DEFINING RACE THROUGH LAW: ENFORCING THE SOCIAL NORMS OF POWER AND PRIVILEGE

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The problem of racial subordination and inequality is one that has saturated the national identity of the United States.[2] It is a problem that has resulted in a body of American jurisprudence that has not only fostered a racist status quo but has also acted as an influential anti-discrimination model around the world. This result is not surprising. The United States is one of the most racially diverse countries in the world, and the historical significance that racial classifications have played in U.S. social hierarchy has given American lawmakers centuries of experience regulating the interaction between races and ethnicities in ways influencing all areas of law and society. Other countries have much to learn from the centuries-long struggles played out in United States Constitutional interpretation and legislative initiatives. The Constitution of the United States often acts as the starting point for constitutional drafting in other countries. Yet some of the most successful anti-discrimination principles found in constitutional models outside the United States owe their effectiveness not to the ways in which they have emulated U.S. constitutionalism, but in the ways that they have departed from it.[3] There are many reasons for the departure, but one of the most important may be that the U.S. model has been built upon a foundation that on the one hand requires racial categories in order to determine citizenship rights,

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[2] MICHAEL OMI & HOWARD Winant, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 65 (2d ed. 1994) (claiming that "[f]or most of its existence both as European colony and as an independent nation, the U.S. was a *racial dictatorship*").

[3] See, for example, the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), and the South African Constitution, S. AFR. CONST. 1996, both of which go beyond the American approach by protecting people from discrimination based on sexual orientation, citizenship, etc., and have constitutional protections for Affirmative Action.

the right to vote and to participate in juries, for example, but on the other, cannot define these categories without resorting to methods that reinforce racial hierarchy. Consequently it has failed to provide a progressive and workable vision of race. If one focuses on the area of employment discrimination law, for example, one sees that race discrimination cases often require judges to judicially notice, and sometimes to determine the race of the complainant (and often the defendant) in order to decide whether a claim validly asserts racial discrimination.[4] Nonetheless, it is virtually impossible to use the law to define membership in a racial group in a way that has much meaning. This is not merely because the legal arena is not particularly well suited to this task, but also because the concept of race, so central to American identity, is paradoxically not amenable to definition. Yet the law itself requires such definition, which has resulted in a legal system designed to grant access to anti-discrimination protections and constitutional rights but has too often denied such access based on judicially defined racial group membership. As a consequence, we are left with a patchwork of often incoherent, inconsistent, degrading, and superficial classifications that have been developed in order to ascertain racial group membership so as to assign advantages and disadvantages that go along with such membership.[5] Race then becomes the tool to organize the distribution of power and resources and to define legal status.

While pondering the treatment of racial classifications through law, it is important to think about why it was thought to be necessary to define race through law in the first place. The answer provides us with a partial explanation as to why the American

[4] *See, e.g.*, Perkins v. Lake County Dep't of Utils., 860 F. Supp. 1262, 1265 (N.D. Ohio 1994) (the court was required to determine whether the plaintiff was an American Indian and therefore a member of a protected class under Title VII).

[5] *See, e.g.*, People v. Hall, 4 Cal. 399, 403–04 (1854) (holding that the words "Indian," "Negro," "Black," and "White" are generic terms designating race and that therefore Chinese and all other people not white are included in the prohibition from being Witnesses against Whites); United States v. Thind, 261 U.S. 204, 214–15 (1923) (holding that a "high caste Hindu" is not a white person as defined in the naturalization law); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding that a person of Arab ancestry may be protected from racial discrimination under 42 U.S.C. § 1981 governing equal rights under law); Ramos v. Flagship Int'l, Inc., 612 F. Supp. 148, 150–51 (E.D.N.Y. 1985) (determining whether a group of non-white Hispanics or Hispanics of Cuban national origin constitute groups readily distinguishable from a group of persons commonly recognized as white); *Perkins*, 860 F. Supp at 1277–78 (holding that plaintiff is entitled to protection under Title VII if the employer reasonably believed that he was a member of a protected class regardless of his weak claim of American Indian ancestry).

approach to race and race discrimination is fraught. Though there have been persistent attempts to scientifically classify people into races, the motivation for doing so is suspect.[6] Nonetheless, American courts and law makers have looked to science to inform legal definitions of race. However, because race is virtually impossible to define with any scientific certainty or social consensus, the way in which the courts have relied on racial classifications is inherently problematic.[7] Whatever the explanation, it is clear that in the United States, racial classifications were in some measure of great importance to the founding of the nation and to the identity of the American people. Insinuating themselves between the lines and in the margins of the American Constitution[8] were conceptions of race and social, economic and political worth. These conceptions were so important that the very structure of the United States government depended on a particular understanding of race that promoted the interests of whites at the expense of African-Americans.[9] The Constitution itself is a document that in some measure was drafted by perpetuating the existing racial code. It represents a compromise that defined what the United States was to be and who would profit in its governance. Therefore, the simple answer to the question of why we divide people into races must include the historical rationale of facilitating the distribution of privileges to those who by "nature" or by "divine" ordinance were entitled to full membership in the human race and those who were to be property or commodities to be consumed by the privileged classes. The

[6] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005) ("Racial classifications raise special fears that they are motivated by an invidious purpose."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Absent . . . judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or . . . racial politics.").

