Racial and ethnic classifications are ubiquitous in American life. Applying for job, applying for a mortgage, applying for university admission, applying for citizenship, applying for government contracts, and much more involves checking a box stating whether one is white, Hispanic, Asian, African American, or Native American, among other classifications.

Common wisdom is that such categories are a matter of self-identification, and to some extent this is true, and inevitably so. Given that most forms seeking ethnic or racial identification do not provide any guidance as to what qualifies one as a member of a relevant group, those seeking the information inevitably rely on both self-identification and voluntary compliance with general norms of such identification.

What most people do not realize, however, is that there are, in fact, legal rules that in some contexts dictate whether someone may claim “minority” status. This is perhaps not surprising, because concrete benefits sometimes accompany one’s identification as a member of a racial or ethnic minority group.

Nevertheless, we tend to blanch at the idea of having the government, at any level, dictate who is or is not a member of an ethnic group. Such determinations are reminiscent not only of Nazi Germany’s racial obsessions, but of America’s own sordid past, when Southern states divided mixed race individuals into categories such as “octoroons” and “quadroons,” and when the U.S. government engaged in pseudo-science and pseudo-anthropology to determine which people from Asia counted as “Asians” not eligible to immigrate to the United States, and which were sufficiently “Caucasian” to be exempt.
Part I of this paper addresses the origins of racial identification in the United States. Part II tracks the origins of definitions of African Americans, Native Americans, Asian Americans, and Hispanic Americans from the colonial era up to the late twentieth century. Part III analyzes the state of racial classifications in the present day, primarily focusing on how the SBA determined its presumptively socially disadvantaged groups.

I. Origins of Racial Identification in the U.S.

At first, people in colonial America were classified by religion; the subjugation of African Americans and Native Americans was justified because neither group was Christian. However, as slavery spread and became institutionalized, African Americans could no longer escape servitude by converting to Christianity. A 1667 Virginia act used “Christians” to refer to colonists and African American Christians were considered members of a different “nation.” This was the first implicit statutory recognition of race in America.

People were also classified in the early colonial era by labor status. In Virginia and Maryland, “unfree” individuals included indented servants, in addition to African Americans. By the mid-1600s, however, slaves were distinguished from European indentured labor.

AFRICAN AMERICANS

The first reported judicial decision referring to African Americans as a race came in 1630, eleven years after the first slaves arrived in Virginia. In this case, a white man was to be whipped before African Americans for having had sexual relations with an African American

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1 Toro, supra note 11, at 1230-31.
2 Toro, supra note 11, at 1231.
3 Toro, supra note 11, at 1231.
4 Gotanda, supra note 12, at 32.
5 Gotanda, supra note 12, at 33.
6 Gotanda, supra note 12, at 33.
woman. The recognition of her race and of the race of the audience in front of which he was to be punished was the first legal record denoting racial differences in colonial America.

The term “mulatto” was coined in 1656 in *In re Mulatto*, whose one-line holding stated that the mulatto was to be held as a slave. There was no discussion of what the individual’s ancestry was, which makes it all the more significant that the court determined him to be African American anyway. This case is considered the first articulation of the “one drop” rule.

A. Trials

Once slavery became institutionalized, and was limited to “Negroes,” slaves sometimes asserted to be white in hopes of earning their freedom, and trials to determine these individuals’ races were commonplace, especially in the nineteenth-century South. An example of such a trial involved a woman in Arkansas who claimed that she and her children were impermissibly held in slavery because she was white. At their trials, they were displayed for inspection and witnesses, both medical experts and laypeople, testified about their appearances, her reception in society, her conduct, her presentation, and her status.

In her study of such cases, Ariela Gross reviewed sixty-eight cases. She found that courts allowed juries to consider a wide array of evidence regarding racial status, but also that there was no agreement as to what were proper authorities to determine race, or even what the definition of race was. Uncertainty over racial definitions meant that the parties could bring in testimony regarding ancestry, reputation, and socially defined criteria to enter these trials. Five different

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8 *Id.* at 1173.
9 *Id.* at 1173.
10 *Id.* at 1173.
11 *Id.* at 1173.
13 *Id.*
14 *Id.* at 117-23.
15 *Id.* at 130.
determinants of race were predominantly used in these trials: (1) physical markers, (2) documented ancestry, (3) ascriptive identity (reputation in society, others’ beliefs about his identity, his social associations), (4) scientific categorization of his race, and (5) performance (how the individual holds himself out, how he acts). The jury was charged with sorting out this evidence. Gross concludes that juries in these trials found reputation evidence at least as persuasive as documentary evidence.

The concept of “performance” as evidence of race came to be in the 1850s as racial science theories gave courts reason to believe that how someone acted was determined in part by their racial makeup. An individual on trial could prove his or her whiteness by “performing” white womanhood or manhood, which could be done either in court or through witnesses testifying as to the individual’s past behavior. A person with partial African descent trying to prove his legal status as a white person would strive to show that he had virtue and honor juries associated with being white, and that he exercised the social, political, and legal rights that a white person would have. In Texas, if a woman’s first husband was white, that fact was admissible as evidence that she had the status of a white woman.

Statutory and common-law presumptions also played a significant role in race trials in some states. For example, in North Carolina, if someone was a slave in 1865 then he was presumed to be African American.

B. Census

16 Id. at 132-33.
17 Id. at 146.
18 Id. at 151.
19 Id. at 156.
20 Id. at 156.
21 Stephenson at 16.
22 GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 16 (1910).
23 Id. at 16.
State legislatures and courts were not the only entities were charged with determining the racial status of people of African descent. The 1850 census included mixed-race individuals for the first time under the category of mullato, expanding classifications beyond black and white. However, proposed questions about individuals’ fractions of blackness or whiteness were deleted, as white Southerners feared that abolitionists would use the revealed frequency of whites having illicit sexual relations with their slaves to the Southerners’ political disadvantage. The inclusion of mulattoes on the census survey itself motivated by racially-charged ill-will; to collect data to support the theories of Southern scientific race theory proponents that mulattoes were inferior in life span and fertility.

The census surveys of 1850 and 1860 and the determination of who was mulatto were a product of naked eye inspections, and classifications were determined by the assessors and not self-reported. The assessors were instructed to mark as a mulatto “all persons having any perceptible trace of African blood.” Census assessors were later tasked, in the 1890 census, with even more difficult tasks- in addition to demarcating mulattoes, determining whether a mixed-race person was an “octroon,” someone who was one-eighth African American, or a “quadroon,” one-quarter African American. By the 1900 census, the effort to determine mulattoes was abandoned, and by the 1920 census, the Census Bureau adopted the one drop rule.

C. State Definitions from Mid-1800s to Early 1900s

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24 Hickman, supra note 25, at 1182.
25 Hickman, supra note 25, at 1183-84.
26 Hickman, supra note 25, at 1184.
27 Hickman, supra note 25, at 1185.
28 Hickman, supra note 25, at 1185.
29 Hickman, supra note 25, at 1185.
30 Stephenson, supra note 45, at 12.
31 Hickman, supra note 25, at 1185.
Some state statutes referred to “persons of color” that included anyone who was not white or Native American. Some states defined who persons of color were and others defined who was to be included in each race. In Oklahoma, “colored” meant African American and white meant all others. Nebraska and Oregon had the narrowest definitions of who was African American, only including those who were one-fourth African American in their definitions. In Alabama, “Negroes” were defined as anyone with an African American ancestor five generations back. Tennessee, by contrast, adopted the one-drop rule. Ohio was the only state in which a person who was more than half white was automatically considered white. Michigan, Virginia, Kentucky, Maryland, Mississippi, and Texas fell somewhere in between the extremes, defining as African American anyone with an African American ancestor three generations back.

