ARTICLES

COLOR-CODED LAW: JUSTICE GORSUCH'S CONCURRENCE IN *STUDENTS FOR FAIR ADMISSIONS* AND 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

The Supreme Court case of *Students for Fair Admissions v. Harvard* received widespread attention for barring racial preferences in college admissions.[2] But little attention was given to Justice Gorsuch's criticism of the

---

[*] Assistant Professor of Business Law, Texas A&M University Central Texas; Lecturer, Texas A&M University School of Law.

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

[2] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Hoang Pham, et al., Students for Fair Admissions *FAQ*, STAN. L. SCH., Dec. 12, 2023, at 1, https://law.stanford.edu/2023/12/12/students-for-fair-admissions-v-harvard-faq-navigating-the-evolving-implications-of-the-courts-ruling/.

racial classification system used by colleges.[3] These classifications are pervasive throughout the government, affecting not only college admissions but also Small Business Administration (SBA) loans,[4] preferential treatment for certain employment positions,[5] the validity of congressional districts,[6] public health grants,[7] and multi-million-dollar government contracts[8]. Classifications such as "Native American" can even affect jurisdiction in criminal proceedings,[9] the ability to remove children from abusive homes,[10] and the ability to hunt reindeer.[11] Given the widespread relevance of racial classifications, it is surprising how unscientific and biased the classification process was. This Essay introduces the reader to the history behind these racial classifications and the various, harmful effects that followed. This will hopefully serve as a powerful catalyst to igniting discussion regarding the proper role of racial classifications in society.

Gorsuch's concurrence explicitly emphasizes the position that racial preferences in college admissions not only violate the Equal Protection Clause of the Fourteenth Amendment—as the majority notes—but also Title VI of the Civil Rights Act of 1964.[12] Gorsuch walks the reader through the plain language of Title VI and how the actions of Harvard College and the University of North Carolina (UNC) violate the statute.[13] The trial record emphatically demonstrates that Harvard and UNC "routinely discriminate on the basis of race when choosing new students . . . ."[14] However,

---

[3] *Students for Fair Admissions*, 600 U.S. at 287–310 (Gorsuch, J., concurring).

[4] *See Minority-Owned Businesses*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/business-guide/grow-your-business/minority-owned-businesses (last visited Sept. 18, 2025).

[5] *See* Michael Conklin, Jennifer Barger-Johnson & Marty Ludlum, *Brian Flores's Employment Discrimination Lawsuit Against the NFL: A Game Changer or Business As Usual?*, 29 JEFFREY S. MOORAD SPORTS L.J. 299, 312–14 (2022).

[6] *See Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-8-6-6/ALDE_00013453/ (last visited Sept. 18, 2025).

[7] *See Minority Research Grant Program*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/priorities/health-equity/grants-awards/minority-research (Jan. 17, 2025, 1:41 PM).

[8] *See* Judge Glock, *Ending Racial Favoritism in Government Contracting*, MANHATTAN INST. (Oct. 5, 2023), https://manhattan.institute/article/ending-racial-favoritism-in-government-contracting.

[9] McGirt v. Oklahoma, 591 U.S. 894, 898 (2020). (Note that Native American is an ethnicity and not a race. However, as this Article illustrates that distinction is largely illusory. For example, the racial classifications used on the Common Application for college admissions use race and ethnicity interchangeably. *See generally,* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 195–96 (2023); *Id.* at 348 (Sotomayor, J., dissenting); *Id.* at 399 (Jackson, J., dissenting).)

[10] BERNSTEIN, *supra* note 1, at 135.

[11] *Id.* at 122.

[12] *Students for Fair Admissions*, 600 U.S. at 287 (Gorsuch, J., concurring).

[13] *Id.* at 288–97.

[14] *Id.* at 288.

