Curbing Racial Classifications

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INTRODUCTION

Harvard's affirmative action woes have sparked a new national conversation. In that context, I would like to look upstream from affirmative action or other programs that assign benefits or burdens on the basis of race, to the very act of *classifying* by race.

In my view, an original sin—a root of the evil of today's diversity, equity, and inclusion regime—is the act of classifying all Americans on the basis of race and ethnicity and reporting the results. The administrative state plays a crucial role in spreading classification. As Professor David Bernstein has ably documented, the administrative state has transformed race into a comprehensive, bureaucratic system which entailed drawing somewhat arbitrary lines. By doing so, it made racial and ethnic sorting "legible" and thus able to be acted upon by both governmental and private decisionmakers. Unsurprisingly, just about every imaginable apparatus

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of administrative control imposes race reporting requirements across virtually every type of program.

Racial classification then enables and serves as a catalyst for the worst excesses of DEI. The act of classifying itself creates a cascade of responses both inside and outside of administrative agencies that inevitably lead to both more racial discrimination and less effective governance. Agency attention that should be devoted to legislatively authorized programs gets diverted into a meta-program, a "whole of government approach," devoted to racial consciousness. And without getting rid of the classifications that make up any DEI regime's foundation, even policymakers who wish to end racial discrimination in our government will be playing with a handicap.

This administrative regime wounds our nation. Racial classification, and the racial discrimination and dysfunctional governance it leaves in its wake, serves only to heighten the salience of race in our society. Race is an objectively minor attribute of the human person, and foregrounding it diminishes the inherent and equal dignity of every human being[1] and leaves our society degraded in the process. Elevating race in this way is not just bad, it's unlawful. Justice Harlan's *Plessy* dissent had it just right, in a line that deserves to be more famous: "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to *know* the race of those entitled to be protected in the enjoyment of such rights."[2]

This essay proceeds as follows. Section I discusses the administrative origins of our current racial classifications and how the administrative state now brings classifications with it into every domain. Section II considers how racial classification helped DEI take off in private companies and then explains why the same classifications within administrative agencies is equally toxic. Finally, Section III makes a call for action: We should take Justice Harlan's advice and start challenging racial classifications by administrative agencies on the ground that they violate the Constitution.

I. THE ADMINISTRATIVE STATE CREATED OUR CURRENT RACIAL CLASSIFICATION SYSTEM AND NOW REQUIRES IT

A. The creation of our modern racial classification scheme

We've always recognized racial differences. In certain times and places, racial classifications served as the basis for a *de jure* discrimination regime. But in mid-century America, a very specific, bureaucratized racial classification scheme took hold of society. Given how many times we get asked to check a box "White/Black/Hispanic/Asian," it's hard to imagine that these dividing lines have not always been so stark. But it's true. As Professor Bernstein has documented, our current racial classification system was largely created by administrative agencies,

1. *See* Galatians 3:28.
2. Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (emphasis added).

shielded from the democratic process.[3] These categories emerged from the federal government in the mid-twentieth century.

The government's apparent need to create a classification regime became clear after Presidents Truman, Eisenhower, and Kennedy issued executive orders prohibiting discrimination on the basis of race. But to maximize[4] the effect of these orders, the government needed crisp definitions of "race," to make the concept maximally legible and recordable. Consider an analogy inspired by *Seeing Like a State*:[5] medieval rulers struggled to tax peasants in villages where (as was common) no one had a true last name. How could a distant lord even know who was who, let alone how much tax they owed? So Middle Ages rulers forced last names upon the villagers.[6] The power to rule is augmented by the power to classify. And thus did the Civil Rights revolution want classifications, too.

Following those initial executive orders, various presidential committees began sketching the rough outlines of what became our modern conception of racial categories.[7] The most significant and lasting action came in 1977 when the Office of Management and Budget issued its guidance on the topic: "Race and Ethnic Standards for Federal Statistics and Administrative Reporting."[8]

The OMB classification scheme can only be described as arbitrary. As Professor Bernstein explains:

> A person qualifies as "Black" regardless of cultural identification so long as he or she has origins in a "black racial group[] of Africa." "Black" is thus defined racially . . . By contrast, the Directive defines "[w]hite[s]" by geographic origin, not race . . . . "Hispanic" is defined as someone of "Spanish culture or origin, regardless of race," basically creating an ethnic category based on a common linguistic heritage . . . . Members of other ethnic groups, including

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3. *See* David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 183 (2021).