By the 1950s, many states’ definition still had not changed. Alabama, Arkansas, Tennessee, and Texas had adopted the one drop rule; Florida, Indiana, Maryland, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Carolina used the one-eighth standard; Kentucky went by a one-sixteenth definition; Georgia, Louisiana and Virginia defined African Americans as those with ascertainable amounts of African American blood; and Oklahoma’s definition included the term “of African descent.” The best known articulation of how the “one drop” rule played out was case involving Susie Phipps, a woman in Louisiana who identified as

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32 STEPHENSON, supra note 45, at 12.
33 STEPHENSON, supra note 45, at 13.
34 STEPHENSON, supra note 45, at 13-14.
35 STEPHENSON, supra note 45, at 14.
36 STEPHENSON, supra note 45, at 14.
37 STEPHENSON, supra note 45, at 15.
38 STEPHENSON, supra note 45, at 15.
39 STEPHENSON, supra note 45, at 14.
40 IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 83 (2nd ed. 2006).
41 Id.
white but who was found to be African American because she had one ancestor five generations back who was African American.42

NATIVE AMERICANS

Like African Americans, American Indians were also involved in cases in which they tried to prove their whiteness in claims of wrongful enslavement.43 In the 1806 Virginia Supreme Court case of Hudgins v. Wright, a girl’s freedom turned on whether her racial classification was Native American or white.44 In reaching its decision, the court attempted to “distinguish the characteristics of the different species of the human race” by analyzing the texture of the girl’s hair, the width of her nose, and the shape of her calf muscles.45

Another case that addressed the intersection of white racial identity and Native American cultural identity is United States v. Rogers, in which the Supreme Court held that despite the white man’s acceptance into the Cherokee tribe, that he was still subject to the jurisdiction of federal courts in a criminal matter.46 In the eyes of the American legal system, Rogers was white in race but Cherokee by culture, and it was his race that governed his place in the legal system.47 This decision extended the blood quantum rule that had governed the determination of who is African American to the determination of who is Native American as well.48 Since those cases were decided in the early 1800s, federal law has defined Native American classifications narrowly, generally as based on membership in a recognized tribe.49

ASIAN AMERICANS

42 Lucas, supra note 31, at 1253.
43 Desautels-Stein, supra note 1, at 36.
44 Desautels-Stein, supra note 1, at 36.
45 Desautels-Stein, supra note 1, at 36.
46 Toro, supra note 11, at 1233.
47 Toro, supra note 11, at 1233-34.
48 Toro, supra note 11, at 1234.
49 Toro, supra note 11, at 1237.
After and as an initial result of the gold rush in 1848, over 100,000 Chinese immigrants came to America. Western states reacted to the influx of Chinese immigrants by updating their miscegenation laws to criminalize intermarriage between Asians and whites. In Mississippi, “Mongolians” were defined as anyone with one-eighth Mongolian blood. In Oregon, miscegenation laws prohibited intermarriage between whites and anyone with one-fourth or more Chinese blood.

[ADD MATERIAL ABOUT FEDERAL IMMIGRATION CASES REGARDING WHO COUNTED AS ASIAN]

**Hispanic Americans**

While whites and blacks are defined by their origins in the original peoples or racial groups of their respective continents, definitions of American Indians and Hispanics include cultural identification with their tribes or Spanish culture, respectively. [ADD HISTORY OF CLASSIFICATION OF “MEXICANS” and HISPANICS IN CENSUS and Elsewhere]

### III. SBA’s 8(a) Program and the DOT’s DBE Certifications

The history of how federal affirmative action programs’ preferred racial and ethnic categories came to be is poorly documented, and how each group is defined is even more obscure. In 1973, six years after the SBA created its 8(a) program for disadvantaged businesses, the term “disadvantaged” was formally defined. SBA rules stated that members of the following groups were “presumed” to be socially disadvantaged: (1) blacks, (2) American Indians, (3)

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51 Stephenson, supra note 45, at 16.
52 Stephenson, supra note 45, at 16.
53 Toro, supra note 11, at 1226-27.
Spanish-Americans, (4) Asian-Americans, and (5) Puerto Ricans.\(^5\) No records of hearings or findings leading up to this decision are available, and no explanation was given as to why the 8(a) program, tasked by President Johnson’s Kerner Commission to encourage black involvement in economic activity, extended benefits to the other groups.\(^5\) Congress passed the Small Business Investment Act in 1978, statutorily authorizing the 8(a) program, and it was clear in the House Committee report that the SBA was to be given “significant discretion” in identifying other minority groups to be given preferences.\(^5\) And that is exactly what the SBA did, but it did so shrouded in a cloud of bureaucratic secrecy.

Similarly, most of the decisions surrounding the construction of the preferred racial groups for federal procurement programs were made behind closed doors in the federal bureaucracy,\(^5\) but the few records that exist suggest that: (1) even the bureaucrats are unable to articulate why certain groups were included and others not, and why certain cultural backgrounds or countries of origins were included or excluded, (2) political forces, including the lobbying efforts of excluded ethnic or cultural groups and politicians’ desires to pander to those groups, were powerful in affecting these groups’ inclusion,\(^5\) and (3) that the storied past of racial classifications in America influenced the formation of this much different sort of racial classification system than the one that originally existed in the 1600s.

i. Bureaucratic Determination of Preferred Groups

While Congress created the original list of preferred groups, bureaucrats in entities like the EEOC and the SBA were left to maintain theses lists,\(^5\) and they almost never had a good


\(^{56}\) Id.

\(^{57}\) Id. at 122-23.

\(^{58}\) SULLIVAN & LA NOUE, supra note 100, at 71.

\(^{59}\) La Noue & Sullivan, supra note 101, at 125-52.

\(^{60}\) La Noue & Sullivan, supra note 101, at 110.
explanation for who was included and why.\textsuperscript{61} When the SBA first defined the presumptively eligible groups, it had gathered no data on the education levels or economic status or history of discrimination of each group.\textsuperscript{62}

One of the main reasons approval was given to expand the list of official “minority” groups under federal law, both antidiscrimination laws and affirmative action programs, was unwillingness to invite political controversy.\textsuperscript{63} The chief of the reports unit at the EEOC opposed the inclusion of Asian Americans and Native Americans on the agency’s forms because there was no statistical evidence of discrimination against Asian Americans, and Native Americans on reservations were excluded from Title VII of the Civil Rights Act.\textsuperscript{64} He didn’t remove these groups because he simply did not want to deal with the backlash.\textsuperscript{65}

Documents from discovery in a few federal cases provide a broader look into either bureaucratic amnesia or deliberate concealment of information regarding the rationale behind the creation of these preferred groups.\textsuperscript{66} Depositions of a former Associate Director of the SBA’s Minority Enterprise Program and a former Associate Administrator of the SBA’s Office of Minority Enterprise Development were taken for multiple federal cases.\textsuperscript{67} Neither of them were able to answer questions about why certain groups were included or excluded as presumptively disadvantaged, or how membership in the groups were defined. Of the few definitive answers that were given, the most revealing information included: (1) that the SBA had no procedure for reviewing whether a group that had previously been socially disadvantaged should retain that status, (2) no inquiry was ever made as

\begin{footnotesize}
\begin{enumerate}
  \item SULLIVAN & LA NOUE, \textit{supra} note 100, at 72.
  \item La Noue & Sullivan, \textit{supra} note 101, at 138.
  \item SULLIVAN & LA NOUE, \textit{supra} note 100, at 72.
  \item SULLIVAN & LA NOUE, \textit{supra} note 100, at 72.
  \item SULLIVAN & LA NOUE, \textit{supra} note 100, at 72.
  \item La Noue & Sullivan, \textit{supra} note 101, at 119.
  \item La Noue & Sullivan, \textit{supra} note 101, at 137.
\end{enumerate}
\end{footnotesize}
to whether an individual was a member of the group they claim they are a part of, and (3) the SBA had no procedures for determining what a multi-racial person needs to show to qualify as a member of a presumptively disadvantaged group.68

