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The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals under Title VII

Ken Nakasu Davison†

I. INTRODUCTION

One observer writes, "Race may be America's single most confounding problem, but the confounding problem about race is that few people seem to know what race is."¹ This remark poignantly captures the irony of race—that is, race still remains an enigma even though we live in a society in which race determines so much of our lives. Indeed, notions of race, to a large extent, govern our public and private identities by associating certain characteristics with socially constructed racial classes. Some characteristics that identify and associate a person with a racial group are susceptible to change and are viewed by the law as the result of mutable social forces. Under Title VII, some courts have adopted a mutability requirement under which employers may permissibly discriminate based upon "socially-driven" characteristics, even if they are a part of a person's racial, sexual or ethnic identity. Social characteristics such as one's language, manner of speech, style of hair, attire and choice of friends are all factors that are commonly viewed as indicators of a person's racial ancestry, but remain unprotected under a mutability analysis.

Foremost amongst indicators of race is phenotype, which is defined as the interaction of an individual's gene structure with his or her surroundings to create physical appearance.² Phenotype indicators, such as hair texture, facial features, and skin color, are assumed to be based on

† J.D., School of Law, University of California, Berkeley School of Law (Boalt Hall), 2005. I am greatly obliged to Professor Angela Harris and the members of the journal writing seminar for their insightful comments and suggestions. I am also obliged to the tireless of work of the ALJ Board, Sara Adibisedeh and her entire entire editing team.


² THE AMERICAN HERITAGE DICTIONARY 1318 (4th ed. 2000) (providing two useful definitions of phenotype for the purposes of this Comment. Phenotype characteristics are "[t]he observable physical or biochemical characteristics of an organism, as determined by both genetic makeup and environment." The dictionary alternatively defines phenotype as "[t]he expression of a specific trait, such as stature or blood type, based on genetic and environmental influences." The dictionary makes clear that phenotype characteristics serve many other useful purposes aside from providing clues about racial identity. However, this Comment will focus upon the use of phenotype in determining race.)
biology and to provide an accurate indication of a person’s racial ancestry. However, phenotype is often an inaccurate means of determining racial identity and can lead to racial misclassification, as well as ultimately result in misapplied prejudices. Through an exploration of the phenomenon of racial misclassification of mixed-race individuals, this Comment attempts to expand a growing critique of the mutability requirement. Namely, through the application of Title VII to the United States’ emerging mixed-race population, this Comment challenges a major underpinning of the mutability requirement—that race is an immutable trait. The occurrence of racial miscategorization demonstrates that a more sensible and administratively straightforward approach entails not examining the race of the discriminatee, but instead whether the discriminator intended to impermissibly discriminate against the employee based upon a protected category.

The notion that humans can be divided neatly into distinct racial groups based upon identifiable genetic differences, and the corollary assumption that phenotype and other attributes are accurate racial indicators, has evolved into an unspoken and unchallenged assumption that directs our way of seeing the world. The result of defining race in purely genetic terms, and what ultimately makes race so difficult to conceptualize, is that the complex social constructions of race are ignored as race takes on the appearance of immutability. Resisting this gravitational-like pull to accept race as an immutable trait is essential to unraveling and ultimately gaining a full understanding of the enigma that is race. Without undermining the important role that race currently plays in constructing minority identities and communities, this Comment analyzes the implications that mixed-race populations play in debunking the myth that racism in the employment context is best remedied through conceptualizing race as immutable. Through their unique interactions with traditional notions of race, mixed-race individuals demonstrate conclusively that conceptualizing race in rigid, archaic categories fails to describe properly how race functions in our society and can potentially lead to the undermining and obscuring of individual rights. Specifically, the high frequency at which multiracial individuals are racially miscategorized demonstrates that it is problematic to conceptualize race as an immutable trait in the context of the law. The purpose of this Comment, however, is not to define race, but to demonstrate how the mixed-race experience contributes to a deeper understanding of how Title VII should be applied to racial discrimination in the employment sector.

Americans commonly use racial indicators to determine another person’s racial background. Indeed, almost everyone at some point in his or her life has made assumptions about another person’s racial background.

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based upon physical appearance or other commonly accepted indicators. However, our collective criteria for determining race are neither as simple nor accurate as we imagine them to be. Although the very social underpinnings of race are founded upon the notion that racial groups can be easily identified by distinct physical differences, the emergence of a mixed-race population in the United States and scientific studies have demonstrated that visual observation is often an inaccurate means of identifying racial background. These realizations, coupled with an understanding that race is in part a social construct, force us to examine whether race is as immutable as it is purported to be. In our contemporary jurisprudence, it is important to dispel the deep-rooted assumption that race is solely defined by biological separations of distinct racial groups. Conceiving of race as a social construct through which we generalize personal characteristics from external indicators will lead to a more effective means to deal with racial discrimination.

The assumption that race is an immutable characteristic is dangerously embedded in contemporary legal constructions of race. Nowhere is this more evident than in the way that some courts have interpreted Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace based upon race, color, religion, sex or national origin. Passed amidst the emerging civil rights movement, Title VII offered a progressive solution to the problem of workplace discrimination. Its unambiguous attempt to end illicit discrimination in employment is evidenced by its clear mandate prohibiting a wide scope of discriminatory practices. Not only did

4. There are a variety of explanations for why people may attempt to determine race. Although the inquiry may be driven by the improper purpose of racial animosity and prejudice, valid but controversial reasons for this type of categorization exist. In some cases, members of a minority group may desire to determine another’s race for inclusionary, rather than exclusionary purpose. To some extent, inclusion within a racial group automatically gives rise to shared experiences and thus, the inquiry about someone else’s race may be driven by this desire to communicate this shared experience.

5. I use the term “collective criteria” in recognition of the extent to which phenotype and similar racial criteria have become an unquestioned means of determining and exhibiting racial identity among all segments of society.

6. I use the terms “mixed-race” and “multi-racial” interchangeably. I feel that the use of “mixed-race” best captures the unique and complex identity of this distinct group of individuals. As a “mixed-race” individual myself, I feel that it not only demonstrates that we are comprised of more than one race, but it also shows that our individual identities are not simply the sum of our races, but combine through a complex formula to create a unique expression. However, throughout the Note I adopt both, since the term “multi-racial” is also often used to describe this segment of the population as a collective.

7. 42 U.S.C. §§ 2000e-2(a)(1) (2004) (discussing only employee suits under the Civil Rights Act—although it is important to recognize other federal and state statutes exist which may provide avenues of relief for discrimination claims).

