University of Michigan Journal of Law Reform

Volume 47 | Issue 1

2013

Categorically Black, White, or Wrong: 'Misperception Discrimination' and the State of Title VII Protection

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CATEGORICALLY BLACK, WHITE, OR WRONG: "MISPERCEPTION DISCRIMINATION" AND THE STATE OF TITLE VII PROTECTION

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This Article exposes an inconspicuous, categorically wrong movement within antidiscrimination law. A band of federal courts have denied Title VII protection to individuals who allege "categorical discrimination": invidious, differential treatment on the basis of race, religion, color, national origin, or sex. Per these courts, a plaintiff who self-identifies as Christian but is misperceived as Muslim cannot assert an actionable claim under Title VII if she suffers an adverse employment action as a result of this misperception and related animus. Though Title VII expressly prohibits discrimination on the basis of religion, courts have held that such a plaintiff's claim of "misperception discrimination" is beyond Title VII's scope. Accordingly, Title VII protection is only extended to such a plaintiff if she is "actually" Muslim or brings forth allegations of invidious, differential treatment based upon her actual Christian identity. This Article argues that these judicially created prerequisites to Title VII protection are categorically wrong. They impose a new "actuality requirement" on Title VII plaintiffs in intentional discrimination cases that engenders unfathomable results. Plaintiffs who suffer from invidious, differential treatment animated by either their self-ascribed or misperceived protected status will be denied statutory protection against discrimination if they fail to prove their actual religious, gender, ethnic, racial, or color identity upon defendant-employers' challenge.

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* Professor and Director of Faculty Development, Cumberland School of Law at Samford University. For generous comments throughout the conceptualization of this project, I extend sincerest gratitude to: Professors Deleso Alford, Michele Anglade, Mario Barnes, Hank Chambers, LaJuana Davis, Kamille Wolff Dean, Brannon Denning, Timothy Glynn, Tristin Green, Bob Greene, Woodrow Hartzog, Herman "Rusty" Johnson, Trina Jones, Angela Mae Kupenda, Tamara Lawson, Nancy Leong, Nancy Levit, Ann McGinley, Natasha Martin, Angela Onwuachi-Willig, Camille Gear Rich, Jessica Roberts, Sandra Sperino, Belle Stoddard, Kerri Stone, Charlie Sullivan, Jeffrey Van Detta, and Michael Zimmer. Earlier drafts or portions of this Article benefitted greatly from presentations made during: the Fifth Annual Seton Hall Employment and Labor Law Forum; the 2011 Law and Society Association Annual Conference; the 2012 Mid-Atlantic People of Color Legal Scholarship Conference; the Cumberland School of Law Faculty Colloquium; the John Marshall School of Law—Atlanta Faculty Workshop; the Sixth and Seventh Annual Lutie A. Lytle Black Women Faculty Workshops; and the Seventh Annual Labor and Employment Law Colloquium at Loyola University—Chicago School of Law. I am deeply appreciative to: the Cumberland School of Law administration for supporting this work and to Jamella Davis (Class of 2011), Gerri Plain (Class of 2012) and Ashley Heidger (Class of 2013) for their outstanding research assistance. As always, I am especially grateful to countless family and friends; my parents, Doris Glymph Greene and the late Milton B. Greene; and my siblings, Colonel (USAF) Kimberly Greene and Bernard Greene, for the endless conversations throughout this Article's evolution and for their unconditional love, support, and encouragement in all that I do.

Though this Article primarily examines the imposition of an actuality requirement in mispercepion discrimination cases, this Article also demonstrates that courts have considered and imposed an actuality requirement in conventionally framed discrimination cases as well. Accordingly, this Article is the first to enumerate the development of, and myriad justifications for, the actuality requirement in cases of categorical discrimination. This Article argues that some courts' imposition of an actuality requirement in misperception and conventionally framed discrimination cases denotes the birth of an unorthodox interpretation of Title VII's reach and meaning nearly fifty years after its enactment—an interpretative methodology that this Article is first to describe as "anti-anticlassificationist."

This Article also highlights a few critical, negative implications of courts' anti-anticlassificationist interpretation of antidiscrimination law. Namely, it examines the emergence of a minimalist "actuality defense" and resulting identity adjudication, which obfuscates the chief issue in intentional discrimination cases: whether the plaintiff suffered unlawful, invidious, differential treatment. Additionally, this Article illuminates that courts' anti-anticlassificationist interpretation and attendant actuality requirement have in fact resuscitated age-old trials of racial determination. They have thereby produced an additional destructive consequence by reifying race as a stable, biological construct. Consequently, this Article proposes fresh, practical, and theoretical interventions to cease the continued anti-anticlassificationist interpretation of Title VII. In doing so, this Article excavates previously unexplored Title VII statutory provisions, longstanding EEOC directives, Fifth and Third Circuit precedent, and recent Supreme Court precedent. Properly read, these sources will show that a prerequisite showing of actuality in cases of categorical discrimination under Title VII is wrong. Thus, this Article affirms that all categorical discrimination plaintiffs—that is, all individuals who have allegedly suffered discriminatory treatment on the basis of their actual or mistaken religious, gender, ethnic, racial, or color identity—are entitled to vindicate their statutory rights to be free from unlawful discrimination.

INTRODUCTION

John has a caramel brown complexion, green eyes, and dark, wavy hair.[1] Since he began working for his employer, John's co-workers have consistently aimed derogatory names and comments at him. Everyday they call him a "wetback" and "an illegal," and they instruct him "to go back to Mexico." Instead of John, his co-workers call him "Juan Valdez." At least once, John also arrived to his work cubicle only to be greeted with pictures of a man named "Juan" with a noose around his neck and an attached note that reads, "Go

1. John's narrative is fictional, yet based upon a composite of actual misperception discrimination cases. *See, e.g.*, Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012); Daniels v. Essex Grp., Inc., 937 F.2d 1264 (7th Cir. 1991).

back where you came from!" John has complained to his supervisor about his co-workers' comments and the picture depicting his lynching. He has explained, to no avail, that his co-workers are harassing him because they misperceive him to be of Mexican origin. To John's knowledge, he does not have any Mexican ancestry; he, his parents, and his grandparents have self-identified as Black,[2] non-Hispanic. Even when he reported the offensive conduct to his supervisor, his supervisor responded, "Well, you do look Mexican," and continued to call him "Juan Valdez" alongside other employees.

John believes that he is the victim of racial harassment and is thinking seriously about suing his employer for racial discrimination. Seemingly, John is experiencing what this Article deems "categorical discrimination"—invidious, differential treatment on the basis of race or another protected characteristic[3]—and he should have a colorable claim of discrimination under Title VII of the 1964 Civil Rights Act.[4] However, a disturbing, counterintuitive development is transpiring within the federal judiciary. It is quite plausible that a court would conclude that, based upon his specific allegations of race-based invidious treatment, John *cannot* seek relief under the federal antidiscrimination laws that prohibit race discrimination in the workplace.

Though it is commonly understood that Title VII makes it unlawful for employers to treat individuals invidiously and differentially

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2. Professor Kimberlé Crenshaw has explained that "Black" deserves capitalization because "Blacks, like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate as it "has deep political and social meaning as a liberating term." Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 4 n.12 (1991). I agree with both Professors Crenshaw and Gotanda and, for both reasons, throughout this Article when I reference people of African descent individually and collectively, the word Black will be represented as a proper noun.

3. John could also assert claims of national origin and/or color discrimination under Title VII of the 1964 Civil Rights Act.

4. Though this Article primarily addresses discrimination cases arising under Title VII, it is important to note that it is equally plausible that a plaintiff like John would not have a colorable race or national origin discrimination claim under similar federal antidiscrimination laws like § 1981 of the Civil Rights Act of 1871, which has been interpreted to prohibit intentional race discrimination in the employment context. *See infra* Part IV.B (examining a § 1981 race discrimination case in which the court held that, in order to maintain their lawsuit, plaintiffs would have to "prove" that they were Native American at trial).

on the basis of race, religion, sex, national origin, and color,[5] a number of federal courts have rejected this interpretation of Title VII's scope in cases of "misperception discrimination."[6] In cases like John's, courts have imposed an "actuality requirement" for Title VII protection. According to these courts, only intentional discrimination claims based upon an individual's actual protected status are cognizable under Title VII. Therefore, John can benefit from Title VII's protection against intentional race discrimination only if he is in fact of Mexican descent or if he brings forth specific allegations of invidious, differential treatment because of his Black, non-Hispanic ancestry.[7]

This result is illogical and inequitable. John's case does not present claims of discrimination that are any less injurious or remediable than if he were to maintain a conventionally framed employment discrimination case in which he alleged discriminatory treatment because of his self-identified Black, non-Hispanic racial identity. Accordingly, this Article posits that plaintiffs in misperception discrimination cases, like plaintiffs in conventionally framed cases, are asserting allegations of invidious, differential treatment on the basis of Title VII's proscribed characteristics. In other words,

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5. *See, e.g.*, Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1369 (10th Cir. 1997) ("The principal goal of Title VII is to eliminate discrimination in employment based on differences of race, color, religion, sex or national origin.") (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 & n.6 (1977)); Lightner v. City of Wilmington, 545 F.3d 260, 264 (4th Cir. 2008) ("Title VII prohibits discrimination on the basis of specifically enumerated grounds: 'race, color, religion, sex, or national origin.' [The statute's] purpose to eliminate these invidious forms of discrimination is clear.") (citation omitted).

6. This Article delineates that all discrimination is the manifestation of one's perceptions, related animus, or stereotypes about the victim of discrimination. Therefore, the descriptor, "misperception discrimination," simply refers to instances whereby the plaintiff alleges that the defendant misperceived her identity, or rather that the defendant's perceptions do not correlate with the plaintiff's self-perception or self-ascribed identity, and that the plaintiff suffered invidious, differential treatment stemming from the defendant's perceptions. *See infra* Part II.A.

7. Classifications as "Black" or "Mexican" are not mutually exclusive racial or ethnic identities. Though discussed less often, one who may identify as Hispanic and/or of Mexican ancestry may also have African ancestry and therefore identify as Afro-Mexican, Afro-Chicana, Afro-Hispanic, or Afro-Latina. *See generally* Tanya Katerí Hernández, *Afro-Mexicans and the Chicano Movement: The Unknown Story*, 92 CAL. L. REV. 1537 (2004). *See also generally* Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, So There Is No Blackness*, 15 S. CAL. INTERDISC. L.J. 199 (2006) (discussing the marginalization of Afro-Mexicans and African ancestry within the paradigm of Mexico's mixed-race or "mestizaje" identity despite Mexico's dealings with African slavery); LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 50 (N.Y. Univ. Press 2007) ("During the first century of Spanish conquest of Mexico, there were about as many African slaves brought to Mexico as Spaniards who emigrated there . . . [and] [o]ver time, African slaves mixed with Spaniards, Indians, and mestizos (people of Indian and Spanish ancestry) in Mexico to produce a racially mixed population.").

they have been subjected to "categorical discrimination." Thus, misperception discrimination plaintiffs are likewise entitled to statutory protection against unlawful discrimination in the workplace.

This Article demonstrates that courts' adoption of an actuality requirement in Title VII cases is categorically wrong. It represents a counterproductive, contrary, and disconcerting position within antidiscrimination law that, if left unexamined and unchallenged, can easily result in a wholesale lack of relief for victims of discriminatory treatment of the very nature that Congress meant to eliminate from the workplace. Moreover, in light of increased immigration, cultural diversity, interracial marriage, and transracial adoption, as well as the formal recognition of multi-racial identity and more fluid self-characterizations of racial, ethnic, religious, and gender identity, claims stemming from misperceptions about a plaintiff's protected status may become as commonplace as traditional claims of discrimination based upon an individual's self-classified identity. Continued application of an actuality requirement in intentional discrimination cases not only fails to respond to these real and ongoing demographic changes in American society but can also engender pervasive discrimination on the basis of race, religion, national origin, color, and sex in contemporary workplaces. Consequently, many individuals will be left without protection against categorical discrimination within Title VII's meaning and reach.

Additionally, imposition of an actuality requirement in categorical discrimination cases not only inflicts obvious injury on discrimination plaintiffs but also yields unexpected repercussions for antidiscrimination law theory, policy, and praxis, which this Article illuminates and aims to remedy. Overall, this Article seeks to end this narrow interpretation of antidiscrimination law generally and Title VII more specifically, which has fast become the predominant interpretive methodology in misperception discrimination cases and has also been employed in conventionally framed discrimination cases. Part I of this Article briefly outlines Title VII's protections and prohibitions. Part II details the development of an implicit and express espousal of an actuality requirement in intentional discrimination cases in which plaintiffs contended that their employers' misperceptions about their race, national origin, and/or religion motivated adverse employment actions, such as harassment or termination.

Part III investigates courts' reasoning for adopting an actuality requirement and argues that these judicial decisions are based on an unsettling misinterpretation of Title VII. Primarily, these courts have reasoned that, unlike the Americans with Disabilities Act

(ADA), which expressly affords protection to individuals discriminated against because of their perceived identity, Title VII protects against discrimination because of an individual's actual identity. Yet, by adopting an actuality requirement in Title VII cases, federal courts have patently disregarded the indelible nexus between employer perception and the resulting invidious, differential treatment, a relationship that courts recognize in ADA cases. Per these courts, to recognize misperception discrimination in the Title VII context would expand statutory protection to a new class of individuals whom Congress did not intend to protect.

Seemingly, the actuality requirement advanced in misperception discrimination cases also derives from a literal interpretation of the plain language of Title VII's substantive provision, which prohibits discrimination "because of *such* individual's race, sex, national origin, color, and religion."[8] More precisely, however, Part III continues by positing that the development of an actuality requirement is the product of an excessively rigid application of the protected class approach first adopted by the Supreme Court in *McDonnell Douglas v. Green*.[9] Courts' intransigence represents a disturbing interpretative methodology that this Article terms an "anti-anticlassificationist" interpretation of Title VII. This approach rejects one of the conventionally accepted purposes of Title VII: to prohibit all decision making on the basis of Title VII's proscribed traits, whether benign or invidious, in furtherance of a norm of individual fairness.[10]

Part IV examines the alarming, counterproductive implications of courts' anti-anticlassificationist interpretation and attendant creation of an actuality mandate in intentional discrimination cases. Part IV.A explores the creation of a minimalist "actuality defense." Part IV.B discusses the emergence of identity adjudication in all intentional discrimination cases. It then details the reality of racial

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8. 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

9. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (holding that the plaintiff, who identified himself as Black, established the initial element of a prima facie case of intentional race discrimination by demonstrating that he belonged to a "racial minority" group). Thereafter, lower courts interpreted the initial prima facie element articulated in *McDonnell Douglas* as requiring a showing of membership within a protected class or a protected group. *See generally* Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463 (2012) (providing a critique of the protected class approach in light of demographic changes within American workplaces).

10. Though legal academics have proposed and identified a number of perspectives appropriated by courts when interpreting Title VII and other antidiscrimination laws, the anticlassificationist and antisubordinationist approaches are largely represented within these academic debates as the chief, conventional methodologies used to interpret antidiscrimination laws. *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

determination litigation in contemporary race discrimination cases[11] and the continued reification of a discredited view of race as a fixed, biological construct. Thus, Part IV.B exposes the implications of an actuality requirement and posits that the creation of an actuality defense and the inundation of identity adjudication in both conventionally framed *and* misperception discrimination cases obfuscate the chief issue in such cases: whether the plaintiff suffered invidious, differential treatment on proscribed grounds.

Part V proffers a number of practical and theoretical interventions that practitioners, jurists, and legal scholars have not fully explored, yet which are critical in quelling further impairment of Title VII's meaning, protection, and efficacy. Specifically, Part V.A unveils the under-examined Fifth Circuit precedent of *EEOC v. WC & M Enterprises*[12] and EEOC guidance. Both of these precedents recognize misperception discrimination cases, reject an actuality requirement in Title VII intentional discrimination cases, and embrace the fact that subjective perceptions about a discrimination victim's protected status animate the invidious, differential treatment from which she suffers. Part V.B provides additional underexplored jurisprudential support for the cessation of an actuality requirement in Title VII cases via its examination of *Fogleman v. Mercy Hospital*.[13] In that case, the Third Circuit expressly legitimized misperception discrimination cases and acknowledged the interconnectedness of employer perceptions and the resulting discrimination in the Title VII context.

In Part V.C, this Article posits that, like the Third Circuit in *Fogelman*, the Supreme Court in *Thompson v. North American Stainless, LP*[14] implicitly denounced a showing of actuality as a prerequisite to maintain a Title VII action. Consequently, *all* categorical discrimination plaintiffs—despite the fact that the alleged discriminatory treatment they experienced may have emanated from their self-ascribed or mistaken identity—have standing to maintain a cause of action under Title VII. In both instances, plaintiffs assert claims of discrimination clearly "within the zones of interests protected by Title VII" and are "persons aggrieved" by a covered employer's unlawful employment practices. Thus, satisfying an actuality requirement should not be required for plaintiffs in conventionally

11. Identity adjudication could also occur in cases of religion, national origin, and sex discrimination. *See infra* notes 167, 263.

12. 496 F.3d 393 (5th Cir. 2007).

13. 283 F.3d 561 (3d Cir. 2002).

14. 131 S. Ct. 863 (2011).

framed *or* misperception discrimination cases to vindicate their statutory rights to be free from racial, religious, color, national origin, and sex discrimination in the workplace.

I. TITLE VII OF THE 1964 CIVIL RIGHTS ACT: ITS PROHIBITIONS AND PROTECTIONS

In 1964, during the heart of the modern civil rights movement, Congress enacted the Civil Rights Act, which is one of the most notable pieces of civil rights legislation to date. Title VII of the 1964 Civil Rights Act proscribes discrimination on the basis of race and color[15] and was designed to address pervasive racial discrimination in the sector of private employment.[16] Congress also forbade discrimination based upon sex, national origin, and religion.[17] Accordingly, in Section 703(a) of Title VII, Congress has made it unlawful for an employer employing fifteen or more employees:[18]

> 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 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.[19]

Title VII further provides that an employer violates the Act whenever a plaintiff "demonstrates that race, color, religion, sex, or

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15. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. 2000e-2 (2006)).

16. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 806 & n.6 (1994) (citing 110 CONG. REC. 2556 (1964) (remarks of Congressman Celler) ("You must remember that the basic purpose of Title VII is to prohibit discrimination in employment *on the basis* of race or color.") (emphasis added)).

17. Civil Rights Act § 703; *see also* Perea, *supra* note 16.

18. Title VII originally defined an "employer" as any entity "engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Civil Rights Act § 701, 78 Stat. at 253. This was later changed to fifteen or more employees. *See* 42 U.S.C. § 2000e(b) (2006).

19. Civil Rights Act § 703(a) (codified at 42 U.S.C. § 2000e-2(a)).

national origin was a motivating factor for any employment practice."[20] Therefore, Title VII expressly protects individuals against race, color, religion, sex, or national origin discrimination both before and during the employment relationship.[21]

Title VII also protects applicants and employees who have opposed an unlawful employment practice or participated in an investigation[22] related to such discrimination from employer retaliation.[23] Specifically, Title VII prohibits an employer from retaliating "against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[24]

An individual who claims that an employer has discriminated against her because of a prohibited basis enumerated in the statute is a "person aggrieved" under Title VII and is permitted to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[25] If the EEOC decides not to sue the employer, Title VII permits an individual aggrieved by a prohibited employment practice to initiate a civil action against the employer.[26] Though Congress did not provide a statutory definition of a "person aggrieved," a little over a decade after Title VII's enactment, the Supreme Court made clear that Title VII was "design[ed] as a comprehensive solution for the problem of *invidious* discrimination in employment."[27] A "person aggrieved" includes, at a

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20. 42 U.S.C. § 2000e-2(m). *But see id.* § 2000e-2(e) (providing that an employer does not violate Title VII when its consideration of national origin, religion, or sex in an employment decision is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise").

21. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that former employees were also included under the statutory term "employees" and are thereby able to maintain an actionable retaliation claim against former employers who are covered under Title VII).

22. At least five federal courts of appeals require a claimant to file a charge of discrimination with the EEOC or a similar enforcement agency or participate in investigatory proceedings before the EEOC or parallel state or local enforcement agency for the extension of protection under the participation clause. *See* Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003); EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 n.2 (11th Cir. 2000); Byers v. Dallas Morning News, Inc. 209 F.3d 419, 428 (5th Cir. 2000); Brower v. Runyon, 178 F.3d 1002, 1005–07 (8th Cir. 1999); Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990).

23. The Supreme Court held that an employer's action against a plaintiff constitutes unlawful retaliation when such an action is considered "materially adverse" or materially injurious or harmful to an objectively reasonable employee in the plaintiff's position. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–73 (2006).

24. 42 U.S.C. § 2000e-3(a) (2006).

25. *Id.* § 2000e-5(b).

26. *Id.* § 2000e-5(b), (f)(1).

27. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975) (emphasis added).

minimum, an individual who suffers invidious, differential treatment (1) on the basis of Title VII's protected categories or (2) in retaliation for protected conduct at the hands of a covered employer.[28] As this Article later demonstrates, such a person is thereby entitled to assert her statutory right to protection from discrimination on the basis of Title VII's proscribed grounds.

However, a band of federal district courts and at least one federal court of appeals have adopted an actuality requirement in Title VII cases of intentional discrimination emanating from an employer's misperceptions about the plaintiff's racial, ethnic, or religious identity.[29] By extension, this actuality requirement also applies to Title VII intentional discrimination cases on the basis of color or sex.[30] Misperception discrimination plaintiffs have alleged that they suffered a hostile work environment and other adverse employment actions, such as termination, because their employers have misperceived their identities. The Supreme Court has articulated

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28. *See* Thompson v. Am. Stainless Steel, LP, 131 S. Ct. 863, 869–70 (2011) (holding that the employee protected against retaliation need not be the applicant or the employee who opposed the discriminatory conduct or participated in a proceeding relating to alleged discrimination under Title VII); *infra* Part V.C.