4. I write "maximize" because laws against race discrimination are enforceable without standardized definitions of races or official designations of which human beings belong to which races. Disparate-treatment restrictions typically look to the subjective intent of the decision-maker (the employer, the landlord, etc.), and all the law needs to standardize is a *generic* definition of race, along the lines of

> common physical characteristics shared by a group of people and transmitted by their ancestors over time. Although the period dictionaries did not use the word "immutable" to describe such common characteristics, it is not much of a linguistic stretch to think that such characteristics are a matter of birth, and not culture.

Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1027 (11th Cir. 2016); *see also* Abdullahi v. Prada USA Corp., 520 F.3d 710, 712 (7th Cir. 2008) (Posner, J.) ("A racial group as the term is generally used in the United States today is a group having a common ancestry and distinct physical traits.")

5. JAMES C. SCOTT, SEEING LIKE A STATE (1999). *See also* Scott Alexander, *Book Review: Seeing Like a State*, SLATESTARCODEX.COM (Mar. 16, 2017), https://slatestarcodex.com/2017/03/16/book-review-seeing-like-a-state/[https://perma.cc/5NPR-9XQF].

6. A comparatively recent example was the Spanish imposition of surnames on Filipinos by colonial decree in 1849.

7. Bernstein, *supra* note 3, at 187–90.

8. *Id*. at 200.

> Arabs, Armenians, Greeks, and most Jews, are lumped into the "[w]hite" category.[9]

A majority of the Supreme Court concurs. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Court notes that these mid-century racial categories are "imprecise"—"plainly overbroad" in some contexts, but "underinclusive" in others.[10] And in Justice Gorsuch's view, these categories "have become only more incoherent with time," due to increases in interracial marriages and increased immigration from across the globe.[11]

B. Racial classification mandates

The administrative state now requires private parties to classify Americans on the basis of these arbitrary racial categories. These requirements extend across all kinds of programs. Perhaps most profoundly, since 1966 the Equal Employment Opportunity Commission (EEOC) has required that employers disclose the racial makeup of their employees. EEO-1 is a mandatory annual data collection that requires all private sector employers with one hundred or more employees, and federal contractors with fifty or more employees meeting certain criteria, to submit a form with their workforce demographic data.[12] EEO-1 requires covered employers to submit demographic data by job category, sex, and race or ethnicity.[13]

But racial classification requirements are not limited to the EEOC. The FCC has proposed reinstating a rule requiring all multichannel video programming distributors to report the demographic composition of their workforces.[14] The Department of Labor's Office of Federal Contract Compliance Programs requires federal contractors to document the race of their employees, applicants, and suppliers.[15] The SEC approved a Nasdaq rule requiring any corporation listing its stock on the Nasdaq stock exchange to classify its board members on the basis of race and gender and publicly disclose the classifications.[16] At the state level, Illinois and California have imposed similar classification requirements on all companies headquartered in their states.[17]

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9. *Id.* at 203–04.
10. 600 U.S. 181, 216 (2023).
11. *Id.* at 293 (Gorsuch, J., concurring).
12. *See* 29 C.F.R. § 1602.7.
13. *EEO Data Collections*, EEOC.GOV, https://www.eeoc.gov/data/eeo-data-collections [https://perma.cc/H4B5-6STD].
14. FCC, Media Bureau Announces Comment And Reply Comment Deadlines For Second FNPRM Seeking Comment On Reinstatement Of The FCC Form 395-A Data Collection (Apr. 3, 2024), https://docs.fcc.gov/public/attachments/DA-24-322A1.pdf [https://perma.cc/3W8D-ACAN].
15. 41 C.F.R. § 60-4.3(a) 7c, 7o, 14.
16. Alliance for Fair Board Recruitment v. SEC, 85 F.4th 226 (5th Cir. 2023).
17. All. for Fair Bd. Recruitment v. Weber, No. 2:21-CV-01951-JAM-AC, 2023 WL 3481146 (E.D. Cal. May 15, 2023); Illinois Public Act 101-0589.