8. § 2000e-2(a):
It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex or national origin.
the legislature prohibit discrimination in hiring practices, it also made illegal more subtle means of discriminating between employees, such as through disparity in compensation, terms, conditions and privileges of employment.9

Although Title VII clearly prohibits certain forms of discrimination, courts have wrestled with the application of its statutory directive to prohibit discrimination. Title VII does not forbid all forms of discrimination by employers, as Congress intended to provide businesses with a certain level of discretion to make decisions. Thus, businesses retain a sphere of permissible favoritism and inequity under the statute. Courts have faced considerable difficulty in distinguishing between discriminatory workplace policies, that unlawfully affect one of Title VII's protected classes, and those workplace policies that are made for bona fide business reasons.10 One example of a workplace policy that arguably falls within this category are employee rules regulating the hair length of male employees. No federal court has ever held that an employer's restrictions on male employees' hair length represents sex-based discrimination, despite the fact that the policies often do not apply to women.11

To discern between permissible and impermissible forms of discrimination, some courts have adopted a line of reasoning which separates employment practices into two distinct categories: those that involve immutable traits and those that involve mutable traits.12 What distinguishes these two categories is the ease with which they can be altered. The immutability requirement assumes that "if a workplace policy burdens a mutable trait, it will normally not be considered to have an adverse impact, as the law assumes that one can easily choose to comply with such a policy or that any difficulty in doing so will be de minimis."13 While immutable traits, such as race and sex, are intrinsic characteristics, mutable traits, such as hair length and language, can be altered with little effort.14 A large number of courts have held that Title VII simply does not prohibit discrimination linked to mutable characteristics—the immutability requirement is still alive today.15

A small body of literature has emerged challenging the notion that immutability is the best means of determining when an employer has impermissibly discriminated based upon race, sex, and other protected

9. Id.
11. Id. (citing Willingham v. Macon Tel. Publ' Co., 507 F.2d 1084 (5th Cir. 1975) (en banc)).
14. Id. at 2207.
15. See generally Gonzales, supra note 13 (outlining various ways in which courts still uphold the immutability requirement).
This collection of critiques is premised upon the shared recognition that the court-created immutable/mutable trait distinction not only fails to address adequately race and sex discrimination as mandated by Title VII, but also serves to divide these victimized communities. This Comment adds to the critique by challenging a major underpinning of the mutability requirement—that race is an immutable trait. Namely, through the application of Title VII to the United States’ emerging mixed-race population, this Comment demonstrates how race—as applied in the employment and social context—can be mutable under Title VII. This unique collection of individuals, whose identities vary greatly and transcend traditional intersectionalities of race, gender, and ethnicity, force the legal community to re-consider how race should be conceptualized under Title VII.

Part II of the Comment examines the origins and evolution of the immutability requirement in the context of Title VII. Part III sets forth the major criticisms of the immutable/mutable distinction. Furthermore, this portion of the Comment builds upon prior discussions of the mutability requirement by expanding the framework to include an attack on race as an immutable characteristic. The Comment questions the theoretical underpinnings of the immutability requirement by demonstrating that race, which provides one of the conceptual foundations to immutability, is in many respects a mutable characteristic. Included is an examination of the movement away from a conception of race as a biological fact towards an understanding of race as a social construct. Part IV incorporates an analysis of mixed-race individuals under Title VII and attempts to demonstrate the inherent limitations and dangers of buying into the immutability requirement. Through examining the trend of racial miscategorization, Part IV explains how an inquiry that focuses on the intent of the discriminator, rather than whether the subject at issue falls into the required immutable category, best carries out Title VII’s mandate to prevent the harmful effects of discrimination.

II. TITLE VII AND THE MUTABLE TRAITS CASES

A. Race as an Immutable Characteristic

Title VII prohibits workplace discrimination premised upon race, color, religion, sex or national origin. The statute applies to private and public employers, as well as labor unions and employment agencies. Although Title VII initially only afforded protection to employees in the private sector, Congress expanded Title VII's coverage to include public

18. § 2000e-2(b)-(d).
employees in 1972. A plaintiff can bring three different types of discrimination claims under Title VII: disparate treatment, disparate impact, and reasonable accommodation. This Comment focuses only on individual disparate treatment claims because these claims entail examining the treatment of similarly situated persons.

Disparate treatment claims provide standing for two distinct groups of plaintiffs: those who are not hired because of discrimination and those who are discriminated against while employed or terminated as a result of discrimination. Title VII specifically makes it unlawful for an employer to “fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin.” The statute also makes it unlawful “to limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee” based on his or her protected status. The Supreme Court has interpreted Title VII to protect against the failure to hire an otherwise qualified applicant and the deprivation of an employee of other opportunities afforded to similarly situated employees based on his or her protected status.

Title VII prohibits workplace discrimination based on an employee’s race. Although the text of Title VII clearly prohibits employment distinctions based upon race, Congress has provided little direction on how to define race. Most notably, race is not defined in the statute’s expansive “Definitions” section. Whether this omission resulted from an oversight or is a consequence of the assumption that race is a fixed, easily applied

20. Id. (stating that all three types of Title VII suits require different standards of proof and are based on different normative assumptions about what constitutes discrimination).
21. This Note only discusses Title VII disparate treatment claims due to the fact that these cases focus on discrimination against individuals, rather than disparate impact claims which focus on facially neutral policies that as applied impermissibly impact a protected group.
25. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the necessary criteria to make a prima facie case for discriminatory hiring practices by an employer); see also, Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (discussing that the plaintiff's burden of establishing a prima facie case creates a presumption for the plaintiff that the employer unlawfully discriminated).
26. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (applying Title VII to a claim of employment discrimination based on the partnership criteria in which gender played a motivating factor).
distinction between individuals, the omission has resulted in confusion over what exactly constitutes racial discrimination. Despite Congress’s failure to provide a working definition of race, the legislative history of the Civil Rights Act and subsequent amendments show that Congress has adopted an expansive definition of discrimination.\(^{29}\) In an interpretive memorandum of the statute, Senators Clark and Case, the bipartisan Senate floor managers for the employment discrimination portion of the Act, stated that it would be unlawful for employers to “segregate or classify employees in any way.”\(^{30}\) Furthermore, in 1972 Congress amended Title VII, but retained its broad definition of discrimination “in order to adequately combat the varied and complex forms of racial and sexual prejudice in the labor market.”\(^{31}\) This legislative history demonstrates that Title VII “encourages courts to evolve their own broad definition proscribing all employment conditions based upon the statute’s five forbidden criteria.”\(^{32}\)

As a result of Title VII’s sparse language and its mandate to provide the courts with wide discretion in interpreting the Act, courts have assumed a significant role in creating a legal definition of race under the statute.\(^{33}\) What has resulted for the most part is a conception of race rooted in the assumption that race is an immutable characteristic.

The Supreme Court, as well as circuit courts, has indisputably stated that race is an immutable characteristic. In 1973, in \textit{Frontiero v. Richardson}, a Supreme Court plurality held that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”\(^{34}\) Subsequently, circuit courts have referred to \textit{Frontiero} for its conception of both race and sex as immutable traits. For example, the Ninth Circuit has also upheld the notion of race as immutable under Title VII, while using this assumption as a basis to hold that sex is also an immutable characteristic. In \textit{Baker v. California Land Title Co.}, which was decided just one year after \textit{Frontiero}, the Ninth Circuit stated that “[s]ince race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense.”\(^{35}\)

\(^{29}\) Bayer, \textit{supra} note 10, at 780; \textit{see also} Clarence Mitchell, \textit{An Advocate’s View of the 1972 Amendments to Title VII,} 5 \textit{COLUM. HUM. RTS. L. REV.} 311 (1973).

