

THE AMERICAN LAW OF RACE

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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.¹ However, as slavery spread and became institutionalized, African Americans could no longer escape servitude by converting to Christianity.² A 1667 Virginia act used “Christians” to refer to colonists and African American Christians were considered members of a different “nation.”³ This was the first implicit statutory recognition of race in America.

People were also classified in the early colonial era by labor status.⁴ In Virginia and Maryland, “unfree” individuals included indentured servants, in addition to African Americans.⁵ By the mid-1600s, however, slaves were distinguished from European indentured labor.⁶

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.⁷ In this case, a white man was to be whipped before African Americans for having had sexual relations with an African American

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.

⁷ Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1173 (1997).

woman.⁸ 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.⁹

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.¹⁰ This case is considered the first articulation of the “one drop” rule.¹¹

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.¹² 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.¹³

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.¹⁴ Uncertainty over racial definitions meant that the parties could bring in testimony regarding ancestry, reputation, and socially defined criteria to enter these trials.¹⁵ Five different

⁸ *Id.* at 1173.

⁹ *Id.* at 1173.

¹⁰ *Id.* at 1173.

¹¹ *Id.* at 1173.

¹² Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109, 111 (1998).

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).¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

Statutory and common-law presumptions also played a significant role in race trials in some states.²² For example, in North Carolina, if someone was a slave in 1865 then he was presumed to be African American.²³

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.²⁴ 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.²⁵ 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.²⁶

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.²⁷ The assessors were instructed to mark as a mulatto "all persons having any perceptible trace of African blood."²⁸ 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 "octoroon," someone who was one-eighth African American, or a "quadroon," one-quarter African American.²⁹ By the 1900 census, the effort to determine mulattoes was abandoned,³⁰ and by the 1920 census, the Census Bureau adopted the one drop rule.³¹

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

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.³² Some states defined who persons of color were and others defined who was to be included in each race.³³ In Oklahoma, “colored” meant African American and white meant all others.³⁴ Nebraska and Oregon had the narrowest definitions of who was African American, only including those who were one-fourth African American in their definitions.³⁵ In Alabama, “Negroes” were defined as anyone with an African American ancestor five generations back.³⁶ Tennessee, by contrast, adopted the one-drop rule.³⁷ Ohio was the only state in which a person who was more than half white was automatically considered white.³⁸ 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.³⁹

By the 1950s, many states’ definition still had not changed.⁴⁰ 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.”⁴¹ The best known articulation of how the “one drop” rule played out was case involving Susie Phipps, a woman in Louisiana who identified as

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 America⁵⁰ 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.⁵¹ In Oregon, miscegenation laws prohibited intermarriage between whites and anyone with one-fourth or more Chinese blood.⁵²

[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.⁵³ [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,⁵⁴ 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)

⁵⁰ Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1, 4 (2000).

⁵¹ STEPHENSON, *supra* note 45, at 16.

⁵² STEPHENSON, *supra* note 45, at 16.

⁵³ Toro, *supra* note 11, at 1226-27.

⁵⁴ JOHN SULLIVAN & GEORGE LA NOUE, *DECONSTRUCTING AFFIRMATIVE ACTION CATEGORIES* 71 (John David Skrentny ed., 2001).

Spanish-Americans, (4) Asian-Americans, and (5) Puerto Ricans.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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,⁵⁸ 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,⁵⁹ 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 these lists,⁶⁰ and they almost never had a good

⁵⁵ George R. La Noue & John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 SANTA CLARA L. REV. 103, 120 (2000).

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.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.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.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.⁶⁴ He didn’t remove these groups because he simply did not want to deal with the backlash.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.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.⁶⁷ [WHEN WERE THESE DEPOSITIONS?] 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

⁶¹ SULLIVAN & LA NOUE, *supra* note 100, at 72.

⁶² La Noue & Sullivan, *supra* note 101, at 138.

⁶³ SULLIVAN & LA NOUE, *supra* note 100, at 72.

⁶⁴ SULLIVAN & LA NOUE, *supra* note 100, at 72.

⁶⁵ SULLIVAN & LA NOUE, *supra* note 100, at 72.

⁶⁶ La Noue & Sullivan, *supra* note 101, at 119.

⁶⁷ La Noue & Sullivan, *supra* note 101, at 137.

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.

constitency.⁷³ 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 contributions from Indians to Voinovich's campaign.⁷⁴

Members of Congress also played a role in ensuring that certain groups were considered presumptively disadvantaged by the SBA.⁷⁵ After a reformulation of the 8(a) program's presumptively disadvantaged groups, Asian Americans were left out.⁷⁶ Groups such as the Washington State Commission on Asian American Affairs caught pressured the SBA and Congress to reclassify Asian Americans as presumptively disadvantaged.⁷⁷ A Democratic Congressman from California introduced an amendment proposing just that, and it passed without debate and without a formal vote.⁷⁸

Groups have also successfully petitioned the SBA directly for inclusion.⁷⁹ 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.⁸⁰ 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.⁸¹ The SBA later added ethnic groups to Asian Pacific Americans and Subcontinent Asian Americans based on their similar cultures and physical characteristics to people who were already included.⁸² 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.

