 (cited in note 282).

289. Id.

important factor in this determination.[290] Under the racial incongruity concept, whites, blacks, and Hispanics have all been stopped when they have been in other racially identifiable neighborhoods.[291] The observed differences in race raise suspicion significant enough to justify a police stop or arrest. This practice has been approved at least indirectly by the courts, allowing police officers to make racially-based stops and justify them post hoc.[292] In this context, the use of racial classifications allows for judicially condoned interferences with liberty, privacy, the freedom of association, and the freedom of movement.

2. Legislative Actions

At the federal, state, and local levels, both intentional and benign measures have made race legally significant in the routine activities of everyday life. Minority communities, many of which were established due to discrimination, are often deprived of the basic protections of zoning ordinances.[293] Residents deprived of zoning protections fear for the safety, quality, and integrity of their communities due to toxic hazards, vile odors, traffic congestion, and blighting appearance.[294] There is also evidence that communities that are nearly one hundred percent black are often deprived of adequate street paving, sanitary sewers, surface water drainage, street lighting, water mains, and fire hydrants.[295] These examples of race-conscious zoning and residential services demonstrate how racial classifications can impact entire urban areas and seriously impact the quality of life in minority areas.

Unfortunately, sometimes even benevolent programs designed to help improve the blighted, often minority, communities only exacerbate race-conscious deprivation. A fourteen-month investigation

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290. See, for example, *State v. Dean*, 112 Ariz. 437, 543 P.2d 425, 427 (1975); *United States v. Richard*, 535 F.2d 246, 248 (3d Cir. 1976); *United States v. Magda*, 547 F.2d 756, 758-59 (2d. Cir. 1976); *People v. Tinsley*, 48 A.D.2d 779, 369 N.Y.S.2d 142, 143 (1976).

291. See note 290.

292. See Susskind, 31 Am. Crim. L. Rev. at 327 (cited in note 287).

293. Jon C. Dubin, *From Junkyards To Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities*, 77 Minn. L. Rev. 739, 740 (1993). For a discussion of the power of zoning as a police power of the government, see *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, 386-90 (1926) (tracing the origins of zoning law and its constitutional justification).

294. Dubin, 77 Minn. L. Rev. at 740. See also *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (commenting on the integrity of residential communities).

295. *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1288-91 (5th Cir. 1971).

during the mid-1980s found that in non-integrated federal rent-subsidy housing, the residential services and privileges were far better than those in the minority areas.[296] Similarly, the Federal Slum Clearance and Urban Renewal Program[297] uprooted and dislocated thousands of black families, most often relocating them in deprived areas.[298]

D. The Problem of Mixed-race Individuals and "Soulmaning"

1. How Do We Classify Children of Mixed Parentage?

Children of mixed parentage now represent approximately three percent of all births in the United States.[299] As of 1989, one million persons of mixed parentage had been born in the prior twenty years.[300] Of those numbers, thirty-nine percent of the mixed-race children were from a black-white union, thirty-six percent were Asian-white, eighteen percent were Indian-white, and the remaining six or seven percent were from Asian-black or Indian-black unions.[301] There were no figures gathered for Hispanic/other-race unions.[302] Prior to 1989, the National Center for Health Statistics classified all children with a minority parent as a member of that minority for

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296. Craig Flournoy and George Rodriguez, *Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing*, Dallas Morning News (Feb. 10-18, 1985) (discussing, in a series of articles, segregation in subsidized housing).

297. United States Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, 414-421. This program was replaced by Title I of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 633-53, codified as amended at 42 U.S.C. §§ 5301-5320 (1988).

298. See Dubin, 77 Minn. L. Rev. at 754 (cited in note 293). See generally Henry W. McGee, Jr., *Urban Renewal in the Crucible of Judicial Review*, 56 Va. L. Rev. 826 (1970); Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962* (M.I.T., 1964).