When pressed for admissions in the various lawsuits, SBA denied that it was required to investigate the history of discrimination against a group before designating a group as presumptively disadvantaged.69 The SBA admitted that it was unaware of any federal study conducted to help determine which if any ethnic or national groups from the Asian continent should be designated as disadvantaged, and that it was unaware of any Congressional findings on whether Spanish or Portuguese individuals (as opposed to South American) were deserving of inclusion as members of presumptively disadvantaged groups.70 The SBA acknowledged that it “has not independently made or sponsored, nor was it legally required to make or sponsor, any specific studies regarding the history of discrimination suffered by groups in America in making decisions to designate and identify, or deny such designation and identification to racial and ethnic groups as presumptively eligible for “social disadvantage.”71

ii. Minority Group Lobbying and Political Responses

While the politicians of earlier times in American history exploited and perpetuated racial classifications to gain support from whites who sought the exclusion of non-whites, modern politicians used inclusion in racial classifications to earn the support of minority groups.72 The Nixon administration included Cuban Americans in the EEOC’s covered groups to seek the loyalty of Cubans fleeing Castro’s regime who were a natural anti-Communist Republican

68 La Noue & Sullivan, supra note 101, at 145-52.
69 La Noue & Sullivan, supra note 101, at 153-54.
70 La Noue & Sullivan, supra note 101, at 153-54.
71 La Noue & Sullivan, supra note 101, at 153.
72 Sullivan & La Noue, supra note 100, at 73.
constitutency. A similar phenomenon occurred on the state level. Ohio George Voinovich included Indians in the state’s affirmative action program, likely in response to generous contributed from Indians to Voinovich’s campaign.

Members of Congress also played a role in ensuring that certain groups were considered presumptively disadvantaged by the SBA. After a reformulation of the 8(a) program’s presumptively disadvantaged groups, Asian Americans were left out. Groups such as the Washington State Commission on Asian American Affairs caught pressured the SBA and Congress to reclassify Asian Americans as presumptively disadvantaged. A Democratic Congressman from California introduced an amendment proposing just that, and it passed without debate and without a formal vote.

Groups have also successfully petitioned the SBA directly for inclusion. The National Association of Americans of Indian Descent and a few Indian businessmen petitioned the SBA to include people from India within the Asian/presumptively disadvantaged category. In this particular case, the SBA provided other reasons for the group’s inclusion. In response, the SBA found that Indians owned fewer businesses than, and their businesses performed worse than, the Asian Pacific American groups who had already been included. The SBA later added ethnic groups to Asian Pacific Americans and Subcontinent Asian Americans based on their similar cultures and physical characteristic to people who were already included. The SBA did not

73 SULLIVAN & LA NOUE, supra note 100, at 73.
74 SULLIVAN & LA NOUE, supra note 100, at 73.
75 La Noue & Sullivan, supra note 101, at 125.
76 La Noue & Sullivan, supra note 101, at 124.
77 La Noue & Sullivan, supra note 101, at 125.
78 La Noue & Sullivan, supra note 101, at 126.
80 Id.
81 Id.
82 Id. at 842.
explain why similar physical characteristics merited eligibility for preferential treatment for procuring governmental. The SBA’s silence on rationale did no go unnoticed; seven of ten public comments received regarding those changes opposed them because no rationale was provided.  

iii. Current State of Presumptively Socially Disadvantaged Groups

Since the 1980s, there has been no review of which groups should receive preferences for federal contracts. Despite the Croson and Adarand decisions that seemed to severely limit the use of racial and ethnic preferences in awarding government contracts, the Small Business Administration, the Federal Department of Transportation, and almost all state departments of transportation, along with other federal, state and local agencies continue to use racial and ethnic criteria to determine presumptive preferential categories for the awarding of government contracts.

The way that eligibility for the SBA 8(a) program and for disadvantaged business status does not seem to have a clearer or more logical a basis than adjudications in the race trials of the mid-1800s. For better or for worse, today’s DBE and 8(a) certification processes primarily operate on the honor code, the checking of a box on a form that, by SBA officials’ own admissions, is never verified.

By far the greatest use of preferences occurs in the United States involves the U.S. government’s purchase of $500 billion worth of goods and services annually, making it the biggest spender in the world. At least 23 percent of all government contracts are awarded to

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83 Id. at 842.
84 La Noue & Sullivan, supra note 101, at 105.
85 For a detailed discussion of how government at various levels evaded Croson and Adarand, see Martin J. Sweet, Merely Judgment: Ignoring, Evading and Trumping the Supreme Court (2010).
86 49 C.F.R. § 26.61(c) (1999); Hickman, supra note 25, at 1185; La Noue & Sullivan, supra note 101, at 145-52.
small disadvantaged businesses, historically underutilized businesses ("HUBs"), women-owned
small businesses, and service-disabled veteran-owned small businesses.\textsuperscript{88} With over $100 billion
on the line for status-based contacts, one would imagine that Congress and the alphabet soup of
Executive agencies would have clearly delineated definitions of who does or does not qualify to
bid on these contracts. However, this analysis of federal and state programs, which depend in
large part on their federal counterparts for guidance, reveals a lack of clarity, or even
rationalization, as to where the lines are drawn.

Part I of this section of the paper discusses the U.S. Department of Transportation’s
(DOT) Disadvantaged Business Enterprise ("DBE") program, its definitions of socially and
economically disadvantaged individuals, the burden of proof for group membership, and the lack
of administrative decisions surrounding determinations of membership. Part II outlines each
states’ Minority Business Enterprise ("MBE") and like programs, their definitions of each
minority group, and the documentation requirements for applicants claiming minority status. Part
III explains what the National Minority Supplier Development Council ("NMSDC") is, which
states accept their certifications, how its definitions differ from the DBE definitions, and the
requirements for proving minority membership. Part IV gives an overview of the Small Business
Administration’s ("SBA") 8(a) program, which states use the SBA definition for their MBE
programs, and appeals decisions from the SBA’s administrative law judges that have adjudicated
on what it means to be a member of certain disadvantaged groups, as well as determining
disadvantage for individuals not included in presumptively disadvantaged groups. Parts V, VI,
and VII cover mostly U.S. District Court, and some Courts of Appeals cases that decide issues of
minority status, race and national origin, and documentary proof of race, respectively. The paper

\textsuperscript{88} Id.
concludes with an analysis of what standards can be pieced together by comparing DBE to MBE to SBA to EEOC definitions, but more importantly, what jurisprudence and legislative guidance are lacking to give meaning to each states’ definitions.

**DOT’s DBE Certification Program**

The most far-reaching federal status-based contracting program is the U.S. Department of Transportation’s DBE program, which is carried out by each state’s DOT. The DBE program certifies “socially and economically disadvantaged individuals,” which are defined as people from the following groups:

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

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbat, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

These definitions beg the question of what it means to “have origins” in a group or from a country. Members of those groups are rebuttably presumed to be socially and economically disadvantaged. All that an applicant has to do to get the benefit of the rebuttable presumption is

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91 Id.
submit a signed, notarized statement that he or she is a member of one of these groups.92 “Relevant information” can be requested from an individual claiming membership in one of the groups if there is a “reasonable basis” to believe he or she is not actually a member.93

Denial and decertification decisions from the states are archived in a database maintained by the DOT but the decisions have one-line reasons such as “failure to cooperate with recipient requests for information” that raise more questions than they answer when it comes to figuring out who “has origins” in a group or in a country and what kinds “relevant information” shown are adequate.94 Appeals decisions, also archived in the database, could have the potential to shed more light on group membership determination; however, there are no appeals that address the issue of social and economic disadvantage.95 This database leaves anyone trying to determine the meaning of the DBE program’s vaguely worded definitions and evidentiary requirements without any answers, at least from the DOT.