⁷⁹ Sean A. Sabin, *Rethinking the Presumption of Social and Economic Disadvantage*, 33 PUB. CONT. L.J. 825, 841 (2004).

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 not go unnoticed; seven of ten public comments received regarding those changes opposed them because no rationale was provided.⁸³

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.⁸⁴ 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.⁸⁵

The way that eligibility for the 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.⁸⁶

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.⁸⁷ At least 23 percent of all government contracts are awarded to

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.

⁸⁷ *SBA's Role in Government Contracting*, SMALL BUS. ADMIN., <https://www.sba.gov/contracting/what-government-contracting/sbas-role-government-contracting> (last visited Dec. 18, 2017).

small disadvantaged businesses, historically underutilized businesses (“HUBs”), women-owned small businesses, and service-disabled veteran-owned small businesses.⁸⁸ With over \$100 billion on the line for status-based contracts, 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

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.⁸⁹ 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, Kiribati, 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;⁹⁰

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.⁹¹ All that an applicant has to do to get the benefit of the rebuttable presumption is

⁸⁹ *History of the DOT DBE Program*, DEP'T OF TRANSP., <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/history-dot-dbe-program> (last updated Jan. 5, 2016).

⁹⁰ 49 C.F.R. § 26.5(2) (2010).

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.

⁹² 49 C.F.R. § 26.61(c) (1999).

⁹³ 49 C.F.R. § 26.67(b)(2)-(3) (2015).

⁹⁴ *Search Decertified DBEs, Denials and DBE Appeal Decisions*, DEP’T OF TRANSP., <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/denials-appeals> (last visited Dec. 18, 2018).

⁹⁵ *Id.*

States with MBE or other similar certification programs: Alabama,⁹⁶ Arkansas,⁹⁷ California,⁹⁸ Connecticut,⁹⁹ Delaware,¹⁰⁰ Florida,¹⁰¹ Illinois,¹⁰² Indiana,¹⁰³ Iowa,¹⁰⁴ Kentucky,¹⁰⁵ Maryland,¹⁰⁶ Massachusetts,¹⁰⁷ Minnesota,¹⁰⁸ Mississippi,¹⁰⁹ Missouri,¹¹⁰ New Jersey,¹¹¹ New York,¹¹² North Carolina,¹¹³

⁹⁶ *Office of Minority Business Enterprise*, ALA. DEP'T OF ECON. & CMTY. AFFAIRS, <http://adeca.alabama.gov/Divisions/ced/cdp/Pages/ombe.aspx> (last visited Jan. 2, 2018).

⁹⁷ *Minority and Women-Owned Business Enterprise*, ARK. ECON. DEV. COMM'N, <http://www.arkansasedc.com/divisions/minority-and-women-owned-business-enterprise> (last visited Dec. 24, 2017).

⁹⁸ *Apply for Certification*, THE SUPPLIER CLEARINGHOUSE, <http://www.thesupplierclearinghouse.com/apply.html> (last visited Dec. 23, 2017).

⁹⁹ *Apply for Small Business Enterprise or Minority Business Enterprise Certification (SBE or MBE)*, CONN. OFFICIAL STATE WEBSITE, <http://portal.ct.gov/DAS/Procurement/Supplier-Diversity/Apply-for-Small-Business-Enterprise-or-Minority-Business-Enterprise-Certification-SBE-or-MBE> (last visited Jan. 2, 2017).

¹⁰⁰ *Certifications*, STATE OF DEL., GOV'T SUPPORT SERV.S, OFFICE OF MGMT. & BUDGET, <https://gss.omb.delaware.gov/osd/certify.shtml> (last visited Dec. 23, 2017).

¹⁰¹ *Office of Supplier Diversity*, FLA. DEP'T OF MGMT. SERV.S, https://www.dms.myflorida.com/agency_administration/office_of_supplier_diversity_osd (last visited Jan. 2, 2018).

¹⁰² *Business Enterprise Program: Vendor Registration*, IL. DEP'T OF CENT. MGMT. SERV.S, https://www2.illinois.gov/cms/business/sell2/bep/pages/vendor_registration.aspx (last visited Jan. 2, 2018).

¹⁰³ *Indiana Firms: Certification Steps*, IND. DEP'T OF ADMIN., <http://www.in.gov/idoa/mwbe/2490.htm> (last visited Dec. 23, 2017).

¹⁰⁴ *Targeted Small Business (TSB) Certification Website*, IOWA ECON. DEV. AUTH., <https://www.iowa.gov/tsb> (last visited Jan. 2, 2018).

¹⁰⁵ *Application and Approval Process*, KY. MINORITY & WOMEN BUS. ENTER. CERTIFICATION PROGRAM, <https://mwbe.ky.gov/Pages/appapproval.aspx> (last visited Dec. 23, 2017).

¹⁰⁶ *MBE Only Certification Application*, MD. DEP'T OF TRANSP., http://www.mdot.maryland.gov/newMDOT/MBE/CertificationForms/MBE_Certification.html (last visited Jan. 2, 2018).