Now permeating every area of American life, the prospect of disparate impact liability *requires* assessing outcomes on the basis of racial classification. From employment[18] to housing[19] to now even "environmental justice,"[20] significant sums of money turn on how outcomes vary across racial classifications.

Even more routine regulatory actions now require racial classification. Consider the Department of Labor's recent proposed rulemaking on updates to rules governing apprenticeships,[21] which I will use as a case study throughout this essay. This rule did not need to be written in a way that creates racialized controversy. The meat of it involves technical changes to the wage schedules of apprentices, an expansion of the industries eligible for apprenticeships, adjustments in the quality standards for apprenticeship programs, and the like.

Yet under the guise of promoting "evidence-based policymaking" and "equity," racial classification finds a way in.[22] The proposed rule requires that apprenticeship providers report on the demographic information of every participant (including their race), along with their progress on a host of metrics, to facilitate "equity" and "transparency."[23] Further, the proposed rule requires that apprenticeship sponsors "submit a written plan for the equitable recruitment and retention of apprentices."[24]

As shown below, requirements like these are not mere bureaucratic recordkeeping. They are a central cog in a powerful DEI machine, which grinds inexorably towards racial discrimination and the increased salience of race in our society.

II. RACIAL CLASSIFICATION CREATES MOMENTUM TOWARDS RACIAL DISCRIMINATION

Here's an analogy to illustrate the mechanics of how racial classification serves as the foundation for a broader race-focused regime. Many have noticed that corporate human resources departments impose pervasive racial discrimination through affirmative action hiring programs and other initiatives that push employees and executives alike to think about race all the time. How did this come to be? Racial classifications, according to one sociologist, played a key role.

A. A Private Sector Parable: How DEI Took Over Companies

This subsection draws on an important book by Harvard sociologist Frank Dobbin, *Inventing Equal Opportunity*.[25] The book tells the story of how the personnel management profession (or 'HR') seized power within companies to

18. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

19. Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015).

20. *See, e.g.*, Louisiana v. U.S. EPA, No. 2:23-cv-00693-JDC-KK (W.D. La. May 24, 2023) (challenging the EPA's use of Civil Rights Act to impose liability for "environmental racism" that causes a disparate impact).

21. *See National Apprenticeship System Enhancements*, 89 Fed. Reg. 3118 (proposed Jan. 17, 2024).

22. *Id.* at 3211–12.

23. *Id.* at 3292 (to be codified at 29 C.F.R. §§ 29.25(a)(1)(i), (c)(2)-(3); *id.* at 3295 (to be codified at 29 C.F.R. § 29.28(a)), *id.* at 3223.

24. *Id.* at 3280 (to be codified at 29 C.F.R. § 29.10(a)(4)).

25. FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009).

manage for CEOs the legal requirements that civil rights law placed upon them, creating the current regime of diversity management that pervades every major company.

The simplified version of the story goes like this. In 1971, *Griggs v. Duke Power Co.* expanded Title VII liability by defining discrimination to go beyond discriminatory treatment on account of race, to include actions that though not discriminatory on their face, cause a disparate impact against a racial group.[26] Corporate executives, for good reason, no longer felt like they understood their legal obligations.[27] Because Congress had not empowered any federal agency with comprehensive rulemaking authority, no agency could clarify matters by putting forward regulations that made clear what was legal and not. In the midst of all this uncertainty, corporate executives turned to the HR profession to develop programs to help them avoid liability.[28]

The HR profession deployed a handful of management techniques to the problem. Two bear specific mentioning for our purposes. First, they created new offices to deal with equal opportunity compliance.[29] Second, they began collecting data on progress towards integration and bias reduction, and instead of micromanaging specific hiring decisions or policies, they held managers individually accountable for driving diversification.[30]