\(^{30}\) Bayer, \textit{supra} note 10, at 775 n.28 citing 110 Cong. Rec. 7212-13 (1964) (containing the above-cited explanation in interpretive memorandum H.R. 7152, which was enacted into law as Title VII).

\(^{31}\) Bayer, \textit{supra} note 10, at 781.

\(^{32}\) \textit{Id.} at 780.

\(^{33}\) The lack of precise definitions of what Congress meant by race has led to significant academic and legal debate over whether White plaintiffs can bring discrimination suits under Title VII. It is clear that Congress intended the statute to prevent future discrimination against certain minority groups. \textit{See} McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); \textit{see also} McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (ruling that the statute affords protection to individuals, rather than classes, and thus the term race includes Whites).

\(^{34}\) \textit{Frontiero} v. \textit{Richardson}, 411 U.S. 677 (1973) (plurality opinion).

\(^{35}\) Bayer, \textit{supra} note 10, at 844 (citing \textit{Baker} v. \textit{Cal. Land Title Co.}, 507 F.2d 895, 897 (9th Cir. 1974), \textit{cert. denied}, 422 U.S. 1046 (1975)).
The Fifth Circuit decision in *Garcia v. Gloor* formally established the immutability requirement under Title VII. In *Gloor*, the Fifth Circuit affirmed a district court decision upholding the discharge of a Hispanic employee for speaking Spanish during working hours in violation of an English-only policy. The policy allowed employees to speak Spanish only during personal time or when assisting a Spanish speaking customer. In ruling against the employee, the court stated that Title VII protection is determined by whether the contested rule was "one that the affected employee can readily observe and [where] nonobservance is a matter of individual preference." Although the plaintiff argued that his termination was a form of national origin discrimination, the court adopted the rationale that the trait was mutable and thus, unprotectable. The court reasoned that the employee could have easily conformed to the workplace policy since the employee knew how to speak English.

The court’s opinion in *Gloor* highlights an important assumption of the mutability analysis—that no matter how entrenched a characteristic is to an individual, if it can be easily altered then it is considered mutable and remains unprotected. The mutability requirement rests upon the belief that an employer may permissibly discriminate against an employee based upon traits that are changeable. An adoption of this distinction affirms the fact that an employee has insubstantial interests at stake that do not warrant legal protection when the interest can be altered to conform with an employer’s policy or rule.

However, in formulating its bright-line rule, the court inserted a confusing and seemingly contradictory cautionary note. The court indicated that the mutability analysis not only entailed looking at the basis for the alleged discrimination, but also required examining on an individual basis whether the trait was mutable. The court reasoned that a non-English speaking employee who is fired for speaking his or her native language may satisfy the immutability requirement because of the lack of choice. The court stated, "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth." By qualifying the general requirement of immutability in this manner, the court put forth the seemingly inconsistent principle that discrimination based upon the same trait may constitute discrimination against one employee but not another under Title VII. It is hard to imagine

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37. *Id.* at 266.
38. *Id.* at 266-69.
39. *Gloor*, 618 F.2d at 270.
40. *Id.*
41. *Id.*
42. Bayer, *supra* note 10, at 839.
43. *Gloor*, 618 F.2d at 270.
how a trait can be both immutable and mutable depending on the context, and where the line between these two areas should be drawn. For example, could the plaintiff in \textit{Gloor} bring a Title VII claim if he knew a limited amount of English but felt more comfortable speaking Spanish? Would it treat two plaintiffs unfairly by allowing a plaintiff to bring a claim if he has lived in the United States but failed to learn English, but deny the claim of a plaintiff who picked up English but has resided in the United States for the same number of years? Given these difficult questions in the application of the immutability requirement, it is hard to see how this type of seemingly subjective line-drawing leads to clearer results than a test that focuses on whether an employer intended to discriminate because of one of Title VII's enumerated categories.

Since \textit{Gloor}, numerous other courts have disallowed discrimination claims based upon a plaintiff's inability to satisfy the immutability requirement.\textsuperscript{44} The attraction to adopting the immutability rationale is understandable, given that race, sex and national origin superficially appear to be immutable characteristics. It may be difficult or even uncomfortable to think about race as anything other than an immutable characteristic. However, as the court recognized in \textit{Gloor}, distinguishing between characteristics that are mutable and immutable is often an arbitrary and subjective exercise. Due to the fact that an employer may permissibly discriminate on the basis of a mutable trait, a number of notable criticisms regarding the mutability requirement have arisen.

\textbf{III. EXPANDING THE CRITIQUE AGAINST THE IMMUTABILITY REQUIREMENT}

\textit{A. Prior Critiques of the Immutability Requirement}

Does the immutable/mutable distinction provide a logical method for determining whether an employer has implicated one of the protected categories under Title VII? A growing number of scholars say no. The mutable traits requirement has been harshly critiqued by a number of observers both within and outside of the context of Title VII.\textsuperscript{45} These criticisms have arisen on multiple fronts and identified numerous problematic areas of the doctrine, including the fact that the distinction

\textsuperscript{44} See Carswell v. Peachford Hosp., 1981 U.S. Dist. LEXIS 14562 (N.D. Ga. 1981) (granting employer's motion for summary judgment against claim by African American woman that was racially discriminated against because employer discharged her for refusing to remove beads from her braided hair); Santee v. Windsor Court Hotel, 2000 U.S. Dist. LEXIS 15960 (E.D. La. 2000) (upholding right of employer to refuse to hire African American employee due to the fact that her blond hair color did not comply with defendant's grooming requirements, and plaintiff was not willing to alter her hair color); see also Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) (en banc) (holding that employer's grooming policies establishing different hair length requirements for men and women do not constitute sex based discrimination).

\textsuperscript{45} For a recent critique of the immutable traits requirement see Gonzales, \textit{supra} note 13.
contravenes Congressional intent, divides communities, and undermines personhood attached to race, national origin, and gender.

In his article *Mutable Characteristics and the Definition of Discrimination under Title VII*, Professor Peter Brandon Bayer challenges the mutability doctrine on two grounds. First, he argues that Congress never intended the application of Title VII to hinge on the immutability distinction. Second, he contends that denying claims based upon mutable characteristics devalues and undermines personhood attached to race, national origin, and gender.46

Professor Bayer argues persuasively that Congress did not intend mutability to be a determinative fact in deciding whether an employer’s restrictions discriminated on one of the five enumerated bases—race, color, sex, national origin, and religion.47 Rather, the plain language and legislative history of the act indicate that Congress chose those categories because they reflect unacceptable employment standards, not because they were immutable.48 Furthermore, the inclusion of religion, which is obviously a mutable category implies that the distinction between immutable and mutable traits should not determine whether protection is afforded under Title VII and Title VII prohibits all distinctions based on sex or race, regardless of whether the characteristic is labeled as mutable or immutable.49