Harvard and UNC's argument that their good intentions serve as a defense for their discriminatory policies is not supported by the statute or case law. As explained by the Supreme Court in *International Union v. Johnson Controls, Inc.*, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[15] In 2025, this principle was further enshrined in *Ames v. Ohio Department of Youth Services*, where the Supreme Court unanimously held that the same protections and legal standards apply to members of majority groups as to members of minority groups in the employment law context.[16]

After establishing the impermissible nature of Harvard and UNC's racial preferences under both Title VI and the Equal Protection Clause of the Fourteenth Amendment, Gorsuch goes further in his concurrence to attack the very practice of racial classifications.[17] The categories provided in the Common Application for college admissions are as follows: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White.[18] Given the longstanding use and importance placed on these racial categories, and how they are used for various governmental purposes, one might assume that they were created based on objective, scientific measures. Such an assumption would be incorrect. These categories were invented by government bureaucrats in the 1970s acting "without any input from anthropologists, sociologists, ethnologists, or other experts."[19] To the credit of the commission that invented the categories, and of particular interest to college admissions, they explicitly acknowledged that these classifications "should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program."[20]

The subjective nature of the government's racial classification system is evident throughout the history of the system's creation. People from Iraq and Turkey are classified as "White."[21] The creation of the "Native Hawaiian or Other Pacific Islander" category was the result of political

---

[15] Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

[16] Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303, 310–11 (2025).

[17] *Students for Fair Admissions*, 600 U.S. at 288–97 (Gorsuch, J., concurring).

[18] *Id.* at 291.

[19] David E. Bernstein, *The Modern American Law of Race*, 94 S. Cal. L. Rev. 171, 196–202 (2021); *Students for Fair Admissions*, 600 U.S. at 291.

[20] Bernstein, *supra* note 19, at 200; Transfer of Responsibility for Certain Statistical Standards from OMB to Commerce, 43 Fed. Reg. 19260, 19269 (May 4, 1978).

[21] *Students for Fair Admissions*, 600 U.S. at 292.

lobbying.[22] All "Asian" people are swept into a single category despite encompassing 60% of the world's population.[23] And, of particular interest to the topic of college admissions, the Common Application used by both Harvard and UNC ask the applicant "how you identify yourself,"[24] which implies subjectivity.

The subjective and arbitrary nature of racial classifications is also illustrated in judicial precedent on the topic. Addressing the inherent arbitrariness of who is permitted to be classified as a given race, a 1997 court found it "repugnant" to deny a U.S. citizen benefits based solely on "the side of a river, a mountain range, or a desert their ancestor decided to settle."[25] The Equal Employment Opportunity Commission (EEOC) permits employers to override the stated racial classification of employees if the classification is "patently false."[26] Black freedmen are sometimes counted by the government as Native Americans, despite not being of the Native American race.[27] Classifications sometimes hinge on subjective determinations, such as whether one looks to be of a given race.[28] Given the level of subjectivity involved, the evidence presented to establish membership in a racial classification can be highly peculiar. For example, one person presented his subscription to *Ebony* magazine as evidence that he was Black.[29] Another person presented his vacation home in Tijuana as evidence that he was Hispanic.[30] A further layer of arbitrariness is added when one understands that these standards often vary from state to state.[31]

II.   PROBLEMS

Not surprisingly, this non-scientific, politically motivated classification system produces problems.[32] Gorsuch alludes to a few of these problems

---

[22] *Id.*

[23] *Id.* This overly broad classification is of particular importance to college admissions as a university may adopt the position that they have too many "Asians" despite having very few Indians and Pakistanis. *Id.*

[24] *Id.* at 291.

[25] Ritchey Produce Co. v. Ohio Dep't of Admin. Servs., 707 N.E.2d 871, 878 (Ohio 1999) (quoting the trial court decision).

[26] BERNSTEIN, *supra* note 1, at xiii.

[27] Harmeet Kaur, *The Cherokee Nation Acknowledges that Descendants of People Once Enslaved by the Tribe Should Also Qualify As Cherokee*, CNN, https://www.cnn.com/2021/02/25/us/cherokee-nation-ruling-freedmen-citizenship-trnd/index.html (Feb. 25, 2021, 8:53 PM) (discussing the decision of the Cherokee Nation Supreme Court that recognized the right to tribal citizenship of descendants of Black people enslaved by the tribe).

[28] BERNSTEIN, *supra* note 1, at 114.

[29] *Id.*

[30] *Id.* at 49.

[31] *Id.* at 25–26.

