

2022

Declassified: Unintended Consequences of Racial Classifications

Michael Conklin

Angelo State University, michael.conklin@angelo.eduFollow this and additional works at: <https://ir.law.utk.edu/rgsj>Part of the [Law Commons](#)

Recommended Citation

Conklin, Michael (2022) "Declassified: Unintended Consequences of Racial Classifications," *Tennessee Journal of Race, Gender, & Social Justice*: Vol. 12: Iss. 2, Article 4.Available at: <https://ir.law.utk.edu/rgsj/vol12/iss2/4>

This Article is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Race, Gender, & Social Justice by an authorized editor. For more information, please visit <https://ir.law.utk.edu/rgsj>.

DECLASSIFIED: UNINTENDED CONSEQUENCES OF RACIAL CLASSIFICATIONS

*Michael Conklin**

“The government developed its classification scheme via a combination of amateur anthropology and sociology, interest group lobbying, incompetence, inertia, lack of public oversight, and happenstance.”¹

I. INTRODUCTION

Government classifications of race affect many significant aspects of American life, including college admissions, multi-million-dollar government contracts, Small Business Administration loans, and preferential treatment for some job openings. Classification as a Native American can even affect the government’s jurisdiction in criminal proceedings² and the removal of children from abusive homes,³ as well as one’s ability to hunt reindeer.⁴ In his 2022 book *Classified: The Untold Story of Racial Classification in America*, David E. Bernstein explains how the current governmental classifications of race developed “via a combination of amateur anthropology and sociology, interest group lobbying, incompetence, inertia, lack of public oversight, and happenstance.”⁵

This review explores the book’s coverage of arbitrary judicial determinations of racial classification and issues with racial classification in scientific research. This review also examines related issues not explicitly covered in the book, such as how racial classifications disproportionately benefit the wealthy, incentivize victimhood status, place racial groups in unhealthy competition against each other, and promote racist stereotypes through cognitive anchoring.

II. BACKGROUND

The arbitrary and unscientific manner in which current racial classifications in the United States are founded results in seemingly contradictory and arbitrary

* Powell Endowed Professor of Business Law, Angelo State University.

¹ DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA* xi (2022).

² *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

³ BERNSTEIN, *supra* note 1, at 134.

⁴ *Id.* at 122.

⁵ *Id.* at xi.

determinations regarding race. Referring to the inherent line-drawing of setting cutoffs for who can be included in a given race, a 1997 court explained how “repugnant” it is to deny U.S. citizens benefits solely because of “the side of a river, a mountain range, or a desert their ancestor decided to settle.”⁶ The Equal Employment Opportunity Commission permits employers to override the stated racial classification of an employee.⁷ The government may count Black freedmen in the racial category of Native Americans despite freedmen not being of Native American race.⁸ Some judicial determinations even dissect the classification, as in the case where a judge held that someone was Hispanic enough to receive a partial minority credit but not the full credit.⁹ Classifications often hinge on highly subjective assessments, such as whether someone looks to be of a certain race.¹⁰ Evidence presented by those seeking to be classified as a racial minority can be highly peculiar. For example, one person presented his subscription to *Ebony* magazine as evidence that he was Black.¹¹ Another presented his vacation home in Tijuana as evidence that he was Hispanic.¹² To add an additional layer of arbitrariness, these standards vary from state to state.¹³

III. RACIAL CLASSIFICATION IN SCIENTIFIC RESEARCH

Federal regulations established in 1977 explicitly warned that these government racial “classifications should not be interpreted as being scientific or anthropological in nature.”¹⁴ Despite this, the Food and Drug Administration and the National Institutes of Health require classification of medical research participants by race.¹⁵ This requirement is not only harmful to the administration of scientific research but also potentially harmful to society at large.

This additional onus on scientific research is a burden that may hinder scientific studies. This is particularly important in time-sensitive research, such as

⁶ *Id.* at 102; *Ritchey Produce Co., Inc. v. Ohio Dep’t of Admin. Servs.*, 707 N.E.2d 871, 878 (Ohio 1999).