¹⁰⁷ *State Certification Standards & Procedures*, MASS. SUPPLIER DIVERSITY OFFICE, <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/procurement-prog-and-serv/sdo/state-cert-prog/certification-standards-and-.html> (last visited Jan. 2 2018).

¹⁰⁸ *Targeted Group/Economically Disadvantaged/Veteran-Owned (TG/ED/VO) Small Business Procurement Program*, MINN. DEP'T OF ADMIN., <http://www.mmd.admin.state.mn.us/mn02001.htm> (last visited Jan. 2, 2018).

¹⁰⁹ *Minority and Small Business*, MISS. DEV. AUTHORITY, <https://www.mississippi.org/minority-certification/> (last visited Jan. 2, 2018).

¹¹⁰ *M/WBE Certifications*, MO. OFFICE OF EQUAL OPPORTUNITY, https://oeo.mo.gov/oeo_certifications/ (last visited Jan. 2, 2018).

¹¹¹ *State Contracting*, N.J. BUS. PORTAL, <http://www.nj.gov/njbusiness/contracting/> (last visited Jan. 2, 2018).

¹¹² *MWBE Certification Eligibility Requirements*, EMPIRE STATE DEV., <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-eligibility-requirements> (last visited Jan. 6, 2018).

¹¹³ *HUB Certification*, N.C. DEP'T OF ADMIN., <https://ncadmin.nc.gov/businesses/hub/hub-certification> (last visited Jan. 6, 2018).

Ohio,¹¹⁴ Oregon,¹¹⁵ Rhode Island,¹¹⁶ South,¹¹⁷ West Virginia,¹¹⁸ and Wisconsin.¹¹⁹

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.¹²⁰

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.¹²¹
- 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.¹²²
- New York- persons of either Native American or Latin American origin (from countries and continents in the DBE definition), regardless of race.¹²³

¹¹⁴ *Business Certification: Minority Business Enterprise (MBE) Program*, OHIO DEP'T OF ADMIN. SERV.S, <http://www.das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Minority-Business-Enterprise-MBE-Program> (last visited Dec. 23, 2017).

¹¹⁵ *Minority and Women Business Enterprise Certification*, BUSINESS OR., <http://www.oregon4biz.com/How-We-Can-Help/COBID/MWBE/> (last visited Jan. 6, 2018).

¹¹⁶ MWE/WBE Directory Search, R.I. OFFICE OF DIVERSITY, EQUITY & OPPORTUNITY, <http://odeo.ri.gov/offices/mbe/wbe/wbe.php#section2> (Jan. 6, 2018).

¹¹⁷ *State Certification*, WASH. OFFICE OF MINORITY & WOMEN'S BUS. ENTER.S, <http://omwbe.wa.gov/certification/state-certification> (last viewed Jan. 7, 2018).

¹¹⁸ *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

¹¹⁹ *Supplier Diversity*, WIS. DEP'T OF ADMIN., <https://doa.wi.gov/Pages/DoingBusiness/SupplierDiversity.aspx> (last viewed Jan. 7, 2018).

¹²⁰ *Small Diverse Businesses*, PA. DEPARTMENT OF GEN. SERV.S, <http://www.dgs.pa.gov/Businesses/Small%20Diverse%20Business%20Program/Small-Diverse-Business-Verification/Pages/default.aspx> (last visited Dec. 23, 2017).

¹²¹ 45 MASS. CODE. REGS. 2.02(1) (2006); VA. CODE. ANN. §2.2-1604 (2017); 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 (Aug. 29, 2017); *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

¹²² N.J. ADMIN. CODE §17:46-1.2 (2009); N.C. GEN. STAT. § 143-128.4(b) (2007); OHIO ADMIN. CODE 123:2-15-01(A).

¹²³ *MWBE Certification Eligibility Requirements*, EMPIRE STATE DEV., <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-eligibility-requirements> (last visited Jan. 6, 2018).

States that exclude people of Portuguese culture or origin from their definition of Hispanic: California,¹²⁴ Illinois,¹²⁵ Rhode Island,¹²⁶ and Tennessee.¹²⁷

States that include Portuguese people separately from Hispanics:

- Connecticut- people having origins in the Iberian Peninsula, including Portugal, regardless of race.¹²⁸
- Massachusetts- people having Portuguese origin. Only included if specifically set forth in programs funded by state transportation bond statutes which include such people.¹²⁹
- Rhode Island- people of Portuguese, Brazilian, or other Portuguese culture or origin regardless of race.¹³⁰

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,¹³¹ Delaware (only the definition of Asian-Pacific American is more broadly defined),¹³² Florida¹³³ (includes people having origins in the Hawaiian Islands prior to 1778),¹³⁴ Illinois,¹³⁵ Maryland,¹³⁶ Massachusetts,¹³⁷ Mississippi,¹³⁸ New Jersey,¹³⁹ New York,¹⁴⁰ North

¹²⁴ PUB. UTIL. COMM'N OF CAL., GEN. ORDER 156 (May 30, 1988).