**States’ MBE Programs**

The majority of states have established MBE certification programs for minority owned businesses looking to bid on state government contracts.

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92 49 C.F.R. § 26.61(c) (1999).
95 *Id.*
States with MBE or other similar certification programs: Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina.

Ohio, Oregon, Rhode Island, South, West Virginia, and Wisconsin.

Pennsylvania has a Small Diverse Business program that allows applicants to self-verify by showing certification by an approved third-party, which includes DBE certification, SBA 8(a) certification, and certification by the National Minority Supplier Development Council.

Many of the states with MBE certification programs use definitions of socially and economically disadvantaged groups that are similar to DBE definitions. Some states, however, have notably different definitions:

States that have unique definitions for Hispanic Americans or Latinos:

- Delaware, Massachusetts, Virginia, and West Virginia—must have origins in Spanish-speaking people (of countries and continents in the DBE definition), includes people with origins in the Caribbean islands.
- New Jersey, North Carolina, and Ohio—people of Spanish or Portuguese culture, having origins in Mexico, South or Central America, or the Caribbean islands, regardless of race.
- New York—persons of either Native American or Latin American origin (from countries and continents in the DBE definition), regardless of race.

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States that exclude people of Portuguese culture or origin from their definition of Hispanic: California, Illinois, Rhode Island, and Tennessee.

States that include Portuguese people separately from Hispanics:
- Connecticut- people having origins in the Iberian Peninsula, including Portugal, regardless of race.
- Massachusetts- people having Portuguese origin. Only included if specifically set forth in programs funded by state transportation bond statutes which include such people.
- Rhode Island- people of Portuguese, Brazilian, or other Portuguese culture or origin regardless of race.

States that define Asian-Pacific and Subcontinental Asian Americans more broadly than the DBE definition (e.g. not limited to specific countries listed in DBE definition): California, Delaware (only the definition of Asian-Pacific American is more broadly defined), Florida (includes people having origins in the Hawaiian Islands prior to 1778), Illinois, Maryland, Massachusetts, Mississippi, New Jersey, New York, North

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125 30 ILL. COMP. STAT. 575/2 (2010).
129 45 MASS. CODE. REGS. 2.02(1).
130 R.I. DEP’T OF ADMIN., RULES, REGULATIONS, PROCEDURES AND CRITERIA GOVERNING CERTIFICATION AND DECERTIFICATION OF MBE ENTERPRISES BY THE STATE OF RHODE ISLAND.
131 PUB. UTIL. COMM’N OF CAL., GEN. ORDER 156.
132 DEL. OFFICE OF SUPPLIER DIVERSITY, POLICY, ELIGIBILITY, APPLICATION, AND AFFIDAVIT REGARDING CERTIFICATION AS DIVERSE BUSINESS (MBE, WBE, VOBE, SDVOBE, IWDBE) AND SMALL BUSINESS (SBF) ENTERPRISES.
133 FLA. STAT. § 288.703 (2017).
135 30 ILL. COMP. STAT. 575/2.
137 45 MASS. CODE. REGS. 2.02(1).
139 N.J. ADMIN. CODE § 17:46-1.2.
Carolina, Ohio, Rhode Island, Tennessee, Virginia and West Virginia.

States with less inclusive definitions of Asian-Pacific or Subcontinental Asian Americans:

- Delaware- definition of Subcontinental Asian Americans only includes people whose ancestors originated in India, Pakistan, or Bangladesh.
- Texas- same as DBE definition but excludes people from Burma, Thailand, Malaysia, Indonesia, Brunei, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, and Hong Kong.

States that have unique definitions for African or Black Americans:

- Connecticut- excludes people of Hispanic origin.
- Delaware and Massachusetts- include people having origins in any of the original peoples of the Cape Verde Islands.
- Florida- may be of any cultural origin but must have origins in any of the black racial groups of the African Diaspora.
- Massachusetts- includes African-Americans.
- Virginia and West Virginia- people having origins in any of the original peoples of Africa.

States that have unique definitions and documentation requirements for Native Americans or American Indians:

141 N.C. GEN. STAT. § 143-128.4(b).
143 R.I. DEP’T OF ADMIN., RULES, REGULATIONS, PROCEDURES AND CRITERIA GOVERNING CERTIFICATION AND DECERTIFICATION OF MBE ENTERPRISES BY THE STATE OF RHODE ISLAND.
145 VA. CODE. ANN. §2.2-1604.
147 DEL. OFFICE OF SUPPLIER DIVERSITY, POLICY, ELIGIBILITY, APPLICATION, AND AFFIDAVIT REGARDING CERTIFICATION AS DIVERSE BUSINESS (MBE, WBE, VOBE, SDVOBE, IWDBE) AND SMALL BUSINESS (SBF) ENTERPRISES.
150 45 MASS. CODE. REGS. 2.02(1); DEL. OFFICE OF SUPPLIER DIVERSITY, POLICY, ELIGIBILITY, APPLICATION, AND AFFIDAVIT REGARDING CERTIFICATION AS DIVERSE BUSINESS (MBE, WBE, VOBE, SDVOBE, IWDBE) AND SMALL BUSINESS (SBF) ENTERPRISES.
151 FLA. STAT. § 288.703.
152 45 MASS. CODE. REGS. 2.02(1).
• Connecticut, Maryland, Virginia, and West Virginia- showing community identification is sufficient, tribal membership is unnecessary.\(^{154}\)
• Florida- must show origins in Indian Tribes of North America prior to 1835\(^{155}\) and present proper documentation.\(^{156}\)
• Illinois- includes people having origins in any of the original peoples of North and South America, including Central America. Maintaining community attachment is sufficient, showing tribal membership is unnecessary.\(^{157}\)
• Maryland, Massachusetts, Mississippi, New Jersey, New York, North Carolina, Rhode Island, Tennessee, Virginia, and West Virginia- include people having origins in any of the original peoples of North America.\(^{158}\)
• Maryland- excludes individuals of Eskimo or Aleutian origin.\(^{159}\)
• Texas- people who are American Indians, Eskimos, Aleuts, or Native Hawaiians.\(^{160}\)

States that include other groups:
• Massachusetts- includes Eskimos or Aleuts, defined as people having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia.\(^{161}\)

States that use the SBA 8(a) program’s definition for “socially and economically disadvantaged individuals” or include other minorities recognized by the SBA:
Indiana, Missouri, Montana, and Washington.\(^{162}\)


\(^{155}\) In 1835, the U.S. Army arrived in Florida to enforce the Treaty of Payne’s Landing, which was signed by Seminoles and which required Indians to rive up their lands and move west. This initiated the start of the Second Seminole War, waged by the U.S. government against Indians. The Seminole Wars, FLA. DEP’T OF STATE, http://dos.myflorida.com/florida-facts/florida-history/seminole-history/the-seminole-wars/ (last visited Dec. 27, 2017).

\(^{156}\) FLA. STAT. § 288.703.

\(^{157}\) 30 ILL. COMP. STAT. 575/2.


\(^{159}\) MD. CODE ANN., STATE FIN. & PROC. §14-301.

\(^{160}\) Tex. Admin. Code §20.11.

\(^{161}\) MASS. CODE. REGS. 2.02(1).

States that do not define groups (beyond African American, Hispanic American, Asian American, etc.): Alabama, Arkansas, Connecticut (does not define “Asian Pacific Americans and Pacific Islanders”), Iowa, Kentucky, South Dakota, and Wisconsin.  

A few states’ definitions’ include a requirement that a person claiming to be a minority be “regarded as such by the community of which the person claims to be a part.” Maryland’s requirement applies to those claiming to be Asian or Hispanic. Virginia and West Virginia’s requirements apply to those claiming to be African American, Asian American, Hispanic American, or Native American.