As well as pointing out that the requirement contravenes Congressional intent, Professor Bayer ties personhood into certain mutable traits. He posits that “individuals define themselves, express their singular personalities, and conceive their special identities through a wide amalgam of acts, including . . . arguably mutable characteristics.”50 Since Title VII is concerned not only with allowing economic benefits, but with preserving the personhood, individuality and self-esteem of employees, any discrimination based on even mutable traits if it brings up one of the protected categories should trigger Title VII protection.51 Professor Bayer’s analysis focuses on the general refusal of courts to find that employer policies mandating personal grooming and language standards constitute racial and sexual discriminatory acts. He contends that courts clearly err when they find sex-based grooming policies, such as those requiring short hair from men and not women, are not sexually discriminatory.52

In *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, Janet E. Halley offers a second critique of the

46. Bayer, supra note 10, at 844.
47. Id. at 772.
48. Id. at 844.
49. Id. at 860.
50. Id. at 839.
51. Id. at 845.
52. Id. at 842.
immutable/mutable analysis in the context of gay rights litigation. While a number of gay rights legal advocates have argued for gay rights based on homosexuality as an immutable trait, Halley cautions against buying into the court created distinction. Halley cautions that buying into the mutability requirement will create a proverbial boomerang effect, where the very strategy that is used for the purpose of protecting a specific group can at times be inverted to harm that same group or others. Specifically, Halley argues that immutability-based claims to gain equal protection for gay rights are unavoidably divisive and counter productive in effectuating the ultimate goal of providing legal rights through pro-gay equal protection litigation. Instead of thinking about pro-gay arguments in terms of biology or other factors, Halley posits that a more effective legal strategy should focus on the political dynamics that define the struggle to gain equal protection. Namely, pro-gay litigators who embrace the immutability requirement do so at the cost of dividing the gay community, as well as representing a negative shift away from equal protection arguments.

B. Limitations of Previous Analyses

One void in the previous arguments for abolishing the immutability requirement is that the assumption that race is an immutable trait has largely gone unchallenged. Clearly, it would be unfair and presumptuous to characterize the critiques as supporting a conception of race as immutable given that the literature universally rejects the mutability requirement. However, the previous critiques focus their attention on the mutability portion of the prong, rather than criticizing the doctrine from the immutability side.

A number of possible reasons may account for the absence of a discussion on whether race can be conceived of as an immutable trait. One reason may be an unconscious or conscious acceptance of the notion that race is an immutable trait. As explained in the introduction, our society as a collective tends to obscure the ways that race has been constructed; given the biological justifications for race as a category, it would not be surprising to overlook this in the criticism. Furthermore, the relatively recent increase of multi-racial populations has popularized the notion that race is a social construction. Other rationales may account for this lapse. One assumption may be that racial protection under Title VII is not in jeopardy under the immutability analysis. A plaintiff who is directly discriminated against because of his race, not a "mutable" trait, would still

53. Halley, supra note 16.
54. Id. at 507-08.
55. Id. at 521.
56. Id. at 507-08.
57. Id. at 520.
58. See Bayer, supra note 10 at 845 (providing a comprehensive discussion of certain mutable aspects of race, such as hair texture and length without focusing on an examination of race itself).
likely be able to bring a claim under the immutability requirement.\textsuperscript{59} This feeling of security may be augmented by the fact that some courts hold that given the legislative history of Title VII Congress intended stronger protection for race discrimination compared with sex discrimination.\textsuperscript{60}

Nevertheless, it is imprudent to assume that a successful challenge to the mutability doctrine can be mounted without raising the possibility, at least in the context of race, that conferring the label of immutability is a misnomer. As mentioned above, even the court in \textit{Gloor} struggled with formulating a clear delineation of what exactly constitutes immutability in the context of national origin discrimination. This Comment posits that by adhering to the mutability requirement, courts have collectively failed to appreciate the extent to which certain notions of race are temporal, contextual and mutable. Understanding that race is largely a societal formulation based upon certain loose "genetic" indicators—which I refer to as phenotype—leads to the conclusion that race is not the inevitable product of human biology; rather, it is an inexact science.

In the context of workplace discrimination, an employee's race is determined on a number of levels, some of which may fail to capture any semblance of biological accuracy. In this sense, an individual's "race" as determined by an employer may shift depending on the "gaze" of the employer. From this perspective, it is arbitrary to say that some racial indicators, such as facial features, should be given protection while others such as hair style, length and texture should not; for in some contexts they are all socially constructed racial indicators. Thus, when an employee is disciplined or terminated for any type of racial characteristic, courts should look at whether an employer did so with racial animus. Furthermore, outside of the context of Title VII, in the larger discussion of race, dispelling our collective assumptions of race as interchangeable with biology is important in uncovering the ways that race has been socially constructed as means to allocate access to economic, social and political goods.

\textbf{C. Race as a Social Construct}

Competing notions of how to define race and what constitutes racial discrimination abound in the context of Title VII. Integrated into this critique of the immutability requirement, as applied to race, is a fundamental disagreement over how the evolution of our understanding of race should be reflected in legal jurisprudence. The outcome of this debate is especially important given that Title VII is a federal shield of justice to regulate improper racial discrimination in the workplace.


\textsuperscript{60} Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) (stating that the legislative history of Title VII demonstrates that its prohibition against sex discrimination was the result of a last-minute addition to the statute).
One conception of race holds that race is the inevitable result of biological fate. This understanding of race presupposes that racial differences are genetically predetermined and fixed. Furthermore, it rests upon the premise that a person's racial makeup and identity are solely determined by genetic forces, largely ignoring the social and political construction of race. By characterizing race as immutable, the language of the mutability requirement embraces this questionable premise that race is immutable and inevitable. This is precisely the problem with the mutability requirement: because protection under its analysis rests upon immutability, it leaves no other avenue to offer full protection to race other than conceiving of it in terms of immutable and mutable. Given our growing understanding of the complicated nature of race, our society has outgrown this simplistic formulation of immutability.

It is understandable why this common conception of race as immutable is enticing for courts. As Adrienne D. Davis notes, "most Americans, of all races, do not view race as indeterminate, but rather as physically cognizable, stable, and culturally significant." However, characterizing race as purely biological largely ignores the complex societal and political threads that have intertwined to construct our common notions of race.

The characterization of race as an immutable trait incorrectly assumes that race is synonymous with a biological description of an individual's makeup. This commonly held view rests upon the notion that there are significant physical differences between various races that can be scientifically tied into specific genes or clusters of genes. The mutability distinction draws upon a common tendency to comport distinctions between races as the same as differences between genders. Clearly, race is not as mutable as religion, which Professor Bayer points out can be altered without regard to any biologically embedded notion. However, race, more than sex, is difficult to place into well-defined, dichotomous categories, even though any formulation of gender differences, which ignores the role of society in inflating and giving increasing significance to certain traits, would be naive.