¹²⁵ 30 ILL. COMP. STAT. 575/2 (2010).

¹²⁶ 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. 2016).

¹²⁷ *Program Eligibility*, TENN. DEP'T OF GEN. SERV.S, <https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/governor-s-office-of-diversity-business-enterprise--godbe--/program-eligibility.html> (last viewed Jan. 7, 2018).

¹²⁸ Conn. Gen. Stat § 32-9n (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, VOB, SDVOB, IWDBE) AND SMALL BUSINESS (SBF) ENTERPRISES.

¹³³ FLA. STAT. § 288.703 (2017).

¹³⁴ In 1778, British explorer, Captain James Cook, became the first European to encounter the Hawaiian Islands. Gene Demby, *It Took Two Centuries, But the Native Hawaiian Population May be Bouncing Back*, NPR (Apr. 18, 2015, 6:03 AM), <https://www.npr.org/sections/codeswitch/2015/04/18/398578801/it-took-two-centuries-but-the-native-hawaii-ans-has-finally-bounced-back>.

¹³⁵ 30 ILL. COMP. STAT. 575/2.

¹³⁶ MD. CODE ANN., STATE FIN. & PROC. §14-301(2016).

¹³⁷ 45 MASS. CODE. REGS. 2.02(1).

¹³⁸ MISS. CODE ANN. § 57-69-3 (2010).

¹³⁹ N.J. ADMIN. CODE §17:46-1.2.

¹⁴⁰ *MWBE Certification Eligibility Requirements*, EMPIRE STATE DEV., <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-eligibility-requirements> (last visited Jan. 6, 2018).

Carolina,¹⁴¹ Ohio,¹⁴² Rhode Island,¹⁴³ Tennessee,¹⁴⁴ Virginia,¹⁴⁵ and West Virginia.¹⁴⁶

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.¹⁴⁷
- 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.¹⁴⁸

States that have unique definitions for African or Black Americans:

- Connecticut- excludes people of Hispanic origin.¹⁴⁹
- Delaware and Massachusetts- include people having origins in any of the original peoples of the Cape Verde Islands.¹⁵⁰
- Florida- may be of any cultural origin but must have origins in any of the black racial groups of the African Diaspora.¹⁵¹
- Massachusetts- includes African-Americans.¹⁵²
- Virginia and West Virginia- people having origins in any of the original peoples of Africa.¹⁵³

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

¹⁴¹ N.C. GEN. STAT. § 143-128.4(b).

¹⁴² OHIO ADMIN. CODE 123:2-15-01(A).

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.

¹⁴⁴ *Program Eligibility*, TENN. DEP'T OF GEN. SERV.S., <https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/governor-s-office-of-diversity-business-enterprise--godbe--/program-eligibility.html> (last viewed Jan. 7, 2018).

¹⁴⁵ VA. CODE. ANN. §2.2-1604.

¹⁴⁶ *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

¹⁴⁷ DEL. OFFICE OF SUPPLIER DIVERSITY, POLICY, ELIGIBILITY, APPLICATION, AND AFFIDAVIT REGARDING CERTIFICATION AS DIVERSE BUSINESS (MBE, WBE, VOB, SDVOB, IWDBE) AND SMALL BUSINESS (SBF) ENTERPRISES.

¹⁴⁸ Tex. Admin. Code §20.11 (2017).

¹⁴⁹ Conn. Gen. Stat § 32-9n.

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, VOB, SDVOB, IWDBE) AND SMALL BUSINESS (SBF) ENTERPRISES.

¹⁵¹ FLA. STAT. § 288.703.

¹⁵² 45 MASS. CODE. REGS. 2.02(1).

¹⁵³ VA. CODE. ANN. §2.2-1604; *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

- 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 1835¹⁵⁵ 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

¹⁵⁴ Conn. Gen. Stat § 32-9n; MD. CODE ANN., STATE FIN. & PROC. §14-301; VA. CODE. ANN. §2.2-1604; *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

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 give 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.

¹⁵⁸ MD. CODE ANN., STATE FIN. & PROC. §14-301; 45 MASS. CODE. REGS. 2.02(1); MISS. CODE ANN. § 57-69-3; N.J. ADMIN. CODE §17:46-1.2; N.C. GEN. STAT. § 143-128.4(b); VA. CODE. ANN. §2.2-1604; R.I. DEP’T OF ADMIN., RULES, REGULATIONS, PROCEDURES AND CRITERIA GOVERNING CERTIFICATION AND DECERTIFICATION OF MBE ENTERPRISES BY THE STATE OF RHODE ISLAND; *MWBE Certification Eligibility Requirements*, EMPIRE STATE DEV., <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-eligibility-requirements> (last visited Jan. 6, 2018); *Program Eligibility*, TENN. DEP’T OF GEN. SERV.S, <https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/governor-s-office-of-diversity-business-enterprise--godbe--/program-eligibility.html> (last viewed Jan. 7, 2018); *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

¹⁵⁹ MD. CODE ANN., STATE FIN. & PROC. §14-301.