The DBE program allows states to presume that someone is a member of the group they claim and evidence does not need to be shown unless that presumption is rebutted. However, most states with MBE or other programs require proof of ethnicity as part of their certification applications. Different forms of documentation are listed followed by the states that allow that form of documentation to prove ethnicity:

- Passport, birth certificate, naturalization papers, green card, or tribal card: Alabama, Arkansas, California, Florida, Iowa, Maryland, Minnesota, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, Texas, Virginia, and Wisconsin.


164 MD. CODE ANN., STATE FIN. & PROC. §14-301.


166 49 C.F.R. § 26.63.

167 ALA. DEP’T OF ECON. & CMTY. AFFAIRS, OFFICE OF MINORITY BUSINESS ENTERPRISE (OMBE) CERTIFICATION APPLICATION (Dec. 2015); THE SUPPLIER CLEARINGHOUSE, VERIFICATION APPLICATION; IOWA ECON. DEV., TARGETED SMALL BUSINESS CERTIFICATION APPLICATION (2017); MINN. MATERIALS MGMT. DIV., SMALL BUSINESS PROCUREMENT APPLICATION (Jul. 1, 2016); N.J. DEP’T OF TREASURY, DIV. OF REVENUE, STATE OF N.J. MBE/WBE CERTIFICATION APPLICATION (2014); N.C. DEP’T OF ADMIN., OFFICE FOR HISTORICALLY UNDERUTILIZED BUS., STATEWIDE UNIFORM CERTIFICATION PROGRAM, DOCUMENTATION REQUIRED (Sept. 29, 2006); BUS. OR., OFFICE OF MINORITY, WOMEN AND EMERGING SMALL BUS., TIPS TO THE MBE/WBE CERTIFICATION PROCESS (2009); R.I. DEP’T OF ADMIN., RULES, REGULATIONS, PROCEDURES AND CRITERIA GOVERNING CERTIFICATION AND DECERTIFICATION OF MBE ENTERPRISES BY THE STATE OF RHODE ISLAND (Aug.
Driver’s license: Alabama, Indianapolis, Iowa, Maryland, New Jersey, Oregon, and Virginia.\textsuperscript{168}

Copy of certification from qualifying organization (e.g. SBA 8(a), NMSDC): Arkansas, Florida (SBA 8(a) only), and Pennsylvania.\textsuperscript{169}

Declarations or certificates from recognized minority or ethnic community organizations: California (three declarations needed) and Indiana.\textsuperscript{170}

Parents’ birth certificates: California, Delaware, and Ohio.\textsuperscript{171}
Affidavit of social economic disadvantage or ethnicity: Mississippi, North Carolina (only if passport, green card, and birth certificate do not prove ethnicity), and Ohio.¹⁷²

Personal statement of ethnic designation or disadvantage: Florida and Ohio.¹⁷³

California’s MBE program allows Native American applicants to submit letters from Tribal Chairmen and letters from the Bureau of Indian Affairs if the applicant’s reservation is terminated.¹⁷⁴

Delaware’s MBE program instructs applicants not to provide any documentation of ethnicity unless specifically requested. The office also gives this instruction for birth certificates: “If applicant’s birth certificate does not identify ethnicity, then also provide birth and/or death certificates of applicant’s parent(s) as named on applicant’s birth certificate. If parent(s)’s documentation does not identify ethnicity, continue in parental lineage with birth or death certificates. If the document identifies ‘colored’ or any other mark that is not specifically naming an ethnicity, the applicant will inform OSD which ethnicities apply.”¹⁷⁵

Indiana’s MBE program allows letters from community groups or ethnic organizations verifying membership.¹⁷⁶

Kentucky’s MBE program requires “proof of racial/ethnic minority status” but no definition is provided as to what that entails.¹⁷⁷

South Dakota allows contractors to rely on written representations by subcontractors regarding their status as MBEs in lieu of independent investigations.¹⁷⁸


¹⁷⁴ PUB. UTIL. COMM’N OF CAL., GEN. ORDER 156 (May 30, 1988).


¹⁷⁶ IND. DEP’T OF ADMIN., DIV. OF SUPPLIER DIVERSITY, APPLICATION FOR CERTIFICATION.


Washington’s MBE program has different requirements for applicants who are “visibly identifiable as a minority” and those who are not. Applicants who are visibly identifiable only need to submit a photograph of themselves or copy of a document with their photograph. Applicants who are not visibly identifiable must submit either a copy of his or her birth certificate, tribal enrollment papers, or “other document[s] which show that the owner meets the definition of minority.”

States that require multiple types of documentation:

- **Alabama:**
  - ID card, tribal card, or naturalization papers, and
  - Picture ID (e.g. driver’s license).

- **Indiana:**
  - Birth certificate,
  - Driver’s license, and
  - Membership letter or certificate of an ethnic organization, tribal certificate, Bureau of Indian Affairs card, passport, armed services discharge papers, any other document that provides evidence of ethnicity.

- **Ohio:**
  - Passport, birth certificate, or certificate of naturalization, and
  - Affidavit verifying certification eligibility, birth certificate (race must be identified), parents’ birth certificates (race must be identified), tribal membership certificate or card, or personal statement of disadvantage.

- **Virginia:**
  - Driver’s license and
  - Passport, permanent resident card, certificate of naturalization, or birth certificate.

**National Minority Supplier Development Council**

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Arkansas and Pennsylvania allow for applicants for MBE certification to only provide copies of certifying documents from the NMSDC.\textsuperscript{184} The NMSDC is a private corporate membership organization that matches more than 12,000 certified MBEs to a network of corporate members seeking to purchase products and services.\textsuperscript{185} Certification is conducted through the NMSDC Network and its 23 Regional Affiliates.\textsuperscript{186}

NMSDC considers minority group members to be U.S. citizens who are at least 25% Asian, Black, Hispanic, or Native American, defined as follows:\textsuperscript{187}

For purposes of NMSDC’s program, a minority group member is an individual who is a U.S. citizen with at least one quarter of the following: Asian-Indian; Asian-Pacific; Black; Hispanic; Native American. These are defined as follows:

Asian-Indian: A U.S. citizen whose origins are from India, Pakistan and Bangladesh.

Asian-Pacific: A U.S. citizen whose origins are from Japan, China, Indonesia, Malaysia, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Thailand, Samoa, Guam, the U.S. Trust Territories of the Pacific or the Northern Marianas.


Hispanic: A U.S. citizen of true-born Hispanic heritage, from any of the Spanish-speaking areas of the following regions: Mexico, Central America, South America and the Caribbean Basin only. Brazilians (Afro-Brazilian, indigenous/Indian only) shall be listed under Hispanic designation for review and certification purposes.

Small Diverse Businesses, supra note 8.
Native American: A person who is an American Indian, Eskimo, Aleut or Native Hawaiian, and regarded as such by the community of which the person claims to be a part. Native Americans must be documented members of a North American tribe, band or otherwise organized group of native people who are indigenous to the continental United States and proof can be provided through a Native American Blood Degree Certificate (i.e., tribal registry letter, tribal roll register number).