29. *See, e.g.*, Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012); El v. Max Daetwyler Corp., No. 3:09-CV-415, 2011 WL 1769805 (W.D.N.C. May 9, 2011), *aff'd*, 451 Fed. App'x 257 (4th Cir. 2011); Adler v. Evanston Nw. Healthcare Corp., No. 07-C-4203, 2008 WL 5272455 (N.D. Ill. Dec. 16, 2008); Lopez-Galvan v. Mens Warehouse, Civil No. 3:06-CV-537, 2008 WL 2705604 (W.D.N.C. July 10, 2008); Uddin v. Universal Avionics Sys. Corp., CIVA 1:05-CV-1115-TWT, 2006 WL 1835291 (N.D. Ga. June 30, 2006); EEOC v. WC & M Enter., Inc., No. Civ.A. H-04-3372, 2005 WL 2106090 (S.D. Tex. 2005), *rev'd*, 496 F.3d 393 (5th Cir. 2007); Butler v. Potter, 345 F. Supp. 2d 844 (E.D. Tenn. 2004); *see also* McIntosh v. Ill. Dep't. of Emp't. Sec., No. 05-C-7044, 2007 WL 1958577 (N.D. Ill. July 2, 2007) (holding that a plaintiff who was born in the United States and self-identified as African American could not support her national origin discrimination claim on the ground that she was misperceived as Hispanic because she spoke Spanish in the workplace unless the plaintiff could demonstrate she was "actually" Hispanic since speaking Spanish did not necessarily signify her "actual" country of origin or race). Examination of available court documents and opinions reveals that the parties involved did not present the EEOC guidance on misperception discrimination to the courts, and the courts did not investigate *sua sponte* the EEOC's guidance on this issue.

30. In *Uddin v. Universal Avionics Systems Corp.*, for example, the court adopted an actuality requirement in a Title VII case alleging religious and misperception race and national origin discrimination. 2006 WL 1835291 at *6. The court dismissed the plaintiff's race and national origin discrimination claims yet denied summary judgment on plaintiff's religious discrimination claim. *Id.* at *4–7. In furtherance of a prima facie actuality mandate, the *Uddin* court granted the plaintiff his day in court on the religious discrimination claim and on a color discrimination claim, which the court raised *sua sponte*. *Id.* at *7, *6 n.3. According to the court, Mr. Uddin established a presumption of color and religious discrimination because he was "in actuality" Muslim, his skin complexion was "in actuality" dark, and he was replaced by a white Christian. *Id.* at *6. In so doing, the *Uddin* court extended an actuality requirement to Title VII color discrimination claims.

various frameworks for courts to use in such intentional discrimination cases. In *McDonnell Douglas v. Green Corp.*,[31] the Supreme Court promulgated a tripartite analytical framework to be utilized in disparate treatment cases in which the plaintiff is unable to proffer "direct"[32] evidence or an admission from the defendant that the proscribed characteristic is the reason for the adverse employment action. According to the Supreme Court, plaintiffs can raise a rebuttable presumption of discrimination by first putting forth a prima facie case that establishes that, more likely than not, a proscribed criterion was the reason for the alleged adverse employment action.[33] In *McDonnell Douglas*, the Court held that plaintiffs could establish a prima facie case of race discrimination by demonstrating:

> (i) that he belong[ed] to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[34]

According to *McDonnell Douglas*, once a plaintiff raises a viable prima facie case, the burden shifts to the defendant-employer to rebut the presumption of discrimination by producing, through admissible evidence, a "legitimate, nondiscriminatory reason" for the

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31. 411 U.S. 792 (1973). See Lapsley v. Columbia University-College of Physicians & Surgeons, 999 F. Supp. 506, 514 (S.D.N.Y. 1998), for a discussion of the original conception for the *McDonnell Douglas* framework. In 1989, the Supreme Court developed an additional analytical framework for disparate treatment cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Per *Price Waterhouse*, if the plaintiff proves that a protected characteristic was a substantial factor in the challenged employment action, the burden shifts to the defendant to prove that it would have made the same decision even had it not considered the protected characteristic. *Id.* at 250. After *Price Waterhouse*, Congress adopted an amended "mixed motive" analytical framework for proving disparate treatment cases. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)). The plaintiff must prove that a protected characteristic was a motivating factor for the challenged employment action. *See* 42 U.S.C. § 2000e-2(m). Upon a plaintiff making this showing, the defendant bears the burden of proving that it would have taken the same action even had it not considered the protected characteristic. *Id.* § 2000e-5(g)(2)(B). The Supreme Court, however, has not expressly overruled *McDonnell Douglas*. Therefore, in this Article, I limit my discussion of proving discrimination via circumstantial evidence to the *McDonnell Douglas* framework.

32. "The classic notion of 'direct evidence' is evidence that, if believed, proves the ultimate question at issue *without drawing any inferences*." MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 29 (7th ed. 2008).

33. *See McDonnell Douglas*, 411 U.S. at 802.

34. *Id.*

alleged adverse employment action.[35] Once the employer has produced a legitimate, nondiscriminatory reason for the adverse employment action, it is incumbent upon the plaintiff to demonstrate that the employer's alleged motivation is a pretext. That is, the plaintiff must present persuasive evidence either that the employer's asserted reason is false or that the employer's underlying motivation for the adverse employment action was, more likely than not, discriminatory.[36]

Though not expressly contemplated in Title VII's statutory language, the Supreme Court, in *Meritor Savings Bank v. Vinson*, interpreted Section 703(a) as prohibiting not only "economic" or "tangible" employment actions like a denial of benefits or termination, but also intangible employment actions such as creating a racially or religiously hostile work environment.[37] Although characterized as intentional discrimination, hostile work environment or harassment claims are not analyzed pursuant to the *McDonnell Douglas* framework. To assert an actionable hostile work environment claim under Title VII, a plaintiff must demonstrate that the discriminatory conduct is both subjectively and objectively sufficiently "severe or pervasive 'to . . . create an abusive working environment.'"[38] Therefore, the plaintiff must not only perceive the work environment as hostile or abusive, but the environment must also be one that a "reasonable person would find hostile or abusive."[39] The plaintiff must also show that the harassing conduct was unwelcome and because of a protected characteristic.[40] Some lower courts expressly require that plaintiffs demonstrate membership within a protected category.[41]

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35. *Id.*

36. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 256 (1981) (holding that a plaintiff may succeed in an intentional discrimination case "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence"); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–48 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . [and] a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated.") (emphasis added).

37. *See* Meritor Savs. Bank v. Vinson, 477 U.S. 57 (1986).

38. *See id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

39. *See* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1991).

40. *Meritor*, 477 U.S. at 68.

41. *See, e.g.*, Harvil v. Westwood Comms., L.L.C., 433 F.3d 428, 434 (5th Cir. 2005) (requiring that a hostile work environment plaintiff demonstrate that she: (1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3) experienced harassment because of a protected trait; and (4) was subjected to harassment that affected a term, condition, or privilege of employment).

In companion cases, the Supreme Court also articulated the ways in which an employer can defend hostile work environment claims under Title VII.[42] The employer's available defenses and, thus, Title VII liability, are conditioned upon the status of the employees creating the hostile work environment. In a situation in which a coworker is the culprit of harassing conduct on the basis of race, color, national origin, religion, or sex, the employer may be held liable under Title VII only if management knew or should have known about the harassment yet failed to take reasonable measures to correct it.[43] An employer is automatically liable for a supervisor's harassment of a subordinate employee when the supervisor's harassment results in a tangible employment action like a termination or demotion.[44] Yet, when a supervisor's harassment does not result in a tangible employment action, an employer is afforded an affirmative defense to defeat Title VII liability.[45] To take advantage of this affirmative defense, the employer must present evidence that it "exercised reasonable care to prevent and correct promptly any . . . harassing behavior" and that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[46]

At the outset, some courts are now rigidly applying the first prong, known as the "membership prong," of the aforementioned legal frameworks to hold that misperception discrimination plaintiffs are not protected under Title VII. These courts reason that the invidious, differential treatment the plaintiffs allegedly suffered was not caused by their actual identity. Implicitly, these courts are characterizing misperception discrimination plaintiffs as persons who are not aggrieved by an unlawful employment practice under the statute, even though they allege that they are the intended target of discrimination on the basis of Title VII's proscribed grounds.[47] These courts have effectively concluded that such plaintiffs do not have standing to initiate a Title VII claim and cannot benefit from Title VII's protection against workplace discrimination.[48]

Such an outcome is categorically wrong. It contravenes the reach and purpose of Title VII's proscriptions against religious, racial, ethnic, color, and sex discrimination, and impairs one's statutory

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42. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

43. *See Faragher*, 524 U.S. at 799.

44. *See Burlington Indus.*, 524 U.S. at 765.

45. *See id.*

46. *Id.*

47. *See infra* Part III.D.

48. *See infra* Part V.

right to be free from such workplace discrimination. Thus, the following sections critically appraise the development and negative consequences of this misinterpretation of Title VII and proffer persuasive legal precedent and EEOC prescriptions for its cessation.

II. THE EVOLUTION OF AN ACTUALITY REQUIREMENT IN TITLE VII CASES

Though in the making for nearly twenty years,[49] the imposition of an actuality requirement in Title VII intentional discrimination cases is nascent. However, an actuality requirement has steadily gained momentum in the federal judiciary within the past decade in categorical discrimination cases involving misperceptions about the plaintiff's race, national origin, and religion.[50] This Part details the concurrent development of both an implicit and an explicit actuality requirement in misperception discrimination cases, as well as more recent applications of this requirement in misperception discrimination cases. In doing so, this Part determines that the imposition of an actuality requirement by the federal judiciary is a burgeoning trend in misperception discrimination cases, thereby illuminating a seismic shift from judicial pliability to judicial rigidity in effectuating Title VII's meaning and reach.

A. Implicit Adoption of an Actuality Requirement

A number of federal courts have imposed an actuality requirement in Title VII intentional race, national origin, and religious discrimination cases.[51] These courts have mandated this requirement primarily in cases of categorical discrimination that derive

49. *See* Perkins v. Lake Cnty. Dep't of Util., 860 F. Supp. 1262, 1262–63 (N.D. Ohio 1994) (defendant-employer arguing that the court should adopt an actuality requirement in Title VII intentional discrimination cases based upon the notion that plaintiff did not prove successfully that he was actually Native American; therefore, the plaintiff was unable to meet a preliminary showing of protection against race and national origin discrimination under Title VII, and thus the plaintiff could not assert an actionable discrimination claim).

50. *See* cases cited *supra* note 29; *see also* Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *9 (C.D. Ill. April 11, 2007) (holding in a conventionally framed race discrimination case under § 1981 that discrimination plaintiffs must satisfy an actuality requirement and thereby prove their racial identity at trial).

51. *See* cases cited *supra* note 29.

from an employer's misperceptions about the plaintiff's race, national origin, or religion.[52] Misperception discrimination cases expose a variety of categorical discrimination manifesting in contemporary American society[53] and workplaces that is no different in legal substance or injurious effect from the invidious, differential treatment based upon a plaintiff's self-ascribed identity alleged in conventionally framed cases. Additionally, these discrimination cases based on mistaken identity foreshadow the framing of discrimination claims to come. With increased immigration, cultural diversity, interracial marriages, and transracial adoptions, as well as more formal recognition of mixed-race classifications and more fluid conceptualizations of gender, racial, and cultural identity,[54] courts will likely encounter more discrimination cases where an alleged dissonance exists between the employer's categorization of an employee and the employee's self-identification.

Fundamentally, misperception discrimination claims are not exceptional. Discrimination plaintiffs claim to suffer invidious or adverse treatment motivated by the discriminator's conscious or unconscious perceptions about their race, color, religion, sex, or national origin,[55] which are informed by personal, temporal, and broader social contexts. In conventionally framed discrimination cases, the employer's perception of the plaintiff's identity simply

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52. *See* cases cited *supra* note 29; *see also* Leonard, 2007 WL 1106136, at *9 (holding, in a conventionally framed race discrimination case under § 1981, that discrimination plaintiffs must satisfy an actuality requirement and prove their racial identity).

53. Misperceptions about an individual's race, color, religion, sex, or national origin engender not only discrimination in the workplace but also violent hate crimes that are at times fatal. *See, e.g.*, Martinez v. State, 980 S.W.2d 662, 666 (Tex. App. 1998) (upholding the enhancement of the defendant's criminal sentence for capital murder under the Texas Hate Crimes Act where the defendant misperceived the minor victim as Black, and such misperception motivated the defendant's victimization of the child, which caused the child's death). Moreover, based upon media reports, an individual who opened fire on Sikhs in their house of worship in Wisconsin, killing six and injuring numerous others, misperceived the victims as Muslims. Though not yet confirmed, the assassin's misperception quite plausibly motivated his targeted act of violence. *See* Samuel G. Freedman, *If the Sikh Temple Had Been a Mosque*, N.Y. TIMES (Aug. 10, 2012), http://www.nytimes.com/2012/08/11/us/if-the-sikh-temple-had-been-a-muslim-mosque-on-religion.html?_r=3.

54. *See* Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 739–40 (2006) (positing that the increase in interracial relationships and the growing acceptance of interracial intimacy, mixed-race identity, and transracial adoption over the past half-century have drastically altered "notions about race and races"; as a result, "racial mixture promises to transform the entire civil rights agenda in the United States"). *See generally* Levit, *supra* note 9.

55. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011) (clarifying that the "basic theory of [the class action plaintiffs in their Title VII intentional sex discrimination case] is that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each of Wal-Mart's managers").

happens to comport with her self-perception.[56] Conversely, in misperception discrimination cases framed as instances of mistaken identity, the employer's perception of the plaintiff's protected status and the plaintiff's self-ascribed identity are at odds. Both types of discrimination cases reflect the socially constructed nature of identity classification. External perceptions of one's identity are oftentimes uncontroverted and, presumably, fixed and logical.[57] Simultaneously, external perceptions of one's identity are oftentimes contestable, seemingly illogical, and formulated independently of any awareness of an individual's self-selected identity.[58]

Nonetheless, an employer's misperception of an individual's protected status does not negate an employer's related animus, stereotyping, stigmatization, or the attendant malicious treatment. Regrettably, a number of federal courts have ignored the fact that such perceptions and the invidious, differential treatment activated by them are at the crux of intentional discrimination. As a result, these courts have adopted—both implicitly and explicitly—an unwarranted actuality requirement in Title VII cases.

This Part first examines *Afshar v. Pinkerton Academy*,[59] the first reported case wherein a federal district court implicitly affirmed an actuality requirement in Title VII. Thereafter, this Part analyzes two central cases that expressly adopt an actuality requirement. The first, *Butler v. Potter*,[60] is the first reported Title VII misperception discrimination case wherein a federal district court expressly adopted an actuality requirement. The second, a more recent case, *Burrage v. FedEx Freight, Inc.*,[61] marks an intractable formation of the actuality requirement in Title VII jurisprudence.

1. *Afshar v. Pinkerton Academy*

It is well-documented that after the tragic events of September 11, 2001, many Americans have become the victims of heightened discrimination and violence, including murder, because of perceptions and misperceptions about their racial, ethnic, and religious

56. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

57. *See infra* Part III.D.

58. *See infra* note 233.

59. No. Civ. 03–137–JD, 2004 WL 1969873 (D.N.H. Sept. 7, 2004).

60. 345 F. Supp. 2d 844 (E.D. Tenn. 2004).

61. No. 4:10-CV-2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012).

identities.[62] Namely, those who have been perceived or misperceived as Muslim and/or of Middle Eastern descent have been uniquely victimized as a result of the terrorist attacks on September 11th.[63] *Afshar v. Pinkerton Academy* is representative of the invidious, differential treatment occurring in American workplaces, which has been coined "post-9/11 discrimination."[64] The plaintiff, Foad Afshar, a native Iranian, immigrated to the United States in 1977. In 1999, Afshar began working for the Academy as Director of the Guidance Department. He experienced his fair share of problems his first year on the job. Members of the Guidance Department issued complaints against him and three guidance counselors resigned at the end of the year. Despite the resignations and complaints, Afshar received a favorable year-end evaluation, and the Academy renewed his employment contract for a second year.[65]

Mr. Afshar's second year evaluations improved and were positive. Indeed, in the summer of 2001, Afshar was offered a promotion to oversee two departments, which he declined. According to Afshar, the 2001 school year began well, but shortly after the terrorist attacks on September 11th he noticed a "distinct change" in the manner in which his colleagues and the administration treated him. Afshar claimed that he was excluded from the school's response to the September 11th tragedy. Soon after, the Assistant Headmaster requested that Afshar present his green card, claiming that it had expired even though it had not. Afshar also alleged that one of the guidance counselors charged him with harassment and, in doing so, accused him of "terrorizing" the department. Approximately six months later, the Academy decided not to renew Afshar's employment contract. Afshar sued his former employer, alleging that "his contract was not renewed because of either his nationality or his perceived religion in violation of Title VII."[66]

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62. *See generally* Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33 (2009); Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE 103 (2012).

63. *See generally* Dawinder S. Sidhu, *Violence against Sikhs Stems from Ignorance and Fear*, BALT. SUN (Aug. 6, 2012), http://www.baltimoresun.com/news/opinion/oped/bs-ed-sikh-shootings-20120806,0,6088052.story (contextualizing the recent killings of Sikhs at a temple in Wisconsin on August 5, 2012 by explaining that "the Sikh community in America—for no reason other than its members' appearance—has suffered extensive harassment, prejudice and violence in the years since the Sept. 11 terrorist attacks"); Sidhu, *supra* note 62.

64. Sahar Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191 (2012).

65. Afshar v. Pinkerton Academy, No. Civ. 03–137–JD, 2004 WL 1969873, at *1 (D.N.H. Sept. 7, 2004).

66. *Id.* at *1.

Afshar, like the vast majority of intentional discrimination plaintiffs, relied upon circumstantial evidence to prove his claims of discrimination and satisfied the *McDonnell Douglas* analytical framework in doing so. Afshar established a prima facie case of national origin discrimination by demonstrating that he was a member of a protected class, i.e., he was Iranian, he was qualified for the guidance counselor position, the Academy terminated him by failing to renew his employment contract, and, allegedly, a woman of non-Iranian descent less qualified than Afshar replaced him as Guidance Counselor.[67]

After Afshar successfully established a prima facie case of national origin discrimination, the Academy asserted that its legitimate, nondiscriminatory reason for not renewing Afshar's contract was due to Afshar's "'issues' with management skills, 'issues' dealing with parents, and problems with staff."[68] The defendant-employer satisfied its burden of production by supplying these reasons. Mr. Afshar satisfied his ultimate burden of persuasion by undermining the credibility and neutrality of the alleged reasons for his termination. According to the court, the Academy "offered new reasons or at least expanded versions of those reasons to justify the decision" throughout litigation upon Afshar's challenge.[69] Moreover, the court contextualized the Academy's assertion that remedying the alleged interpersonal strife between the staff and Afshar was one of its legitimate, nondiscriminatory reasons for not renewing his contract.[70] The court recognized that the friction between Mr. Afshar and his co-workers manifested shortly after September 11th and was infused with ethnic bias against Afshar emanating from the tragic events.[71] The court held that "to the extent that [the Academy] argues that its decision to terminate Afshar was necessary to resolve unrest in the Department, even if the unrest was unfounded and due in part to discriminatory animus, that would not be a legitimate basis for terminating him."[72]

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67. *Id.* at *4. The court specifically outlined that a plaintiff demonstrates a prima facie case of discrimination by producing evidence of the following: "(1) he is a member of a protected class; (2) he was qualified for the job; (3) the employer took an adverse employment action against him; and (4) the position remained open or was filled by a person with similar qualifications." *Id.*

68. *Id.*

69. *Id.*

70. *See generally* D. Wendy Greene, *Pretext Without Context*, 75 MO. L. REV. 403 (2010) (positing that courts should place an employment discrimination plaintiff's proffer of pretext—statements and behavior in the workplace—within historical and contemporary social context as well as relational context in order to more meaningfully redress subtle race and ethnic discrimination permeating contemporary workplaces).

71. *See Afshar*, 2004 WL 1969873, at *4.

72. *Id.*

Although the court denied the Academy's summary judgment motion,[73] its reasoning foreshadowed the creation of an actuality requirement. The court did not expressly hold that misperception discrimination cases are outside of Title VII's jurisdiction, but it did hold tightly to *McDonnell Douglas'* protected class approach, which essentially recognizes actionable discrimination as that which is generated because of the plaintiff's actual or self-ascribed identity. First, the court held that Afshar satisfied a prima facie case of unlawful discrimination in part because he was actually Iranian and he was replaced by a non-Iranian, i.e., someone outside of his protected class.[74] Accordingly, the court merged Afshar's religious discrimination claim with his alternative claim of national origin discrimination, reasoning that Afshar's national origin claim and misperception religious discrimination claims were "indistinguishable."[75] In a rare decision that granted a race and national origin discrimination plaintiff his day in court,[76] the *Afshar* court failed to utilize an important opportunity to allow the plaintiff to accurately frame his discrimination claim and to clarify that misperception discrimination claims are cognizable under Title VII. Indeed, it is quite probable that Mr. Afshar's co-workers harassed him because of his national origin, as knowledge of his Iranian nativity could have engendered their misperception that he was Muslim. It is equally plausible that, without any knowledge of his national origin, Mr. Afshar's co-workers misperceived him as Muslim. In other words, Afshar's national origin may have had no bearing on his coworkers' perception of him as Muslim. Nonetheless, by subsuming Mr. Afshar's national origin and religious discrimination claims and employing a strict protected class approach in its analysis of his prima facie case, the court essentially afforded Mr. Afshar Title VII protection against invidious, differential treatment based upon his actual national origin.[77] Thus, the *Afshar* court implicitly affirmed that Title VII proscribes discrimination on the basis of the plaintiff's actual protected status.