299. Felicity Barringer, *Mixed-Race Generation Emerges But is not Sure Where it Fits*, N. Y. Times 22 (Sept. 24, 1989).

300. Id.

301. Id.

302. Id. The omission of Hispanics in these 1989 figures further supports the notion that Hispanics are not routinely treated as a distinct race, and are again, apparently considered white for statistical purposes. See notes 224-25 and accompanying text. Much like the incarceration percentages cited in note 224, the National Center compiled no separate figures for Hispanic persons. See also Tim Bovee, *Interracial Couples Increase: "Biggest Problem We Have is Our Credit Cards,"* Plain Dealer 1A (Feb. 12, 1993) (stating that "[t]he Census Bureau also noted that there were 1.2 million marriages between Hispanics and other ethnic groups, but that figure was not used in calculating the number of interracial couples").

statistical purposes.[303] In 1989, however, the National Center changed the classification rule, adopting the slavery era rule of defining the child solely by the status of the mother.[304]

The number of biracial individuals undoubtedly has increased dramatically in the last twenty years. As that number increases, the call for the creation of a biracial or multiracial category grows stronger.[305] A biracial category, at first blush, sounds like a very palatable idea. The present scheme of forcing individuals to deny part of their heritage by listing themselves by only one racial classification may distance a child from one of its parents.[306] Upon further examination, however, the palatability of the category gives way to weighty legal concerns. There may never be communities consisting of all or a majority of biracial individuals.[307] Even if such communities did exist, because biracial individuals comprise roughly three percent of the population, their concerns would likely be unattended and unheard.[308] To that extent, biracial individuals would never be able to participate in "group politics" or exercise "group rights."[309] While it may be necessary to allow biracial individuals to classify themselves as such, the creation of a legal classification for this group may effectively deprive them of a meaningful voice in the racial debate. While a biracial classification with broad parameters may be helpful, the

303. Barringer, *Mixed-Race Generation* at 22. The remaining six to seven percent of children born to minority unions are not classified by this same rule. The rule for these children is not clear.

304. Id. While the National Center may have had sound reasons for this policy (i.e. the rise in illegitimate births, the convenience of obtaining information about the mother, etc.), it is a return to the slavery method of classifying a person by their mother's status. See note 55. Under this method, however, there are no standards to determine the race of the parent, and apparently, no inquiry is made into the mother's racial background. See note 191 and accompanying text.

305. See Barringer, *Mixed-Race Generation* at 22 (quoting Jewelle Gibbs, a clinical psychologist and an associate professor at the University of California at Berkeley).

306. See id. (describing the beliefs of several parents who fear being denied as the child identifies himself/herself with the racial classification of the other).

307. But see Margaret Usdansky, *For Interracial Kids, Growth Spurt Cultures Often Clash With Society*, USA Today 7A (Dec. 11, 1992) (noting Cindy Nakashima's argument that mixed-race individuals have their own culture).

308. This three percent figure encompasses all mixed race individuals, irrespective of the union that produced the mix. See text accompanying note 299. The diversity of views and heritage within this category would further dilute the significance of their power. How would this group be treated in affirmative action or voting rights cases?

309. See Gilanshah, 12 Law and Ineq. at 183 (cited in note 54) (discussing intragroup conflicts that may arise in the creation of a multiracial classification).

category would have to be much more expansive than many advocates currently envision.[310]

2. "Soulmaning"

From slavery to the present, some black individuals have passed for white.[311] In recent years, however, incidents of whites claiming to be black have become more and more frequent.[312] This Author uses the term "soulmaning"[313] to describe whites passing for black to gain employment, education, and political opportunities. The Malones and Stebbins incidents[314] illustrate the soulmaning phenomenon.

a. Using Race as a Political Tool

While the case of Mark Stebbins may seem unbelievable, his case is probably more common than unusual.[315] In many instances, the "Black Pride" movement of the 1960s encouraged people to take pride in and embrace their fractional black heritage.[316] Mark Stebbins could very well have been one of these individuals,[317] but that seems very unlikely. The political benefit that he received by identifying

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310. See Bovee, Plain Dealer at 1A (cited in note 302). Many just want a biracial category for mixed-race children on school documents. This Author proposes creating a new biracial classification that includes many now considered to be Hispanic. See Part IV.

311. See notes 114-17 and accompanying text; Peggy Peterman, *After Growing Up Hiding Her Race, A Former Teacher Fights to Claim Her Ancestry in a World of Black and White*, St. Petersburg Times 1D (Sept. 15, 1989). This article discusses the case of Mary Christine Walker discussed in Part III.A.2. Apparently, Ms. Walker and her thirteen brothers and sisters had been "passing" all of their lives. Now, the majority of her siblings are angry with her for revealing a family secret. Id.