[32] *See id.* at 8.

in his concurrence,[33] but many more exist. Primarily, the significance placed on racial classifications does not serve the system's intent of advantaging those in need. For example, the majority of Harvard's Black and Latino students are from wealthy backgrounds.[34] The wealthy are also better able to conduct extensive genealogical research to find a distant relative that will qualify them as a minority.[35]

In addition to college admissions, the National Institutes of Health (NIH) and the Food and Drug Administration (FDA) require the classification of medical research participants by race.[36] Sometimes these requirements go beyond mere documentation and require actual participation from minority groups.[37] This practice risks perpetuating harmful stereotypes of significant genetic differences between the races and, consequently, harms minorities in three ways. First, this practice implies that if a scientific study did not have strong minority representation, the results are somehow less trustworthy.[38] This was demonstrated by vaccine hesitancy during the COVID-19 pandemic.[39] Second, promoting the notion of a strong link between biology and race is a notion welcomed by hate groups trying to promote racial inferiority.[40] Finally, encouraging medical professionals to consider race may exacerbate existing problems of racial health care disparities.[41]

Another problem with the government's use of racial classifications comes from its potential anchoring effect. "[Cognitive a]nchoring is a behavioral bias whereby exposure to certain information disproportionately

---

[33] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 287 (2023) (Gorsuch, J., concurring).

[34] Jonathan Zimmerman, *How Affirmative Action Helps the Rich*, NEWSDAY (Mar. 18, 2019, 6:00 AM), https://www.newsday.com/opinion/commentary/affirmative-action-college-admissions-scandal-s35274.

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

[36] *Id.* at 141.

[37] *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 (July 21, 2025).

[38] BERNSTEIN, *supra* note 1, at 150.

[39] Michael Conklin, *Racial Preferences in COVID-19 Vaccination: Legal and Practical Implications*, 5 HOW. HUM. & CIV. RTS. L. REV. 141, 147 (2021); S*ee also* Michael Conklin, *Legality of Racial Discrimination in the Distribution of Lifesaving COVID-19 Treatments*, 19 IND. HEALTH L. REV. 315, 315 (2022) ("[T]he Centers for Disease Control and Prevention ('CDC') and various medical experts advocated for explicit racial preferences in distribution [of the vaccine.]").

[40] *See* BERNSTEIN, *supra* note 1, at 150.

[41] Conklin, *Legality of Explicit Racial Discrimination*, *supra* note 39, at 325–26.

affects future perceptions."[42] Even subtle reminders of one's membership in a racial class can produce altered behavior. For example, a Harvard University study found that, when Asian women were anchored to their gender before taking a math test, they performed significantly worse than Asian women who were anchored to their Asian heritage prior to completing the same math test.[43]

This anchoring effect may produce adverse outcomes when government forms require individuals to identify their race, as it may reinforce negative stereotypes associated with that classification. [44] This increased racial consciousness, especially in marginalized groups, has been demonstrated to sow racial division.[45] For example, non-Hispanic whites may adopt a victim status, perceiving the political gains of other minority groups as their own losses.[46]

The manner in which the government uses racial classifications likely has the unintended consequence of establishing race as a universal proxy for disadvantage. For example, the SBA refers to certain racial groups as "presumptively disadvantaged."[47] According to the SBA, minority-owned businesses are referred to as "disadvantaged" businesses regardless of how profitable, how wealthy, or how well-connected the owner was at the inception of the business.[48] Additionally, the SBA refused to recognize someone as Hispanic because she did not present evidence that she had been discriminated against for being Hispanic.[49] Another unintended consequence harming those whom racial preference programs are intended to help is that it "needlessly tokenize[s]" them and creates skepticism regarding their accomplishments.[50]

---

[42] Michael Conklin, *Combating Arbitrary Jurisprudence by Addressing Anchoring Bias*, 97 WASH. UNIV. L. REV. ONLINE 1, 1 (2019); *see generally Anchoring (Cognitive Bias)*, EBSCO (2024), https://www.ebsco.com/research-starters/social-sciences-and-humanities/anchoring-cognitive-bias.

[43] Margaret Shig, Todd L. Pittinsky & Nalini Ambady, *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCH. SCI. 80, 80–81 (1999). 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. *Id.* at 82–83.