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73. *Id.* at *5.

74. *Id.* at *3.

75. *Id.* at *3 n.2.

76. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006), for a study of race and national origin employment discrimination cases in which Professor Parker concludes that "plaintiffs almost always lose when courts resolve their claims." *Id.* at 894. Parker contends that the main reason for such a low success rate in national origin and race discrimination cases is an "anti-race plaintiff *ideology*" embraced by the judiciary, or a judicial attitude that race and national origin discrimination plaintiffs' claims "lack legal merit and the defendants are right as a matter of law." *Id.* at 933.

77. *See Afshar*, 2004 WL 1969873, at *3 n.2.

B. Express Adoption of an Actuality Requirement

1. *Butler v. Potter*

Only months after *Afshar v. Pinkerton Academy,* a federal district court in the Eastern District of Tennessee expressly held that a showing of actuality was required for Title VII protection against categorical discrimination.[78] In *Butler v. Potter*, a former carrier with the U.S. Postal Service, Jesse Butler, who identified as a "white, Caucasian"[79] male, alleged, among other claims, that his supervisor harassed him on the basis of race or national origin in violation of Title VII.[80] According to Mr. Butler, his supervisor "accused" him of being "Arab, Indian or Middle Eastern" because of his facial features—namely, his "prominent nose"[81]—and harassed him accordingly.[82] With only a passing reference to Title VII's substantive provision, Section 703(a), the court endorsed the legal argument of the U.S. government[83] that "Title VII protects those persons that belong to a protected class, and says nothing about protection of persons who are *perceived* to belong to a protected class."[84] In so holding, the court also summarily adopted the federal government's legal reasoning. The court declared that discrimination in Title VII cases would not be conceptualized by the court as a

78. In September 2004, the court issued its opinion in *Afshar v. Pinkerton Academy*. In November 2004, the court issued its opinion in *Butler v. Potter*, 345 F. Supp. 2d 844 (E.D. Tenn. 2004).

79. *Butler*, 345 F. Supp. 2d at 846.

80. *Id.*

81. *Id.* at 850. *See generally* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355, 1365–66 (illustrating that an individual's physical characteristics, like skin color, cranial structure, and the shape of one's nose or lips, have been racialized historically and contemporarily).

82. *Butler*, 345 F. Supp. 2d at 846.

83. In this case, attorneys with the U.S. Department of Justice, Office of the U.S. Attorney in Knoxville, Tennessee, represented the Postmaster General of the United States Postal Service in his representative capacity. *See id.* at 846. Interestingly, governmental attorneys for two federal agencies during the George W. Bush administration played a critical role in developing conflicting jurisprudence on the issue of whether a showing of actuality is required for Title VII intentional discrimination cases involving misperceptions about the plaintiff's protected status. In 2004, in *Butler v. Potter*, the U.S. Department of Justice argued successfully for the imposition of an actuality requirement in an intentional race/national origin discrimination case under Title VII. In 2007, the EEOC argued successfully before the Fifth Circuit in *EEOC v. WC & M Enterprises* that actuality is not required for Title VII protection against intentional national origin discrimination emanating from an employer's misperceptions about the plaintiff's ethnic identity. *See infra* Part V.A.

84. *Butler*, 345 F.Supp.2d at 850 (citation omitted). Defense counsel also supported its argument for an actuality requirement (and thus disavowal of a perception theory in the Title VII context) by referencing the Rehabilitation Act of 1973, which preceded the Americans with Disabilities Act in proscribing disability discrimination. *See id.*

phenomenon animated by employer perception: "Congress has shown, through . . . the Americans with Disabilities Act, that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class."[85] The court further intimated that since neither Mr. Butler nor the federal government proffered controlling legal precedent that expressly recognized a perception theory of discrimination in the Title VII context, it was obligated to hold that Butler's misperception discrimination claim was not actionable.[86]

Seemingly, the *Butler* court was amenable to foregoing a showing of actuality had the litigants presented persuasive or controlling legal authority to this effect.[87] Nonetheless, since *Butler*, a number of federal district courts have expressly adopted an actuality requirement in categorical discrimination cases involving allegations of misperceptions about the plaintiff's religion, race, or national origin, and one federal court of appeals has sanctioned this prerequisite for statutory protection.[88] In doing so, most courts have simply rehashed the reasoning the *Butler* court advanced.[89] For example, in *Lewis v. North General Hospital*, a federal district court in New York held that a plaintiff's Title VII case failed as a matter of law where an employer allegedly discriminated against the plaintiff based upon his misperceived religious identity.[90] Citing to *Butler* for support, the *Lewis* court proclaimed that "protections of Title VII do not extend to persons who are *merely* perceived to belong to a protected class."[91]

More recent misperception discrimination cases[92] reveal a more intractable disposition. Indeed, in the case discussed next, *Burrage*

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85. *Id.*

86. *Id.*

87. *Id.* (noting that neither plaintiff nor defendant put forth controlling authority that supported a holding that Title VII embraces a perception theory like the ADA and thus does not require a showing of actuality in intentional discrimination cases).

88. *See* cases cited *supra* note 29.

89. *See* Adler v. Evanston Nw. Healthcare Corp., No. 07-C-4203, 2008 WL 5272455, at *4 (N.D. Ill. Dec. 16, 2008); Lopez-Galvan v. Mens Warehouse, Civil No. 3:06-CV-537, 2008 WL 2705604, at *7 (W.D.N.C. July 10, 2008); McIntosh v. Ill. Dep't. of Emp't. Sec., No. 05-C-7044, 2007 WL 1958577, at *5 (N.D. Ill. July 2, 2007); Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *8 (C.D. Ill. April 11, 2007); Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D. Ga. June 30, 2006); EEOC v. WC & M Enter., Inc., No. Civ.A. H-04-3372, 2005 WL 2106090, at *4 (S.D. Tex. 2005) *rev'd*, 496 F.3d 393 (5th Cir. 2007).

90. 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007).

91. *Id.* (emphasis added).

92. *See, e.g.*, Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012); El v. Max Daetwyler Corp., No. 3:09-CV-415, 2011 WL 1769805, at *5–6 (W.D.N.C. May 9, 2011). A more detailed discussion of the *El* case is found *infra* Part III.B.

v. FedEx Freight, Inc.,[93] a federal district court in the Northern District of Ohio went to great lengths to ensconce an actuality requirement for categorical discrimination plaintiffs.

2. *Burrage v. FedEx Freight, Inc.*

Born of an African-American father and a white mother,[94] Nathaniel Burrage claimed that his supervisors and several co-workers at FedEx harassed him because they misperceived him as Mexican.[95] According to Burrage, for approximately three years his supervisor and co-workers referred to him as Mexican and "cheap labor" in a "derogatory and pervasive manner" and directed the Spanish terms "Andale, Andale" and "Arriba, Arriba" toward him.[96] Burrage alleged that after informing his supervisor of his Black and white parentage, Burrage's supervisor retorted that he "looked Mexican."[97] Burrage claimed that he attempted to explain that being called Mexican offended him because one of his ex-girlfriends requested that he deny to her family that he was Black and pretend to be Mexican.[98] His supervisor laughed at his account and continued to call him Mexican.[99]

Burrage also alleged that, on one occasion, FedEx dockworkers pointedly questioned him about the veracity of a dehumanizing graffiti statement on a trailer that read, "Mexicans were 'proof that American Indians had sex with buffalos.'"[100] Burrage also claimed that one day after greeting one of his supervisors, the supervisor replied, "I don't talk to Mexicans."[101] According to Burrage, he complained to supervisory level FedEx employees, including the supervisor who allegedly called him "Mexican" on several occasions and told Burrage that he did not speak to Mexicans, about the race-based references aimed at him by both supervisors and co-workers.[102] In doing so, he confided that their conduct left him feeling "degraded," "embarrassed and [a]shamed," and disinterested in working.[103]

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93. *Burrage*, 2012 WL 1068794.
94. *Id.* at *2 n.2.
95. *Id.* at *1–2.
96. *Id.* at *1–2, *4.
97. *Id.* at *1–2.
98. *Id.*
99. *Id.*
100. *Id.* at *2.
101. *Id.* at *3.
102. *Id.* at *2.
103. *Id.*

Burrage filed a Title VII claim against FedEx, alleging that he suffered harassment on the basis of his race and/or color.[104] The court granted FedEx's summary judgment motion on several grounds.[105] First, like the *Butler* court, the *Burrage* court reasoned that Burrage failed to satisfy a prima facie element of a Title VII intentional race discrimination claim: actual membership within the racial group of which the harassers perceived the plaintiff to be a member.[106] In other words, since Burrage was not actually Mexican as his co-workers and supervisors allegedly perceived him to be, he could not satisfy a prima face case of race discrimination. Indeed, the court held that "Title VII protects only those who are *actually* in a protected class, and not those who are *perceived* to be in a protected class."[107] The court further pronounced that "[c]laims based on perceived class membership are not legally viable under Title VII, and the Court *will not expand* the reach of Title VII to cover that which Congress *chose* not to protect."[108]

According to the court, Burrage did not present an actionable Title VII race discrimination claim because none of the "alleged harassing events were based upon his race (African-American) or had a racial character or purpose."[109] The *Burrage* court reasoned:

> [a]t best, the references to Burrage as "the Mexican" and "cheap labor," and the use of the Spanish terms "andale" and "ariba," [sic] represent the very unfortunate employment of offensive stereotypes of Hispanics, and can be said to arise out of a misperception that Burrage was of Hispanic descent; or at worst, they amount to incomprehensible name calling. They cannot *reasonably* be considered to have referred to the fact that Burrage's race was African-American or that his skin color was brown . . .[110]

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104. *Id.* at *1. Burrage also filed a complaint pursuant to Ohio state law. *Id.*

105. *See id.* at *8–9 (holding that Burrage failed to demonstrate a basis for employer liability because he did not satisfy an actuality requirement, he did not sufficiently notify the employer of alleged racial harassment, and he failed to take advantage of the reporting process outlined in the employer's anti-harassment policy, of which he was aware).

106. Burrage did not satisfy the first element of a hostile work environment claim within this jurisdiction. Per the court, an employee asserting that he suffered a hostile work environment on the basis of race or color in violation of Title VII must first establish that "he is a *member of a protected class*." *Id.* at *4. (emphasis added).

107. *Id.* at *5. (emphasis added).

108. *Id.* at *8. (emphasis added).

109. *Id.* at *5. Notably, the court classified Burrage as African American rather than mixed-race although Burrage self-identified as Black and mixed-race. *Id.* at *1, *6.

110. *Id.* at *6. (emphasis added). Logically, one may question whether courts will begin deciphering which racially derogatory terms are associated with a particular racial group.

Therefore, the court did not simply impose an actuality requirement on plaintiffs in order to receive statutory protection and ensure that an employer's invidious, differential treatment of the plaintiff on Title VII's proscribed bases would be deemed remediable. It cemented an artificial line between protection and nonprotection under Title VII by holding that the discrimination that one suffers does not become actionable until the discriminatory treatment corresponds with one's actual protected status. Indeed, the court expressly held that Burrage's racial harassment claim failed because "Burrage [did not] maintain that his supervisors and co-workers began to use any terms that were . . . related to his status as an African-American, *upon learning of his true race*."[111]

By the court's reasoning, only if Burrage were in fact Mexican or began suffering derogatory comments or references related to his self-ascribed and self-reported racial identity as biracial or Black would the court recognize Burrage's statutory right to be free from racial harassment.[112] Instead of being called "Mexican," "cheap labor," and having "andale" and "arriba" directed at him in a deprecating manner by supervisors and co-workers, Burrage would have to put forth allegations that he was called pejorative terms alluding to his self-ascribed racial identity, like "zebra,"[113] "Euronigger,"[114] "half-breed,"[115] "Buckwheat,"[116] "nigger,"[117] or

111. *Id.* at *8 n.8 (emphasis added).

112. Based upon Burrage's self-identification.

113. See *Madison v. IBP, Inc.*, 149 F. Supp. 2d 730, 752 (S.D. Iowa 1999), for a race discrimination suit brought under Title VII, § 1981, and a state antidiscrimination law in which a white female plaintiff contended that she endured racial insults aimed at her marriage to a Black man and their children, whom a co-worker called "zebras," "monkeys" and "fucking nigger babies."

114. *See, e.g.*, Moore v. Bd. of Educ., 300 F. Supp. 2d 641, 643 & n.2 (N.D. Ill. 2004) (minor plaintiff who self-identified as "African American and Caucasian" asserting a denial of equal protection under the Fourteenth Amendment because a public school high school teacher allegedly made several public, racially discriminatory comments related to plaintiff's biracial identity, which included calling him "Euronigger").

115. See *Wheaton v. North Oakland Medical Center*, 130 F. App'x 773, 777 (6th Cir. 2005), for a Title VII race discrimination case in which a white female plaintiff supported her hostile work environment claim with testimony that co-workers made insulting comments about her long-term relationship with a Black man, and that a co-worker called their daughter a "half breed."

116. See *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991), for a Title VII race-based hostile work environment case in which a Black male plaintiff testified that his coworkers nicknamed him "Buckwheat."

117. *See, e.g.*, *id.* at 1267 (Black male plaintiff testifying during the trial of his Title VII race-based hostile work environment case that his co-worker called him "nigger" and "dumb nigger"). As seen in *Madison v. IBP, Inc.*, this pejorative term unfortunately has been used to demean individuals racialized as non-white more generally, as when a co-worker of a race discrimination plaintiff called the plaintiff's children, who were of Black and white parentage, "niggers." 149 F. Supp. 2d at 752.

"monkey."[118] Alternatively, according to the court, Burrage could only benefit from Title VII's protection against a racially hostile work environment once the employer uncovered his mixed-race heritage and subjected him to dehumanizing graffiti in the workplace that specifically targeted interracial Black-white relationships, biracial children, and/or Blacks more generally, rather than the dehumanizing graffiti about individuals of Mexican ancestry (who may or may not be of African descent).[119]

The court displayed an equally myopic and intransigent adherence to an actuality requirement in its analysis of Burrage's color discrimination claim. The court acknowledged the plausibility of FedEx employees aiming "offensive stereotypes of Hispanics"[120] at Burrage because of their "misperception that Burrage was of Hispanic descent."[121] Remarkably, however, the court concluded that his being called "Mexican" in a racially subordinating manner and being subjected to offensive stereotypes about Hispanics could not "reasonably be considered to have referred to the fact that . . . his skin color was brown."[122]

First, in failing to acknowledge the obvious nexus between Burrage's theories of race and color discrimination, the court held that Burrage's Title VII color discrimination claim was not actionable because the alleged remarks of Burrage's co-workers and supervisors did not have a "color-related character or purpose."[123] According to the court's reasoning, Burrage needed to proffer express statements of FedEx employees that his skin color rather than his general physical appearance (which plausibly encompasses his skin color) spawned the comments "andale," "arriba," "cheap labor," and "Mexican," as well as his supervisor's persisting belief that Burrage "looked Mexican." Moreover, although the court expressly recognized the often indistinguishable nature of race and national origin discrimination,[124] it depicted Burrage's Title VII case as one

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118. *See Madison*, 149 F. Supp. 2d at 752 (race discrimination plaintiff contending that co-worker called her biracial children "monkeys").

119. *But see Daniels*, 937 F.2d at 1268 (Seventh Circuit affirming that a racial harassment claim can be supported by racially offensive comments not aimed at a plaintiff's or a co-worker's "actual" race in light of evidence proffered that plaintiff's co-worker, Randy Heron, was called "Reinaldo Gonzalez" because he "looked Mexican" and that "Reinaldo" was scrawled on a wall in the workplace alongside references to the Ku Klux Klan).

120. *Id.* at *6.

121. *Id.*

122. *Id.*

123. *See id.* at *5 (contrasting Burrage's allegations with the aphorism "the blacker the berry, the sweeter the juice" proffered in support of a Title VII color discrimination claim that survived summary judgment).

124. *See id.* at *7 (acknowledging that discrimination on the basis of national origin or race "certainly overlap").

"where issues of national origin and race are [not] so intertwined that it is difficult to separate the two for purposes of analysis."[125] The court characterized Burrage's hostile work environment case as one of national origin discrimination, deeming it "a separate and distinct form of discrimination" from race or color discrimination.[126] In the court's estimation, the alleged comments directed at Burrage were unequivocally based upon national origin and not upon race or color.[127] Consequently, the court held that Burrage could not "recast a national origin claim into one of race or color."[128] The court criticized Burrage's quite cogent argument that "'but for' his skin color, he would not have been perceived as Mexican or Hispanic,"[129] as "circular logic." Meanwhile, the court itself engaged in flawed reasoning in order to circle back to and fortify its initial decree: "Title VII protects only those who are *actually* in a protected class."[130] The court would not recognize categorical discrimination cases emanating from an employer's misperceptions about a plaintiff's race, color, or national origin under Title VII unless Congress commanded the court to do so.

In light of its express actuality requirement, it appears that the court strategically framed Burrage's race and color discrimination claims as theoretically distinguishable from his claim of national origin discrimination in order to effectively render Burrage's hostile work environment claim irremediable under Title VII. To present an actionable Title VII claim of national origin discrimination, Burrage would have to undermine his allegations and, once again, satisfy a superfluous condition by demonstrating that he was actually of Mexican descent. What if Burrage or a like plaintiff uncovered during the litigation of his employment discrimination case that he descended from Mexican ancestors or discovered that he was adopted and that his natural mother or father was of Mexican descent?[131] What if his supervisors also began aiming

125. *Id.*

126. *See id.* at *6 ("[C]omments supporting one type of discrimination can[not] provide the sole support for a claim for a separate and distinct form of discrimination.").

127. *See id.* at *7 (cursorily citing to federal court opinions in Title VII discrimination cases as support for its treatment of race, national origin, and color discrimination as unrelated, discrete concepts).

128. *Id.*

129. *Id.*

130. *Id.* at *5. (emphasis added).

131. See, for example, *Wood v. Freeman Decorating Services, Inc.*, No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4–5 (D. Nev. Feb. 19, 2010), for a Title VII intentional race/national origin discrimination case in which the plaintiff maintained that he began to self-identify as Native American after his adopted mother informed him that his biological parents were Native American though his birth certificate classified him as white and he had self-classified as white and as Hispanic at earlier points in his life. *See also* Defendant's Motion

derogatory comments at Burrage related to his Black or multi-racial identity or making deprecating references about his skin color? According to the court's holding and rationale, such ancestral evidence and offensive comments could magically transform non-cognizable claims of national origin, race, or color discrimination into cognizable claims of discrimination under Title VII.

Such a line of demarcation between statutory protection and non-protection is nonsensical and contrived. There is no plausible reason for the court to protect Burrage against a racially hostile work environment if the employer repeatedly called him a "half-breed" or "Buckwheat" rather than shouting "andale" at him in a demeaning way or calling him "cheap labor." Likewise, there is no reason for a court to extend Title VII protection to an employee who self-identifies as Hispanic and whom an employer calls "cheap labor" and directs "andale" or "arriba" in a derogatory manner but to fail to extend statutory protection to Burrage who suffers the same invidious treatment in the workplace.

III. TOWARDS UNITY: THE METHODS BEHIND THE ACTUALITY MADNESS

Part II described the birth of the actuality requirement imposed in Title VII intentional discrimination cases. This Part will continue exploring the development of certain courts' actuality requirement and will also consider the myriad underlying justifications for their inflexibility in Title VII misperception discrimination cases. This Part argues that such courts' interpretative methodology in cases of categorical discrimination marks the arrival of a peculiar "anti-anticlassificationist" interpretation of Title VII, an intransigent statutory reading that negates express legislative objectives and conventional understandings of the meaning and scope of antidiscrimination law.

A. Nothing Borrowed: Courts' Refusal to Apply the ADA's Perception Theory to the Title VII Context

Uniformly, without exploring Title VII's purpose or meaning or even referencing the EEOC's express guidance on misperception discrimination,[132] a band of federal district courts and one federal

to Dismiss, Wood v. Freeman Decorating Servs., Inc., No. 3:08-CV-00375-LRH-RAM, 2009 WL 4836455 (D. Nev. July 30, 2009).