On Dobbin's account, dramatic change followed. By creating constituencies inside the business who were committed to staying at the cutting edge of anti-discrimination practice (the equal opportunity office), the company's progress towards equity goals became unmoored from any specific legal requirements.[31] And by using racial classification data as a key part of performance evaluation, decisionmakers naturally made decisions on the basis of race and internalized a race-conscious attitude.[32]

All of this power emanating from HR also changed HR itself: The HR profession began to act, in Dobbin's terminology, like a "social movement."[33] Because directing the country's push towards increasing minority representation was now part of HR's mission, it attracted people committed to advancing that mission by whatever means necessary. And HR constantly looked to academics and activists "for new things to try" to further these new goals.[34]

This HR-led revolution proved even more powerful than law. In the 1980s, President Reagan appointed Clarence Thomas as head of the EEOC, and enforcement of discrimination law fell dramatically.[35] Yet, according to Dobbin, despite

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26. *See Griggs*, 401 U.S. at 430.
27. Dobbin, *supra* note 25, at 80.
28. *Id.* at 82-88.
29. *Id.* at 83-88.
30. *Id.* at 88-91.
31. *Id.* at 98, 131.
32. *Id.* at 88-91.
33. *Id.* at 9.
34. *Id.* at 11.
35. *Id.* at 136-37.

the dramatically reduced liability risk, little changed inside companies.[36] The HR techniques created their own momentum towards race-conscious approaches. Even a new presidential administration could not dial it back.

B. Public Sector Application: The DEI Infrastructure of Agencies

Our administrative agencies now contain a racial classification infrastructure similar to what exists in the corporate world. Almost every agency, for example, has an office that is positioned to advocate for a focus on race, usually dubbed a "Office for Civil Rights." But here I want to focus on the office dedicated to research, evaluation, and "evidence-based policymaking." At the Department of Labor, this office is known as the "Chief Evaluation Office."

Despite the innocuous branding, these offices are at the vanguard of internal stakeholders that relentlessly advocate for a race-conscious frame. Take a look at President Biden's memorandum issued to these offices at the start of his administration.[37] It directs agencies to "where possible, provide . . . data disaggregated by gender, race, ethnicity, age, income, and other demographic factors that support researchers in understanding the effects of policies and programs on equity and justice."[38] The evidence-based policymaking community seems to place a primary focus on collecting race-classified data and using it to drive policymakers to make decisions with changing racial balance at the front of mind. As a paper from the Urban Institute, an important think tank for the evidence-based policymaking movement, recently put it, "critical race theory . . . should be a core component of the investigation" into specific policies.[39] And the evidence-based policymaking community truly does function like a "movement." Agency staff, nonprofits, think tanks, and academics are in a constant interchange of ideas about the evaluation of federal programs, including the need to find new ways to promote "equity."

At every turn, the government ensures that race-classified data is collected, published, and used to hector both policymakers and private parties to change outcomes to ensure a different racial balance. This is, after all, what the government means when it says it wants to collect and publish data to promote "transparency" and "equity."

In short, the same ingredients that led to the DEI-ification of corporate America exist within federal agencies too.

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36. *Id*. at 138.

37. Memorandum On Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, 2001 Daily Comp. Pres. Doc. 96 (Jan. 27, 2021).

38. *Id*. § 5(d)(iv).

39. LAUDAN Y. ARON & MARTHA FEDOROWICZ, URBAN INSTITUTE, IMPROVING EVIDENCE BASED POLICYMAKING: A REVIEW 17 (2021), https://www.urban.org/sites/default/files/publication/104159/improving-evidence-based-policymaking-a-review.pdf [https://perma.cc/Q5R6-GEA5].

C. Case Study: The Lifecycle of a Racial Classification

Recall the recent proposed rulemaking from the Department of Labor concerning apprenticeships. How does a rule that starts as a seemingly benign racial classification—for demographic data purposes only—grow into racial discrimination and other DEI excesses?