¹⁶⁰ Tex. Admin. Code §20.11.

¹⁶¹ MASS. CODE. REGS. 2.02(1).

¹⁶² 25 IND. ADMIN. CODE 5-2-1 Sec. 1. (a)(14) (2003); MO. CODE REGS. ANN. Tit. 1, § 10-17.010(1)(F) (2016); WASH. ADMIN. CODE §362-20-030 (2003); *Disadvantaged Business Enterprise*, Montana Department of Transportation, <http://www.mdt.mt.gov/business/contracting/civil/dbe-interested.shtml> (last visited Dec. 24, 2017).

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.¹⁶³

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.¹⁶⁴ Virginia and West Virginia’s requirements apply to those claiming to be African American, Asian American, Hispanic American, or Native American.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷

¹⁶³ CONN. GEN. STAT § 32-9n; IOWA CODE § 15.102; *Office of Minority Business Enterprise*, ALA. DEP’T OF ECON. & CMTY. AFFAIRS, <http://adeca.alabama.gov/Divisions/ced/cdp/Pages/ombe.aspx> (last visited Jan. 2, 2018); *Minority and Women-Owned Business Enterprise*, ARK. ECON. DEV. COMM’N, <http://www.arkansasedc.com/divisions/minority-and-women-owned-business-enterprise> (last visited Dec. 24, 2017); *Application and Approval Process*, KY. MINORITY & WOMEN BUS. ENTER. CERTIFICATION PROGRAM, <https://mwbe.ky.gov/Pages/appapproval.aspx> (last visited Dec. 23, 2017); *Information for Vendors*, S.D. BUREAU OF ADMIN, <https://boa.sd.gov/divisions/procurement/vendors/> (last visited Dec. 23, 2017); *Eligibility Criteria*, WIS. DEP’T OF ADMIN., <https://doa.wi.gov/Pages/StateEmployees/EligibilityCriteria.aspx> (last viewed Jan. 7, 2018).

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

¹⁶⁵ VA. CODE ANN. §2.2-1604; *Minority Business Information*, W.VA. PURCHASING DIV., <http://www.state.wv.us/admin/purchase/minority.html> (last viewed Jan. 7, 2018).

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.¹⁶⁸

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

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

Parents' birth certificates: California, Delaware, and Ohio.¹⁷¹

2016); TEX. COMPTROLLER OF PUB. ACCOUNTS, HUB, CERTIFICATION CORPORATION (Mar. 2017); WIS. SUPPLIER DIVERSITY PROGRAM, WOMAN, MINORITY, DISABLED VETERAN-OWNED BUSINESS ENTERPRISE (WBE/DBE/DVB) DOCUMENT CHECKLIST; ARK. ECON. DEV. COMM'N, <http://www.arkansasedc.com/divisions/minority-and-women-owned-business-enterprise> (last visited Dec. 24, 2017); *Certification Required Documents*, FL. DEP'T OF MGMT. SERV.S, https://www.dms.myflorida.com/agency_administration/office_of_supplier_diversity_osd/get_certified/certification_required_documents (last viewed Jan. 7, 2018); *Required Documents for a Corporation seeking MBE-Only Certification*, MD. OFFICE OF MINORITY BUS. ENTER., <https://mbe.mdot.maryland.gov/apply/app-required.asp?type=corp&ctype=mbeonly> (last viewed Jan. 7, 2018); *Business Certification: Minority Business Enterprise (MBE) Program*, OHIO DEP'T OF ADMIN. SERV.S, <http://www.das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Minority-Business-Enterprise-MBE-Program> (last visited Dec. 23, 2017); *SWaM Forms and Governing Regulations*, VA. DEP'T OF SMALL BUS. & SUPPLIER DIVERSITY, <https://www.sbsd.virginia.gov/certification-division/swam/swam-forms-and-governing-regulations/> (last visited Dec. 23, 2017).

¹⁶⁸ ALA. DEP'T OF ECON. & CMTY. AFFAIRS, OFFICE OF MINORITY BUSINESS ENTERPRISE (OMBE) CERTIFICATION APPLICATION (Dec. 2015); Indianapolis Office of Minority & Women Bus. Dev., Certification Application (Mar. 2016); IOWA ECON. DEV., TARGETED SMALL BUSINESS CERTIFICATION APPLICATION (2017); N.J. DEP'T OF TREASURY, DIV. OF REVENUE, STATE OF N.J. MBE/WBE CERTIFICATION APPLICATION (2014); BUS. OR., OFFICE OF MINORITY, WOMEN AND EMERGING SMALL BUS., TIPS TO THE MBE/WBE CERTIFICATION PROCESS (2009); *Required Documents for a Corporation seeking MBE-Only Certification*, MD. OFFICE OF MINORITY BUS. ENTER., <https://mbe.mdot.maryland.gov/apply/app-required.asp?type=corp&ctype=mbeonly> (last viewed Jan. 7, 2018); *SWaM Forms and Governing Regulations*, VA. DEP'T OF SMALL BUS. & SUPPLIER DIVERSITY, <https://www.sbsd.virginia.gov/certification-division/swam/swam-forms-and-governing-regulations/> (last visited Dec. 23, 2017).