312. See notes 2-22 and accompanying text.

313. "Soul Man" was a 1986 movie starring C. Thomas Howe, Rae Dawn Chong, and James Earl Jones. In the movie, Howe plays Mark Watson, a wealthy California student who is admitted to Harvard Law School, but whose father refuses to pay the tuition. Unable to qualify for student aid and loans because of his father's wealthy status, Watson takes tanning pills and puts on make-up to make himself appear black, so that he can win a minority scholarship for which no minority has applied. Michael Blowen, . . . *Or a Study in Insensitivity?*, Boston Globe 44 (Oct. 24, 1986).

314. See Part I.

315. See discussion of Mark Stebbins in Part I.

316. See generally F. James Davis, *Who is Black: One Nation's Definition* (Pennsylvania State U., 1991). Rather than reject the one drop rule of the early twentieth century, the theme of the 1960s was to unify as many people under the term "black" as possible. This philosophy is also crucial in the case of mixed-race individuals.

317. See generally *Black or White?* (cited in note 16). Stebbins asserts that he participated in the civil rights protests of the 1960s. It is not clear, however, whether Stebbins identified himself as black at that time.

himself as black in a district composed of thirty-seven percent blacks and eighty-three percent minorities is a classic example of soulmaning. Running as a white candidate in this district against a black incumbent would have resulted in defeat if the voters voted along racial lines. It is not unreasonable to argue that Stebbins declared himself black in order to win the race.

Regardless of his motivations, blacks in the district were willing to embrace Stebbins because of the much needed black political power he could generate as a black council member. In a society so heavily reliant on race, it is advantageous for all minority groups to accept those who self-identify with the group to inflate their numbers and political entitlements.[318] Consequently, minority groups may welcome those who are soulmaning when it is beneficial to the group at large. When, however, the benefit is only incurred by the individual, the attitude of the minority group is usually more hostile.[319]

b. Using Race to Obtain Job Opportunities

The case of the Malone twins demonstrates soulmaning in the context of employment.[320] The Malones were found guilty of committing racial fraud to obtain a job.[321] The Malones apparently believed that there was some benefit to be gained by classifying themselves as blacks.[322] Soulmaning in the job context does not elicit the open-armed response that Stebbins received in the political arena. As Massachusetts Department of Personnel Administration David Hayley pointed out at the time of the Malone incident, the reaction of minorities in this instance is much different. Hayley argued that because the Malones denied two minorities the opportunity to serve as Boston firefighters, no one would ever know what those two minority firefighters might have accomplished.[323] This type of sentiment seems to be common among minorities in this context.[324]

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318. See Saragoza, et al., 5 La Raza L. J. at 1 (cited in note 22). Groups like the Mexican American Legal Defense and Educational Fund ("MALDEF") have relied on aggregated statistics to push for district elections as a means of increasing the political representation of Latinos. Id.

319. See notes 10-14 and accompanying text.

320. See discussion of the Malones' case in Part I.

321. See Hernandez, Boston Globe at 13 (cited in note 2).

322. See discussion of passing in Part II. The Malones seem to have ascribed to the major tenant of passing: economic gain.

323. See Hernandez and Ellement, Boston Globe at 29 (cited in note 5).

324. See id. (describing the outrage of black and Hispanic groups after the Malones' hearing for racial fraud).

The Malones took advantage of a hiring policy designed to remedy past and present discrimination in city government. In this remedial context, a standardless definition of race will allow racial fraud to continue, and there will be no remedy for past discrimination. The reality of affirmative action, calls for diversity, and even political campaigns, may make soulmaning a recurring phenomenon. Failure to develop intelligent rules in this arena could lead to strained racial tensions and the blatant abuse of policies designed to bring about social justice.

IV. FASHIONING A NEW CONCEPTION OF RACE

The major problem with race in the modern era is the assumption that everyone defines the term in the same way.[325] As the analysis in this Note has shown, the meaning of race encompasses notions of physical characteristics, culture, and national origin. The analysis also shows that at its core, race is a sociopolitical construct that flows, not from fact, but from perception. To the extent that rights and opportunities are tied to race, racial groups have reconceptualized their major unifying themes in attempts to encompass as many people as possible. The increased presence of mixed race children and the repeal of discriminatory statutes defining race has led to a crossroad in the racial classification debate. With these thoughts in mind, this Note proposes that society reconceptualize its notion of race.