132. *See infra* Part V.A.

appellate court have concluded that cases involving invidious, differential treatment motivated by an employer's misperceptions about an employee's race, religion, or national origin (and by extension, color or sex) are beyond Title VII's scope.[133] Moreover, these courts did not acknowledge the fact that the alleged invidious, differential treatment the plaintiffs experienced is inherently connected to the defendant-employer's perceptions of the plaintiffs' racial, ethnic, or religious identity or status.[134] Notably, in these intentional discrimination cases, the focal point for courts when adopting an actuality requirement (and rejecting a perception theory of discrimination) is an antidiscrimination statute Congress enacted nearly three decades *after* Title VII, the Americans with Disabilities Act (ADA).[135] The recurring, express justification that courts proffer for imposing an actuality requirement is a facial difference among the substantive provisions of the Americans with Disabilities Act and Title VII of the 1964 Civil Rights Act.[136]

In 1990, Congress enacted the Americans with Disabilities Act to respond to the discrimination that disabled individuals experienced in the American workplace, as well as the lack of access in places of public accommodation.[137] With the ADA, Congress expressly covered claims stemming from misperceptions about an individual. The Act made it unlawful for employers to discriminate against individuals whom they "regard[ed] as" disabled even if the individuals

133. *See, e.g.*, Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794, at *5–6 (N.D. Ohio Mar. 29, 2012); El v. Max Daetwyler Corp., No. 3:09-CV-415, 2011 WL 1769805, at *5–6 (W.D.N.C. May 9, 2011) *aff'd*, 451 Fed. App'x 257 (4th Cir. 2011); Adler v. Evanston Nw. Healthcare Corp., No. 07-C-4203, 2008 WL 5272455, at *4 (N.D. Ill. Dec. 16, 2008); Lopez-Galvan v. Mens Warehouse, Civil No. 3:06-CV-537, 2008 WL 2705604, at *7 (W.D.N.C. July 10, 2008); McIntosh v. Ill. Dep't. of Emp't. Sec., No. 05-C-7044, at *5 (N.D. Ill. July 2, 2007); Uddin v. Universal Avionics Sys. Corp., CIVA1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D. Ga. June 30, 2006); EEOC v. WC & M Enter., Inc., No. Civ.A. H-04-3372, 2005 WL 2106090, at *4 (S.D. Tex. 2005) *rev'd*, 496 F.3d 393 (5th Cir. 2007).

134. *See infra* Parts III.A, C.

135. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

136. *See* Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *12 (C.D. Ill. April 11, 2007) (distinguishing the plain language of § 1981 and the ADA to hold that the plaintiffs must prove their "actual" race at trial in order to maintain their § 1981 race discrimination claim). Accordingly, the adoption of the actuality requirement is not limited to the Title VII context and thus implicates the available federal protection against race discrimination and quite plausibly broader state level protection under antidiscrimination statutes that mirror the plain language of Title VII's substantive provision.

137. Americans with Disabilities Act § 2, 104 Stat. at 328–29 (codified as amended at 42 U.S.C. § 12101).

did not suffer an actual disability.[138] In 2008, Congress further enacted the ADA Amendments Act (ADAAA) with the express purpose of ensuring that courts construe "the definition of disability . . . in favor of broad coverage of individuals . . . to the maximum extent permitted."[139] Like the ADA, the ADAAA prohibits covered employers[140] from discriminating against an individual who has an actual disability, a record of a disability, or who is regarded as having a disability.[141]

As outlined in Part I, Title VII does not expressly include "regarded as" language in its substantive provision like the ADA. Instead, Title VII prohibits covered employers from discriminating against an individual "because of *such individual's* race, color, religion, sex, or national origin."[142] Accordingly, courts have reasoned that, since the ADA expressly includes a "regarded as" or perception theory of discrimination in its substantive provision and Title VII does not, discrimination claims based upon an employer's misperception about the plaintiff's race, national origin, religion (and, by extension, color and sex) are not cognizable under Title VII.

Yet, in their groundbreaking article, *By Any Other Name?: On Being "Regarded as" Black and Why Title VII Should Apply Even if Lakisha and Jamal are White*, Professors Angela Onwuachi-Willig and Mario Barnes argue that if courts viewed the substantive provisions in the ADA and Title VII as mutually reinforcing rather than distinct concepts, a more precise and nuanced understanding of the operation of discrimination would be revealed.[143] At the heart of invidious, differential treatment are perceptions or misperceptions that observable or ascertainable characteristics signify an individual's physical and mental capability, morality, and self-worth, among other individual characteristics.[144] Indeed, the Third Circuit acknowledged the interdependency between perceptions and

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138. *Id.* § 3, 104 Stat. at 329–30 (codified as amended at 42 U.S.C. § 12102).

139. ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2–4, 122 Stat. 3553, 3553–56 (codified at 42 U.S.C. §§ 12101–02).

140. The ADA defines an "employer" as a "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." Americans with Disabilities Act § 101, 104 Stat. at 330 (codified as amended at 42 U.S.C. § 12111).

141. ADA Amendments Act § 4, 122 Stat. at 3555 (codified at 42 U.S.C. § 12102).

142. 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

143. *See* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1325–43.

144. According to Professor Robert Post:

> [p]rejudice against a stigmatizing characteristic, such as race or sex, can manifest itself through invidious judgments of the "differential worth" of persons who display the

discrimination in its declaration that "[d]iscrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits."[145]

Professors Onwuachi-Willig and Barnes also poignantly observe that, notwithstanding the fact that Title VII does not expressly include "regarded as" language, "*nothing* . . . prevents a court from using doctrinal analyses and understandings from other antidiscrimination statutes to assist in understanding the operation of discriminatory conduct within the Title VII context."[146] Nonetheless, when ascertaining the operation of discrimination in the Title VII context, a number of federal courts have successively found *something* preventing them from appropriating the ADA's express acknowledgement of discrimination as a perception based phenomenon. It appears that courts have manipulated a seemingly logical comparative construal of the ADA's and Title VII's plain language to substantiate the unqualified dismissal of discrimination cases.

Regrettably, courts have relied upon the mere presence of the ADA's "regarded as" language to deny protection to individuals whose allegations unequivocally implicate protected characteristics and their invidious use, despite the fact that Congress sought to eliminate such considerations in employment decisions. Courts have boldly declared that "Title VII protects those persons that belong to a protected class. . . . [since] Congress has shown, through . . . the Americans with Disabilities Act, that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class."[147] In doing so, courts have contrasted the substantive provisions of the ADA and Title VII in a way that does not acknowledge that Title VII has "long-shared [sic] with the ADA an identical congressional and judicial philosophy—namely, that employer perception or stereotype is an appropriate justification for

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characteristic, or it can manifest itself through "faulty" judgments about the capacities of such persons. American antidiscrimination law understands itself as negating such prejudice by eliminating or carefully scrutinizing the use of stigmatizing characteristics as a ground for judgment.

Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law,* 88 CAL. L. REV. 1, 9 (2000) (quoting Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976), and GORDON W. ALLPORT, THE NATURE OF PREJUDICE 9 (1954)).

145. Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991).

146. Onwuachi-Willig & Barnes, *supra* note 143, at 1328. (emphasis added).

147. Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn 2004).

imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate."[148] Furthermore, some courts have simply dismissed the fact that employers' subjective perceptions, related animus, stigmatization, and stereotypes are the impetuses for resulting invidious, differential treatment in all cases, whether such categorical discrimination is on the grounds of disability, race, national origin, sex, religion, or color.

B. Something Borrowed: A Rigid Application of the Protected Class Approach in McDonnell Douglas

Title VII provides that it is unlawful for an employer to discriminate "because of *such individual's* race, color, religion, sex, or national origin."[149] Courts have routinely held that this substantive statutory provision prohibits discrimination *on the basis of* race, color, sex, national origin, and religion.[150] Nonetheless, as previously discussed, a number of federal courts have concluded that this proscription affords statutory protection only to individuals who are discriminated against on the basis of their actual race, color, religion, sex, or national origin.[151]

It is unlikely that the courts are simply engaging in a strict, literal interpretation of Title VII's plain language. Courts like the *Butler* court have merely referenced Title VII's substantive provision by citation.[152] Equally significant, courts make no mention of Congress's interpretive memoranda issued during the enactment of Title VII or Congress's more recent expression of Title VII's proscriptions.[153] For example, an oft-cited bipartisan interpretive memo, which Senators Clifford Case and Joseph Clark, the floor managers of the Civil Rights Act of 1964, entered into the congressional record, explains that "[t]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section [703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin."[154]

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148. Craig Robert Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 827 (2009).

149. 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

150. *See supra* note 5 and accompanying text.

151. *See* cases cited *supra* note 29.

152. *See, e.g.*, Butler, 345 F. Supp. 2d 844.

153. *See* cases cited *supra* note 29.

154. 110 CONG. REC. 7213 (1964) (emphasis added).

Moreover, as previously mentioned, in 1991 Congress amended Title VII and, in doing so, clarified that an employer violates the Act when a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[155] A faithful construal of this more recent statutory amendment and of congressional intent in enacting Section 703 would permit claims of invidious, differential treatment *on the basis of* Title VII's proscribed characteristics regardless of whether such treatment derives from the plaintiff's self-ascribed or mistaken identity.[156] Nevertheless, no express deconstruction of Title VII's original and more recent statutory language or of Title VII's purpose and meaning emerges in the opinions of cases like *Butler*.[157] Therefore, it does not appear that courts are attempting to employ an exacting interpretation of Title VII's plain language to conclude that Title VII only protects individuals against discrimination because of their actual protected status and, thus, that misperception discrimination plaintiffs are a class of individuals that Congress did not intend to cover.

It does appear, however, that courts are engaging in a literal application of the protected class approach first articulated in *McDonnell Douglas v. Green*. *McDonnell Douglas* was a conventionally framed Title VII intentional discrimination case in that the plaintiff alleged that his former employer discriminated against him because of his self-ascribed racial identity. The Supreme Court held that the plaintiff established the first element of his prima facie case of racial discrimination because he demonstrated that he was a member of a racial minority (i.e., because he was Black).[158] Accordingly, a plaintiff may satisfy an initial prima facie element by demonstrating that she is a member of a protected class, which generally amounts to a simple attestation by the plaintiff of her relevant identity. For example, the plaintiff in a race discrimination case may allege that she is white or, in a sex discrimination case, the plaintiff may allege that she is a woman.[159] Since *Vinson v. Meritor Savings Bank*,[160] wherein the Supreme Court recognized a harassment theory of discrimination under Title VII, some lower courts have closely

155. 42 U.S.C. § 2000e-2(m) (2006).

156. *See infra* Part V.

157. *See* cases cited *supra* note 29.

158. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

159. *But see* Part IV.B (demonstrating that courts' actuality requirement will engender identity litigation as an initial matter in conventionally framed intentional discrimination cases as well as those deriving from misperceptions about the plaintiff's identity).

160. 477 U.S. 57, 64–67 (1986).

followed *McDonnell Douglas* and have also required Title VII harassment plaintiffs to prove membership within a protected class.[161]

However, this rigid application of the *McDonnell Douglas* formula is misplaced. The Supreme Court made clear that the elements of a prima facie case were not meant to be applied in formulaic fashion. In *McDonnell Douglas v. Green*, the court cautioned lower courts against perfunctorily applying the framework developed therein to assess Title VII intentional discrimination cases based upon circumstantial evidence. In doing so, the court explained that "facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations."[162] In *Furnco Construction Corporation v. Waters*, the Supreme Court reiterated that the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of the *common* experience as it bears on the critical question of discrimination."[163]

Consequently, *McDonnell Douglas*'s initial prima facie element—a plaintiff demonstrates that she is a member of a protected class—may simply be the manifestation of the facts of the case at hand. The plaintiff in *McDonnell Douglas* self-identified as Black and the employer perceived him as such (or, at least, did not challenge the plaintiff's racial identity).[164] It is also quite probable that when articulating this membership prong, the Supreme Court did not contemplate that a Title VII discrimination plaintiff's allegations of invidious, differential treatment may not comport with her self-ascribed identity. The Court may have conceptualized certain identities, like racial and gender identities, in static terms. The development of a membership prong in *McDonnell Douglas* may have also been a function of the lack of clarity at the time concerning whether Title VII was solely meant to redress discrimination against nonwhites, or if all individuals regardless of their racial classification would be protected against discrimination engaged in by covered employers.[165] Nevertheless, based upon the Court's express

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161. *See, e.g.*, Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794, at *4 (N.D. Ohio Mar. 29, 2012) (holding that a Title VII hostile work environment plaintiff must first establish membership within a protected class); Harvil v. Westwood Comms., L.L.C., 433 F.3d 428, 434 (5th Cir. 2005) (requiring a hostile work environment plaintiff to demonstrate that she "is a member of a protected group").

162. *McDonnell Douglas*, 411 U.S. at 802 n.3.

163. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added).

164. *See McDonnell Douglas*, 411 U.S. 792.

165. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976) (clarifying three years after *McDonnell Douglas* that the legislative history, EEOC statutory interpretations, and dicta in *Griggs* affirm that Title VII is "not limited to discrimination against

directive that lower courts fluidly apply the elements it set forth in *McDonnell Douglas*, it is illogical to conclude that the first prong of the *McDonnell Douglas* framework must be construed as an absolute bar against misperception discrimination claims.

Professor Natasha Martin acutely observes, however, that:

> [d]iscrimination law confronts identity as if it were static, and this approach has been shown to be inadequate in capturing the complexity of identity and the perceptions of employees in contemporary work settings. The protected-class approach under Title VII has focused largely on the physical embodiment of the identity category—the immutable aspects of an individual's identity.[166]

Courts' unyielding devotion to the *McDonnell Douglas*'s membership prong in cases of misperception discrimination reflects the criticality to the protected class approach of identity as an immutable quality. Thus, the convergence of the legal construction of immutability and the protected class approach is entrenched in antidiscrimination law.[167] As a consequence, courts have effortlessly and rigidly applied this membership prong in misperception discrimination cases. In doing so, courts have instituted an onerous burden on plaintiffs, and set aside reason and established legal precedent in the process, as seen in a more recent Title VII misperception discrimination case, *El v. Max Daetwyler Corporation.*[168]

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members of any particular race," and thereby holding that Title VII prohibits racial discrimination against whites as well nonwhites).

166. Natasha T. Martin, *Diversity and the Virtual Workplace: Performance Identity and Shifting Boundaries of Workplace Engagement*, 16 LEWIS & CLARK L. REV. 605, 642 (2012).

167. *See* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1509 (2011) (arguing that "the concept of immutability has been a fixture in both constitutional and statutory analysis of discrimination issues . . . [and] is a unifying principle that satisfactorily explains the protected classifications [covered in employment discrimination statutes]"). *But see* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. (forthcoming 2013) (manuscript at 77–79), *available at* http://ssrn.com/abstract=2238252 (explaining that, in order for plaintiffs to benefit from protection against sexual orientation discrimination under current and future state and local laws, there is a "temptation to require a plaintiff to prove she is a member of a protected class (i.e., lesbian, gay, bisexual, or transgender) as a part of her prima facie case of discrimination" and cautioning against applying a protected class/immutability approach that results in the adjudication of one's sexual orientation because "courts rely on narrow, self-identification and reputation based definitions [of sexual orientation], which distract from the purpose of remedying discrimination and require a plaintiff who desires the law's protection to 'out' herself," and fail to acknowledge the fluidity and multidimensionality of sexual orientation).

168. El v. Max Daetwyler Corp., No. 3:09-CV-415, 2011 WL 1769805, (W.D.N.C. May 9, 2011) *aff'd*, 451 Fed. App'x 257 (4th Cir. 2011).

In *El v. Max Daetwyler Corporation*, a pro se plaintiff, Darryl El, alleged that he was terminated from his employment in violation of Title VII based upon his race, color, and religion.[169] He specifically claimed that he experienced invidious, differential treatment based upon his "perceived race, Negroid,"[170] and his religion.[171] In his complaint, El stated that he was in fact a Universalist and later testified at a motion hearing that "he had no religion."[172] Nonetheless, Mr. El alleged that, after the terrorist attacks on September 11, 2001, co-workers and a supervisor began treating Muslim employees "with suspicion" and began treating him differently because they misperceived him as Muslim.[173] He specifically contended that several coworkers threatened him a day after the terrorist attacks, a few co-workers and a supervisor asked him to declare his religious identity, and, at an undesignated time, a few of his co-workers and a supervisor requested that he "remove [his] religious pictures."[174]

Like the *Burrage* court, the *El* court held that the plaintiff's claims of intentional race and religious discrimination were beyond Title VII's jurisdiction and dismissed his case.[175] The Fourth Circuit summarily affirmed the dismissal of El's discrimination case.[176] Specifically, the district court held that El's Title VII religious discrimination claim failed as a matter of law, since his allegations of invidious, differential treatment in the workplace were not based upon his actual religion or his being a Universalist[177] but upon

169. *Id.* at *1.

170. *Id.* at *5.

171. *Id.* at *6.

172. *Id.* at *5.

173. *Id.*

174. *Id.* at *4.

175. *Id.* at *5–7. On a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the *El* court dismissed the plaintiff's Title VII claims of intentional discrimination based upon misperceptions about his religion, race, and color, employing the Supreme Court's heightened "plausibility" pleading standard for civil litigants adopted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), on employment discrimination cases. *See El*, 2011 WL 1769805, at *2–3. For a more detailed examination of the *Twombly/Iqbal* plausibility standard's impact on the early dismissal of employment discrimination cases, see generally Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621 (2011). *See also* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011) (illustrating the increased dismissals of race discrimination claims initiated by Black plaintiffs after the Supreme Court's decisions in *Iqbal* and *Twombly*).

176. 451 Fed. App'x. 257 (4th Cir. 2011).

177. Arguably, El's allegations of religious discrimination were not based upon his atheism, as courts have established that Title VII protects atheists against religious discrimination. *See, e.g.*, Reed v. Great Lakes Cos. Inc., 330 F.3d 931, 934 (7th Cir. 2003) (asserting that "an atheist . . . cannot be fired because his employer dislikes atheists" and thereby concluding an employer's discrimination on the basis of atheism violates Title VII).

misperceptions about his being Muslim.[178] With respect to El's religious discrimination claim, the court circuitously declared that "El cannot be a member of a protected class absent some membership in a protected class."[179] Notably, in an act of dogged adherence to a formalistic version of the protected class approach, the *El* court directly contravened established precedent in its declaration that religious discrimination plaintiffs are only protected if they are members of a religious group.[180] It has long been recognized that atheists, too, are protected under Title VII.[181] Therefore, an individual need not be a member of a religious group to benefit from Title VII's protection against religious discrimination.[182]

Just as the posture of the court in *El* represented a break with the traditional recognition of antidiscrimination protections for atheists, the posture of courts in more recent employment discrimination cases like *El* and *Burrage* also reflects a dramatic shift in judicial attitude. Courts have moved from flexibility to rigidity in just fifty years since Title VII's enactment. Six years after Congress enacted Title VII, the Fifth Circuit Court of Appeals declared that it is "the duty of the courts [in Title VII cases] to make sure that [Title VII] works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."[183] Here, courts' ultimate denial of protection in previously mentioned misperception discrimination cases in no way constitutes an embrace of this judicial charge to interpret broadly Title VII in furtherance of the statute's goals and meaning so that Title VII "works."

Though not without flaws, broad judicial interpretation of Title VII's proscriptions has been pivotal in the diminishment of exclusionary and subordinating employment practices on the basis of race, color, sex, national origin, and religion. Importantly, courts have interpreted Title VII expansively to reach invidious, differential treatment in the workplace that Congress did not initially envision when enacting Title VII but which squarely fits within Title

178. *El*, 2011 WL 1769805, at *6.

179. *Id.*

180. *See id.*

181. *See* Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (affirming that Title VII protects atheists from religious discrimination).

182. *See id.*; *Reed*, 330 F.3d at 934.

183. Culpepper v. Reynolds, 421 F.2d 888, 891 (5th Cir. 1970).

VII's province, such as hostile work environment[184] or same-sex harassment claims.[185] Indeed, in its recognition of same-sex harassment as an actionable Title VII claim in *Oncale v. Sundowner Offshore Services*, the Supreme Court explicated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[186] Consequently, broad purposive interpretation of Title VII on the part of courts, including this nation's highest court, has helped to solidify a normative ideal of inclusion and equal treatment in the American workplace.

Yet, nearly fifty years after Title VII's enactment, a "battle with semantics" in which some federal courts have engaged has instigated the imposition of an actuality requirement in cases involving the principle evil for which Congress aimed to provide protection and relief: invidious, differential treatment on the basis of race, color, sex, national origin, and religion. Courts' excessively narrow interpretation of Title VII in categorical discrimination cases signifies a notable shift in judicial perspective with respect to Title VII's reach in protecting individuals against workplace discrimination on the basis of the statute's enumerated grounds. Indeed, the denial of Title VII protection to plaintiffs alleging invidious, differential treatment on the basis of Title VII's proscribed characteristics via a seemingly literal application of Title VII's plain language and an express, exacting appropriation of the protected class approach marks the arrival of a new yet erroneous interpretative methodology that will elicit countless negative consequences if not ceased.[187]

C. Something New?: An "Anti-Anticlassificationist Interpretation" of Title VII

By creating an artificial, unresolved tension between the "regarded as" language in the ADA and the "such individual" language in Title VII and strictly adhering to a protected class approach, courts deny purposive effect to Title VII's proscription against invidious, differential treatment in the workplace.[188] This

184. *See* Meritor Savs. Bank v. Vinson, 477 U.S. 57, 64–67 (1986) (holding that sexual harassment violated Title VII's proscriptions against sex discrimination as such treatment affected a "term, condition, and privilege" of employment).

185. *See* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) (holding that same-sex harassment claims are covered under Title VII).

186. *Id.* at 79.

187. *See infra* Part IV and note 265.

188. *But see Culpepper*, 421 F.2d at 891 n.3. During a speech made to lawyers shortly after Title VII's enactment, the Honorable Griffin B. Bell of the Fifth Circuit Court of Appeals implored that the judiciary's approach in interpreting and enforcing Title VII be "generous"

interpretative dissonance prods Congress to amend Title VII, yet engenders destructive implications that impede Title VII's meaning and scope in the meantime. Courts' inflexible posture in defining Title VII's reach in combating workplace discrimination marks the arrival of a new interpretative perspective within antidiscrimination jurisprudence, which this Article describes as "anti-anticlassificationist."