Race has traditionally been formulated as biological categories based upon geographically observed physical differences. Traditional 19th century racial classification systems divided human beings into four

61. Adrienne D. Davis, Identity Notes Part One: Playing in the Light, 45 AM. U.L. REV. 695, 700 (1996) (observing that in comparison with other countries, like Nicaragua, racial categories in the United States are not as natural and fixed as they are purported to be, but are actually the product of local and political forces).
distinct races: Native Americans, Asians, Africans and Europeans. Less frequently, other brown-skinned peoples have been included as a separate race. However, contemporary biologists and physical anthropologists have denounced the notion of race as consisting of separate distinct types with physical features, gene pools and character traits that intrinsically differed from one another. Modern members of the scientific community are more apt to characterize race as subspecies which only differ in appearance due to geographic location.

Recent scientific studies have consistently demonstrated that there are few, if any, significant genetic differences between each race. These studies have conclusively demonstrated that intra-race genetic differences are greater than inter-race differences: "that is, greater genetic variation exist within the populations [such as those] typically labeled Black and White than between these populations." The Supreme Court has recognized this arbitrary nature of racial categories, stating that "it has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races." It is ironic that the very scientific basis that race was built upon has demonstrated that racial distinction are as much founded on societal notions as they are on fact.

Today, many observers agree that race is largely a social construct. Although race undeniably has a foundation based upon certain generally attributable physical differences, these physical differences are by no means exclusive to any particular race. Although much talk of race has taken place in the scientific realm, this has come at the cost of misconstruing the way that race in reality has been constructed. A better way of formulating this question is why racial categories exist if perceived racial differences cannot function with the accuracy required of group allocation. The answer to this question, and to unraveling the enigma of race, involves recognizing that race is a social construct. As Stephen Satris writes, "racial categorization is far less quantitatively and scientifically determined, and far more socially determined, than is generally admitted."

The enhanced significance that Americans attach to race originates from an exclusionary social system in which access to legal, political and social rights depended upon race. Satris explains that the racial system is "a
matter of screening the population for those who will be admitted into an exclusive ‘White’ group. All other people—nonwhite people—are classified as belonging to the ‘colored’ racial category.”\(^{73}\) This binary racial system, which evolved into legal standards by the advent of the one drop rule, was tied into a system of wealth, societal and political power held exclusively by the White class.\(^{74}\) The maintenance of disparate racial classes depended largely upon the ability to accurately separate different racial groups. In order to effectuate this necessary goal, a great emphasis was placed upon physical characteristics. Today, phenotype indicators, such as hair texture, facial features, and skin color, are still assumed to provide an accurate indication of a person’s racial ancestry.

In workplace discrimination, racial identities are often attained superficially through the unavoidable practice of phenotype categorization; “race derives much of its power from seeming to be a natural or biological phenomenon or, at the very least, a coherent social category.”\(^{75}\) By this, I refer to the widely held notion that certain physical characteristics, such as skin color and hair texture, are appropriate indicators of racial ancestry. Conceiving of race as largely a societal construct demonstrates how race as it is played out in our social interactions has little to do with accurately tabulating race: very little about race is concerned with accurately categorizing people based on their predominant ancestry.\(^{76}\) That is to say, racial categorization in America is not founded upon concerns of accurately separating people’s ancestry into finite and accurate percentages. Instead, it has historically been focused on maintaining a binary conception of race divided into Black and White, or for the most part White and non-White. For example, most people of Black and White ancestry are considered Black, although this is a scientifically inaccurate description of their ancestral makeup.\(^{77}\) The extent to which this is true can be ascertained by the relative infrequency of occurrences in which a person of mixed Black and White ancestry would be discriminated against because they are White. The ability to maintain the White and non-White distinction evolved from the ease with which it could be administered. Given the visibility of physical traits that were associated with non-White races, persons could be easily categorized.

The enhanced attention to physical characteristics rather than a person’s actual biological makeup highlights the important point that in

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73. *Id.* at 53-54.
74. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161 (1997) (explaining the historical creation of the one-drop rule as a bright line requirement to maintain a pure White class, while denying even mixed-race Blacks from the economic and social privileges of their White ancestors).
76. *Id.*
77. SATRIS, *supra* note 72 at 54.
terms of discrimination, the actual biological background of the discriminatee may not be as important as what the discriminator perceives. The occurrence of racial miscategorization demonstrates that a more sensible and administratively straightforward approach entails not examining the race of the discriminatee, but instead whether the discriminator intended to impermissibly discriminate against the employee based upon a protected category. Under a strict biological conception of race, a racially miscategorized victim of discrimination cannot establish that he was discriminated against because of "such individual's race" as required under the language of Title VII. Under Title VII, courts can only fully afford protection to all employees against racial discrimination by looking at the intent of the discriminator, rather than whether the characteristic of the employee is mutable or not. By focusing on the intent of the discriminator, courts do not place themselves in the precarious position of forcing the discriminatee to establish that he was part of the protected racial group at issue, which may be impossible in the case of a racial mistake. At least one court has adopted this approach under Title VII.

However, adopting this approach entails evolving our laws to recognize that racial discrimination can occur outside of the illusion of biology and scientific accuracy in order to protect against all types of discrimination. This involves a significant shift from conceiving of race, as well as gender, in the simplistic terms of mutable and immutable. Nowhere is this change more warranted than in the case of mixed-race individuals.

IV. MIXED-RACE INDIVIDUALS UNDER TITLE VII

Conceptualizing race as an immutable characteristic is especially problematic when applied to mixed-race populations. While some of the prior critiques of the mutable traits theory, such as hair length, style of dress or cultural mannerisms are to some extent equally applicable to mixed-race individuals, this section examines the problems specifically associated with mixed-race populations. As demonstrated in the previous section, workplace discrimination can be grounded in inaccurate racial perceptions. This tendency to mischaracterize a person's race is heightened for mixed-race people as these individuals are often not easily racially identifiable based on stereotypical racial indicators. Examining how racial discrimination functions with mixed-race populations demonstrates why courts must examine Title VII claims based upon intent, rather than if the discrimination fits within traditional notions of race. To avoid these complications associated with applying Title VII to racial discrimination, this section posits that Title VII analysis should focus on "racial animus"
rather than resting protection upon whether a particular trait is one that is potentially malleable.

Viewing the mutable traits requirement from the perspective of mixed-race individuals helps explain why the current analysis falls short of fulfilling Congressional intent under Title VII. As traditional borders to race mixing have to some extent been removed, the mixed-race population in the United States has increased at an extremely high rate. However, only recently has society begun to examine the impact that this new population will have on our current treatment of race in America. Few formal studies have been undertaken of mixed-race populations, and most of the existing analysis is limited to the social sciences fields. Generally, the legal community only began to recognize the impact that mixed-race individuals will have on our current legal discourse after the Census 2000.80 Population growth, coupled with the relative scarcity of study into the impact of mixed-race individuals, has placed us far behind in the effort to re-conceptualize our outmoded ways of thinking about how race functions under the law.