A. Eliminating Confusion in the Definition of Race and National Origin

As discussed in Part III, the confusion in defining race stems in large part from the fact that race is closely tied to national origin,[326] and from the internal inconsistencies in racial classifications promulgated by the EEOC.[327] This confusion is particularly true with the Hispanic classification. Consequently, there is a need to establish a classification scheme that clearly delineates race from national origin and defines all of the racial categories according to consistent stan-

325. Recall Professor Finkelman's "I'll know it when I see it" definition raised in the text accompanying note 28. As the discussion in Parts I-III demonstrate, however, this belief is simply not true.

326. See notes 205-25 and accompanying text.

327. See notes 160-70 and accompanying text.

dards. A classification scheme that fails to correct these two problems will simply perpetuate the status quo.

1. Correcting the National Origin Problem

The major source of confusion between race and national origin is the definition of national origin offered by the EEOC that makes references to physical characteristics and cultural notions that are commonly thought of as components of race.[328] Congressman Dent's comments on the definition of national origin under Title VII,[329] however, suggest that national origin should not encompass culture or appearance, but rather should be concerned only with one's country of birth.[330] Adopting Congressman Dent's definition would make place of birth the linchpin of national origin, and would fail to consider race, color, or cultural components at all. This approach to national origin would therefore end the confusion of race and national origin. A legal rule that racial discrimination claims *can only* be brought by natural-born citizens of the United States and national origin claims *cannot* be brought by natural-born citizens of the United States will sever race and national origin for legal purposes.[331]

Adhering to a natural-born citizen analysis may also determine how individuals are classified in other contexts: Natural born citizens fall within the racial categories; non-natural born citizens do not.[332]

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328. See EEOC Report at 1625 (cited in note 149); Domengeaux, Comment, 46 La. L. Rev. at 1156-81 (cited in note 223) (discussing definitions of national origin with these components).

329. See 110 Cong. Rec. 2549 (Feb. 8, 1964) (stating that "[n]ational origin, of course, has nothing to do with color, religion, or the race of an individual," but rather concerns only the country of origin).

330. Id.

331. While this assertion seems somewhat simplistic, it will undoubtedly end much of the debate surrounding national origin and § 1981 claims. See notes 205-19 and accompanying text.

There is some support for this assertion in Justice Brennan's concurring opinion in *Al-Khazraji v. Saint Francis College*, where he argues that "national origin" denotes one's place of birth and is distinct from ancestry. *Saint Francis College*, 481 U.S. at 613. (Brennan, J., concurring). Justice Brennan reads *Saint Francis College* as allowing claims based on ancestry to be brought only under § 1981 and not allowing claims based on birthplace. Id. Justice Brennan's opinion advocates viewing national origin as birthplace only, and limits § 1981 claims to race or ancestry separate from birthplace. The logical extension of Justice Brennan's argument is that a person's place of birth is an insufficient basis of a § 1981 claim. Id. at 614. By limiting § 1981 claims to natural-born citizens, those whose national origin is clearly the United States, there is no confusion as to the basis of the § 1981 claim. Note that non-natural born citizens still would be able to invoke the protection of Title VII.

332. Again, this simplistic proposal is efficient because it draws a bright line between race and national origin. Critics of *Saint Francis College* have argued that the opinion draws no meaningful distinction between race and national origin. Rachel R. Munafo, *National Origin Discrimination Revisited*, 34 Catholic Lawyer 271, 275 (1991); Barbara A. Bayliss, Note, Saint

While almost all racial classifications generally involve some notion of national origin, this notion is one of historical rather than recent origins. By allowing only natural-born citizens of this country to be racially classified, it will be clear that the person's national origin is American. The racial designation, however, tracks the national origin of the person's ancestors. This distinction between race and national origin would end the attempts to confuse the two for legal purposes.[333]

2. Ending the Internal Inconsistency in Race Classifications

In redefining race, it is necessary to eliminate the terms black, Hispanic, and white. The terms black and white suggests that color is the distinguishing factor among these two groups. While there may be some differences at the extremes, color is not the sole factor for defining race. Likewise, the term Hispanic gives no treatment at all to the notion of color and utterly destroys the necessary distinction between race and national origin.[334] In eliminating these categories, the task then becomes to define race in such a way that there is consistency running throughout the classification scheme. A change of this nature suggests the following racial categories:

> *African Americans*—All natural born citizens having the majority of their origins in the original peoples of sub-Saharan Africa.
>
> *Asian Americans*—All natural born citizens having the majority of their origins in the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.
>
> *European Americans*—All natural born citizens having the majority of their origins in the original peoples of Europe.
>
> *Native Americans*—All natural born citizens having the majority of their origins in the original peoples of North, Central, and South America.
>
> *Biracial Americans*—All natural born citizens who have origins in two or more racial groups or have the majority of their origins in the original peoples of Northern Africa and the Middle East.