[7] *See, e.g.*, Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 ORE. L. REV. 261, 323–26 (1997) (discussing the Supreme Court's difficulty in defining race).

[8] *See* U.S. CONST. art. I, § 2, cl. 3 (determining the apportionment of representatives to the House of Representatives and taxes by the numbers of "free Persons . . . and excluding Indians not taxed, three fifths of all other Persons," understood to refer to slaves who were not counted as whole persons); U.S. CONST. art. IV, § 2, cl. 3 (requiring a slave who escapes to a different state to be returned upon a claim by his or her master). *See also* Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 17–18 (1976) (discussing the "slavery compromise").

[9] *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 32–35 (5th ed. 2004) (explaining the various economic and political reasons that the Founding Fathers were willing to sacrifice the rights of Blacks in order to establish the framework for a new federal government).

consequent classification of people into racial groups has had profound consequences for the American people and for the American legal system.

Hence, from the founding of the nation, our legal system has played a central role in determining racial membership in order to distribute or manage privilege. The courts have been adept at developing categories that sheltered the white race from the onslaught of those who might lay claim to whiteness.[10] Several early cases demonstrate the ease with which the courts were able to do this. For example, in *People v. Hall*, the Supreme Court of California held that the words "Indian," "Negro," "Black," and "White" were generic terms designating race and therefore "Chinese" and all other people not white were prohibited from being witnesses against whites in the courts of law.[11] In *United States v. Thind,* the term "white persons" in the Naturalization Act was held not to include a "high caste Hindu," who was included in the anthropological definition of Caucasian, but nonetheless, would not be considered a white person in the common sense understanding of the term.[12] The Naturalization Act had stated that it "shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."[13] The *Thind* Court stated that "[i]f the applicant is a white person within the meaning of this section, he is entitled to naturalization; otherwise not."[14] In determining the legislative intent of the Naturalization Act the Court held, "[t]he intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified."[15] The words of the statute, the Court confirmed, imply a racial test: "[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound

[10] For a discussion of the significance of whiteness in perpetuating racial hierarchy, *see* CRITICAL WHITE STUDIES: LOOKING BEYOND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2d ed. 2006); Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1 (1995); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

[11] *Hall*, 4 Cal. at 404.

[12] *Thind*, 261 U.S. at 214.

[13] *Id.* at 207

[14] *Id.*

[15] *Id.*

differences between them today."[16] Interestingly, the Court did not rely on a scientific definition of race because the science at the time would have resulted in the placement of high caste Hindus into the category Caucasian.[17] That result would have been unacceptable to the common man, whose unscientific impressions about the race of the plaintiff would be determinative.[18]

Although it is true that the courts today do not engage in the crude and explicit exercise of categorizing groups of people in order to protect white privilege, it is clear that race privilege continues to exist, is largely invisible to critical examination, and is likely to go unchallenged in the courts of the United States.[19] Though popular culture has made great strides in drawing attention to what it means to be white and the privileges associated with whiteness,[20] the legal system has not incorporated this enhanced understanding of race privilege in any measurable way. Consequently, the legal system sees race discrimination and inequality through a stale legal prism that requires courts to determine the race of the parties in order to determine the appropriate role that race has played or ought to play in a given case. But, at the same time, working within a particular antidiscrimination framework, courts are doctrinally ill-equipped to consider historical and contextual influences that assign social meaning to racial classifications. The ways in which race privilege and disadvantage are reflected in our ordinary system of government does not fit nicely into our current

[16] *Id.* at 209.

[17] *Id.* at 210.

[18] *Id.* at 210, 214–15.

[19] *See, e.g.*, Maurice R. Dyson, *When Government is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in* PICS v. Seattle School District, 40 U. TOL. L. REV. 145, 146–47 (2008); Barbara J. Flagg, *"Was Blind but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent,* 91 MICH. L. REV. 953, 958–59; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 3 (1991); Harris, *supra* note 10, at 1713–15; Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply To Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 233–35 (1993); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 844–45; Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1153–55 (2008); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 37 (1990); L. Mun Wong, *Di(s)-secting and Dis(s)-closing "Whiteness": Two Tales About Psychology*, 4 FEMINISM & PSYCHOL. 133, 134 (1994).

[20] *See, e.g.*, Stuff White People Like, http://stuffwhitepeoplelike.com (last visited Nov. 1, 2009); *see also* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, *in* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* at 33 (Wellesley College Center for Research on Women, Working Paper No. 189, 1988), *available at* http://www.case.edu/president/aaction/UnpackingTheKnapsack.pdf.

legal models.[21] Consequently, structural or systemic racial subordination fall well outside the structure of legal redress that was designed to address individual cases involving an identifiable wrongdoer and an identifiable person who has been wronged. This tension within antidiscrimination law constitutes a significant weakness, but also explains why too strong a reliance on American antidiscrimination law to resolve systemic racism is ill advised.

[21] *See* Christopher A. Bracey, *The* Cul de Sac *of Race Preference Discourse*, 72 S. CAL. L. REV. 1231, 1310 (2006); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3–4 (1994).