¹⁶⁹ ARK. ECON. DEV. COMM'N, <http://www.arkansasedc.com/divisions/minority-and-women-owned-business-enterprise> (last visited Dec. 24, 2017); *Certification Required Documents*, FL. DEP'T OF MGMT. SERV.S, https://www.dms.myflorida.com/agency_administration/office_of_supplier_diversity_osd/get_certified/certification_required_documents (last viewed Jan. 7, 2018); *Small Diverse Business Verification*, Pa. Dep't of Gen. Serv.s <http://www.dgs.pa.gov/Businesses/Small%20Diverse%20Business%20Program/Small-Diverse-Business-Verification/Pages/default.aspx> (last viewed Jan. 7, 2018).

¹⁷⁰ THE SUPPLIER CLEARINGHOUSE, VERIFICATION APPLICATION; IND. DEP'T OF ADMIN., DIV. OF SUPPLIER DIVERSITY, APPLICATION FOR CERTIFICATION.

¹⁷¹ THE SUPPLIER CLEARINGHOUSE, VERIFICATION APPLICATION; *Certifications*, STATE OF DEL., GOV'T SUPPORT SERV.S, OFFICE OF MGMT. & BUDGET, <https://gss.omb.delaware.gov/osd/certify.shtml> (last visited Dec. 23, 2017); OHIO DEP'T OF ADMIN. SERV.S, <http://www.das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Minority-Business-Enterprise-MBE-Program> (last visited Dec. 23, 2017).

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

¹⁷² MISS. DEV. AUTH., MINORITY & SMALL BUS. DEV. DIV., CERTIFICATION APPLICATION (Aug. 29, 2017); N.C. DEP'T OF ADMIN., OFFICE FOR HISTORICALLY UNDERUTILIZED BUS., STATEWIDE UNIFORM CERTIFICATION PROGRAM, DOCUMENTATION REQUIRED (Sept. 29, 2006); OHIO DEP'T OF ADMIN. SERV.S, <http://www.das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Minority-Business-Enterprise-MBE-Program> (last visited Dec. 23, 2017).

¹⁷³ *Certification Required Documents*, FL. DEP'T OF MGMT. SERV.S, https://www.dms.myflorida.com/agency_administration/office_of_supplier_diversity_osd/get_certified/certification_required_documents (last viewed Jan. 7, 2018); OHIO DEP'T OF ADMIN. SERV.S, <http://www.das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Minority-Business-Enterprise-MBE-Program> (last visited Dec. 23, 2017).

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

¹⁷⁵ *Certifications*, STATE OF DEL., GOV'T SUPPORT SERV.S, OFFICE OF MGMT. & BUDGET, <https://gss.omb.delaware.gov/osd/certify.shtml> (last visited Dec. 23, 2017).

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

¹⁷⁷ *Application and Approval Process*, KY. MINORITY & WOMEN BUS. ENTER. CERTIFICATION PROGRAM, <https://mwbe.ky.gov/Pages/appapproval.aspx> (last visited Dec. 23, 2017).

¹⁷⁸ *Information for Vendors*, S.D. BUREAU OF ADMIN, <https://boa.sd.gov/divisions/procurement/vendors/> (last visited Dec. 23, 2017).

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.”¹⁷⁹

States that require multiple types of documentation:

- Alabama:
 - ID card, tribal card, or naturalization papers, and
 - Picture ID (e.g. driver’s license).¹⁸⁰
- 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.¹⁸¹
- 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.¹⁸²
- Virginia:
 - Driver’s license and
 - Passport, permanent resident card, certificate of naturalization, or birth certificate.¹⁸³

National Minority Supplier Development Council

¹⁷⁹ Wash. Admin. Code §362-20-030 (2003).

¹⁸⁰ *Office of Minority Business Enterprise*, ALA. DEP’T OF ECON. & CMTY. AFFAIRS, <http://adeca.alabama.gov/Divisions/ced/cdp/Pages/ombe.aspx> (last visited Dec. 23, 2017).

¹⁸¹ *Indiana Firms: Certification Steps*, IND. DEP’T OF ADMIN., <http://www.in.gov/idoa/mwbe/2490.htm> (last visited Dec. 23, 2017).

¹⁸² *Business Certification: Minority Business Enterprise (MBE) Program*, OHIO DEP’T OF ADMIN. SERV.S, <http://www.das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Minority-Business-Enterprise-MBE-Program> (last visited Dec. 23, 2017).

¹⁸³ *SWaM Forms and Governing Regulations*, VA. DEP’T OF SMALL BUS. & SUPPLIER DIVERSITY, <https://www.sbsd.virginia.gov/certification-division/swam/swam-forms-and-governing-regulations/> (last visited Dec. 23, 2017).

Arkansas and Pennsylvania allow for applicants for MBE certification to only provide copies of certifying documents from the NMSDC.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.¹⁸⁵ Certification is conducted through the NMSDC Network and its 23 Regional Affiliates.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: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.