[44] *See generally id.*

[45] BERNSTEIN, *supra* note 1, at 171.

[46] *Id.*

[47] 13 C.F.R. § 124.103(b)(1) (2025).

[48] BERNSTEIN, *supra* note 1, at 48.

[49] *Id.* at ix.

[50] *See* Michael Conklin, *Good for the Goose but not for the Gander: Biden's Promise to Appoint a Black Female to the Supreme Court and Title VII Principles*, 9 TEX. A&M L. REV. ARGUENDO 35, 35 (2022) (quoting Christina Cauterucci, *How Biden's Vow to Name a Black Woman to the Supreme Court Backfired*, THE SLATE GROUP (Jan. 31, 2022, 6:07 PM), https://slate.com/news-and-politics/2022/01/biden-scotus-black-woman-nominee.html).

The reality that there is often only a limited number of racial preferences available produces an incentive structure whereby participants are encouraged to focus on their disadvantages.[51] Further problematic is the fact that one demographic group can rise in the hierarchy of disadvantage—not only by emphasizing its own disadvantages—but also by diminishing the disadvantages of other groups. For example, in the 1980s, Chinese-American businesspeople lobbied their local government to exclude Indian-Americans from receiving racial preferences.[52] They argued that Indian-Americans should be excluded because they have not experienced racial discrimination.[53] Perhaps even worse, this incentive structure may produce division *within* a given racial classification.[54] For example, studies show that many Black people who support slavery reparations for all Black people actually withhold support if reparations are limited only to those who can prove slave descent.[55] Additionally, incentivizing some people to emphasize their race while incentivizing others to hide their race implies the existence of a problematic hierarchy.[56]

Racial classification determinations are sometimes "contingent upon whether the person in question acts in conformity with [the] stereotypes [of] a given race."[57] This practice promotes racist notions, such as how members of a minority group are to be viewed not as autonomous individuals but rather as a collective monolith. This mindset perpetuates the harmful practice of deeming some individuals within a racial group as "lesser" simply because they are perceived as acting inconsistently with their racial identity. The United States of America has a troubled history with such accusations. For instance, the racial slur "Uncle Tom" is used to disparage Black individuals perceived as failing to conform to their

---

[51] *See* BERNSTEIN, *supra* note 1, at 91–92.

[52] *Id.* at 94.

[53] *Id.*

[54] *See, e.g.*, Michael Conklin, *An Uphill Battle for Reparationists: A Quantitative Analysis of the Effectiveness of Slavery Reparations Rhetoric*, 10 COLUM. J. OF RACE & L. 33, 53–54 (2020) (discussing how the matter of deciding who qualifies for slavery reparations might cause division within the African American community).

[55] *Id.* at 55 (2020). Note that this does not mean 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.*

[56] *See, e.g.*, Amy Qin, *Applying to College, and Trying to Appear 'Less Asian'*, N.Y. TIMES,, https://www.nytimes.com/2022/12/02/us/asian-american-college-applications.html (June 20, 2023) (showing that before the decision in *Students for Fair Admissions*, Asians were encouraged to hide their race in college applications).

[57] Michael Conklin, *Declassified: Unintended Consequences of Racial Classifications*, 12 TENN. J. OF RACE, GENDER & SOC. JUST. 81, 86 (2023) (citing BERNSTEIN, *supra* note 1, at 3–4, 53).

expected racial behavior.[58] Highly accomplished Black figures such as Thomas Sowell,[59] Former President Barack Obama,[60] Justice Clarence Thomas,[61] and Former Secretary of State Condoleezza Rice[62] have all been attacked for acting inconsistently with their racial identities. Similarly, President Joe Biden stated that a Black person who does not vote for him "ain't Black."[63] Consistent with this problematic mindset are court cases that adjudicate a person as "kind of" Hispanic, thus qualifying them to receive only partial, rather than full, minority credit.[64] Not only does this persistent policing of racial "authenticity" undermine individual autonomy, it also reinforces harmful stereotypes.