Francis College v. Al-Khazraji: *Cosmetic Surgery of a Fresh Breadth for § 1981*, 16 Pepperdine L. Rev. 77, 93 (1988). The distinction offered by this Note seems to effectively draw a line between race and national origin for functional purposes.

333. While there will probably always be some general societal confusion in this area, the law must draw a bright-line rule to distinguish the two. Because of the confusion between race and nation origin in *Saint Francis College*, the number of § 1981 claims has risen sharply since the decision was handed down. See Munafo, 34 Catholic Lawyer at 276 (noting that § 1981 claims brought by Arabs, Jews, and other ethnicities and national origins increased after *Saint Francis College*. Claimants are being encouraged to allege discrimination "couched in terms of race, and avoid unnecessary references to national origin." Bayliss at 93. The bright-line distinction drawn by this Note would end this type of intentional confusion.

334. See Part IV.A.1.

While these new classifications may appear to be an exercise in excessive hyphenation, on further analysis these racial classifications seem to reflect more accurately America's sociopolitical notions of race. The Hispanic classification is eliminated and the other racial classifications are restructured so that they are parallel.[335] The Biracial-American classification addresses the rising number of biracial individuals in the United States, and the political reality that most North Africans and Middle Easterners are not treated as whites in the United States.[336] An alternative to eliminating the Hispanic category may be to restructure the classification so that it applies to a more easily identifiable group of people.[337] Recent court cases, however, have argued that even attempts to limit the Hispanic category

335. This restructuring is done to make the definition of race consistent throughout the classifications.

336. See note 167 (discussing Middle Easterners and North Africans who have been deemed white for purposes of § 1981). While many may criticize classifying Middle Easterners as biracial, it seems preferable to classifying them as white or European-American as the status quo does. First, the common perception that physical appearances change gradually from northern Europe te southern Africa leaves northern Africa and the Middle East as the regions on the Old World Continuum where people would "appear" to be in the middle of the two extremes. See Kopytoff and Higginbotham, 77 Georgetown L. J. at 1981 (cited in note 46) (discussing the gradual appearance of changes along the Old World continuum). The very essence of the Biracial category is the perception that the individual so classified is thought to be in the center of two extremes.

Second, there are many cases in which claimants from this part of the world have argued that they are not considered white in the United States because of their physical appearance. See, for example, *Hussein v. Oshkosh Motor Truck Company*, 816 F.2d 348, 350 (7th Cir. 1987) (claiming that Egyptian-born plaintiff is a "member of the Negro or Brown Race"); *Abdulrahim v. Gene B. Glick Company, Inc.*, 612 F. Supp. 256, 263 (N.D. Ind. 1985) (alleging that the Syrian plaintiffs "skin color is such that he may be perceived as 'non white' "); *Saad v. Burns Int'l Sec. Services, Inc.*, 456 F. Supp. 33, 37 (D. D.C. 1978) (rejecting Arab plaintiff's self identification as a non-Caucasian). See also Aaron Epstein, *Arabs Allied in Bias Cases Before the Supreme Court*, Philadelphia Inquirer A12 (Nov. 20, 1986) (noting the racial character of discrimination against many Arabs and Jews based on "blood" and "supposedly distinctive physical and ethnic qualities"). These cases illustrate, quite convincingly, that inclusion of north Africans and Middle Easterners in the white or European-American category is misguided.

While some may argue that another racial category should be created (perhaps Mediterranean-American), this Note rejects that argument for three reasons. First, this category would be extremely small in comparison to the other reformulated categories. This small size would leave this group out of any significant group rights debate. Second, the United States has traditionally classified northern Africans and Middle Easterners as white, apparently not drawing a *major* distinction between Europeans and people from these areas. To that extent, creating another category may be more difficult. Third, and finally, these classifications are socio-political by design and concerned primarily with creating a verifiable classification scheme consistent with modern perceptions for legal purposes. This Note supports the assertion that including northern Africans' and Middle Easterners' descendants in the Biracial category is correct as a sociopolitical matter and far better than the status quo.