Black: A U.S. citizen who is of African descent.

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.

¹⁸⁴ *Minority and Women-Owned Business Enterprise*, ARK. ECON. DEV. COMM'N, <http://www.arkansasedc.com/divisions/minority-and-women-owned-business-enterprise> (last visited Dec. 24, 2017); *Small Diverse Businesses*, *supra* note 8.

¹⁸⁵ *About NMSDC*, NAT'L MINORITY SUPPLIER DIVERSITY COUNCIL, <http://www.nmsdc.org/about-nmsdc/> (last visited Dec. 24, 2017).

¹⁸⁶ *Our Network*, NAT'L MINORITY SUPPLIER DIVERSITY COUNCIL, <http://www.nmsdc.org/our-network/> (last visited Dec. 24, 2017).

¹⁸⁷ *MBE Certification*, NAT'L MINORITY SUPPLIER DIVERSITY COUNCIL, <http://www.nmsdc.org/mbes/mbc-certification/> (last visited Dec. 24, 2017).

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.¹⁸⁸ 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 exludes 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.¹⁸⁹

Minority group membership is established by "a combination of screenings, interviews, and site visits."¹⁹⁰ The NMSDC requires applicants to provide copies of driver's licenses and either birth certificates or U.S. passports.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.¹⁹² Applicants are permitted to submit letters of appeal if his or her application is denied.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.¹⁹⁴ Missouri and Washington's MBE programs, and Montana's DBE

¹⁸⁹ 49 C.F.R. § 26.5(2); *What is a MBE?*, NAT'L MINORITY SUPPLIER DIVERSITY COUNCIL, <http://www.nmsdc.org/mbes/what-is-an-mbe/> (last visited Dec. 25, 2017).

¹⁹⁰ *MBE Certification*, *supra* note 106.

¹⁹¹ *MBE Certification*, *supra* note 106.

¹⁹² 49 C.F.R. § 26.61(c).

¹⁹³ *MBE Certification*, *supra* note 106.

¹⁹⁴ 25 IND. ADMIN. CODE 5-2-1 Sec. 1. (a)(14); Wash. Admin. Code §362-20-045 (2004); *Disadvantaged Business Enterprise*, Montana Department of Transportation, <http://www.mdt.mt.gov/business/contracting/civil/dbe-interested.shtml> (last visited Dec. 24, 2017).

program, use the DBE definition but recognizes any additional groups that the SBA deems disadvantaged.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ 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

¹⁹⁵ MO. CODE REGS. ANN. Tit. 1, § 10-17.010(1)(F); WASH. ADMIN. CODE §362-20-030.

¹⁹⁶ 13 C.F.R. § 124.103(b)(1) (2009).

¹⁹⁷ 13 C.F.R. § 124.103(b)(3) (2009); 49 C.F.R. § 26.63(a)(1) (2012).

¹⁹⁸ *OHA Decisions*, SMALL BUS. ADMIN., <https://www.sba.gov/oha/decisions> (last visited Dec. 18, 2017).

prejudice or bias.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ Another judge ruled that, “no evidence of discrimination as a Hispanic American is needed for a member of that class.”²⁰² 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.²⁰³

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.²⁰⁴ 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.²⁰⁵

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.²⁰⁶ To further support her claim, she also stated that she grew up in a bilingual family, that 40% of her

¹⁹⁹ Columbia Gen., Inc., SBA No. MSBE-90-4-9-8 (Nov. 14, 1990).

²⁰⁰ DCS Elec., Inc., No. 399 MSBE-91-10-4-26 (May 8 1992).

²⁰¹ *Id.*

²⁰² Rothschild-Lynn Legal & Fin. Serv.s, No. 499 MSBE-94-10-13-46 (Apr. 12 1995).

²⁰³ Garza Telecomm., Inc., No. 620 MSBE-98-05-11-10 (Nov. 6, 1998).

²⁰⁴ Columbia Gen., Inc., SBA No. MSBE-90-4-9-8 (Nov. 14, 1990).

²⁰⁵ Timely Eng’g Soil Tests, LLC, SBA No. BDP-297 (Aug. 27, 2008).

²⁰⁶ DCS Elec., Inc., No. 399 MSBE-91-10-4-26 (May 8 1992).

family is bilingual, and that at least 10% of her family does not speak English.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.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.²⁰⁹ The applicant had previously been denied certification by another authority for being a European Hispanic.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.”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.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.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.”²¹⁴

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

In *Rothschild-Lynn Legal & Fin. Serv.s*, a Sephardic Jew from Spain was found to be eligible for certification as a Hispanic.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.²¹⁶ The applicant had also sought judicial notice that in addition to being Hispanic, he is also black and Jewish because he is Moorish.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.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.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.²²⁰ The judge chided the SBA for erroneously assuming that someone in the white racial category could not belong to the Hispanic ethnic category.²²¹ The judge concluded that, "whether an individual is white, black, or any other race bears no relationship to his or her ethnicity."²²² The judge ruled that the SBA's reliance on the birth certificates to determine whether the board members were Hispanic was erroneous.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.²²⁴

²¹⁵ *Rothschild-Lynn Legal & Fin. Serv.s*, No. 499 MSBE-94-10-13-46 (Apr. 12 1995).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Garza Telecomm., Inc.*, No. 620 MSBE-98-05-11-10 (Nov. 6, 1998).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

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.