Unlike the NMSDC, the DBE certification program and most MBE programs, do not require an individual to be a U.S. citizen; lawfully admitted permanent residents are also eligible. The NMSDC’s definitions for each minority group are also generally narrower than DBE definitions. Asian-Indian excludes those with origins from Bhutan, the Maldives Islands, Nepal and Sri Lanka. Asiain-Pacific excludes those with origins from Burma, Brunei, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, and Hong Kong. Unlike federal law, NMSDC excludes people of Spanish or Portuguese heritage whose families never lived in Central or South American. Brazilians, defined as Afro-Brazilian or indigenous/Indian only, are only listed as Hispanic for “review and certification purposes.” The NMSDC definition limits Hispanics to those of “true-born Hispanic heritage,” but doesn’t define what that means. The NMSDC definition is broader in that it includes the Caribbean basin, whereas the DBE definition is limited to Puerto Ricans, Cubans, and Dominicans. With regard to Native Americans, the DBE definition does not specify how one can prove he is a member of a tribe. The DBE definition includes all members of federally or state recognized tribes, it is unclear if

188 49 C.F.R. § 26.5(2).
the NMSDC’s use of American Indians includes all such individuals. It is also unclear whether
NMSDC’s use of Eskimo has the same meaning of Alaska Natives in the DBE definition.\footnote{189}

Minority group membership is established by “a combination of screenings, interviews,
and site visits.”\footnote{190} The NMSDC requires applicants to provide copies of driver’s licenses and
either birth certificates or U.S. passports.\footnote{191} Unlike the DBE policy, the NMSDC has no
presumption of social and economic disadvantage that an applicant can obtain by simply signing
an affidavit.\footnote{192} Applicants are permitted to submit letters of appeal if his or her application is
denied.\footnote{193}

Unlike state and federal laws, which are entirely unclear on how to treat people of mixed
ancestry, the NMSDC requires applicants to have, at a minimum, one-quarter of the relevant
heritage. It is not entirely clear, however, what that means in practice. For example, if an
applicant has a grandfather who was half-Mexican and half-Irish, but was known as Mexican-
American in his community, does that make the applicant one-quarter Hispanic, or one-eighth
Hispanic. Meanwhile, while federal and state law require Native American applicants to
members of recognized tribes, under NMSDC rules it’s apparently sufficient to have one
grandparent who was a member of a recognized tribe.

**SBA 8(a) Program and Appeals Decisions**

Indiana’s MBE program uses the SBA 8(a) definition of socially and economically
disadvantaged individuals.\footnote{194} Missouri and Washington’s MBE programs, and Montana’s DBE

\begin{footnotes}
\footnote{189}{49 C.F.R. § 26.5(2); *What is a MBE?*, NAT’L MINORITY SUPPLIER DIVERSITY COUNCIL,
\footnote{190}{MBE Certification, supra note 106.}
\footnote{191}{MBE Certification, supra note 106.}
\footnote{192}{49 C.F.R. § 26.61(c).}
\footnote{193}{MBE Certification, supra note 106.}
\end{footnotes}
program, use the DBE definition but recognizes any additional groups that the SBA deems disadvantaged. It is unclear whether Montana’s Department of Transportation is authorized to expand its definition of DBEs beyond the scope of the U.S. DOT’s definition to include other disadvantaged groups recognized by the SBA.

The SBA’s definitions of socially disadvantaged groups roughly mirror the DBE’s definitions, except that the SBA does not further define Black Americans and Hispanic Americans. In the SBA program, the presumption of social disadvantage may be overcome with “credible evidence to the contrary,” as opposed to the DBE certification program’s requirement that a “well founded reason to question the individual’s claim of membership” be shown before an applicant must be asked to present additional evidence that he is a member of a disadvantaged group.

While the DOT’s DBE decisions and appeals database does not have any rulings on the issue of social and economic disadvantage, the SBA’s database of hearings and appeals decisions does. Given the similarities in the definitions, it may be fair to assume that if appeals were brought to the DOT in the future regarding the issue of social and economic disadvantage that they might be resolved similarly to how the SBA’s administrative law judges ruled in these decisions.

The main takeaway from the relevant cases is that different judges have interpreted the SBA’s definitions and eligibility determination criteria in completely contradictory ways. One judge affirmed an associate administrator’s finding that the regulations do not permit an applicant to use resemblance to members of a socially disadvantaged group as evidence of

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195 MO. CODE REGS. ANN. Tit. 1, § 10-17.010(1)(F); WASH. ADMIN. CODE §362-20-030.
prejudice or bias. But another judge found one applicant’s blond hair, light skin, and Anglo-Saxon or Northern European-like appearance to be evidence that she was not Hispanic, as she had claimed. One judge ruled that an applicant’s evidence only proved the fact that Hispanics in general faced social disadvantage but not that she personally faced disadvantage. Another judge ruled that, “no evidence of discrimination as a Hispanic American is needed for a member of that class.” And a third judge ruled that children with one Hispanic parent necessarily share that parent’s Hispanic ethnicity, and that their ethnicity is not determined by the “white” designation on their birth certificates.

An Iranian man was found not to be Subcontinental Asian. The rationale given was that he did not prove racial or ethnic prejudice or bias caused him hardship in doing business, and that there were other reasons that could have caused him hardship. However, an Uzbekistani man was found to be otherwise socially disadvantaged, even though he did not qualify as a member of a presumptively disadvantaged group, in part because his statement of his country of origin was sufficient to show his ethnicity, which was a distinguishing feature that contributed to his social disadvantage.

In *DCS Elec., Inc.*, a blond-haired light-skinned business owner claimed Hispanic heritage and identity as a Hispanic American, citing to Hispanic family members that had resided with her who had established customs and habits characteristic of Hispanic heritage. To further support her claim, she also stated that she grew up in a bilingual family, that 40% of her

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201 *Id*.
family is bilingual, and that at least 10% of her family does not speak English.\textsuperscript{207} She also claimed that she is knowledgeable in Spanish and has been recognized in her language abilities in past employment by being tasked to interpret for Spanish-speaking customers.\textsuperscript{208}

The applicant was denied certification because: (1) she had Hispanic ancestry but she could not be identified as Hispanic American, (2) she had been denied certification by another authority, (3) there was not evidence that she had been denied educational, employment, or business development opportunities because of her identification as a Hispanic American.\textsuperscript{209} The applicant had previously been denied certification by another authority for being a European Hispanic.\textsuperscript{210} In a footnote in the decision, the judge noted that, “the [SBA’s] regulations are not clear as to the meaning of the term “Hispanic American,” i.e. whether it includes only Hispanics from this Continent.”\textsuperscript{211}

Upon review of the denial of certification, the administrative law judge ruled that the SBA demonstrated there was reason to question the applicant’s claimed status as a Hispanic American, citing her: (1) name, Christine Combs, (2) maiden name, Mundy, and, (3) lack of accent.\textsuperscript{212} The judge ruled that the SBA’s decision was not arbitrary, capricious, or contrary to the law because the applicant provided no substantive evidence as having held herself out as Hispanic or having been identified as Hispanic.\textsuperscript{213} While there was no allegation of racial fraud, the judge noted that the applicant’s assertions of prejudice and bias are “clearly subjective” and “self-serving.”\textsuperscript{214}
In Rothschild-Lynn Legal & Fin. Serv.s, a Sephardic Jew from Spain was found to be eligible for certification as a Hispanic.\textsuperscript{215} The administrative law judge ruled that once it was established that he was Hispanic, any evidence in support of his membership in a non-designated group, being religiously Jewish, should have been ignored.\textsuperscript{216} The applicant had also sought judicial notice that in addition to being Hispanic, he is also black and Jewish because he is Moorish.\textsuperscript{217} The judge ruled that the presumption of being a member of a designated group is not lost if additional evidence of discrimination as a member of a non-designated group is found to be not clear and convincing.\textsuperscript{218}

