

Race, Markets and Patents

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This paper examines the use of racial categories in patent law. Motivated by the grant in 2002 of a patent on a pharmaceutical compound to be used with "black patients," the paper documents the use of racial categories, specifically the categories "Negro" and "African-American" in granted patents from 1790 to the present. The research uncovered about 1000 instances of the use of these categories in published patents. Almost all of these instances, except for about three, were in the specifications rather than the claims. The analytical portion of the paper examines, using the economic critique of color blindness developed by Professor Glenn Loury, the implications of using racial categories in patent law. The paper analyzes possible issues of patentability raised by the use of these categories as well as Constitutional issues. The main conclusion is that use of racial categories in specifications is acceptable while use in the claims should not be permitted, either as not meeting the requirements of patentability or as violating the Constitution.