337. Hispanics have been defined in many different ways: *Maklin v. City of Boston*, 969 F.2d 1273, 1275 (5th Cir. 1992) (Spanish surnamed); *Fullilove v. Klutznick*, 448 U.S. 448, 464 (1980) (Spanish-Americans); *Croson*, 488 U.S. at 478 (Spanish-speaking).

are ineffective because Hispanics belong to all of the human races and are most often racially mixed.[338] Linking membership to Latin American origin by describing as Hispanic all natural born citizens having the majority of their origins in the Spanish speaking peoples of Latin America would make the Hispanic classification parallel with the other definitions and may be a viable alternative to eliminating the category.[339]

The new classifications also realistically recognize the extent to which perceptions dictate racial classifications. Many white Hispanics, for example, are often treated as whites, and many black Hispanics are treated as blacks.[340] As a practical matter, it seems as if these individuals would be more correctly identified as European-Americans and African-Americans respectively, since they are likely treated as such. Similarly, as noted previously, biracial individuals are often mistaken for brown-skinned Hispanics.[341] Categorizing these individuals as biracial is more reflective of general perceptions. In fact, the Hispanic class has been linked primarily on the basis of a common language and has always been divided among color lines.[342] The Native American and Asian American categories needed no substantial revisions, but the tribal requirement is eliminated to make the Native American classification parallel with the other classifications. It bears noting that some Central and South Americans cur-

338. *Alen v. State*, 596 S.2d 1083, 1092 (Fla. Ct. App. 1992) (Gersten, J., specially concurring) (analyzing the traditional approaches to limiting the Hispanic classification).

339. It is important to note that the Hispanic classification, created by the OMB in 1978, was designed as an ethnic label to encompass all of the peoples covered under the EEOC's current definition. See 43 Federal Register 19269 (1978). Since that time, the Hispanic classification has been one of the most abused racial categories because of its broad parameters. Patricia Wen, *Schools On Lookout For Affirmative Action Abuses*, Boston Globe 48 (Oct. 19, 1988). Courts have recognized the under- and over-inclusiveness of this classification on several different occasions. See *Peighthal v. Metropolitan Dade County*, 26 F.3d 1545, 1560 (11th Cir. 1994); *Alen*, 596 S.2d at 1094. The restructuring offered by this Note is the only proposal of its kind clearly attempting to link the Hispanic classification to some historical notion of national origin. While this restructured classification will most likely yield confusion, it is the only viable alternative to eliminating the classification altogether.

340. See notes 239 and 338.

341. See note 239.

342. See notes 149-62; *Eggleston v. Chicago Journeyman Plumbers' Local Union No. 130*, 657 F.2d 890, 898 (7th Cir. 1981). In *Eggleston*, the defense counsel attempted to defeat the class action suit brought by blacks and Hispanics by arguing that the class was not certifiable. Id. at 890. The court noted: "Rose testified that he was not Spanish-surnamed and that he considered his race to be mulatto, . . . Taylor testified that his race was mestizo, and . . . Viera testified he was white. . . . He further testified that he had fled from Cuba in 1972, [and] that his father was Cuban." Id. at 898-99 (footnote omitted). The testimony illustrates that Hispanics routinely classify themselves according to color, making the language the only common theme in this classification.

rently encompassed in the Hispanic classifications may more correctly fit within the Native American classification.[343]

While it is possible to abuse any scheme, this approach offers several advantages over the status quo. First, it totally removes the theme of white racial purity from the racial debate. By adopting a sociopolitical definition of race based on a majority rule, biological notions of white supremacy give way to cultural, historical, and perceptional notions of race. Second, this classification removes the confusion between race and national origin from the racial debate. While any definition of race refers to national origin, the proffered definitions of race categorize only those individuals who are actually natural citizens. Third, by eliminating the black, white, and Hispanic classifications and replacing them with European-American, African-American, and Biracial-American classifications, the United States's approach to race can become consistent. Each racial category gives some treatment to factors other than color, but does not totally disregard the significance of color in the racial classification. Even though these classifications are much clearer than those promulgated by the EEOC, there must be a verification procedure to enforce classification.