In Garza Telecomm., Inc., two siblings, whose mother is Hispanic, were found to also be Hispanic despite the fact that their birth certificates stated that their color or race is white.\textsuperscript{219} The opinion noted that the SBA never questioned the mother’s Hispanic ethnicity, even though her color or race is listed as white on her children’s birth certificates.\textsuperscript{220} The judge chided the SBA for erroneously assuming that someone in the white racial category could not belong to the Hispanic ethnic category.\textsuperscript{221} The judge concluded that, “whether an individual is white, black, or any other race bears no relationship to his or her ethnicity.”\textsuperscript{222} The judge ruled that the SBA’s reliance on the birth certificates to determine whether the board members were Hispanic was erroneous.\textsuperscript{223} The judge also ruled that since the SBA had found that the siblings’ mother was Hispanic, that it should have necessarily found that they were also Hispanic.\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{215} Rothschild-Lynn Legal & Fin. Serv.s, No. 499 MSBE-94-10-13-46 (Apr. 12 1995).
\item \textsuperscript{216} \textit{Id}.
\item \textsuperscript{217} \textit{Id}.
\item \textsuperscript{218} \textit{Id}.
\item \textsuperscript{219} Garza Telecomm., Inc., No. 620 MSBE-98-05-11-10 (Nov. 6, 1998).
\item \textsuperscript{220} \textit{Id}.
\item \textsuperscript{221} \textit{Id}.
\item \textsuperscript{222} \textit{Id}.
\item \textsuperscript{223} \textit{Id}.
\item \textsuperscript{224} \textit{Id}.
\end{itemize}
Cases on Minority Status

Beyond administrative context, there are other cases in which judges and aljs have had to decide whether an individual is a member of an affirmative-action category. The most famous case, perhaps, is the Massachusetts Supreme Judicial Court case of *Malone v. Haley*.\(^{225}\) *Malone* involved twin firefighters who had listed that they were black when applying for minority-preferred positions in the fire department but whom the department understood to be white.\(^{226}\) The department fired them for engaging in fraud.

At their administrative hearing challenging their firing, the only evidence the firefighters provided of their purported black identity was a photograph of their allegedly black great-grandmother.\(^{227}\) The administrative decision found that firefighters were not “objectively” black because of their: (1) visual appearance, (2) lack of documentary evidence, and (3) perception by the community.\(^{228}\) The examiner also found that the firefighters’ claims of minority status were made in bad faith, because they and their families had always held themselves out to be white and were recognized as such up until they applied for promotion in the fire department after a settlement required minority preferences.\(^{229}\)

*Malone* is one of the rare cases where a charge of racial fraud was brought. Other cases touching on racial identity do not deal with such allegations; plaintiffs have brought suit against state agencies claiming that they should be considered minorities as applied to eligibility for MBE programs.

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\(^{226}\) *Id.* at 388.

\(^{227}\) *Id.* at 390-91.

\(^{228}\) *Id.* at 390.

\(^{229}\) *Id.* at 392-93.
In *Jana-Rock Constr., Inc. v. New York State Dep’t of Econ. Dev.*, an applicant was denied MBE certification because he was found not to be “Hispanic” within the meaning of New York law because his parents were born in Spain, not South America. His company was certified by the New York DOT as a DBE, but was rejected for MBE certification because the state’s definition of Hispanic was not as broad as the federal DBE definition; the federal definition included “all persons from, or decedents of persons from, Spain or Portugal.” The applicant brought this suit alleging that the state’s definition of Hispanic violated the Equal Protection Clause of the Fourteenth Amendment because it excluded people of Spanish or Portuguese descent. The Second Circuit affirmed the district court’s dismissal of the applicant’s action.

The opinion details the U.S. DOT’s decision to include “other Spanish or Portuguese culture or origin” in its definition of Hispanic; the definition was broadened after comments and petitions were received from groups such as the Hispanic American Contractors Association. The opinion also noted that the DOT concluded that this expansion would remain unchanged unless legislation directed it to act otherwise.

In *Marinelli Constr. Corp. v. State*, an applicant for MBE certification appealed a lower court’s denial of his application. The lower court had found that the applicant was ineligible because he was of South American descent but not of Hispanic origin. The applicant’s father was born in Argentina but his father’s birth certificate described his grandparents as Italian.

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230 *Jana-Rock Constr., Inc. v. New York State Dep’t of Econ. Dev.*, 438 F.3d 195, 202 (2nd Cir. 2006).
231 *Id.*
232 *Id.* at 200.
233 *Id.*
234 *Id.* at 201.
235 *Id.*
237 *Id.*
238 *Id.*
New York’s MBE certification program assumed, without a finding, that the applicant was of Hispanic descent but not Hispanic origin, and denied the applicant’s application.\textsuperscript{239} The MBE certification program found that the applicant’s parents’ birthplace alone was not determinative of minority group membership.\textsuperscript{240}

The court found that the state’s definition of Hispanic did not include those of European but not Spanish origin who had adopted Spanish culture.\textsuperscript{241} The court held that “descent” is meant to signify nationality or continental affiliation, while “origin” is meant to identify the source of ethnicity as either Hispanic or Indian.\textsuperscript{242} The applicant was found to have satisfied the “descent” prong, but not the “origin” prong.\textsuperscript{243} The court came to this conclusion despite the fact that the applicant’s paternal ancestors had Spanish-sounding surnames: Denardes, Montazza, and Buchiles.\textsuperscript{244} The court found that the applicant’s father’s birth certificate permitted the MBE certification program to reasonably infer that his grandparents were not Hispanics, but Italians living in Argentina.\textsuperscript{245} The court affirmed the MBE certification program’s dismissal of the application.\textsuperscript{246}

In \textit{Major Concrete Constr., Inc. v. Erie}, an applicant for MBE certification who was 25% Mexican, 25% Irish, and 25% Italian was found not to be Hispanic.\textsuperscript{247} The Erie/Buffalo Joint Certification Committee brought this appeal from a lower court’s order reversing its denial of the certification application.\textsuperscript{248} The applicant claimed that he qualifies as Hispanic because his

\begin{itemize}
  \item \textsuperscript{239} Id. at 1001.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id.
  \item \textsuperscript{242} Id.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} Id.
  \item \textsuperscript{246} Id.
  \item \textsuperscript{247} \textit{Major Concrete Constr., Inc. v. Erie}, 521 N.Y.S.2d 959 (NY. App. Div. 1987).
  \item \textsuperscript{248} Id. at 959-60.
\end{itemize}
grandmother was 100% Mexican. However, he admitted that he did not keep any ties with the Hispanic community, did not belong to any Hispanic groups or clubs, did not have any Hispanic friends, and that no Hispanics live in his neighborhood. The MBE certification program denied his application on the grounds that: (1) he is only 25% Mexican, (2) he keeps no contact with the Hispanic community or its culture, and (3) neither he nor members of members of his family identify as Hispanic.

While these cases shed some light on how courts have defined different minority groups, the lack of cases that touch on racial fraud when searching for terms such as “DBE certification,” “DOT DBE certification,” or even “socially disadvantaged” is notable. The majority of cases relating to MBE or DBE certifications concern the “control” aspect of certification: whether the minority group member applying for certification is actually the majority owner of the business.

**Cases Defining Race and National Origin**

In *Lewis v. Del. Dep’t of Pub. Instruction*, a Panama-born African American employee brought an employment discrimination suit alleging discrimination on the basis of his race and national origin. The court found that the employee established a prima facie case for discrimination and denied the state’s motion for summary judgment. The state claimed that the employee should not be protected from *national origin* discrimination just because he was born in Panama, and argued that the employee’s appearance is African American and not Hispanic, and that he primarily spoke English. The court found that, for summary judgment purposes, the employee established that he is Hispanic because he: (1) speaks Spanish fluently,

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249 *Id.* at 960.
250 *Id.*
251 *Id.*
253 *Id.* at 361.
254 *Id.* at 360.
(2) alleged that he speaks with an accent, (3) has used his bilingual skills to translate documents for his employer, and (4) is an active and visible leader in the Latino community.\(^{255}\)

In *Bennun v. Rutgers State Univ.*, a Hispanic associate professor alleged discrimination on the basis of national origin against the university.\(^{256}\) The university argued that it was not liable because the professor failed to show that he is Hispanic.\(^{257}\) The Third Circuit affirmed the district court’s finding that the professor is Hispanic because that finding was not clearly erroneous.\(^{258}\) In coming to this conclusion, the Third Circuit consulted Webster’s New Dictionary definition of Hispanic, “of, or derived from Spain or the Spanish,” and applied it to the professor’s uncontroverted claim that his father is a Sephardic Jew.\(^{259}\)

The Third Circuit found the following facts about the professor to support the district court’s finding that he is Hispanic: he (1) was born in Argentina, where Hispanic culture is predominant, (2) was immersed in Spanish ways of life, and (3) speaks Spanish at home, which was also noted as a factor the census relied on when determining race.\(^{260}\) The Third Circuit also found the fact that the district court had the opportunity to observe the professor’s appearance, speech, and mannerisms supported its conclusion that the district court’s decision was not clearly erroneous.\(^{261}\) The Third Circuit concluded that determinations in regards to discrimination must be based on an individual’s objective appearance to others and not his own objective feelings about his own ethnicity.\(^{262}\)

**Cases on Documentary Proof of Race**

\(^{255}\) *Id.*

\(^{256}\) *Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3d. Cir. 1991).