It is important to note that courts' interpretative methodology largely shapes the scope of antidiscrimination law's prohibitions and protections. Professor Jessica Roberts aptly explicates that:

> the antidiscrimination principle is often described in terms of two sometimes competing, sometimes complementary, interpretations: antisubordination and anticlassification. These two versions of the antidiscrimination principle employ differing accounts of the meaning of equality. The antisubordination principle roughly holds that covered entities should not act in a way that reinforces the social status of subjugated groups . . . Its complement, the anticlassification principle, maintains that covered entities should not consider certain classes of forbidden traits under any circumstance, adopting a formal equal treatment model of equality.[189]

In *The Anticlassification Turn,*[190] Professor Bradley Areheart explains that, at least facially, Title VII's substantive disparate treatment provision is "anticlassificationist" in nature.[191] Areheart submits that the Supreme Court evidenced its early antisubordinationist commitments by interpreting Title VII to embody a disparate impact theory of discrimination in *Griggs v. Duke Power Company.*[192] Areheart argues, however, that the Supreme Court's recent decision in *Ricci v. DeStefano,*[193] a Title VII race discrimination case, solidifies the Supreme Court's shift from an antisubordinationist interpretation of Title VII to an anticlassificationist approach, which "shields individuals from all forms of disparate treatment based

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in order to "make [Title VII] work." *Id.* Judge Bell also proclaimed "[w]e want to fill in these gaps, and we want to stay within the intent of Congress in making it work." *Id.*

189. Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 626–29 (2011).

190. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955 (2012).

191. *Id.* at 969.

192. *See id.* at 993; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (adopting a disparate impact theory of discrimination in Title VII cases to redress "not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

193. 129 S. Ct. 2658 (2009).

upon a forbidden trait" in furtherance of a norm of individual fairness.[194]

Assuming that the prevailing posture of the Supreme Court (and other members of the federal judiciary) is to interpret Title VII through an anticlassificationist lens, it is notable that a number of federal judges have rejected this perspective in Title VII misperception discrimination cases. Through an express, strict application of the protected class approach and an implicit, literal interpretation of Title VII's statutory language, a divergent anti-anticlassificationist interpretation of Title VII emerges. Such an anti-anticlassificationist methodology is marked by a paucity of meaningful statutory interpretation, which effectively frustrates the orthodox aim of the elimination of Title VII's proscribed traits in all decision making in furtherance of a norm of individual fairness. Indeed, no deliberation of Title VII's arguable goal of prohibiting any consideration of race, religion, sex, color, or national origin from employment decision making surfaces in the court opinions which decree an actuality mandate.[195]

Similarly, courts have not expressly acknowledged that underlying misperception discrimination plaintiffs' allegations is an employer's targeted unfair treatment on the basis of Title VII's proscribed characteristics. Also notably lacking is an acknowledgement that Title VII should be interpreted in a manner effectuating fair and equal treatment rather than maintaining invidious, differential treatment in the workplace. Moreover, courts in previously mentioned misperception discrimination cases do not expressly consider the potential negative consequences, both practical and policy oriented, that an anti-anticlassificationist statutory interpretation will produce.

Courts' anti-anticlassificationist interpretation and attendant actuality requirement fail to acknowledge the interrelated operation of human categorization based upon conscious and unconscious perceptions and resulting invidious (or even favorable), differential treatment. Based upon one's discernible characteristics, like skin color, hair texture, behavior, dress, accent, speech, language, and names,[196] everyone is perceived by an observer at any given moment as a particular race, color, ethnicity, or gender.[197] In *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title*

194. *See* Areheart, *supra* note 190, at 963, 993–95.

195. *See* cases cited *supra* note 29.

196. *See, e.g.*, El-Hakem v. BJY Inc., 415 F.3d 1068, 1073 (9th Cir. 2005) (observing that an individual's non-physical traits like a name could serve as a proxy for race or ethnicity).

197. *See generally* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004).

VII, Professor Camille Gear Rich describes "[t]he cognitive process that people rely on to ascertain the race or ethnicity of another person . . . as racial or ethnic ascription."[198] Professor Gear Rich explains that:

> [r]acial/ethnic ascription works by triggering racial or ethnic associations when one sees another person display certain traits. The most common form of racial and ethnic ascription is morphology-based ascription. This kind of ascription occurs when a subject interprets another person's visible, physical features to correlate with a set of features she identifies with a certain race or ethnic group. These features include skin color, hair texture, and nose or eye shape. The subject learns to correlate these traits with one of three or four racial categories and, in some cases, an ethnic subgroup. Stated alternatively, morphology-based racial/ethnic ascription operates by those "common sense" cognitive rules that cause a person to conclude automatically that chocolate skin tones signify that a person is African, that olive skin tones indicate Latin origin, that certain eye shapes are Asian or Caucasian, or that particular nose structures are Caucasian or African. This cognitive process is such a well-entrenched part of social interaction that it typically functions unnoticed. This is evidenced by the fact that most Americans believe that they can, upon review of a person's physical traits, easily identify the person's race or ethnicity.[199]

Professor Gear Rich further elucidates that:

> the same way that people develop a lexicon of morphological traits that they use to identify a person's race or ethnicity, they also develop a taxonomy of voluntary behaviors that signify race and ethnicity. That is, in the same way that we associate skin color, eye color, or nose shape with particular races or ethnic groups, we also maintain beliefs about the dialects, aesthetics, and mannerisms that signal one's race or ethnic status.[200]

Accordingly, in the manner that one's morphological characteristics signify race to the external observer, the racialization process

198. *Id.* at 1145.
199. *Id.* at 1145–46 (citations omitted).
200. *Id.* at 1158.

encompasses "performance-based ascription" or the external categorization of one's race in light of "'voluntary' race/ethnicity-associated behavior."[201]

Based upon his empirical study of sighted and blind peoples' conceptualizations of race, Professor Osagie Obasogie likewise concludes that the majority of blind respondents, similarly to sighted respondents, correlated race primarily with physical traits like skin color.[202] According to Professor Obasogie, generally "both blind and sighted people understand race in visual terms, suggesting that there is a significant shared social experience that not only gives race its meaning but makes it perceptible in the first place."[203] More than half of the blind respondents participating in Professor Obasogie's study also reported that audible characteristics such as an individual's accent, tone of voice, and speech pattern served as a secondary set of characteristics appropriated to categorize one's race.[204] However, Professor Obasogie surmises that:

> these audible clues did not stand in for the visual cues a sighted person might rely upon, nor did they become primary in how blind respondents conceived race. Rather, voice and accent remained secondary measures used to give a sense of what is thought to be the primary characteristic of race: visual cues.[205]

In addition to audible characteristics, for a number of the blind respondents, an individual's skin texture, hair texture, and bodily aroma were also significant factors in the respondents' categorization of an individual's race.[206]

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201. *Id.* at 1143.

202. Osagie K. Obasogie, *Do Blind People See Race? Social, Legal, and Theoretical Considerations*, 44 LAW & SOC'Y REV. 585, 595–96 (2010).

203. *Id.* at 597.

204. *Id.* at 599.

205. *Id.*

206. *See id.* at 600–01.

Accordingly, despite omnipresent attestations of colorblindness,[207] gender-blindness,[208] and post-racialism,[209] it is essentially impossible for any one person to escape being perceived and, thus, categorized by an observer through the lens of race, ethnicity, religion, color, and gender, which are proscribed characteristics in employment decision making under Title VII. According to Professor Linda Hamilton Krieger:

> people categorize objects in their environment in a particular way because it proves useful in understanding their environment and predicting future events. It would be difficult to argue credibly that racial, ethnic, or gender distinctions have no utility in understanding American society or negotiating experience within it. . . . [Therefore] [a]s a theoretical matter, the notion that racial, ethnic, or gender distinctions could be ignored in the priming of schematic expectancies is, at best, implausible. As an empirical matter, it is simply insupportable.

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207. Professor John Powell argues that a "colorblind, race-neutral position currently occupies center stage in the American debate on race, both in politics and in the law." John A. Powell, *An Agenda For the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 893 (1995); s*ee also* Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 876 (2008) (arguing that the colorblind rhetoric "ignores, cements, and blinds itself to the historical factors that determine, shape and continue to structure the racial caste system that law and society constructed in the first place").

208. According to Professor Lucinda Finley:

> [t]he insistence that the law should be blind to stereotyped, not "real," differences of gender, just as it should be color-blind, is often prescribed as the proper antidote to . . . "girls and boys each have their proper place" separate spheres thinking [fundamental to the Supreme Court's decision in *Plessy v. Ferguson*, which affirmed the constitutionality of the separate-but-equal doctrine].

Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1108 (1996) (citing J.E.B. v. Alabama, 114 S. Ct. 1419, 1422 (1994)).

209. In 2008, a sea of media pundits, politicians, and average Americans proclaimed that the election of President Barack Obama demarcated a post-racial moment in United States history. *See generally* Berta Esperanza Hernández-Truyol, *Narratives of Identity, Nation, and Outsiders Within Outsiders: Not Yet a Post-Anything World*, 14 HARV. LATINO L. REV. 325, 325–36 (2011) (acknowledging that "[t]he present conceptualization of a post-racial America became mainstream for many when Barack Obama took office as the 44th President of the United States in 2008" and noting that, immediately following his election, "all of the major news outlets began debating whether his victory brought an official end to the acknowledged pernicious and longstanding racial and ethnic stigmas that have pervaded this country"). Professor Sumi Cho maintains that "post-racialism is yet distinct as a descriptive matter [from colorblindness], in that it signals a racially transcendent event that authorizes the retreat from race. Colorblindness, in comparison, offers a largely normative claim for a retreat from race that is aspirational in nature." Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1597–98 (2009).

> Because gender, ethnic, and racial distinctions are often perceptually apparent, and because these categories are made salient by our social and cultural context, we can expect race, ethnic, and gender-based schemas to be implicated in the processing of information about other people. Once activated, the content of a schema will profoundly affect how we interpret a person's subsequent behavior, what about that behavior we remember, and how we use the behavior in judging the person later.[210]

Such external observations and attendant categorizations are beyond an individual's control, and are typically irrelevant to one's ability to perform her job duties, but serve as the central basis for pervasive, systematic, and purposeful exclusion of individuals from (and marginalization within) employment opportunities in the American workforce. For that reason, Congress deemed it necessary to proscribe invidious, differential treatment on certain bases with the enactment of Title VII.[211] Consequently, Title VII protects everyone who is an employee of or seeks employment with a covered entity against race, color, sex, national origin, and religious discrimination. Any individual who suffers invidious, differential treatment at the hands of a covered employer is therefore able to seek relief under Title VII.

Judges' anti-anticlassificationist interpretation of Title VII, which expressly denies statutory protection to certain individuals alleging that they are the victims of invidious, differential treatment on the basis of proscribed characteristics, is categorically wrong. Such judicial interpretation contravenes the express purposes of Title VII: to afford "statutory rights against invidious discrimination in employment"[212] and to eliminate such treatment from the workplace.[213] Indeed, rather than dismantle categorical, inequitable treatment

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210. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1201–02 (1995).

211. *See* Perkins v. Lake Cnty. Dep't. of Util., 860 F. Supp. 1262, 1276 (N.D. Ohio 1994) (explicating that a Title VII plaintiff need not prove her racial identity in order to assert an actionable claim of race or national origin discrimination in light of Title VII's express purpose: to "address [invidious treatment based upon] perceived differences which do not have a basis in fact between races and ethnic groups").

212. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 457–58 (1975).

213. *See* McKennon v. Nashville Banner Pub'g Co., 513 U.S. 352, 358 (1995) (acknowledging that Title VII and the ADEA share a mutual purpose of "elimination of discrimination in the workplace") (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

against an individual on the basis of race, sex, color, national origin, and religion, courts' misinterpretation of Title VII allows unchecked invidious, differential treatment in the workplace.[214]

D. Something Old, Something New?: What Lies Beneath the Actuality Requirement

The mere presence of the ADA's "regarded as" language has enabled courts to perpetuate such invidious, differential treatment by embracing the argument that Title VII, unlike the ADA, only prohibits discrimination based upon an individual's actual protected status. However, such a facial difference between the two statutes does not adequately explain the dearth of thoughtful deconstruction by the courts regarding Title VII's substantive provision, purpose. Courts' distinction between the substantive provisions in Title VII and the ADA—in addition to an unyielding, literal application of the protected class approach, which casts aside reason and legal precedent and translates into an unorthodox, anti-anticlassificationist interpretation of Title VII's proscriptions—causes one to pause. On its face, the imposition of an actuality requirement in cases of categorical discrimination is perplexing and problematic. Understandably, questions abound relating to the development of and rationale for the adoption of this puzzling legal prerequisite in cases of invidious, differential treatment.

The previously examined cases offer little to draw upon to definitively deduce courts' justifications for employing an anti-anticlassificationist interpretation of Title VII. Therefore, this Part contemplates more obscure and more obvious explanations, new and old, for this categorically wrong movement in antidiscrimination law. Namely, this Part observes the ways in which the actuality requirement reflects lawmakers' understandings of identity classification, the operation of discrimination, and antidiscrimination litigation. It also considers courts' divergent treatment of the ADA's and Title VII's statutory language and purpose as well as courts' rigid application of antidiscrimination law's protected class approach.

Perkins v. Lake County Department of Utilities, the first reported Title VII case in which an employer argued for the imposition of an actuality requirement before a federal district court, was a case of intentional race/national origin discrimination.[215] Ten years after

214. *See infra* Part IV.A.

215. *Perkins*, 860 F. Supp. 1262.

Perkins, Butler v. Potter—the first reported Title VII case in which a federal district court expressly adopted an actuality requirement—was also an intentional race/national origin discrimination case.[216] Therefore, one simple observation may explain the derivation of an actuality requirement: this mandate reflects an age-old conceptualization of racial identity as biological, fixed, and inherent, as well as courts' longstanding treatment of "race and ethnicity as biological, morphological concepts and discrimination as a reaction to a set of biologically fixed traits."[217]

Since the founding of the United States, securing race as a static, predictable, and biological trait has functioned as a principal and shared aspiration (and arguably fascination) among academic, social, political, and legal communities alike.[218] Conceptualizations of permanent, inheritable race, racial hierarchies, racial purity and racial superiority were espoused to justify and effectuate racial oppression and exclusion in a plethora of manifestations including racial colonization,[219] racial slavery,[220] racial segregation,[221] and racial violence,[222] as well as exclusionary race-based immigration

216. 345 F. Supp. 2d 844 (E.D. Tenn. 2004).

217. Rich, *supra* note 197, at 1134.

218. *See generally* Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History and the Law*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 231 (2008).

219. D. Wendy Greene, *On Race, Nationhood, and Citizenship*, 34 T. MARSHALL L. REV. 421, 425 (2009) (reviewing LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (N.Y. Univ. Press 2007)) ("Grounded in notions of white racial superiority, Euro-American politicians and military leaders espoused 'Manifest Destiny' as the rationale for, and the method by which, to expand United States borders westward [to colonize Mexico] and abroad and create a Euro-American dynasty consisting of predominantly Euro-Americans.").

220. *See* D. Wendy Greene, *Determining the (In)Determinable: Race in Brazil and the United States*, 14 MICH. J. RACE & L. 143, 164 (2009) ("[W]hite slave owners, philosophers, and politicians, like Thomas Jefferson, articulated formal defenses of slavery in concert with the country's philosophical origins [which espoused liberty, equality and natural rights of men], yet grounded in the presumption of whites' natural superiority and Blacks' innate inferiority.").

221. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (holding state-sanctioned racially segregated public schools unconstitutional).

222. Throughout American history, notions of white supremacy and white racial purity permeated the social fabric and fueled the lynching of racial minorities—largely men racialized as non-white because of their ethnicity, color, race, or religion—when they transgressed (or were perceived to transgress) socially and legally constructed racial boundaries, which served as a form of extra-legal criminal enforcement. *See generally* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 31–39 (1996).

policies[223] and property ownership qualifications.[224] According to Professor Christian Sundquist:

> [t]he meaning of "race" has been vigorously contested throughout history. Early theories of race assigned social, intellectual, moral and physical values to perceived physical differences among groups of people. The perception that race should be defined in terms of genetic and biological difference fuelled the "race science" of the eighteenth and nineteenth centuries, during which time geneticists, physiognomists, eugenicists, anthropologists and others purported to find scientific justification for denying equal treatment to non-white persons.[225]

As Professor Sundquist explains, post-World War II academic, legal, and scientific communities have consistently repudiated scientific notions of race and, conversely, have embraced a conceptualization of race as a social construct.[226] For example, legal scholar Ian Haney-López explains that:

> [t]here are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites. One's race is not determined by a single gene or gene cluster, as is, for example, sickle cell anemia. Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types.[227]

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223. In 1790 and 1870, Congress enacted express race-based prerequisites for naturalized United States citizenship. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (permitting only free whites to become naturalized U.S. citizens); Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (repealed 1952) (extending naturalized U.S. citizenship to individuals of "African nativity").

224. *See, e.g.*, Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 808–09 (2008) (describing the U.S. government's early-twentieth-century adherence to blood quantum laws, which dictated that individuals with less than "one-half American Indian blood" or ancestry could not own property after the enactment of the Dawes Severalty Act, which divided indigenous-owned land as well as commanded that "[m]ixed-blood" American Indians could only sell their property to "full-blood" American Indians with the permission of the federal government).

225. Christian B. Sundquist, *Science Fictions and Racial Fables: Navigating the Final Frontier of Genetic Interpretation*, 25 HARV. BLACKLETTER L.J. 57, 57 (2009).

226. *See* Sundquist, *supra* note 218, at 252–56 (illustrating that post-World War II, the United Nations established the Educational, Scientific and Cultural Organization, UNESCO, to develop a formal statement on race to "scientifically debunk the biological conception of race" and drew upon leaders within the scientific community in doing so).

227. 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, 11 (1994).

Professor Haney-López thereby defines "race" as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry" and argues that:

> race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.[228]

Though a scientific notion of race has largely been condemned, and a social constructionist view of race has been endorsed within a variety of intellectual communities,[229] a fixed, biological, and inherent notion of racial/ethnic identity remains salient. This has continued despite the existence and recognition of "multi-raciality,"[230] even for those who subscribe to the conception that race is a social construct.[231] Generally speaking, an individual, consciously or unconsciously, perceives her self-classified race, much like her sex, as a primary component within her macro identity (e.g., profession, religion, age, etc.) that is static and indisputable. According to Omi and Winant, "at the level of experience, of everyday life, race is an

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228. *Id.* at 7.

229. Namely, Professor Sundquist argues that post-World War II, federal courts in the United States have "generally embraced the modern rejection of biological theories of race [and] [i]nstead . . . have focused on racial 'markers' such as ancestry, physical appearance, language, outsider perception, and self-identification to determine race." Sundquist, *supra* note 218, at 256. However, with the meteoric rise of genetic ancestry tests, "contemporary society has unquestionably assumed that race has some genetically-determinable essence." *Id.* at 257.

230. In its recognition of "multi-raciality," and thus the fluidity of race and socio-legally constructed status based upon racial difference, the colonial Virginia legislature in 1662 attempted to promulgate a fixed racial and social status for mixed-race children of white and Black parentage by codifying that such children's racial and social status followed the mother's status. *See* EDMUND MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM 333 (1975).

231. *See, e.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (observing the socially constructed and fluid nature of race while implicitly adhering to a biological notion of race in its affirmation of the lower court's holding that § 1981 "'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.'"); *see also* Abdullahi v. Prada, 520 F.3d 710 (7th Cir. 2008) (Judge Posner appealing to both fluid, social constructionist and fixed, biological notions of race in recognizing that mutable, ethnic characteristics like one's accent can animate invidious treatment akin to racism).

almost indissoluble part of our identities. Our society is so thoroughly racialized that to be without racial identity is to be in danger of having no identity. To be raceless is akin to being genderless."[232] Even those individuals who consciously and acutely subscribe to an ideal that race is a malleable social construct, and whose experiences bear this out, are not exempt from this default understanding of one's self-identity.[233] Accordingly, it is important to remember that lawyers advanced and adopted the actuality mandate in intentional race discrimination cases. The lawyers arguing and adjudicating these cases are human beings whose understandings of racial identity were likely shaped by broader social, political, legal, and economic forces, as well as specific personal experiences.

With this in mind, it is more fathomable that this legal position and resulting statutory imperative, the actuality requirement, could take shape. When confronted with a discrimination claim emanating from misperceptions about a plaintiff's race, a lawyer who

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232. Michael Omi & Howard Winant, *On the Theoretical Concept of Race*, *in* RACE AND REPRESENTATION IN EDUCATION 5 (Cameron McCarthy & Warren Crichlow eds., 1993). Indeed, Justice Sandra Day O'Connor noted the improbability of an individual navigating through contemporary American society without the micro and macro operation of race shaping her experiences. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique [racialized] experience . . . in a society, like our own, in which race unfortunately still matters.").