Imagine what could happen after this rule goes into effect and the Department of Labor collects this data and these program proposals for increasing equity. First, the evaluation office publishes a report documenting that certain racial minorities are underrepresented among apprentices nationwide and calling for increased diversity.[40] Next, the Department of Labor organizes a conference for all operators of apprenticeship programs.[41] The Department of Labor hires consultants from the nonprofit sector to lecture on the need to increase representation from those groups.[42] Then, the Department of Labor hires a contractor from elsewhere in the nonprofit-consulting blob to review apprentice program plan submissions, and that contractor, informed by the latest thinking in the social program research community, suggests rewrites to the program's plan that will ensure an increase in specific races' participation or passage. Through it all, even a conservative executive at the Department of Labor under a Republican president will recognize that significant stakeholders within the department are entirely invested in seeing this effort succeed, and he may save his political capital for another fight.

Does anybody doubt that private apprenticeship program operators, after having gone through all that, will start engaging in racial discrimination through affirmative action to achieve a different racial balance in their program? Could anyone deny that explicit discrimination was encouraged by the government?

Racial classification, given the dynamics that currently prevail within government agencies, leads inexorably towards a world with more racial discrimination.

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40. *Cf.* Andrew Clarkwest et al., *Wage Growth Disparities by Gender and Race/Ethnicity Among Entrants to Mid-Level Occupations in the United States*, Prepared for the U.S. Department of Labor's Chief Evaluation Office (Dec. 2021), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/Wage%20Growth%20Disparities%20by%20Gender%20and%20RaceEthnicity%20Among%20Entrants%20to%20Mid-Level%20Occupations.pdf [https://perma.cc/JQS2-9JHW].

41. *Cf.* Dep't of Lab., *OFCCP Compliance Assistance for Construction Contractors*, (Apr. 10, 2024), https://www.dol.gov/agencies/ofccp/events/ofccp-compliance-assistance-construction-contractors-1 [https://perma.cc/Z77U-5WGS] ("The Compliance Assistance for Construction Contractors presentation guides federal construction contractors through their Equal Employment Opportunity and Affirmative Action obligations when working on federal construction projects. This presentation addresses construction contractor obligations found under the regulations implementing EO 11246, VEVRAA, and Section 503.").

42. *Cf.* Dep't of Lab., *Department of Labor Conference Report Fiscal Year 2022*, https://www.dol.gov/agencies/ocfo/2022-DOL-Conference-Report [https://perma.cc/3QWT-6UZ9] (describing "Workers' Voice Summit" event, which "[a]dvanc[es] diversity, equity, inclusion, and accessibility," through "partnerships with community-based organizations").

III. RACIAL CLASSIFICATION ITSELF MUST BE EXPELLED FROM OUR GOVERNMENT

In my view, the only way to stop the classify-report-pressure-discriminate cycle is cutting it off at the head. Just as in 1970s corporate America where private executives could not slow the momentum towards modern DEI, we cannot rely on executive leadership within agencies to tamp down any of this. These dynamics are too ingrained.

We need to bring legal challenges to racial classifications. When government rules require reporting of data classifying Americans by race and do so for the purpose of encouraging racial discrimination, it is state action that violates the Constitution.[43] Racial classification may be permissible when it is necessary to remedy past discrimination.[44] And perhaps there are settings where such classifications do not encourage racial discrimination. But when it comes to broad-based racial classifications of Americans led by our current administrative agencies, those actions are almost always unconstitutional.

If successful, legal challenges like this may give agency leaders the tool that 1970s corporate executives lacked: A clear statement of the law that gives them the leverage necessary to resist the pull of the activist mob.

CONCLUSION

The administrative state created racial classifications to enable it to regulate race relations. That may have had the intention of reducing racial discrimination, but today, racial classification serves only to accelerate discrimination. Instead of replacing one kind of evil race discrimination with another, we should finally follow the advice of Justice Harlan's dissent in *Plessy v. Ferguson* and "obliterate[] the race line from our systems of governments, national and state," so that we can "place[] our free institutions upon the broad and sure foundation of the equality of all men before the law."[45]

43. *See* W.H. Scott Const. Co. v. City of Jackson, Miss., 199 F.3d 206, 215 (5th Cir. 1999) ("[T]he relevant question is not whether a [law] requires the use of [protected classifications], but whether it authorizes or encourages them."). *See also* Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 711 (9th Cir. 1997).

44. *Cf.* Ricci v. DeStefano, 557 U.S. 557, 579 (2009).

45. 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).