⁷ BERNSTEIN, *supra* note 1, at xiii.

⁸ “Freedmen” are the descendants of Black slaves owned by Native Americans. Harmeet Kaur, *The Cherokee Nation Acknowledges That Descendants of People Once Enslaved by the Tribe Should Also Qualify as Cherokee*, CNN (Feb. 25, 2021, 8:53 PM), <https://www.cnn.com/2021/02/25/us/cherokee-nation-ruling-freedmen-citizenship-trnd/index.html>.

⁹ *In re Application of Kist Corp.*, 99 F.C.C.2d 201, 248 (1983).

¹⁰ BERNSTEIN, *supra* note 1, at 114.

¹¹ *Id.*

¹² *Id.* at 49.

¹³ *Id.* at 25.

¹⁴ Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19, 260 (May 4, 1978).

¹⁵ BERNSTEIN, *supra* note 1, at 141.

the testing of life-saving vaccines during a pandemic, because these requirements sometimes go beyond simply documenting the race of research subjects to requiring participation from minority groups.¹⁶

The insertion of race into scientific research may encourage the false belief among lay audiences that race plays a significant role in biology.¹⁷ This belief harms minorities in three ways. First, the clear implication is that research not conducted with strong minority representation is somehow less trustworthy to those minority communities.¹⁸ Such belief likely leads to increased distrust from minority communities in life-saving scientific advancements, most recently seen in COVID-19 vaccine hesitancy.¹⁹ Second, promoting the belief that race plays a significant role in biology is a welcome misconception to racial hate groups who promote unscientific notions of racial inferiority.²⁰ Finally, encouraging medical professionals to consider the race of their patients may exacerbate the pre-existing problem of racial discrimination in medical outcomes.²¹

IV. RACIAL CLASSIFICATIONS DISPROPORTIONATELY BENEFIT THE WEALTHY

Not discussed in the book is how the benefits of racial classifications are often disproportionately gained by the least disadvantaged in each group, despite racial classifications often being justified as a benefit to those who are most in need of help. For example, over 70% of Black and Latino students at Harvard come from wealthy backgrounds.²²

The wealthy can afford to conduct extensive genealogical research to find a distant relative that will qualify them as a minority.²³ The wealthy are also more

¹⁶ *NIH Policy and Guidelines on The Inclusion of Women and Minorities as Subjects in Clinical Research*, NAT'L INSTS. OF HEALTH, <https://grants.nih.gov/policy/inclusion/women-and-minorities/guidelines.htm> (last updated Dec. 6, 2017).

¹⁷ BERNSTEIN, *supra* note 1, at 150.

¹⁸ *Id.*

¹⁹ Michael Conklin, *Racial Preferences in COVID-19 Vaccination*, 5 HOW. HUM. & C. R. L. REV. 141, 147 (2021).

²⁰ *Id.* at 167.

²¹ Michael Conklin, *Legality of Explicit Racial Discrimination in the Distribution of Lifesaving COVID-19 Treatments*, 19 IND. HEALTH L. REV. 315, 325–26 (2022).

²² Jonathan Zimmerman, *How Affirmative Action Helps the Rich*, NEWSDAY (Mar. 18, 2019), <https://www.newsday.com/opinion/commentary/affirmative-action-college-admissions-scandal-s35274>.