²²⁵ *Malone v. Haley*, No. 88-339, slip op. (Mass. July 25, 1988). One scholar has considered the test set out in *Malone* to be a likely starting point for similar inquiries into racial fraud. Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 387 (2006).

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.²³⁰ 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.”²³¹ 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.²³² The Second Circuit affirmed the district court’s dismissal of the applicant’s action.²³³

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.²³⁴ The opinion also noted that the DOT concluded that this expansion would remain unchanged unless legislation directed it to act otherwise.²³⁵

In *Marinelli Constr. Corp. v. State*, an applicant for MBE certification appealed a lower court’s denial of his application.²³⁶ The lower court had found that the applicant was ineligible because he was of South American descent but not of Hispanic origin.²³⁷ The applicant’s father was born in Argentina but his father’s birth certificate described his grandparents as Italian.²³⁸

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.*

²³⁶ *Marinelli Constr. Corp. v. State*, 613 N.Y.S.2d 1000 (N.Y. App. Div. 1994).

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.²³⁹ The MBE certification program found that the applicant’s parents’ birthplace alone was not determinative of minority group membership.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.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.²⁴² The applicant was found to have satisfied the “descent” prong, but not the “origin” prong.²⁴³ The court came to this conclusion despite the fact that the applicant’s paternal ancestors had Spanish-sounding surnames: Denardes, Montazza, and Buchiles.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.²⁴⁵ The court affirmed the MBE certification program’s dismissal of the application.²⁴⁶

In *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.²⁴⁷ The Erie/Buffalo Joint Certification Committee brought this appeal from a lower court’s order reversing its denial of the certification application.²⁴⁸ The applicant claimed that he qualifies as Hispanic because his

²³⁹ *Id.* at 1001.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Major Concrete Constr., Inc. v. Erie*, 521 N.Y.S.2d 959 (NY. App. Div. 1987).

²⁴⁸ *Id.* at 959-60.

grandmother was 100% Mexican.²⁴⁹ 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.²⁵⁰ 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.²⁵¹

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.²⁵² The court found that the employee established a prima facie case for discrimination and denied the state’s motion for summary judgment.²⁵³ 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.²⁵⁴ The court found that, for summary judgment purposes, the employee established that he is Hispanic because he: (1) speaks Spanish fluently,

²⁴⁹ *Id.* at 960.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Lewis v. Del. Dep’t of Pub. Instruction*, 948 F. Supp. 352, 355 (D. Del. 1996).

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.²⁶³ 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.²⁶⁴ 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.²⁶⁵

“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.²⁶⁶ 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.²⁶⁷ The court also noted that the EEOC itself discourages employers from visually identifying individuals by race.²⁶⁸ For these reasons, the court decided that the EEOC’s evidence failed to satisfy any of the *Daubert* factors.²⁶⁹

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

²⁶³ *Equal Emp't Opportunity Comm'n v. Kaplan Higher Learning Educ. Corp.*, No. 1:10 CV 2882, 2013 WL 322116, at *3 (N.D. Ohio Jan. 28, 2013).

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.²⁷⁰ The court denied the company's motion for summary judgment with respect to the couple's claims for monetary damages.²⁷¹ 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.²⁷²

In *Doe v. State*, children of a deceased couple sought to change the race on their parents' birth certificates.²⁷³ The court found that the children failed to prove that their parents' racial designations (as "colored" as opposed to "white") were incorrect.²⁷⁴ 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.²⁷⁵ 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.²⁷⁶

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

²⁷⁰ *Smith v. Chrysler Fin. Co.*, No. Civ.A.00-CV-6003 DMC, 2004 WL 3201002, at *1 (D.N.J. Dec. 30, 2004).

²⁷¹ *Id.* at *3.

²⁷² *Id.*

²⁷³ *Doe v. State*, 479 So. 2d 369, 371 (La. Ct. App. 1985).

²⁷⁴ *Id.* at 372.

²⁷⁵ *Id.*

²⁷⁶ Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 801 (2015).

class under Title VII.²⁷⁷ An American Indian employee brought an employment discrimination action claiming disparate treatment because of his status as an Indian.²⁷⁸ 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.²⁷⁹

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.²⁸⁰ 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.²⁸¹ 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.²⁸² The court found that the employer's reasonable belief that the employee is Indian to be controlling.²⁸³

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.²⁸⁴ The court explained that objective appearance and employer perception are the basis for discrimination and the key factors relevant to

²⁷⁷ *Perkins v. Lake Cty. Dep't of Util.*, 860 F. Supp. 1262, 1263 (N.D. Ohio 1994).

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.²⁸⁵ The court expressed that whether the employee was 1% Indian or 100% Indian was therefore immaterial.²⁸⁶

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.²⁸⁷

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?)

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 desendants 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.