233. Indeed, to substantiate this point, a personal narrative is illustrative. I—a native South Carolinian of known Native American, European, and African ancestry who self-identifies as Black and American—actively embrace and recognize the socially constructed nature of race. In fact, the contextual and fluid nature of racial classification has borne out in my own personal experiences domestically and abroad. For example, on numerous occasions observers have classified me as Ethiopian and Hispanic, namely with ethnic origins in both Spanish- and Portuguese-speaking countries. When an observer begins to address me in their native language or simply inquires, for example, whether I am Brazilian, Ethiopian, or Dominican (and they express shock when I answer in the negative), admittedly my immediate reaction is one of curiosity. I wonder which of my physical markers or behaviors could have engendered the observer's perceptions. I recognize that my wonderment stems from an embedded construction of my racial and ethnic identity as a Black American without Hispanic, Iberian, or Ethiopian roots and my daily conscious and unconscious operation through this lens. Intellectually, however, I am aware that this external classification of my race and ethnicity is a contextual, subjective, and relational determination. When I have shared these experiences with others, many listeners have affirmed the observer's misclassification of my race and ethnicity, implicitly appealing to a notion of fixed, physical racial and ethnic attributes in doing so. Listeners, even those who also embrace a social constructionist view of race, have expressed that, due to my skin color, hair texture, or the shape of my nose and eyes, it is plausible that observers could perceive me as Brazilian or as Ethiopian. Equally as many listeners cannot fathom my racial or ethnic classification as anything other than what I have self-reported: an externally reinforced self-perception which has been informed by broader historical and contemporary constructions of race and ancestry in the United States, as well as my family's relatively fixed identity as Black Americans—or Americans of African descent without any known Hispanic, Iberian, or Ethiopian ancestry or specific knowledge of our African country of origin.

represents either a plaintiff or an employer, or a judge deciding such a case, may simply be unable to rationalize the proposition that a plaintiff's race was mistaken. Similarly, a lawyer or judge might outright disbelieve that a plaintiff's race could be mistaken, based on her own preset conceptualizations of race and sex as fixed, indisputable constructs. The development of a legal principle in conformity with a lawmaker's conscious or unconscious default understanding of racial identity as a provable, unmistakable, fixed construct could reflexively emerge.[234]

For example, the plaintiff in *LaRocca v. Precision Motorcars, Inc.*, like Burrage, alleged that he was harassed by his supervisor, who perceived him as Mexican, even though the supervisor was aware that the plaintiff self-identified as Italian-American.[235] Specifically, LaRocca claimed that his supervisor called him a "spic" and a "wetback."[236] Essentialist, fixed notions of race or ethnicity undergirded the court's decision to recognize LaRocca's misperception discrimination claim. The court treated the plaintiff's darker skin complexion as a physical characteristic indicative of Italian ancestry.[237] Accordingly, the court held that LaRocca's claim of national origin harassment was actionable, as his actual national origin, or rather his innate ethnic characteristic, triggered the alleged invidious treatment.[238] In other words, but for LaRocca's dark brown skin color, a physical characteristic presumably inherent to his Italian ancestry, LaRocca's supervisor would not have perceived him as Mexican and harassed him accordingly.[239] Thus, by treating LaRocca's brown skin complexion as a physical proxy for his Italian ancestry, the court implicitly appealed to a notion that fixed, physical racial characteristics exist.

Hence, the underlying reasoning for the advancement of an actuality requirement in *Perkins* and its eventual adoption in *Butler*—

234. This understanding could also easily extend to sex misperception discrimination claims.

235. LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762 (D. Neb. 1999).

236. *Id.* at 766.

237. *Id.* at 770.

238. *Id.*

239. *Id.* Though the court accepted the plaintiff's contention that his supervisor misperceived him as Mexican during his employment, the court viewed the supervisor's misperception as an "isolated incident," which was corrected; therefore, the harassment the plaintiff suffered was not due to his misperceived ethnic identity but rather his actual ethnic identity. *Id.* at 770–71. Accordingly, the court held that the plaintiff's Title VII and § 1981 hostile work environment claims were actionable since the supervisor developed and acted upon a "reasonable" perception of the plaintiff's ethnic identity due to one of his physical characteristics—his darker skin color—which is supposedly inherent to individuals of Italian descent, i.e., the plaintiff's actual national origin. *Id.* at 770–71, 776–77. In so holding, the court implicated an actuality requirement.

both race and national origin discrimination cases—are quite plausibly the product of conscious or subliminal conceptualizations about race on the part of defense counsel and judges alike. Without any patent reflection of the logic undergirding the development of an actuality requirement or its natural consequences, a number of federal district courts after *Butler* merely regurgitated the court's holding and rationale and imposed this onerous and unnecessary mandate in categorical race and national origin discrimination cases.[240] The requirement was subsequently extended to religious discrimination cases.[241]

Although a simple inability to visualize race as anything other than a fixed, biological construct is the most obvious explanation for the initial adoption of an actuality requirement in Title VII race and national origin cases, a number of other possible explanations for its continued implementation exist. More generally, judges deciding misperception cases may have decided not to view discrimination as a perception-based phenomenon in Title VII cases, though expressly acknowledged in the ADA, for fear that doing so will open the proverbial Pandora's Box. Courts may be fearful that individuals with deceitful motives will be encouraged to disingenuously frame employment discrimination claims as stemming from misperceptions about their respective identities. For example, a plaintiff may insincerely claim that an employer misperceived her as Native American and appropriate racially offensive comments about Native Americans and/or differential treatment of Native Americans in the workplace, arguably not intentionally aimed at the plaintiff, to support her discrimination claim.[242]

It is also plausible that lawyers arguing and judges deciding these cases are incorrectly conceptualizing the alleged discrimination emanating from misperceptions about one's race or religion, for example, as less injurious than discrimination implicating one's actual racial or religious identity. They may believe that the plaintiff endures minimal, ancillary harm rather than a direct, personal offense since the invidious treatment is ostensibly not animated by, or is unrelated to, her self-ascribed racial or religious identity. Accordingly, courts may be viewing misperception discrimination cases as third-party discrimination cases, which are cases wherein the plaintiffs are seeking redress for the unlawful discrimination that other

240. *See* cases cited *supra* note 29.

241. *See* El v. Max Daetwyler Corp., No. 3:09-CV-415, 2011 WL 1769805 (W.D.N.C. May 9, 2011) aff'd, 451 Fed. App'x 257 (4th Cir. 2011).

242. *See, e.g.*, Defendant's Motion to Dismiss, Wood v. Freeman Decorating Servs., Inc., No. 3:08-CV-00375-LRH-RAM, 2009 WL 4836455 (D. Nev. July 30, 2009).

individuals have suffered rather than any discrimination that they have endured directly. Prototypical third-party cases are sex discrimination cases initiated by male plaintiffs on behalf of women or race discrimination cases brought on behalf of non-white employees by white plaintiffs.[243] Some courts have not recognized these third-party claims, reasoning that an employer's discrimination against individuals based on Title VII's proscribed bases indirectly harms third-party claimants, as such discrimination is unrelated to the plaintiffs' protected status. Correspondingly, these courts have held that Title VII protects an individual against proscribed discrimination specifically aimed at her because of her protected status.[244]

It is not a far-fetched possibility that courts may be conceptualizing misperception discrimination claims as akin to these third-party discrimination claims. For example, in *Wood v. Freeman Decorating Services, Inc.*, counsel for the defendant-employer argued that the plaintiff, who alleged suffering a racially hostile work environment, did not have standing under Title VII because he could not prove his self-proclaimed Native American identity.[245] To undermine the veracity of Mr. Wood's racial classification as Native American, the defendant-employer proffered evidence that Wood self-identified as Hispanic on a military admissions form on which American Indian was a choice.[246] Additionally, the defendant-employer argued that Wood could not provide any documentation that he was Native American. The only proof he could offer was his adopted mother's

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243. *See generally* Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497 (2010) (categorizing third-party race discrimination claims initiated by white plaintiffs as "interracial solidarity" claims and providing a more nuanced conceptualization of the injuries suffered by whites because of an employer's minority-targeted discrimination and thus arguing for the legal recognition of such claims).

244. *See, e.g.*, Jackson v. Deen, No. 4:12-CV-139, 2013 WL 4078292, at *2, *6–7 (S.D. Ga. Aug. 12, 2013) (holding that a female plaintiff, one who self-identified as white yet was arguably misperceived as African American or mixed-race, did not have standing under Title VII and § 1981 to challenge the derogatory comments and treatment aimed at her African-American co-workers, though she claimed she was personally affected by the alleged racially discriminatory and subordinating work environment. The court held that the plaintiff was "not an aggrieved party under Title VII because her interests are not those arguably sought to be protected by [the] statute" since none of the "racially offensive comments were either directed toward [her] or made with intent to harass her." Notably, in so holding, the court relied upon the Supreme Court's decision in *Thompson v. North American Stainless Steel*, later discussed in Part V.C); Childress v. City of Richmond, 134 F.3d 1205, 1207, 1209 (4th Cir. 1998) (en banc) (Luttig, J., concurring) (finding that, since plaintiffs "assert[ed] only the rights of third-parties to be free from race or sex-based discrimination in the workplace," white male plaintiffs did not have standing under Title VII to sue for sex and race-based hostile work environment claims based upon the alleged harassment of Black and female employees) *cert. denied*, 524 U.S. 927 (1998).

245. Defendant's Motion to Dismiss, Wood v. Freeman Decorating Servs., Inc., No. 3:08-CV-00375-LRH-RAM, 2009 WL 4836455 (D. Nev. July 30, 2009).

246. *Id.*

hearsay admissions to him that his natural parents were Native American.[247] The defense further contended that Wood's self-classification as Native American was an insincere and self-serving attempt to capitalize on alleged racially offensive conduct toward, and statements about, Native Americans in the workplace.[248]

As a result, the defendant-employer sought the dismissal of Mr. Wood's Title VII case and asserted that his hostile work environment claim failed as a matter of law because he was unable to show that "he was subjected to racially derogatory comments based on *his* race."[249] In support of its contention that Title VII intentional discrimination cases are actionable only when the alleged invidious, differential treatment is related to the plaintiff's protected status, the defendant-employer cited to Title VII third-party sex and race discrimination cases wherein courts held that the plaintiffs did not have standing to bring a discrimination action on behalf of other individuals since the alleged discrimination was not based on the plaintiffs' sex or race, respectively.[250] Notably, however, the court held that Mr. Wood's race discrimination claim was actionable. Yet, in doing so, the court relied in part upon a case wherein the court upheld a third-party discrimination claim.[251] Thus, some other courts may also be viewing misperception discrimination cases as akin to third-party cases.

Additionally, the emergence of an anti-anticlassificationist interpretation of Title VII could be the result of a haphazard, mechanical application of the protected class approach despite the Supreme Court's caveats to the contrary.[252] Conversely, to the extent that courts misconstrue claims of misperception discrimination as radically different from conventionally framed claims of discrimination, courts' anti-anticlassificationist interpretation could also be the manifestation of what Professor Jed Rubenfeld describes as an "anti-antidiscrimination agenda," whereby courts cite to textual grounds to quash a plaintiff's theory of discrimination "perceived to take antidiscrimination ideology too far"[253] by "extend[ing] antidiscrimination ideas to unusual contexts."[254]

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247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *See* Wood v. Freeman Decorating Servs., Inc., No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010).

252. *See supra* Part III.B.

253. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142–43 (2002).

254. *Id.* at 1143.

Similarly, Title VII misperception discrimination claims may fall victim to judicial biases against employment claims more generally.[255] Professor Michael Selmi asserts that, in part, judges' "general misperception . . . that employment cases are easy—not difficult—to win, and [that] the volume of employment discrimination cases is said to reflect an excessive amount of costly nuisance suits" account for employment discrimination cases' relative lack of success.[256] Selmi maintains that judicial biases against discrimination lawsuits, though different depending on the particular cause of action, also explain employment discrimination cases' high rate of failure.[257] For example, before Congress amended the Americans with Disabilities Act in 2008,[258] in response to what they viewed as an expansive act, courts "trimmed [the Act's] scope as a way of ferreting out some of the more extravagant claims, but in the process have excluded many claims that were clearly intended to fall within the statute's ambit."[259] Moreover, as it pertains to race discrimination cases, "which are generally the most difficult claim for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way."[260] Accordingly, the reproduction of an anti-anticlassificationist statutory interpretation and attendant actuality requirement in previously mentioned intentional discrimination cases may be indicative of pervasive judicial bias against employment discrimination cases and a concerted attempt to restrain further expansion of Title VII's scope and the resulting litigation.

This latter possibility, indeed, appears more supportable in recent cases, like *Burrage* and *El*, wherein the courts boldly proclaimed that categorical discrimination claims deriving from misperceptions would not be recognized until Congress expressly instructed the courts otherwise by amending Title VII. Meanwhile, the *Burrage* and *El* courts advanced tenuous analytical reasoning to ensure that actionable claims of invidious, differential treatment comport with an individual's self-classified or provable protected status in the meantime.

In doing so, such an anti-anticlassificationist interpretation of Title VII creates a legal fiction that the only rightful beneficiaries of

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255. *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

256. *Id.* at 556.

257. *Id.*

258. *See supra* Part III.A.

259. Selmi, *supra* note 255, at 556.

260. *Id. See generally* Parker, *supra* note 76.

Title VII's protections against workplace discrimination are individuals who allege invidious, differential treatment on the basis of their self-ascribed identity. Courts are mistaken in their belief that by recognizing misperception discrimination cases, statutory protection will be extended to a new class of individuals. Fundamentally, the only class of individuals unable to benefit from Title VII's proscriptions consists of those discriminated against by entities not covered by Title VII.[261] Nonetheless, courts like *Burrage* and *El* have denied Title VII protection to misperception discrimination plaintiffs, even at the expense of undermining longstanding legal principles as well as Title VII's meaning and purpose, and despite the risk of engendering paradoxical, "absurd results"[262] for categorical discrimination cases on the basis of an individual's race, color, sex, national origin, and religion.

Title VII extends protection and relief to individuals suffering invidious, differential treatment perpetrated by a covered employer because of the statute's forbidden criteria, regardless of whether such categorical discrimination derives from an accurate or inaccurate categorization of an individual's racial, ethnic, gender, or religious identity. Although it is likely presumed that everyone will self-identify as a member of a particular socially constructed racial group, or as male or female, not everyone will (or does) classify as a member of a singular racial, ethnic, color, or religious group, or even classify themselves as simply male or female.[263] Moreover, one's racial, religious, ethnic, and gender self-identification can

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261. For example, employers with less than fifteen employees are expressly exempted from Title VII coverage. *See* 42 U.S.C. § 2000e(b) (2006). Businesses and enterprises on or in close proximity of Native American reservations that afford an employment preference to Native Americans are also exempt from Title VII coverage. *See id.* § 2000e-2(i).

262. Per time-honored Supreme Court jurisprudence, the prevailing rule courts are to apply when interpreting statutes is that the "plain language" of the statute governs except when giving effect to the plain language produces "absurd or glaringly unjust" results. *See* United States v. Rodgers, 466 U.S. 475, 484 (1984) (quoting Sorrells v. United States, 287 U.S. 435, 450 (1932)). See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2398–408 (2003), for the origins of the absurdity doctrine in addition to the seminal Supreme Court cases in which the Court appropriated the absurdity doctrine when literal application of a statute's plain language led to nonsensical results. Professor Manning posits that the absurdity doctrine "rests on a judicial judgment that a particular statutory outcome, although prescribed by the text, would sharply contradict society's 'common sense' of morality, fairness, or some other deeply held value." *Id.* at 2405–06.

263. For example, some individuals may not classify themselves in singular racial terms like Black and white but rather as mixed-race or multiracial due to their diverse racial or ethnic heritage. Similarly, individuals may not identify as either female or male due to their intersex identity. *See generally* Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of . . . (Perceived) Sex,"* 34 N.Y.U. REV. L. & SOC. CHANGE 55 (2010).

change throughout the course of one's life. This lack of fixed classification or membership within a protected class does not render an individual unprotected from invidious, differential treatment in the workplace on Title VII's proscribed bases. Correspondingly, differential, invidious treatment based upon the statute's forbidden criteria that does not neatly comport with an individual's actual self-identification, yet is specifically aimed at the individual, is not beyond Title VII's remedial scope. Indeed, Congress and the Supreme Court made clear that the purpose of Title VII is to protect all Americans from categorical discrimination engaged in by covered employers *on the basis* of race, color, national origin, sex, and religion.[264]

IV. WHAT LIES AHEAD: NEGATIVE IMPLICATIONS OF AN ACTUALITY REQUIREMENT

Though countless negative consequences could ensue from certain courts' unwillingness to follow the mandates of Congress and the Supreme Court,[265] this Part identifies a few of the most crucial. These three unexamined, yet critically important, implications of courts' imposition of an actuality requirement in misperception discrimination cases are the emergence of a minimalist actuality defense, the resuscitation of identity adjudication in all categorical discrimination cases, and the reification of race as a fixed, biological construct. With respect to the evolution of identity adjudication, this Part specifically investigates racial determination litigation in

264. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976), in which the court held that Title VII and § 1981 prohibited discrimination against white men and women. The court proclaimed that its holding was in accordance with "uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans.'" *Id.* at 280 (quoting Congressman Celler's remarks at 110 CONG. REC. 2578 (1964)).

265. As seen in *El*, courts' imposition of an actuality requirement in pre-discovery stages, like in a court's evaluation of whether to dismiss a case per a 12(b)(6) motion, may discourage plaintiffs and plaintiffs' counsel from bringing meritorious Title VII claims of unlawful race, religion, color, sex, or national origin discrimination. Indeed, if courts apply the plausibility standard articulated in *Iqbal/Twombly* in misperception discrimination cases and thus dismiss misperception discrimination cases pre-discovery, then they signal that the only plausible discrimination is that which derives from an individual's "actual" protected status. Accordingly, this confluence of procedural and substantive law erroneously conveys that categorical discrimination emanating from misperceptions about the plaintiff's protected status is not only inconceivable but also irremediable under Title VII. Additionally, courts could impose an actuality requirement and thus require plaintiffs to prove their membership in a protected class to be awarded protection under current and future federal and state antidiscrimination laws. *See supra* note 175.

categorical race[266] discrimination cases and an attendant consequence: the reification of race as a stable, biological construct.

A. The Creation of a Minimalist Actuality Defense in Categorical Discrimination Cases

Despite specific contentions that the plaintiff conceivably suffered invidious, differential treatment on the basis of proscribed characteristics under Title VII, several federal courts have decreed that Title VII plaintiffs are only protected against unlawful discrimination if they experience invidious, differential treatment occasioned by the defendant's accurate classification of the plaintiff's racial, religious, ethnic, color, or gender identity. In doing so, these courts have afforded employers a minimalist defense even in otherwise viable cases of discrimination resulting from an employer's subjective perceptions or misperceptions of an individual's race, color, national origin, religion, or sex. Essentially, employers need not deny the allegations of discriminatory treatment on the basis of proscribed characteristics. Rather, employers can effectively defend a case of categorical discrimination on the grounds that the alleged invidious, differential treatment did not relate to the individual's actual or self-ascribed race, religion, national origin, color, or sex. However, whether invidious treatment derives from a plaintiff's actual or misperceived status is irrelevant and should not bear on the viability of her discrimination case.

As Professor Craig Robert Senn clarifies:

> employers who [are either "accurate discriminators" or "erroneous discriminators"] are identical in discriminatory intent and action. An "accurate discriminator" and an "erroneous discriminator" are each motivated to act based on a protected trait, and each actually manifests that intent in the form of a tangible, adverse employment action. Of course, the difference between these employers is the *accuracy* of the perception of protected status—one subset's employers happened to be "right" while the other subset's employers happened to be "wrong." But, the "erroneous discriminators" are—to be blunt—still discriminators.[267]

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266. Due to the intersectional nature of race, national origin, and religion, racial determination litigation could also denote the determination of an individual's identity who alleges discrimination on the basis of religion or national origin. *See infra* note 283.

267. Senn, *supra* note 148, at 856.

Indeed, as one federal district court in a recent misperception race discrimination case opined, it is "as offensive as it is incorrect" for an employer to contend that it is blameless on the issue of discrimination simply because the employer's perception of the plaintiff's race and resulting negative treatment did not align with the plaintiff's actual racial identity.[268] Unfortunately, in a series of intentional discrimination cases, federal courts reached the opposite result. These courts have endorsed the patently erroneous prescription that an individual's statutory right to be free from racial, religious, ethnic, color, and sex discrimination under Title VII is not conditioned upon whether an employer conceivably discriminated against an individual on the basis of a proscribed characteristic but rather upon the precision with which an employer's perception corresponds to an individual's self-ascribed or provable racial, religious, ethnic, color, or gender identity and whether the employer treats her accordingly.[269]

This prima facie actuality requirement indicates a divergence from assessing the "critical question of discrimination"[270] in Title VII intentional discrimination cases. Not only does an actuality requirement leave a Title VII plaintiff wanting for protection against discrimination, but it may also leave her unprotected against retaliation for opposing such discriminatory treatment. In some

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268. Boutros v. Avis Rent a Car Sys., LLC, No. 10-C-8196, 2013 WL 3834405, at *7 (N.D. Ill. July 24, 2013). In this case, the plaintiff, who identified as Assyrian, alleged that he suffered a hostile work environment and was terminated because the defendant-employer misperceived him as Arab. *Id.* at *6–7. The court rejected the employer's defense that it could not be held liable for unlawful race discrimination under Title VII because it was not aware of the plaintiff's racial identity. *Id.* at *7.

269. As seen in *Burrage*, such a condition will have a deleterious effect on individuals who self-classify as mixed-race or multi-racial. Indeed, Professor Sharona Hoffman observes that "[t]he growing population of individuals of mixed 'racial' backgrounds makes the question of 'race' identity in American society increasingly complex and the idea that there are fixed 'racial' categories increasingly outdated." Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1141 (2004). In employment discrimination cases involving plaintiffs like Burrage who identify as mixed-race, courts generally place such plaintiffs into a monoracial category and analyze the case accordingly. Professor Nancy Leong critiques the "judicial erasure" of mixed-race plaintiffs and the particular animus and resulting discrimination that mixed-race individuals endure. *See* Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469 (2010). *See generally* Ken Nakasu Davison, Note and Comment, *The Mixed-Race Experience: Treatment of Racially Mischaracterized Individuals Under Title VII*, 12 ASIAN L.J. 161, 176 (2005) (arguing that courts' emphasis on whether a plaintiff's employment discrimination claim "fits within traditional notions of race" rather than on employer's intent is not only misplaced but is also especially problematic for mixed-race individuals, as the "tendency to mischaracterize a person's race is heightened for mixed-race people" because "[they] are often not easily identifiable based on stereotypical indicators"); Scott Rives, Comment, *Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1310 (2012) (arguing that mixed-race plaintiffs should be accorded the task of "fram[ing] race as he or she desires for the initial complaint").

270. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added).

jurisdictions, to assert an actionable claim of retaliation under Title VII's opposition clause, a plaintiff must demonstrate a reasonable, good faith belief that the alleged discriminatory conduct violated Title VII.[271] However, as Professor Deborah Brake and Professor Joanna Grossman synthesize:

> [i]n addition to a reasonable factual basis, an employee who opposes discrimination also must have a legally sound belief that Title VII was violated in order to secure the law's protection from retaliation. The reasonableness of the employee's belief is measured by existing law, and courts charge employees with full knowledge of existing law—including circuit-specific precedents—even if an employee had a good faith belief that the law reached farther.[272]

Accordingly, the reasonableness, and thereby the legal recognition, of a Title VII plaintiff's opposition claim is contingent upon whether the underlying challenged conduct constitutes an actionable claim of discrimination per existing Title VII case law and not upon whether a lay person would deem the challenged conduct within the province of Title VII's proscriptions.[273] Plausibly, a court could hold that a Title VII plaintiff who is retaliated against because she opposed invidious, differential treatment emanating from the employer's misperceptions about her (or another individual's) protected status does not have an actionable claim of retaliation in light of legal precedent that declares that the underlying challenged conduct—misperception discrimination—is beyond Title VII's scope.

The confluence of these outcomes—no protection against discrimination and no protection against retaliation suffered for those opposing misperception discrimination—will engender unbridled invidious, differential treatment in the workplace motivated by misperceptions about employees' protected status and activity, as such categorical discrimination can ensue without legal consequence. As a result, a minimalist, actuality defense signals to employers that

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271. *See, e.g.*, Trent v. Valley Elec. Ass'n Inc., 41 F.3d 524, 526 (9th Cir. 1994).

272. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As A Rights-Claiming System*, 86 N.C. L. REV. 859, 919 (2008).

273. *See, e.g.*, McBride v. Lawstaf, Inc., No. 1:96-CV-0196-CC, 1996 WL 755779, at *1–2 (N.D. Ga. Sept. 19, 1996) (rejecting plaintiff's Title VII retaliation claim by holding that the plaintiff's opposition to her employer-temporary staffing agency's policy of not referring "qualified applicants with 'braided' hair styles for employment positions" was not protected activity because such policy as a matter of law did not violate Title VII's proscriptions against race-based employment practices).

they need not attempt to prevent or remedy misperception discrimination, since some courts have concluded that such treatment does not violate Title VII. Therefore, this legal mandate effectively contravenes dual aims of Title VII and like antidiscrimination laws: deterring employers from engaging in discrimination and encouraging employers to critically examine their discriminatory behaviors and decisions.[274]

B. The Emergence of Identity Adjudication and the Reification of Biological Race in Categorical Discrimination Cases

The imposition of an actuality requirement in cases of invidious, differential treatment unnecessarily resuscitates litigation to affirm the plaintiff's actual identity. The contours of identity litigation are best illustrated in the race discrimination context. The United States possesses an extensive body of racial determination jurisprudence. For the vast majority of U.S. history, the legal determination of race has been essential to the provision or denial of political, social, legal, and economic rights and privileges. According to Professor Ariela Gross, "[d]etermining racial identity [has been] about raising some people up . . . to put others down; enslaving some people to free others; taking land from some people to give it to others; robbing people of their dignity to give others a sense of supremacy."[275] Consequently, one's classification as a free person or a slave,[276] as well as the ability to ride in one train car or another,[277]

274. *See* McKennon v. Nashville Banner Publ'g, 513 U.S. 352, 358 (explaining that "Congress designed the remedial measures in [Title VII and the ADEA] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination.") (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975). In *McKennon*, the high court also noted that "[d]eterrence is one object of [Title VII and the ADEA]." *Id.* at 358.

275. ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 9 (Harvard Univ. Press 2008).

276. *See, e.g.*, Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134 (1806); *see also* Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of* Hudgins v. Wrights, *in* RACE LAW STORIES 147 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (providing a detailed analysis of this well-known freedom suit).

277. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

exercise the right to vote,[278] marry,[279] serve on a jury,[280] attend one public school or another,[281] and become a naturalized citizen[282] have all depended upon the legal determination of the individual's race.

Mandating that plaintiffs prove their race in categorical race, national origin, and some religious[283] discrimination cases essentially revives age-old trials of racial determination. In her seminal work on racial determination cases adjudicated by nineteenth century courts in the American South, Professor Ariela Gross reveals that, in determining an individual's race when challenged, judges and juries assessed evidence related to one's physical features (which often included physical inspections), the racial reputation of one's parents and other family members, and one's racial reputation in society, which was largely based upon community members' perceptions of one's racial associations in social settings as well as other behaviors and norms that signified race, i.e., racial performance.[284]

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278. *See, e.g.*, People v. Dean, 14 Mich. 406 (Mich. 1866).

279. *See, e.g.*, State v. Pass, 121 P.2d 882, 883–84 (1942) (upholding the constitutionality of an Arizona anti-miscegenation law legally voiding marriages between "persons of Caucasian blood, or their descendants, [and] Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants" and thereby nullifying the marriage between a criminal defendant who testified to having European, Piute and Mexican ancestry and his wife who testified to having Spanish, French, and Mexican ancestry).

280. *See, e.g.*, State v. Davis, 18 S.C.L. (2 Bail.) 558 (S.C. Ct. App. 1831).

281. *See, e.g.*, Wall v. Oyster, 36 App. D.C. 50 (D.C. Cir. 1910); *see also* Rice v. Gong Lum, 104 So. 105, 110 (Miss. 1925) (concluding that Chinese persons were "colored" within the meaning of the Mississippi state constitution and thus mandating that the daughter of the Chinese plaintiff attend the public secondary school for "colored" children rather than the school assigned for "white" children).

282. *See, e.g.*, Ozawa v. United States, 260 U.S. 178 (1922) (holding that a Japanese immigrant was not "white" for the purposes of becoming a naturalized citizen pursuant to the Naturalization Act, which only permitted "free whites" and African descendants to become naturalized U.S. citizens).

283. *See, e.g.*, Smith v. Specialty Pool Contractors, No. 02:07-CV-1464, 2008 WL 4410163, at *6 (W.D. Pa. Sept. 24, 2008) (denying summary judgment in Title VII race and religious discrimination case where plaintiff, a practicing Catholic, alleged racial and religious harassment because his father was Jewish). This case illustrates the conflation of race and religion in that one's racial and religious identities can be viewed as indistinguishable from one another. Though the court did not mandate a showing of actuality, in light of this conflation of race and religion, this case demonstrates the possibility of litigating an individual's race in instances that can be likewise characterized as religious discrimination.

284. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (exploring racial determination trials that took place in the American South during the 1800s). *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (N.Y. Univ. Press 1996) (examining "prerequisite cases" in which federal courts adjudicated one's "whiteness" in order to become a naturalized American citizen); Greene, *supra* note 220 (examining historical and contemporary racial determination cases to illustrate that determining one's "Blackness" is not based upon methodical application of the infamous "one-drop" rule but rather is an exercise that is social, relational, and contextual in nature and is based upon an assessment of one's physical

In contemporary misperception cases, plaintiffs may be similarly required to produce evidence of their ancestry, racial reputation in society, racial statuses, racial associations, and racial performance.[285] A plaintiff may also need to submit to an inspection of her physical appearance without an ostensibly legitimate purpose.

Furthermore, the *Burrage* court advanced an essentialist requirement applicable to national origin or race discrimination claimants. A plaintiff must demonstrate that the ascertainable trait(s), which presumably triggered an employer's invidious, differential treatment, are traceable to a "personal characteristic common to people of a certain national origin [or the plaintiff's] national origin, itself."[286] Therefore, for a viable claim of national origin or race discrimination to exist, Title VII plaintiffs would need to demonstrate that an observable physical characteristic, like a particular skin complexion or a non-physical characteristic, or the use of a particular language, is a "common, personal characteristic" shared by individuals of a particular national origin or ancestry. This standard fails to acknowledge that physical or non-physical proxies that an observer uses to assign a racial or ethnic identity of another person are experientially shaped by broader social forces (inclusive of political and legal forces), the observer's personal encounters with racial, ethnic, and color classification, and the contexts in which such classifications are made. Thus, the process of determining another's race and ethnicity is quite individualistic, subjective, and often idiosyncratic. Nonetheless, the revival of racial determination litigation in all categorical discrimination cases is a real consequence of courts' anti-anticlassificationist interpretation of antidiscrimination laws.

Indeed, a conventionally framed discrimination case, *Leonard v. Katsinas*,[287] evidences that reputational, physical, and associational evidence of a plaintiff's actual racial or ethnic identity can be required. In *Leonard v. Katsinas*, the plaintiffs, who identified as Native American, claimed that the defendant denied their entry into a restaurant on the basis of their race.[288] They alleged that one of the defendants told them expressly that "he was barring them

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appearance, conduct, and associations within a broader historical and contemporary sociolegal context of race relations and hierarchy).

285. *See* Ariela J. Gross, *Reply*, 83 S. CAL. L. REV. 495, 497 (2010) ("[A]ll of the various bases of identity—appearance, ancestry, reputation, status, performance, science, and associations—have continued to be important throughout U.S. history to this day.").

286. Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794, at *7 (N.D. Ohio Mar. 29, 2012).

287. No. 05-1069, 2007 WL 1106136 (C.D. Ill. Apr. 11, 2007).

288. *Id.* at *13.

from the [r]estaurant because they [were] Native American."[289] The plaintiffs in *Leonard* brought their race discrimination claims pursuant to § 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[290] To establish this racial discrimination claim under § 1981, the plaintiffs were required to demonstrate: "[they were members] of a racial minority; . . . defendants had the intent to discriminate on the basis of race; and . . . the discrimination concerned the making or enforcing of a contract."[291] The defendant specifically argued that the plaintiffs could not satisfy the first element of their racial discrimination case because not all of the plaintiffs could prove that they were "racially Native American."[292] In other words, the defendant contended that the plaintiffs' claims of race discrimination automatically failed since not all of them could produce proof that they were actually Native American.

Fittingly, the *Leonard* court ruminated, "if there is evidence that an alleged discriminator believed the plaintiffs to be members of a member class—in this case, Native Americans—and discriminated against them on this belief, should it even matter if the plaintiffs are actually members of that protected class or not?"[293] At the summary judgment stage, the court employed the reasonable basis test first adopted in *Perkins v. Lake County Department of Utilities* as previously discussed.[294] According to the *Perkins* court, satisfaction of the reasonable basis test establishes the initial prima facie element in the

289. *Id.*

290. 42 U.S.C. § 1981(a) (2006).

291. *Leonard*, 2007 WL 1106136, at *7 (quoting Pourghoraishi v. Flying J Inc., 449 F.3d 751, 756 (7th Cir. 2006)).

292. *Id.* at *8. The defendants further contended that they had no knowledge that plaintiffs were Native American. *Id.* at *13.

293. *Id.* at *9.

294. 860 F. Supp. 1262 (N.D. Ohio 1994). Like a number of courts in misperception discrimination cases, the court's adoption of a reasonable basis test evidences a strong allegiance to formulaic satisfaction of the prima facie elements articulated in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). However, unlike the courts in misperception discrimination cases examined in Parts II-III, the *Perkins* court attempted to set forth a more liberal requirement for maintaining a prima facie case of discrimination, which acknowledged the socially constructed nature of race. *See Perkins,* 860 F. Supp. 1262. Several courts since *Perkins* have applied the reasonable basis test in intentional race and national origin cases. *See, e.g.*, Lewis v. State of Delaware Dep't of Pub. Instruction, 948 F. Supp. 352 (D. Del 1996); Greene v. Swain Cnty. P'ship for Health, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004); Lebyed v. DTG Operations, Inc., No. 5:08-CV-00438-FL, 2010 WL 1332417 (E.D.N.C. Jan. 22, 2010); *see also* Wood v. Freeman Decorating Servs., Inc., No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4–5 (D. Nev. Feb. 19, 2010) (relying in part on *Perkins'* reasonable basis test in concluding that the plaintiff presented sufficient evidence that the employer could have correctly or mistakenly perceived him as Native American since the plaintiff "identified himself with American Indian culture and heritage" and his co-workers harassed and aimed derogatory

McDonnell Douglas analysis by demonstrating membership in a protected class.[295] Doing so requires that a plaintiff put forth objective physical appearance, associational, and reputational evidence to support her claim that the employer reasonably perceived her as a member of a particular protected class under Title VII.[296] Applying the *Perkins* court's reasonable basis test, the *Leonard* court held that "a focus on the *perception* of the alleged discriminator is appropriate at [the summary judgment] stage."[297] Therefore, as long as plaintiffs could present "some objective evidence" that led the defendant to believe that the plaintiffs were Native American and deny them entry into the restaurant because of this belief, plaintiffs could proceed to trial.[298] Regrettably, however, the *Leonard* court decided that the reasonable basis approach would not apply at trial. In order to ultimately prevail in their race discrimination case, the court held that the plaintiffs would have to prove "through competent evidence, that they [were] members of the protected class."[299] Even though the plaintiffs alleged that the defendant admitted denying them entry to the restaurant because he perceived them as Native American, the court mandated that the plaintiffs would have to prove that they were actually Native American to proceed with their race discrimination case.

It is important to take note that in contemporary legal contexts beyond categorical discrimination cases, the determination of whether an individual is Native American is critical, as it determines eligibility for a various governmental benefits and preferences accorded to Native Americans.[300] For example, the Bureau of Indian Affairs, the federal agency that administers federal benefits and services for Native American tribes, has promulgated regulations requiring one-half or one-quarter Native American blood or ancestry to qualify for governmental hiring preferences, government-sponsored employment assistance, educational loans and grants,

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comments at him because of his association). Thus, inconspicuously, three discrete standards for statutory protection have emerged in Title VII intentional race, national origin, and religion discrimination cases: a prima facie showing of actuality; a prima facie showing of objective reasonableness; and a prima facie showing of the employer's perception or misperception about the individual's protected status. Ultimately, courts or Congress will need to resolve this quandary. Meanwhile, this Article endeavors toward a more cohesive conceptualization of Title VII protection for courts to appropriate in categorical discrimination cases. *See infra* Part V.C.

295. *See Perkins*, 860 F. Supp. at 1278.

296. *See id.*

297. Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *12 (C.D. Ill. April 11, 2007).

298. *Id.* (quoting *Perkins*, 860 F. Supp. at 1278).

299. *Id.* at *13.

300. *See* Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REF. 275, 277 (2000–2001).

and adult vocational training, among other benefits.[301] In addition to a specific quantum of Native American lineal ancestors, some federal and state laws require that individuals prove their membership or enrollment within a recognized tribe to qualify for benefits and preferences reserved for Native Americans.[302]

Despite its irrelevance to the issue of whether an employer's subjective perceptions of the plaintiff elicited negative biases and resulted in invidious, differential treatment, the *Leonard* court required the plaintiffs to prove their Native American ancestry and/or tribal membership like individuals seeking governmental benefits and services designated for Native Americans (as well as tribal recognition).[303] In justifying its imposition of an actuality requirement and attendant adjudication of plaintiffs' indigeneity at trial, the *Leonard* court reasoned similarly to, but less emphatically than, some courts in Title VII misperception discrimination cases mentioned previously. The court opined that since "Congress has not elected to amend Title VII or § 1981 to correspondingly widen the scope of statutory protection[, this] is some suggestion that [Congress] regards *actual* membership within a protected class a mandatory requirement to prevail under those statutes."[304]

As *Leonard v. Katsinas* illustrates, the imposition of an actuality requirement and attendant identity adjudication are categorically wrong developments not limited to misperception discrimination cases. Courts have also applied an anti-anticlassificationist interpretation of federal antidiscrimination laws, and thereby mandated evidentiary proof of a plaintiff's racial identity, in conventionally framed discrimination cases under Title VII and § 1981. As a result, defendants are able to defend all categorical discrimination cases by contesting the plaintiff's self-ascribed identity. Therefore, if courts continue to reify an actuality requirement in misperception and conventionally framed discrimination cases, courts will become inundated with identity adjudication.

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301. *Id.* at 280–81.

302. *See id.*

303. Professor Gould explains that:

> [m]ost tribal constitutions require that a person seeking membership must have a specified quantum of tribal blood, or, without regard to blood quantum, must be descended from a member of the tribe. The tribal constitution for the Fort Apache reservation, for example, requires at least one-half degree White Mountain Apache blood.

L. Scott Gould, *The Congressional Response to* Duro v. Reina*: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 60 n.23 (1994).

304. Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *13 (C.D. Ill. April 11, 2007).

It is difficult to imagine that Congress envisioned what the court in *Leonard v. Katsinas* pronounced to race and national origin discrimination plaintiffs: to seek redress for alleged invidious, differential treatment suffered because of their racial identities, plaintiffs must engage in a racial determination trial whereby plaintiffs and defendants respectively will attempt to prove and disprove the plaintiffs' race through the presentation of myriad forms of evidence. To prove the plaintiff's racial or ethnic identity, plaintiffs and defendants in discrimination cases may present a variety of evidence. For example, a plaintiff could simply proffer documents on which she self-declares her race. Alternatively, a plaintiff could put forward reputational evidence via lay witness testimony of the plaintiff's racial reputation based upon her racial associations or declarations within particular communities and contexts. She might offer genealogical evidence based upon lay or expert witness testimony, family trees, ancestral records, census records, or even DNA ancestry tests results. Finally, she might produce physical evidence informed by lay or expert witness examinations of the plaintiff's physical appearance, just to name a few examples. Such litigation is unnecessary and is uniquely harmful, as it reinforces a discredited notion of race as a biological, "immutable,"[305] and predictable construct in that one's race will necessarily manifest through his or her phenotype, conduct, and associations.[306]

Moreover, adjudicating one's race unnecessarily increases litigation costs, encumbers judicial resources, and burdens discrimination plaintiffs. In doing so, it fails to address the central issue in cases of invidious, differential treatment:[307] "whether for *any reason*, a racially discriminatory employment decision has been

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305. I have previously critiqued the judiciary's continued reinforcement of the "immutability" doctrine in Title VII race and national origin cases, arguing that this concept "defies society's understanding of race historically and contemporarily." Greene, *supra* note 81, at 1369.

306. Physical characteristics in addition to "[c]onformity with race-based stereotypes and behaviors, which were constructed through group-based social relations as well as the law, [have] also determined [and continue to determine] one's race." *Id.*

307. The Supreme Court has categorized the use of race for the implementation of race-conscious affirmative action and other race-conscious remedial measures as intentional race discrimination. *See, e.g.*, City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). Therefore, proffering evidence of one's racial or ethnic identity may be relevant in the race-conscious affirmative action context or when an individual allegedly misrepresents her race in order to benefit from a race-conscious affirmative action program. *See, e.g.*, Malone v. Civil Serv. Comm'n, 646 N.E.2d 150 (Mass. App. Ct. 1995). Additionally, in *Ricci v. DeStefano*, the Supreme Court announced that a governmental body's consideration of race in its decision not to certify promotional exam results, which disproportionately impacted African American firefighters and thus resulted in a negative employment decision for white male firefighters and a Hispanic male firefighter, constitutes intentional race discrimination under Title VII. *See* 557 U.S. 557, 592–93 (2009).

made."[308] Therefore, in the *Leonard* case, whether the defendant made an accurate assessment of the plaintiffs' racial identity is irrelevant to the question of whether the plaintiffs were discriminated against on the basis of race. What is relevant is whether the defendant perceived the plaintiffs as Native American and barred them from entering the restaurant on that ground. Thus, as the *Leonard* court correctly notes, a focus on the defendant's perceptions and whether these perceptions generated the invidious, differential treatment is the appropriate inquiry in categorical discrimination cases.

Indeed, in the context of racial discrimination, the court in *Perkins v. Lake County Department of Utilities* explained that "subjective perception of an individual's race clearly plays an important role in racial classification where discrimination is involved . . . [moreover,] [t]his court has never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct."[309] Thus, a court need not check the racial, ethnic, or religious pedigree of a plaintiff in a categorical discrimination case to ascertain whether a defendant's subjective perceptions about the plaintiff's racial, ethnic, or religious identity motivated the defendant's alleged discriminatory treatment toward the plaintiff. Doing so is plainly wrong in not only race, national origin, and religion discrimination cases, but in all cases of invidious, differential treatment. It diverts attention from the important question of whether a defendant's perceptions about an individual's race, national origin, religion, color, or sex inspired the discriminatory treatment to the irrelevant issue of whether an individual can prove her identity.[310]

V. (MIS)PERCEPTIONS ARE PROTECTED UNDER TITLE VII

Within the federal judiciary, the adoption of an actuality requirement is a budding trend in misperception discrimination cases

308. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

309. Perkins v. Lake Cnty. Dep't of Utils., 860 F. Supp. 1262, 1273 (N.D. Ohio 1994).

310. The ineffective redress of disability discrimination, and thus the unintended consequences of an actuality requirement, are best illustrated in the ADA context. In 2008, Congress was forced to amend the ADA to overturn restrictive statutory interpretations on the part of courts, which imposed onerous burdens on disability discrimination plaintiffs by requiring them to prove that they suffered from an actual disability, leaving many individuals whom Congress intended to cover unprotected under the Act. *See* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217–24 (2008).

arising under Title VII.[311] Additionally, as the previous Part illustrated, some federal courts in conventionally framed discrimination cases have even allowed an actuality defense, and, as a result, imposed an actuality requirement on plaintiffs. In so doing, courts have ignored the central purposes of Title VII in part because of the ADA's "regarded as" language. This language has made it relatively easy and facially logical for courts to argue that Title VII, unlike the ADA, requires discrimination be based upon an individual's actual protected status. Furthermore, adopting an actuality requirement would be an easy enterprise for courts if they were not provided with legal authority or EEOC guidance on the issue of misperception discrimination.