²³ For example, some Americans are able to maintain their status as a Native American while being only 1/4,096 Native American. BERNSTEIN, *supra* note 1, at 130.

likely to have genealogical records passed down to help conduct this research.²⁴ Additionally, the wealthy tend to be more well connected, which further increases the likelihood of receiving benefits based on racial classifications. For example, to receive certain racial preferences in California, applicants are required to submit three affidavits from “recognized minority or ethnic community organizations.”²⁵ Furthermore, the standards set by the Bureau of Indian Affairs to obtain a Certified Degree of Indian Blood status may require extensive knowledge of genealogical documentation.²⁶

V. RACIAL CLASSIFICATIONS INCENTIVIZE VICTIMHOOD STATUS

Although never expressly discussed in the book, the nature in which racial classifications are used as a proxy for disadvantage is highly problematic. Such a belief could promote feelings of racial inferiority and therefore breed racial division. For example, the Small Business Administration (“SBA”) refers to people who are “presumptively disadvantaged.”²⁷ Minority-owned businesses, no matter how successful, are referred to as “disadvantaged” businesses according to the SBA.²⁸ However, in a 1992 case, the SBA refused to recognize a loan applicant as Hispanic because she did not present evidence that she had been discriminated against for being Hispanic.²⁹

That SBA case also demonstrates a problem with using racial classifications to distribute government benefits. Because there is a fixed amount of benefits available, the system creates an incentive structure which rewards the touting of disadvantage. Even more problematic is that a group can rise in the rankings of disadvantage not only by promoting its disadvantage but also by diminishing the hardship of competing groups. Just one example of this harmful phenomena is found in 1980s San Francisco. There, Chinese American businesspeople lobbied the local government to exclude Indian Americans from receiving racial preferences.³⁰ The Chinese Americans argued that Indian Americans should be excluded because they have not experienced racial discrimination.³¹ The competitive nature of acquiring government benefits by attempting to tout the relative hardships of one group over others can even sow division within a racial group. For example, studies show that some Black people who support slavery

²⁴ This prediction is based on how acquiring and maintaining detailed genealogical records is somewhat of a luxury that poor families are less likely to be afforded.

²⁵ BERNSTEIN, *supra* note 1, at 26.

²⁶ *Id.* at 125.

²⁷ 13 C.F.R. § 124.103 (2022).

²⁸ BERNSTEIN, *supra* note 1, at 48.

²⁹ *Id.* at ix.

³⁰ *Id.* at 94.

³¹ *Id.*

reparations for all Black people actually withhold support for slavery reparations if only given to Black people who can prove slave descent.³²

VI. ANCHORING

Never discussed in the book is how racial classifications may have the unintended consequence of perpetuating harmful stereotypes due to a cognitive bias called anchoring. Anchoring is a behavioral bias by which exposure to certain information disproportionately affects future perceptions.³³ Anchoring studies show that even subtle reminders of membership in a class can result in altered behavior. A 1999 study found that when Asian women were asked questions about being female and then given a math test, they performed significantly worse than the Asian women who were asked questions about their race before the math test.³⁴ This is because the first group was subconsciously anchored to negative stereotypes regarding women and math while the second group was subconsciously anchored to positive stereotypes regarding Asians and math.³⁵

It is easy to see how this same heuristic would apply to the various instances in which people are reminded of their race by being asked to report it. Examples include job applications, college applications, government housing forms, census forms, medical forms, and military enlistment forms. This is especially troubling when it comes to members of historically oppressed minority groups filling out forms for the government—the very entity that fostered the past oppression. The effect of reminding non-Hispanic whites of their race could be equally troubling, as it produces increased racial consciousness.³⁶ This increased racial consciousness has been shown to increase racial division by causing non-Hispanic whites to adopt a victim status, perceiving the political gains of minority groups as their own losses.³⁷ The divisiveness resulting from racial classifications is so significant that some multiethnic countries, such as France, refuse to use them.³⁸

³² Michael Conklin, *An Uphill Battle for Reparationists: A Quantitative Analysis of the Effectiveness of Slavery Reparations Rhetoric*, 10 COLUM. J. RACE & L. 33, 55 (2020). Note that this is not saying that, if given the binary choice, Black people would prefer reparations for all instead of just for those who can prove slave descent. Rather, this means that, if given the choice between reparations only for Black people who can prove slave descent or no reparations at all, they would choose the latter. *Id.*

³³ Michael Conklin, *Combating Arbitrary Jurisprudence by Addressing Anchoring Bias*, 97 WASH. U. L. REV. ONLINE 1 (2019).