\(^{257}\) *Id.* at 171.

\(^{258}\) *Id.* at 172.

\(^{259}\) *Id.* at 173.

\(^{260}\) *Id.*

\(^{261}\) *Id.*

\(^{262}\) *Id.*
In *Equal Emp’t Opportunity Comm’n v. Kaplan Higher Learning Educ. Corp.*, the Equal Employment Opportunity Commission (“EEOC”) alleged employment discrimination by the company because it used credit history in making hiring decisions, a practice the EEOC claimed had a disparate impact on Black applicants. The court found that the EEOC failed to present a prima facie case of disparate impact discrimination and granted the defendant’s motion for summary judgment. The court found that the “race rating” method used by the EEOC’s expert witness to determine the race of a particular job applicant was not a reliable way to gather statistical evidence to show discrimination.

“Race rating” was conducted by five individuals with advanced degrees in cultural anthropology and similar fields after they looked at driver’s license photos and names provided by state DMVs. Applicants were assigned a race if four of the five “race raters” could agree. The court also noted that other U.S. District Courts, in considering similar studies, had decided that the exclusion of study subjects whose race was not easily discernible was problematic, specifically because subjects such as dark-skinned blacks might be overrepresented. The court also noted that the EEOC itself discourages employers from visually identifying individuals by race. For these reasons, the court decided that the EEOC’s evidence failed to satisfy any of the *Daubert* factors.

In *Smith v. Chrysler Fin. Co.*, an African-American couple filed a class action suit alleging the company’s retail credit pricing system was discriminatory and that it had a disparate

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264 *Id.* at *4.
265 *Id.*
266 *Id.* at *5.
267 *Id.* at *8.
268 *Id.* at *9.
269 *Id.* at *7.
impact on African Americans. The court denied the company’s motion for summary judgment with respect to the couple’s claims for monetary damages. The court found that the company’s method used to calculate fees paid by customers of each race, by determining race from black and white photocopies of customers’ driver’s licenses, to have too great a potential for error for the court to deny the couple standing based on this determination alone.

In *Doe v. State*, children of a deceased couple sought to change the race on their parents’ birth certificates. The court found that the children failed to prove that their parents’ racial designations (as “colored” as opposed to “white”) were incorrect. In reaching this conclusion, the court reasoned that expert testimony indicated that the concept of racial classification of individuals, as opposed to groups, is scientifically insupportable, that the evidence conclusively proved that the “subjective perceptions” of their parents’ races were correctly recorded on their birth certificates, and that there was no proof their parents preferred to be designated as white nor did they ever object to being designated as colored in their lifetimes. One law review article from 2015 noted that race designations on birth certificates are not disputed in determining racial identity in cases after *Doe v. State*, which the author posits is in response to the National Center for Health Statistics’ standard birth certificate that advised that data on parents’ race should only be used for medical or health reasons.

In *Perkins v. Lake Cty. Dep’t of Util.*, the court addressed the issue of the extent to which provable genetic or hereditary classification controls an individual’s membership in a protected

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271 *Id.* at *3.
272 *Id.*
274 *Id.* at 372.
275 *Id.*
An American Indian employee brought an employment discrimination action claiming disparate treatment because of his status as an Indian. The court found that regardless of the employee’s percentage of Indian ancestry, he is entitled to protection if his employer reasonably believed, based on some objective evidence, that he is a member of that class.

The county submitted evidence suggesting that neither the employee nor his immediate family are members of any tribe, live in an Indian community, or participate in Indian cultural events. However, there was also evidence that the employee had the physical appearance of an Indian, that he believed he was an Indian, that he represented himself as an Indian, and that his employer believed him to be an Indian and conceded that he may have some Indian blood, although less than one-sixteenth. The court found the employee’s birth certificate and his family members’ birth and death certificates, which listed them as white, and their census listings were not dispositive. The court found that the employer’s reasonable belief that the employee is Indian to be controlling.

The court decided that it was unnecessary and inappropriate to attempt to measure the allegedly Native American employee’s documentable connection to tribes because employers do not discriminate on the basis of such factors. The court explained that objective appearance and employer perception are the basis for discrimination and the key factors relevant to

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278 Id. at 1262.
279 Id.
280 Id. at 1276.
281 Id.
282 Id. at 1277.
283 Id.
284 Perkins, 860 F. Supp. at 1278.
determining membership in a protected class. The court expressed that whether the employee was 1% Indian or 100% Indian was therefore immaterial.

However, the applicability of these employment discrimination cases to adjudicating whether an individual is a member of a socially and economically disadvantaged group is questionable. The court in Perkins noted that Title VII:

Addresses perceived differences which do not have a basis in fact between races and ethnic groups. For example, when bringing an action under Title VII African Americans do not have to demonstrate that their relatives lived in Africa, or that they visit the site of their roots, or that they are involved in any kind of cultural activities associated with Africa. They only have to appear to be African Americans to be deemed members of that protected class. … Title VII is in force to equalize rather than separate…This court finds that membership in a given protected class carries a lower threshold of proof than would be the case under entitlement legislation.

Considering the presumption of disadvantage given to members of DBE and MBE defined groups, there may not actually be a higher standard for entitlement programs, as the Perkins court suggested.

Further Analysis/Conclusion

TBA

I may address the following issues:

1. Is it constitutional for the government to dictate racial/ethnic classifications that provide/rewards benefits, or if the government is going to use these classifications, must it accept self-identification (at least outside the context of Native Americans, given the special status of Indian tribes?)

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285 Id.
286 Id.
287 Id. at 1276.
2. If the government is permitted to dictate racial/ethnic classifications, are these classifications inherently arbitrary, or are they arbitrary in practice? For example, is there some non-arbitrary way of defining “Hispanic?” Is there a reason why white people of purely European origin who happen to have Spanish-speaking ancestry should be a relevant category? Spanish? Portuguese? Argentines of Italian descent? Jews whose ancestors stopped off for a generation in Cuba on their ultimate path to the U.S.? Sephardic Jews whose ancestors spoke Ladino generations ago, but haven’t lived in a Spanish-speaking country for five hundred years? What about Asian? The category seems to match the racist categories of the Asian Exclusion Act. But what sense does it make to include everyone from Indians to Fillipinos in the same category? Especially if there is no evidence that any particular group of Asians is in fact economically disadvantaged?

3. As interracial/ethnic marriage becomes increasingly common, does it make sense to consider anyone with any Hispanic/African/Asian heritage to be a member of a “minority” group, even if they look “white,” have a European last name, and consider themselves to be white (as half of American Hispanics do) in contexts other than minority certification? At some point, won’t this entirely undermine the point of minority status, as a large majority of the population will be able to claim it?

4. Proposal: Limit minority status to members of recognized Indian tribes and to documented descendents of American slaves who identify as African-American. These are the groups that have faced state violence and exclusion, and limited such status to these categories avoids many of the arbitrariness and other problems defined above.