A. Growth of Mixed-race Populations: The Biracial Baby Boom

Mixed-race people encompass an ever-increasing portion of our population. Before the 2000 Census there were few accurate indications of the size of the multiracial population living in the United States.82 For the first time, the 2000 Census allowed individuals to select more than one racial category in an effort to accurately tabulate the mixed-race population. The current data from the 2000 Census reveals that multiracial individuals comprise a significant portion of the population. Nationally, approximately 2.4 percent of the population indicated that they have a multiracial heritage.83 However, the percentages were significantly correlated to geographic location within the United States. For example,


81. Maria P.P. Root, With, Between, and Beyond Race, in RACIALLY MIXED PEOPLE IN AMERICA 3 (Maria P.P. Root ed., 1992) (originating the term, "biracial baby boom" to describe the rapid increase in mixed-race populations subsequent to the end of anti-miscegenation laws in 1967).

82. Prior to the changes adopted in 2000, the census contained no mixed-race category to choose from. Due to this absence, filling out the census for multiracial individuals entailed reducing their identities to fit themselves into a single category. This omission further contributed to a highly inaccurate tabulation of the size of the quickly growing mixed-race population. See Naomi Zack, Border People and Antidiscrimination Law: American Mixed-race: The U.S. Census and Related Issues, 17 HARV. BLACKLETTER J. 33 (2001) (stating that prior to the 2000 Census mixed-race individuals were forced to choose one part of their identity, although the 1980 and 1990 censuses allowed census takers to select an "other" box).

Hawaiian residents reported the highest rate with more than 20 percent reporting as more than one race. Alaska followed with 5.4 percent and California was third with 4.7 percent. Overall, the existence of a significant and rapidly increasing mixed-race population has made it vital to re-conceptualize our perceptions of race.

As well as demonstrating an appreciable mixed-race population, the Census data clearly shows the complex and multiple dimensions of race mixing. For a variety of reasons, much of the focus on mixed-race people has been in the context of mixing between Whites and non-Whites. First, since the inception of slavery much of the animus against multiracial individuals was formed as a pretext for protecting whiteness. Second, the social and political denial of people of mixed heritage is extensively intertwined with legislation aimed at preventing and marginalizing mixed-race Blacks and Whites. Each state had separate rules governing when a person was considered Black. However, increases in mixed-race people of Asian descent have constituted a considerable portion of the mixed-race population. While the emergence of a mixed White and Asian population has generated considerable social and academic commentary, little attention has been given to the mixings of Asians with other populations of color. This falls in line with the general trend that much of the attention seems to be focused on groups that are culturally and socially distinct, such as Blacks and Whites and Asians and Whites. For example, despite its prevalence, Latino and Asian mixing has not been treated in the discourse. This demonstrates the lack of knowledge, even at the highest levels of our academic institutions, of society with regards to racial mixing.

The tendency to view race mixing strictly in the context of its Black and White origins, to a large extent obscures the multiple dynamics of mixed-race Asian Americans. The increase in mixed-race Asians, and mixed-race people in general, is attributable to a number of legal and legislative advancements. In 1967, anti-miscegenation laws were repealed, which directly contributed to growth in the number of interracial relationships and a subsequent growth in the number of multiracial children. Furthermore, increased immigration from Asian countries has also contributed to the increase in interracial marriages. Specifically, the Immigration and Naturalization Act of 1952 removed certain racial

84. Id.
85. Id.
86. ROOT, supra note 81, at 6 (explaining that most of the attention over race mixing focuses on groups which are culturally distinct, as well as groups who threaten the purity of whiteness).
88. ROOT, supra note 81, at 6.
89. Id.
90. Id.
prohibitions to immigration and naturalization by removing Japanese immigrants from the category of “aliens ineligible for citizenship.”92 The subsequent Immigration and Naturalization Act of 1965 replaced national quotas with hemispheric quotas, thereby further facilitating increased Asian immigration.93 These changes in immigration policies brought more contact between certain Asian groups and Whites; “[b]etween 1970 and 1995, the number of interracial married couples has more than tripled.”94 Overall, by 1992, the Census indicated that the number of biracial babies was increasing at a faster rate than the number of monoracial babies.95 Maria P.P. Root has termed this general growth in mixed-race children the commencement of the current “biracial baby boom.”96

B. A Racial Mix-Up: Racial Miscategorization of Mixed-race Individuals

Racial discrimination against mixed-race individuals occurs in a number of distinct ways. On one hand, mixed-race individuals are directly discriminated against because of their distinct mixed identity. The negative treatment of the mixed-race population has historically been promulgated by science-based concepts, such as the hybrid degeneracy theory97 and the sociocultural rejection argument.98 These same theories, which provided a

92. Id. at 67.
93. Id. at 68.
94. See also, MONIZ supra note 83, at 101.
95. Id.
96. ROOT, supra note 81, at 3.
97. Generally, the larger society has either outrightly or implicitly rejected mixed-race individuals. Despite some exceptions, the overall perception of mixed-race populations has been overwhelmingly negative. Cynthia Nakashima has observed “although not every theory or attitude or image regarding people of mixed-race has been negative, the majority of the ideology has been troublesome.” Nakashima points to two theories upon which mixed-race individuals have been directly discriminated against: through biological justifications and sociocultural/sociopolitical justifications. The sociocultural theory against people of mixed-race evolved subsequent to the hybrid degeneracy (biological) theory. Whereas the biological arguments against intermarriage and race mixing were premised on protecting the future of the White race, the emerging social arguments shifted to critique the inability of multiracial individuals to attain proper psychological maturity. The social theory stated that multiracial people were . . . unable to deal with their bi-culturality — their conflicting cultures left them torn and confused, and their nonacceptance by either or any racial group meant that they were pathetically marginal and outcast, left to be the target of both of their parent groups’ anger and hatred for one another.
98. It has been argued that exceptions to this general rule exist. One plausible theory maintains that mixed-race Americans of White and Black descent shared a better experience prior to the passage of civil rights legislation during the second half of the twentieth century due to their ability to “pass” as White and enjoy the privileges of the White citizenship. See generally G. Reginald Daniel, Passers and Pluralists: Subverting the Racial Divide, in RACIALLY MIXED PEOPLE IN AMERICA 92 (Maria P.P. Root ed., 1992) (stating the proposition that although “passing” may be viewed as a benefit on a micro-scale to those who were able to benefit from it, on a macro level passing did not signal the acceptance of
rationale against interracial relationships in the past, still provide contemporary bases for discrimination against people of mixed-race. A distinct and arguably more complicated form of racial discrimination against mixed-race individuals involves prejudice based upon an incorrect assumption regarding an individual's racial classification. This type of discrimination arises when a discriminator acts upon prejudice against a mixed-race individual under the false belief that the person is of a certain racial background. Root has described this phenomenon of being incorrectly racially categorized as "situational race," and distinguishes it from the phenomenon of "multiple construction," where a mixed-race individual can blend into both of his distinct racial backgrounds.

One troubling facet of situational race is the frequency at which it occurs. In a recent study, Rudy P. Guevarra confirmed the validity of Root's situational race theory by interviewing a group of Mexipinos, or individuals of Mexican and Filipino descent. In his study, Guevarra confirmed that many Mexipinos are often confused as being associated with wholly distinct racial and ethnic groups. Many Mexipinos interviewees indicated that they were regularly mistaken as Polynesian, Hawaiian, Persian, Middle Eastern, Greek and other ethnic groups. More troubling was the fact that many also stated that their racial background was openly assumed or questioned on a weekly basis. Furthermore, most of the Mexipinos interviewees indicated that they could easily "pass" between their Mexican and Filipino identities depending on what situation they found themselves in. Although Guevarra's study reveals that situational race occurs often, the fact remains that this type of incorrect racial categorization of multiracial people occurs far more frequently than it is made explicit.