³⁴ Margaret Shig, Todd L. Pittinsky & Nalini Ambady, *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCH. SCI. 80, 80–81 (1999).

³⁵ *Id.* at 82–83.

³⁶ BERNSTEIN, *supra* note 1, at 170–71.

³⁷ *Id.* at 171.

³⁸ *Id.* at 171–72.

Racial classifications elicit an additional problem related to anchoring. Racial classification determinations may be contingent upon whether the person in question acts in conformity with stereotypes regarding a given race.³⁹ This is troubling for a number of reasons. It promotes the racist notion that minority groups are a collective monolith rather than the truth, which is that there is great diversity within racial groups.⁴⁰ It promotes racist accusations that some people have a “lesser” racial identity because they are deemed to act in a way inconsistent with their race. America has an unfortunate history with such accusations.⁴¹ For instance, the racial slur “Uncle Tom” is used to describe Black people who are determined to not act Black.⁴² Highly accomplished Black figures such as Clarence Thomas,⁴³ Condoleezza Rice,⁴⁴ and Larry Elder⁴⁵ have been attacked as race traitors due to their political beliefs. President Joe Biden stated that a Black person who does not vote for him “ain’t Black.”⁴⁶

VII. CONCLUSION

Bernstein’s book provides a detailed accounting of the current racial classification system in America. Even readers who practice law will likely be surprised at the arbitrariness involved in creating the classifications and resulting arbitrariness in decisions regarding classification adjudications. While Bernstein does discuss some of the negative consequences of racial classifications, he leaves out some significant examples. These include problems that arise from how benefits based on race disproportionately go to the wealthy, incentivizing a victimization hierarchy, and anchoring.

³⁹ *Id.* at 3, 53.

⁴⁰ *Id.* at 22.

⁴¹ *Id.*

⁴² Clifford Thompson, *Dear White People: Stop Using the Term ‘Uncle Tom’*, WASH. POST (Nov. 16, 2018, 6:00 AM), https://www.washingtonpost.com/outlook/dear-white-people-stop-using-the-term-uncle-tom/2018/11/15/8a68e9c0-e84e-11e8-a939-9469f1166f9d_story.html.

⁴³ *Id.*

⁴⁴ Luther Campbell, *Condoleezza Rice Is an Uncle Tom*, MIA. NEW TIMES (Sept. 6, 2012), <https://www.miaminewtimes.com/news/condoleezza-rice-is-an-uncle-tom-6389021>.

⁴⁵ Ward Connerly, *The Racist Smear Campaign Against Larry Elder*, ORANGE CNTY. REG. (Aug. 29, 2021, 10:44 AM), <https://www.ocregister.com/2021/08/29/the-racist-smear-campaign-against-larry-elder/>.

⁴⁶ Christina Wilkie, *Biden Tells African American Radio Host: ‘You Ain’t Black’ if You Have Trouble Deciding Between Trump and Me*, CNBC (May 22, 2020, 3:50 PM), <https://www.cnbc.com/2020/05/22/biden-you-aint-black-if-you-have-trouble-deciding-between-me-or-trump.html>.

While the two upcoming Supreme Court cases on racial discrimination in college admissions⁴⁷ have the potential to significantly alter the use of racial classifications, the practice of classifying people by Directive No. 15 racial categories will continue. Bernstein concludes the book on a positive note, however. He describes the violent American history toward minority groups such as the Irish, Scandinavians, Catholics, and Mormons that has now largely dissipated.⁴⁸ Hopefully, Bernstein posits, “Americans also will one day look back on today’s racial divisions and accompanying tensions as a faintly ridiculous vestige of a less sophisticated, enlightened, and tolerant past.”⁴⁹ Government policies toward racial classification may play a significant role in achieving this goal.

⁴⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022).

⁴⁸ BERNSTEIN, *supra* note 1, at 184.

⁴⁹ *Id.*