III.   CONCLUSION

The persistence of government-imposed racial classifications represents a troubling paradox for a nation committed to the ideal of equal treatment under the law. As Justice Gorsuch's concurrence highlights, these categories—created through bureaucratic happenstance and political compromise rather than scientific rigor—continue to shape numerous aspects of life. This is not to say that race is not a relevant factor in twenty-first century America. In fact, race plays a role in numerous aspects of life, including negotiated outcomes,[65] facial recognition technology,[66] hiring practices,[67]

---

[58] 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.

[59] Michelle Malkin, *The 'Uncle Tom' Card Is Dead*, NAT'L REV. (May 2, 2018, 10:43 AM), https://www.nationalreview.com/2018/05/black-republicans-uncle-tom-card-dead/.

[60] Randall Kennedy, *Why Obama's Black Critics Are Wrong*, CNN (Sept. 19, 2011, 7:28 AM), https://www.cnn.com/2011/09/19/opinion/kennedy-racial-critique-obama.

[61] Michael Conklin, *The Silent Justice Speaks: Clarence Thomas in His Own Words*, GA. L. REV. ONLINE (Aug. 5, 2020), https://georgialawreview.org/2020/08/05/the-silent-justice-speaks-clarence-thomas-in-his-own-words/.

[62] *See* 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.

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

[64] *See e.g., In re* Application of Kist Corp., 99 F.C.C.2d 201, 248 (1983).

[65] *See* Michael Conklin, *Negotiations in At-Risk Communities and Negotiating for Social Justice: A Review of Transformative Negotiation*, 17 NEGOT. & CONFLICT MGMT. RSCH. 349 (2025) (discussing blind spots in negotiation literature and the practical application of negotiation principles in at-risk communities).

[66] *See* Michael Conklin & Brian Elzweig, *A Face Only an Attorney Could Love: Madison Square Garden's Use of Facial Recognition Technology to Ban Lawyers with Pending Litigation*, 83 MD. L. REV. 578, 598–99 (2024).

[67] *See* Conklin et al., *supra* note 5, at 314, 317.

the use of artificial intelligence,[68] deceptive crime statistics,[69] perceptions of the tax code,[70] and law school rankings.[71]

Regardless of the significance of race, the government's rigid use of racial categories may result in more harm than benefit. It is because of this harm that some other multiethnic countries, such as France, refuse to use racial classifications.[72] As demonstrated in this Essay, the government's use of racial classifications risks perpetuating harmful stereotypes, increasing vaccine hesitancy, exacerbating both intra- and inter-racial conflict, and benefitting the privileged disproportionately. Gorsuch's concurrence in *Students for Fair Admissions* sheds light on this pressing issue.

This Essay will hopefully serve as a powerful catalyst to ignite discussion on this often-overlooked issue. There is evidence to suggest that racial salience peaked around 2021/2022 and has been on the decline since.[73] Perhaps we are inching closer to what one expert on racial classifications hoped is a time when Americans will "look back on today's racial divisions and accompanying tensions as a faintly ridiculous vestige of a less sophisticated, enlightened, and tolerant past."[74]

---

[68] *See* Michael Conklin & Jun Wu, *Justice by Algorithm: Are Artificial Intelligence Risk Assessment Tools Biased Against Minorities?*, 16 S.J. OF POL'Y & JUST. 2 (2022).

[69] *See* Michael Conklin, *The Inflation of Black Crime Statistics.: Age-Adjusted Rates Paint a More Accurate Picture*, 25 SOC. JUST. L. REV. 40, 46–47 (2020).

[70] *See* Michael Conklin, *Is the Tax Code Racist? A Critique of Dorothy Brown's* The Whiteness of Wealth, 21 APPALACHIAN J.L. 1, 1 (2022) (book review).

[71] *See* Michael Conklin, *Howard Law School, Race, and Peer Rankings: The Increasing Correlation Between Racial Salience and Preferential Rankings*, 59 WILLAMETTE L. REV. 189 (2023).

[72] BERNSTEIN, *supra* note 1, at 171–72.

[73] *See* Michael Conklin, *Peak Wokeness in Legal Scholarship: An Empirical Analysis of Recent Trends in Progressive Topics*, 61 CAL. W. L. REV. 381, 382 (2025).

[74] BERNSTEIN, *supra* note 1, at 184.