B. Enforcing Racial Classifications under the Sociopolitical Approach

1. The Verification Process

The reconceptualization of race and racial classification should help solve the problems of passing and soulmaning. This Note advocates the revival of the practice of placing race on birth certificates to make the racial verification process simpler. The move toward a "color-blind" society is a noble goal, but as noted earlier, even those who advocate this approach recognize the need for a definition of race and a consistent approach to racial classification.[344] Defining race and clarifying the racial classification problem accomplishes nothing without some form of verification. Birth certificates are the most effective way to accomplish this task.[345]

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343. This assertion is in reference to the earlier analysis showing that many present Hispanics have Native American ancestry, particularly those from Central America. See notes 229, 238 and accompanying text. Including Central and South Americans in the Native American classification makes this classification more historically accurate.

344. See notes 139-47 and accompanying text.

345. Almost everyone has a birth certificate and routinely presents it for a number of reasons. See, for example, Ark. Const., Amend. 51, § 9 (requiring a birth certificate for vote

At birth, individuals should be classified according to the race of their parents. When the races of the parents are different, the individual should be classified as biracial with the race of the parents clearly identified. When an individual has two biracial parents, the child should remain biracial. When only one parent is biracial the designation of the child should be the race that predominates.[346] This approach ensures that an individual can never legally claim to be a member of a race that is not represented in his parent's generation. Those who falsely allege their race should be charged with racial fraud and subject to criminal penalties.[347] There would be no need for fractional formulas and no need to delve into an individual's ancestry beyond the parental level.

2. Examining the Malone and Stebbins Cases Under the Sociopolitical Approach

Under a sociopolitical classification scheme, the Malones and Stebbins cases would have been resolved differently for two reasons. First, the Malones and Stebbins would not have been able to allege that they were black under the new classification system. Under the sociopolitical classification scheme, the racial designations of the parties would have been on their birth certificates. Their birth certificates would have been presented at the original time of employment or to the voting registrar, making it impossible for them to change their racial classification in the middle of their lives. The Malones and Stebbins would have been bound by their birth certificate designations and therefore would not have been able to receive benefits by changing their race.

Second, the cases would have been resolved differently because the new racial classification scheme is a majority scheme examining the race of an individual's parents. Assuming, arguendo, that the Malones had a black great grandmother, the Malones would still be classified as European-American under the new system since the

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registration); Nev. Rev. Stat. § 483.800 (1994) (requiring presentation of birth certificate to obtain an identification card); S.D. Cod. Laws § 32-12-3.1 (1989) (requiring birth certificate or other proof of birth for driver's license); Va. Code § 18.2-308.2:2 (1988 and Supp. 1994) (requiring birth certificate presentation for purchase of a firearm); La. Rev. Stat. Ann. § 9:225 (West 1991) (requiring birth certificate presentation te obtain a marriage license).

346. This rule is consistent with the majority rule approach in the new classifications. See Part IV.A.2.

347. Penalties could be fines, public service, or a permanent notation of racial fraud on a person's employment record.

majority of their origins would be in the original peoples of Europe.[348] Likewise, in the case of Stebbins, even if he had an ancestor who passed for white, the majority of his origins also would be in the original peoples of Europe. He could not have relied on a broad nose or an afro as proof of his race. The proposed classification scheme would require a much more objective, consistent definition of race, with individuals being subjected to fines and immediate job or benefit termination if they falsified their racial identity. In short, a well-designed classification scheme based on a majority rule and readily subject to a verification procedure could have prevented the two cases from ever happening.

V. CONCLUSION

This Note leads to but one conclusion regarding definitions of race and racial classification: something must be done. Even if the approach offered here may not provide a perfect solution, it was designed to urge the United States to reconceptualize its approach to race. If society is truly committed to remedying past and present discrimination, it must be willing to see the role that racial definitions play in perpetuating notions of inferiority and institutionalized racism. Minority groups must be willing to see the impact that this discriminatory system has had on them. While the ends may have justified the means for many years, this country is entering into an era in which the expansion of racial categories for political advantage may begin to impede the progress of those that expansion was designed to help. Where restrictive racial rules once denied many the chance to live a decent life, the total absence of rules will undoubtedly

348. Recall that the claim of the Malones and Stebbins were premised on one black ancestor. Under the new classifications, one black ancestor would not be enough to classify a person as black.

do the same thing. In a society where race matters, everyone must be under the same set of assumptions and rules. Currently, the assumptions and rules are simply not consistent, nor consistently applied.

*Luther Wright, Jr.**

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