In What Are You?, Pearl Fuyo Gaskins addresses the tendency of mixed-race individuals to experience the phenomenon of situational race

mixed-race people. It only further solidified the racial hierarchy where whiteness is perceived as the indicator of acceptance and did little towards creating an acceptance of mixed-race people.

99. See Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999) (granting associational standing under Title VII to a Caucasian father who was harassed at his employment because his child was biracial). In addition to ridiculing the plaintiff, the plaintiff's boss allegedly stated that "no one ever told me that he had a mixed-race child" and that "this was going to hurt his [boss's] image in the community and his dealership." Underlying the discrimination that Tetro faced were both concerns over hybrid degeneracy, as well as the sociocultural theory.


102. Id. at 85.

103. Id.

104. Id. at 84.

105. Id. at 85.
due to their racially ambiguous appearances. She recounts that through her own experience, "[a]s a racially mixed person, I have been asked, . . . "What are you?" or "Where are you from?" countless times by curious and sometimes obnoxious people." Numerous other interviewees in Gaskin's book recall similar incidents of situational race. One mixed-race individual indicated that "everyone [incorrectly] automatically assumes that I'm either black, Puerto Rican, or Mexican." Another interviewee who is of Japanese and Black descent stated that "everyone thought I was Filipino, or Mexican, or all African American."

In *One Drop of Blood*, Lawrence Wright highlights some troubling data regarding the prevalence of situational race. He explains that a National Center for Heath Statistics survey established that 5.8 percent of people identifying as Black were thought to be White by a census interviewer. Additionally, almost one third of people identifying as Asian were thought to be White or Black by independent observers.

As indicated by the preceding paragraphs, multiracial individuals face a high risk of being victimized by situational race. Although assumptions about racial identity based upon phenotype can be inaccurate even for mono-racial individuals, the inherent inaccuracies of this method of classification are heightened when applied to multiracial individuals. Despite the remarkable diversity of mixed-race populations, these populations share a nearly universal experience—most mixed individuals are accustomed to having their background mistaken by observers.

A number of societal causes may account for the increasingly high rates of situational race experienced by multiracial individuals. One contributing factor is that multiracial persons, more than most mono-racial individuals, constantly receive an exaggerated emphasis on their physical appearance. While phenotype classification is also often second nature when examining mono-racial individuals, multiracial individuals are treated differently because their physical appearance does not always comport with traditional stereotypes of racial appearance. Given our collective tendency to place a heavy emphasis on race, as well as at times stereotyping certain characteristics with various racial identities, this tendency is especially disconcerting given that multiracial individuals are
often incorrectly categorized.\textsuperscript{114} For example, Asian Americans of mixed racial descent tend to exhibit physical characteristics that often fall outside of conventional racial categories.\textsuperscript{115} Hapas,\textsuperscript{116} although of Asian descent, are extremely different in their physical appearance. While some Hapas are indistinguishable from monoracial Asians, others may appear to be White, while still others may look traditionally mixed.\textsuperscript{117} Similarly, a person of a Black-Japanese background may physically appear to be Filipino or even Hispanic.\textsuperscript{118}

Given the extent to which traditional notions of race are engrained in our collective psyche, coupled with the growing multiracial population, mixed-race individuals increasingly find themselves in the uncertain position of being discriminated against based upon a classification with which they are not racially nor ethnically associated. Given the increasing number of mixed-race babies, and how easy it is for situational race to occur, it is time to reassess how discrimination is determined under Title VII. Specifically, the current prevalence of racial miscategorization provides insight into the potential difficulties of proving membership in the racial group at issue under the mutable traits requirement, as well as its tendency to be under inclusive.

The occurrence of situational race demonstrates the inherent weaknesses in the mutability requirement of Title VII. The result of racial miscategorization can lead to prejudices being applied incorrectly, if they ever were applied correctly in the first place, to a mistaken group. However inaccurate these assumptions may be, the reality remains that in the employment context they can result in impermissible disparate treatment under Title VII for both plaintiffs who are not hired and plaintiffs who are discriminated against while employed or terminated because of discrimination.

\textit{Perkins v. Lake County Department of Utilities} illustrates why courts must look at an employer's intent, rather than the positionality of the plaintiff, in deciding Title VII claims.\textsuperscript{119} In \textit{Perkins}, the court faced the issue of whether a plaintiff must be a part of the racial group at issue in order to prevail on a Title VII discrimination claim.\textsuperscript{120} In what the court referred to as "a question which may well be one of first impression," the court examined "the extent to which provable genetic/hereditary classification controls on the proposition of membership in a protected

\begin{footnotes}
\footnotetext{114}{NAKASHIMA, \textit{supra} note 87, at 163.}
\footnotetext{115}{GUEVARA, \textit{supra} note 101, at 84.}
\footnotetext{116}{The term Hapa refers to individuals of mixed descent. Originated in Hawaii to refer to people of mixed Hawaiian descent, the term has become increasingly popular within the mixed-race community. GASKINS, \textit{supra} note 107, at 12.}
\footnotetext{117}{\textit{See}, e.g., GASKINS, \textit{supra} note 106.}
\footnotetext{118}{ROOT, \textit{supra} note 81, at 6.}
\footnotetext{119}{Perkins v. Lake County Dept. of Util., 860 F. Supp. 1262 (N.D. Ohio 1994).}
\footnotetext{120}{\textit{Id.} at 1263.}
\end{footnotes}
class within the meaning of Title VII." Ultimately, the court held that discriminatory actions based upon incorrect racial categorization of an employee could still constitute impermissible disparate treatment. The plaintiff in Perkins sought relief under Title VII, claiming that his employer had discriminated against him based upon national origin. The plaintiff alleged that over the course of his twelve-year employment, he was subjected to numerous racial comments, was forced to work the worst jobs, and was not promoted or even considered for promotion due to his race, American Indian. To dismiss the case on summary judgment, the defendant employer argued that the plaintiff was in fact not American Indian, and thus could not obtain Title VII relief based upon the defendant’s mistaken belief that he was American Indian. The plaintiff’s racial background was ambiguous at best and he was unsuccessful in putting forth evidence establishing his American Indian lineage, despite an extensive fact finding effort. However, the court ultimately concluded that in the case where an employee is incorrectly discriminated against because of race, the test should focus on the employer’s reasonable belief that the plaintiff was a member of the protected class, not the plaintiff’s actual racial classification. Under this test, a racially miscategorized plaintiff could satisfy the required showing that he is a member of the protected class to establish a prima facie case of discrimination based upon sufficiently objective proof that the employer had a reasonable belief as to the employee’s status in a protected racial group. The court suggested that such evidence could consist of the plaintiff’s “physical appearance, language, cultural activities, or associations.” Applying the test to the plaintiff’s case, the court held that because the plaintiff looked American Indian, held himself out to be American Indian, and was generally perceived as being American Indian, he had made a sufficient showing to defeat the defendant’s summary judgment motion. Raising the same concerns as have been issued in this Comment, the court concluded that a plaintiff who is not a part of a protected group at issue can nevertheless “obtain Title VII relief for discrimination based upon his and his employer’s mistaken belief that he is an American Indian.” First, the court explicitly recognized that racial miscategorization concerns do exist in the employment context. Based upon its experience with employment matters, it stated that “This Court has

121. Id.
122. Id. at 1277.
123. Id. at 1265.
124. Id. at 1263.
125. Id. at 1265-66.
127. Id.
128. Id. at 1278.
129. Id.
130. Id. at 1265.
never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct.\textsuperscript{131} The court further explained that "subjective perception of an individual's race clearly plays an important role in racial classification."\textsuperscript{132} The court's discussion of the prevalence of racial miscategorization and the subjectivity of determining race is likely the result of what may ultimately result in discrimination limbo. Under the language of Title VII, a plaintiff must prove that he was discriminated against because of "such individual's race."\textsuperscript{133} A racially miscategorized victim of discrimination cannot establish that he was discriminated against because of his race, as required under the language of Title VII. Therefore, it may be impossible for a racially miscategorized plaintiff to establish that he is a part of the protected category at issue.

A second benefit to focusing on whether the employer reasonably believed that the employee was part of the protected group is that it avoids the complicated and often indeterminate task of establishing a plaintiff's actual racial background. In \textit{Perkins}, the plaintiff's attempts to establish his American Indian lineage identity led to an almost comical dispute over his racial identity. While the plaintiff desperately attempted to establish that he was at least 1/16 Native American, the defendant employer submitted certificates of homesteading and hired experts to disprove his American Indian heritage.\textsuperscript{134} Despite hearing the testimony of an expert in the field of tracing family ancestry, and viewing census records and birth certificates, the court could not come to a firm conclusion as to whether the plaintiff had Native American ancestry.\textsuperscript{135}

Due to the lack of solid evidence regarding his racial ancestry, the plaintiff was forced to resort to the use of phenotype identification to determine his race, a practice which the court found troubling.\textsuperscript{136} To establish his Native American identity, the plaintiff enlisted an "expert witness" who had extensive experience with Native Indians.\textsuperscript{137} The expert, Mr. Fletcher, testified that "there was no doubt in his mind that the plaintiff was Native American" based upon his "facial features," although he admitted that on a number of occasions he himself as a Native American had been mistaken for an Italian or Mexican:\textsuperscript{138}

\begin{quote}
A. I said that he appeared to look like an Indian to me. He certainly—I've been around a lot of native people, and him walking in my door, I—it would be very hard for me to mistake him for anything else.
\end{quote}

\textsuperscript{131} \textit{Id.} at 1273.
\textsuperscript{134} \textit{Perkins}, 860 F. Supp. at 1269.
\textsuperscript{135} \textit{Id.} at 1276-77.
\textsuperscript{136} \textit{Id.} at 1277-78.
\textsuperscript{138} \textit{Id.} at 1270.
Q. Okay. Any specific features that indicate that to you?
A. Well, yes. You could tell by his facial structure, is one thing,
Q. Okay.
A. The other thing, he just—Indians look Indians [sic]. They have facial
features, you know, about them and the complexion, that it would be hard
to discern. They'd either have, number one, the facial features or the
complexion.
* * * * *
A. You know, but I'm around Indians every day, every day, and you just
can't hardly miss some feature in them, regardless of how much they've
been mixed.139

As the above conversation indicates, and as the court ultimately
concluded, visual observation of an individual is not always an accurate
means of determining racial identity. This is especially true in the case of
mixed-race individuals, such as the plaintiff in the instant matter, where
phenotype features may be the result of a long line of racial mixing, as well
as other environmental and external factors, such as sun exposure or diet.
The court realized that "while this question [of the plaintiff's racial
background] is simple and would seem to be amenable to a straightforward
answer, this Court has discovered that the issue of membership in a given
racial classification is deceptively complex."140 As the court finally noted,
"it is clear that in America [racial] categories are arbitrary, confused and
hopelessly intermingled," which has led to them being ill-defined and
subjective.141

In the case of situational race in the workplace, a multiracial plaintiff
would be able to bring a racial discrimination under the Perkins test. The
existence of situational identity in the workplace undermines the rationale
that the immutability requirement provides a superior remedy for
discrimination under Title VII. In the area of race discrimination, the
immutability test rests upon the assumption that there is a fixed distinction
between mutable and immutable traits. However, racial discrimination is
often more complex than assumed to be under an immutability conception
of Title VII. When mixed-race individuals find themselves victims of
situational identity in the workplace, to retain the protection of Title VII
courts must shift their inquiry from whether the plaintiff falls into the
appropriate category to whether the employer carried the requisite
discriminatory intent.

V. CONCLUSION

As the mixed-race population increases and traditional practices of
determining race become less accurate, courts must formulate innovative

139. Id.
140. Id. at 1271.
141. Id.
methods of prohibiting racial discrimination. Since the inception of Title VII, courts have faced a considerable task in providing reasonable solutions to confront discrimination in the employment sector while simultaneously giving effect to Title VII's broad mandate to ensure equality in the workplace. The occurrence of racial mischaracterization provides the courts with an opportunity to re-examine the current treatment of discrimination under Title VII. Given the prevalence of situational race, especially as applied to mixed-race individuals, future courts will be faced with an interesting quandary. As the decision in Perkins indicates, courts must decide whether and by what means a racially miscategorized plaintiff can meet Title VII's requirement that he be a part of the protected class at issue.

However, I posit that the phenomenon of racial mischaracterization not only contributes to a greater awareness of the experience of mixed-race Americans, but also contributes to a deeper understanding of how our society should treat race in general. The immutable traits theory, which prohibits only discriminatory acts which are based on immutable traits, is under inclusive since it fails to fully account for various forms of impermissible discrimination. Is it so obvious that the termination of a Black employee for wearing braids and kinks in her hair is different than disciplining an employee for her dark skin or other facial features?\textsuperscript{142} Under the immutable traits theory only one of the above plaintiffs would be able to raise a substantial claim for Title VII protection. Under an alternative intent-based model, the inquiry would focus on the intent of the discriminator, rather than whether the plaintiff could satisfy a strict test for the trait at issue. Instead, a court would be able to use its discretion to examine whether the employer had the requisite discriminatory intent. An intent-based model recognizes that discrimination comes in various forms, thus allowing courts to arrive at more equitable results. This model is superior in carrying out the directive of Title VII to remedy discrimination in the workplace based upon race, color, religion, sex, or national origin.

\textsuperscript{142} See Carswell v. Peachford Hosp., 1981 U.S. Dist. LEXIS 14562 (N.D. Ga. 1981) (granting employer’s motion for summary judgment against claim by African American woman that was racially discriminated against because employer discharged her for refusing to remove beads from her braided hair).