However, this trend has not been universal. Certain federal courts and the EEOC have resisted an anti-anticlassificationist interpretation of Title VII, thereby refusing to impose an actuality requirement.[312] Yet, this alternative interpretation of Title VII is severely marginalized within legal argument, opinions, and scholarship. Consequently, this Article builds upon, as well as departs from, the academic literature[313] and jurisprudence specifically addressing the viability of discrimination cases emanating from misperceptions about an individual's protected status. In the following sections, in lieu of arguing for the transplantation of the ADA's "regarded as" language to Title VII, this Article presents Title VII jurisprudential support and EEOC directives to show that all individuals alleging categorical discrimination on the basis of Title VII's proscribed characteristics are already entitled to statutory protection and have standing to maintain a claim of discrimination, regardless of whether their identity was correctly perceived.

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311. *Compare* cases cited *supra* note 29 (adopting an actuality requirement), *with* cases cited *infra* note 312 (declining to adopt an actuality requirement).

312. *See Perkins*, 860 F. Supp. at 1273 (declining to adopt an actuality requirement yet adopting a reasonable basis test in a Title VII race/national origin discrimination case); EEOC v. WC & M Enter., 496 F.3d 393, 401 (5th Cir. 2007); Boutros v. Avis Rent a Car Sys., LLC, No. 10-C-8196, 2013 WL 3834405, at *7 (N.D. Ill. July 24, 2013); Henao v. Wyndham Vacation Resorts, Inc., No. 10-00772 SOM/BMK, 2013 WL 704895, at *7 (D. Haw. Feb. 26, 2013) (citing EEOC v. WC & M Enterprises); Smith v. Specialty Pool Contractors, No. 02:07-CV-1464, 2008 WL 4410163, at * 6 (W.D. Penn. Sept. 24, 2008) (citing Fogelman v. Mercy Hosp., Inc., 283 F.3d 561, 567 (3d Cir. 2002)); *Wood v. Freeman Decorating Servs., Inc.*, No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010) (pronouncing that "plaintiffs who are not members of [a] protected class have standing to challenge racially discriminatory conduct in their own right when they are the direct target of discrimination") (quoting RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1055 (9th Cir. 2002) (citing Estate of Amos v. City of Page, 257 F.3d 1086, 1093–94 (9th Cir. 2001))).

313. *See* Onwuachi-Willig & Barnes, *supra* note 143; *see also* Senn, *supra* note 148; Charity Williams, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357 (2008).

First, Section A examines underappreciated EEOC directives and Fifth Circuit precedent in *EEOC v. WC & M Enterprises*, both of which affirm that misperception discrimination cases are cognizable under Title VII. Section B further explores the ways in which some courts have rejected an anti-anticlassificationist interpretation of Title VII, independent of the EEOC's guidelines on misperception discrimination. Specifically, this Section revisits briefly *Perkins v. Lake County Department of Utilities* and brings to the forefront an often overlooked Third Circuit case, *Fogleman v. Mercy Hospital*, both of which recognize the nexus between employer perception, bias, and resulting discrimination in Title VII cases.

Lastly, Section C explains that the Supreme Court has implicitly rejected an actuality requirement in Title VII cases and thus has articulated a more cohesive notion of statutory protection in a recent Title VII retaliation case, *Thompson v. North American Stainless, LP*. In their offer of practical solutions *within* Title VII's ambit, the following sections cover new and important ground towards extending protection to all victims of invidious, differential treatment on the basis of race, color, national origin, religion, or sex.

A. *Protection for Misperception Discrimination Plaintiffs:* EEOC v. WC & M Enterprises *and Longstanding EEOC Directives*

1. EEOC Directives

For over thirty years, the EEOC has issued interpretive directives on matters of employment discrimination involving misperception. Only the Fifth Circuit and a few other federal courts have expressly taken note of such directives in Title VII misperception discrimination cases.[314] In concluding that references to national origin directed at the plaintiff are sufficient to establish a prima facie case of national origin discrimination, the Fifth Circuit relied upon the EEOC Guidelines published in 1980, which state:

> [i]n order to have a claim of national origin discrimination under Title VII, it is not necessary to show that the alleged discriminator knew the *particular* national origin group to which the complainant belonged. [To prove a national origin

314. *See, e.g.*, EEOC v. WC & M Enter., 496 F.3d 393, 401 (5th Cir. 2007); Henao v. Wyndham Vacation Resorts, Inc., No. 10-00772 SOM/BMK, 2013 WL 704895, at *7 (D. Haw. Feb. 26, 2013).

> claim], it is enough to show that the claimant was treated differently than others because of his or her foreign accent, appearance, or physical characteristics.[315]

In 2002, the EEOC reinforced its earlier guidance by enumerating that unlawful national origin discrimination under Title VII embodies:

> [e]mployment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, *regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity.*[316]

However, the EEOC did not simply limit its guidance on misperceptions to the context of national origin discrimination. The EEOC has specifically stated in its Compliance Manual that unlawful race discrimination under Title VII constitutes "discrimination against an individual based on a belief that the individual is a member of a particular racial group, *regardless of how the individual identifies himself.* Discrimination against an individual based on a perception of his or her race violates Title VII *even if that perception is wrong.*"[317] In light of increased workplace religious, ethnic, and racial discrimination post-9/11, the EEOC fortified its position that discrimination claims resulting from misperceptions about an individual's racial, religious, or ethnic identity are cognizable under Title VII. According to EEOC guidelines issued in 2002 in response to post-9/11 discrimination, Title VII prohibits "[h]arassing or otherwise discriminating because of the perception or belief that a person is a member of a particular racial, national origin, or religious group *whether or not that perception is correct.*"[318]

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315. *WC & M Enter.*, 496 F.3d at 401. (quoting 45 Fed. Reg. 85632, 85633 (Dec. 29, 1980)) (emphasis in original).

316. EEOC Compl. Man. § 13-II(B) (2002) (emphasis added).

317. EEOC Compl. Man. § 15-II (2006) (emphasis added).

318. *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, U.S. EQUAL OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm (last visited Aug. 2, 2013) (emphasis added). The EEOC has also expressed in its official publication, which provides guidance to employers on complying with the various antidiscrimination laws the agency enforces, that discrimination based on misperceptions about an individual's race constitutes unlawful discrimination under Title VII. According to the EEOC, "discrimination [occurs] against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong." EEOC Compl. Man. § 15-II (2006) (emphasis added). The EEOC provides parallel

Accordingly, the EEOC has announced repeatedly that the extension of Title VII protection to race, religion, and national origin discrimination is not contingent upon a plaintiff's showing that the alleged discrimination was induced by her actual racial, religious, or ethnic identity. Instead, a plaintiff is protected when race, religion, or national origin is the basis for a covered employer's invidious, differential treatment. In its directives on religious, national origin, and racial discrimination, the EEOC acknowledges the nexus between employer perceptions of an individual's identity and the actualization of invidious, differential treatment. Furthermore, according to the EEOC, the plaintiff need not demonstrate that the employer is aware of the plaintiff's self-ascribed racial, ethnic, or religious identity, nor must the plaintiff demonstrate that her identity comports with the employer's perception in order to assert an actionable claim of discrimination.

2. *EEOC v. WC & M Enterprises*

In its prosecution of a Title VII case in *EEOC v. WC & M Enterprises*, the EEOC presented its above regulations on misperception discrimination to the Fifth Circuit, which proved to be influential to the successful outcome of the case.[319] The plaintiff-intervenor, Mohommed Rafiq, like Foad Afshar,[320] alleged that beginning September 11, 2001 and lasting until the end of his employment, he experienced post-9/11 discrimination.[321] Specifically, he contended that he experienced harassment because of his religion and national origin in violation of Title VII. Rafiq, born in India, was a practicing Muslim.[322] According to Rafiq, upon reporting to work on the afternoon of September 11th, his co-workers and supervisors were watching media reports of the terrorist attacks and inquired sarcastically about his whereabouts prior to his arrival. Rafiq felt as if "[his] supervisors and colleagues were implying that [he] had participated in some way in the terrorist attacks against the United States."[323] Thereafter, his co-workers and supervisors repeatedly

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guidance for national origin discrimination. *See* EEOC Comp. Man. § 13-II(B) (2002) ("Employment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity.").

319. 496 F.3d 393 (5th Cir. 2007).

320. *See supra* Part II.A.

321. 496 F.3d at 396–97.

322. *Id.* at 396.

323. *Id.*

called him "Taliban" despite his requests that they cease doing so and his complaints to management. According to Rafiq, he was subjected to mocking inquiries and comments about his Islamic faith and religious practices.[324]

Furthermore, on numerous occasions, Rafiq's supervisors and coworkers allegedly called him "Arab."[325] Rafiq also recalled an incident when, allegedly after inquiring about his mandatory attendance at a United Way event, his supervisor responded, "This is America. That's the way things work over here. This is not the Islamic country where you come from."[326] His supervisor issued a written reprimand stating that Rafiq was acting like a "Muslim extremist" and he could no longer work with him due to his "militant stance."[327] Days later, Rafiq reported to management another harassing altercation involving a different supervisor. Two days after issuing his complaint, Rafiq was terminated.[328]

Rafiq sued his former employer on the basis of religion and national origin discrimination in violation of Title VII, and the EEOC decided to litigate Rafiq's case on his behalf.[329] Similar to other federal district courts in misperception discrimination cases, the court granted the defendant-employer's summary judgment motion with respect to Rafiq's national origin discrimination claim.[330]

Like *Burrage*, *El*, and a series of other federal district court cases,[331] the court held in *WC & M Enterprises* that the EEOC could not assert a national origin discrimination claim because none of the alleged harassing comments referred to Rafiq's actual birthplace of India.[332] However, on appeal, the Fifth Circuit overruled the district court's conclusion that actuality is required in Title VII intentional discrimination cases. The Fifth Circuit declared that "a party is able to establish a discrimination claim [under Title VII] based on its own national origin *even though the discriminatory acts do not identify the victim's actual country of origin*."[333] The Fifth Circuit deferred to the EEOC's longstanding guidance on national origin

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324. *Id.*
325. *Id.* at 397.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *See id.*
331. *See* cases cited *supra* note 29.
332. EEOC v. WC & M Enter., Inc., No. Civ.A. H-04-3372, 2005 WL 2106090, at *4 (S.D. Tex. 2005) (holding that the EEOC's national origin discrimination claim failed as a matter of law because none of the comments referring to Rafiq's national origin specifically targeted India, Rafiq's birthplace).
333. *WC & M Enter.*, 496 F.3d at 401 (emphasis added).

discrimination[334] and held that alleged derogatory comments related to national origin, or rather the alleged statements specifically referencing co-workers' and supervisors' perception (or misperception) of Rafiq's country of origin, were sufficient to assert a cognizable claim of national origin discrimination.[335]

The Eleventh Circuit recently endorsed the Fifth Circuit's holding by observing that "a harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."[336] The fact that two federal courts of appeal have taken seriously the EEOC's guidelines on misperception discrimination and rejected an anti-anticlassificationist interpretation of Title VII suggests that this will be the natural disposition of courts when deciding future misperception discrimination cases. However, as previously discussed, a number of federal district courts and at least one federal court of appeals have adopted an antithetical posture, which other courts may be inclined to follow.[337] Consequently, divergent readings of Title VII's scope and meaning in misperception discrimination cases within the federal judiciary have produced a legal tension (that may soon engender a federal circuit split), which is in need of a resolution.

B. Employer Perception Animates Employment Discrimination: Perkins v. Lake County Department of Utilities *and* Fogleman v. Mercy Hospital

Independent of the EEOC's guidance and express protection against misperception discrimination, a couple of courts have explicitly recognized the relationship between invidious, differential treatment aimed at a discrimination plaintiff and the employer perceptions that motivate it.[338] This Section examines those decisions

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334. *See also* Eriksen v. Allied Waste Sys., Inc., No. 06-13549, 2007 WL 1003851, at *6 (E.D. Mich. April 2, 2007) (relying on the EEOC's guidance to conclude that "national origin discrimination is not based on the actual national origin of the plaintiff, but rather on the perceived characteristics of the plaintiff leading the alleged discriminator to treat the plaintiff differently").

335. *WC & M Enter.*, 496 F.3d at 401–03.

336. Jones v. UPS Ground Freight, 683 F.3d 1283, 1299 (11th Cir. 2012) (citing *WC & M Enter.*, 496 F.3d at 401).

337. *See supra* text accompanying note 29.

338. *See, e.g.*, Fogleman v. Mercy Hosp., Inc., 283 F.3d 561 (3d Cir. 2002) (adopting a perception theory in Title VII cases); see *also* Smith v. Specialty Pool Contractors, No. 02:07-CV-1464, 2008 WL 4410163, at * 6 (W.D. Penn. Sept. 24, 2008) (adopting the Third Circuit's perception theory in *Fogleman* to allow a Title VII plaintiff's religious discrimination claim based upon his perceived religious identity).

by briefly revisiting *Perkins v. Lake County Department of Utilities*[339] and introducing a notable Third Circuit case, *Fogleman v. Mercy Hospital*.[340] Recall that in *Perkins v. Lake County Department of Utilities*, the plaintiff contended that he was discriminated against because he was Native American, and the defendant-employer raised an actuality defense, claiming that the plaintiff did not assert an actionable race/national origin claim because he was not actually Native American.[341] The federal district court in Ohio declined to adopt an actuality requirement and, thus, refused to mandate the adjudication of the plaintiff's race.[342] In so doing, the *Perkins* court explained that it was "unnecessary, and indeed inappropriate, to attempt to measure [the plaintiff's] percentage of Indian blood or to examine his documentable connection to recognized existing tribes" for the maintenance of the plaintiff's categorical race discrimination case.[343]

Essentially, the *Perkins* court affirmed that an anti-anticlassificationist interpretation of Title VII (which would later be adopted by some courts in parallel contexts) is inconsistent with the aims of Title VII and the operation of discrimination. The court noted that, in its experience deciding employment discrimination cases, it had "never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct."[344] Accordingly, the court found it incongruous for the plaintiff to first prove that he was actually Native American in a case alleging invidious, differential treatment.[345] The court reasoned that antidiscrimination legislation like Title VII sought "to equalize the footing of all employees without regard to the employer's *subjective* perceptions and preconceived ideas"[346] rather than provide benefits on the basis of race, sex, national origin, religion, and color.[347]

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339. 860 F. Supp. 1262 (N.D. Ohio 1994).

340. 283 F.3d 561.

341. *Perkins*, 860 F. Supp. at 1278.

342. *Id.*

343. *Id. But see* Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136 (C.D. Ill. April 11, 2007) (requiring racial discrimination plaintiffs to prove that they were Native American for an actionable § 1981 claim); *supra* Part IV.B.

344. *Perkins*, 860 F. Supp. at 1273.

345. *Id.*

346. *Id.* at 1278 (emphasis added).

347. Again, the *Perkins* court adopted a reasonable basis test which mandates that a plaintiff proffer objective evidence that supports the notion that the employer reasonably believed that the plaintiff was a member of a protected category. *Id.* According to the court, an "objective basis may consist of physical appearance, language, cultural activities, or associations, so long as any or all of those objective factors lead the employer to believe that a given employee is a member of that protected class, and to deal with him/her on that basis." *Id.* I

In *Fogleman v. Mercy Hospital,* the Third Circuit similarly rejected an anti-anticlassificationist interpretation of antidiscrimination legislation, recognizing the interactive nature between subjective perceptions, related bias or stereotypes, and resulting invidious, differential treatment. In *Fogleman*, the plaintiff alleged that his former employer retaliated against him in violation of two federal antidiscrimination statutes, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA).[348] He also alleged that his employer violated a state antidiscrimination statute.[349] Fogleman and his father worked together for the defendant-employer for fifteen years.[350] Fogleman's father alleged in a separate lawsuit against the defendant-employer that he was unlawfully terminated because of his age and disability. Subsequently, the defendant-employer terminated Fogleman (the son).

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contend, however, that satisfying the court's reasonable basis test is not as simple as it seems. To maintain a Title VII race or national origin discrimination case, the objective characteristics that a plaintiff would rely upon are not objective but rather determined subjectively, relationally, and contextually and thus are contestable. For example, an individual who self-identifies as Native American could describe her skin color as light brown, one observer could describe the individual's skin color as medium brown and characterize her as Hispanic, and another observer could describe the same individual as having a fair skin color and characterize her as white. Plausibly, the two observers may not find the respective opinion of the other a reasonable assessment of the individual's skin color and race. *But see* Davison, *supra* note 269, at 184 (endorsing the *Perkins* court's reasonable belief requirement by reasoning "it avoids the complicated and often indeterminate task of establishing a plaintiff's actual racial background"). Furthermore, the *Perkins* court's rationale for a reasonable basis test in race discrimination cases is grounded in a fixed, physical construction of indigeneity and Blackness. *See Perkins,* 860 F. Supp. at 1278 & n.20. For additional commentary on the *Perkins* court's express ruminations on the static and immutable physicality of Blackness, see Greene, *supra* note 220, at 184.

348. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 564 (3d Cir. 2002).

349. *Id.* at 564. The ADA and the Pennsylvania Human Relations Act (PHRA) contain parallel anti-retaliation provisions to Title VII. The ADA's anti-retaliation provision states:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 503, 104 Stat. 327, 370 (codified at 42 U.S.C. § 12203(a) (2006)).

The ADEA also makes it an unlawful employment practice:

> for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(d), 81 Stat. 602, 603 (codified as amended at 29 U.S.C. § 623(d) (2006)).

350. *See Fogleman*, 283 F.3d. at 564.

As a result, the junior Fogleman sued, alleging that he was unlawfully retaliated against because of his father's protected activity (i.e., initiating legal causes of action under applicable antidiscrimination statutes).[351]

Fogleman argued that even though he had not engaged in protected activity, like opposing the alleged discrimination against his father or participating in his father's lawsuit, he was still protected against retaliation under the applicable antidiscrimination statutes because his employer "perceived him to be so engaged."[352] The Third Circuit concluded that the statutory language of the relevant antidiscrimination laws directly supported Fogleman's perception theory and held that if "[Fogleman] can show, as he claims, that adverse action was taken against him because [the defendant-employer] thought he was assisting his father and thereby engaging in protected activity, it does not matter whether [the defendant's] perception was factually correct."[353] According to the *Fogelman* court, antidiscrimination statutes like Title VII "focus on the employer's *subjective reasons* for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter."[354] Accordingly, in order to assert a cognizable claim under antidiscrimination statutes, a retaliation plaintiff does not have to satisfy an actuality requirement. That is, the plaintiff need not actually oppose an employer's discriminatory practice or participate in a proceeding related to alleged unlawful discrimination.

In rejecting an actuality requirement for retaliation plaintiffs, the Third Circuit analogized Fogleman's case to the following hypothetical situation:

> [i]magine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is Muslim. The employer is still discriminating on the basis of religion *even if the applicant is not in fact a Muslim*. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.[355]

These factual scenarios are eerily reminiscent of the misperception discrimination cases *El* and *Afshar*, in which courts expressly

351. *Id.*
352. *Id.* at 571.
353. *Id.* at 571–72.
354. *Id.* at 571 (emphasis added).
355. *Id.* (emphasis added).

rejected the application of a perception theory.[356] Yet, the Third Circuit reasoned that employer perceptions are integral to the manifestation of discrimination. In doing so, the Third Circuit delineated that a plaintiff whom an employer allegedly misperceives as engaging in protected activity maintains an actionable claim of discrimination, just like a plaintiff against whom an employer discriminates because of a misperception that she is Muslim. For the Third Circuit, a showing of actuality in discrimination cases arising under the substantive and anti-retaliation provisions of antidiscrimination laws like Title VII is categorically wrong. Consequently, in Title VII intentional discrimination cases, courts have relied upon the Third Circuit's logic to conclude that a plaintiff asserted a cognizable claim of discrimination.[357] Thus, the Fifth Circuit's holding in *EEOC v. WC & M Enterprises*, the Third Circuit's reasoning in *Fogleman*, and the EEOC's guidance solidify that asserting a remediable claim of unlawful discrimination is not contingent upon a plaintiff's demonstration that an employer discriminated against her because of her actual protected status.

C. Towards Title VII Protection for all "Persons Aggrieved" by Categorical Discrimination: Thompson v. American Stainless, LP

The previous sections have demonstrated that the actuality requirement is not an inherent or stable prerequisite for Title VII protection. This Section argues that an intentional discrimination plaintiff need not satisfy an actuality requirement to seek redress for an alleged unlawful practice under Title VII. As previously discussed in Part I, Title VII provides that "persons aggrieved" may seek statutory protection and relief. Yet, Congress did not define which individuals are "persons aggrieved" by practices proscribed under the Act, such as race, color, sex, national origin, and color

356. *See supra* Parts II–III.

357. *See, e.g.*, Smith v. Specialty Pool Contractors, No. 02:07-CV-1464, 2008 WL 4410163, at *6 (W.D. Pa. Sept. 24, 2008).

discrimination;[358] by retaliation for opposing unlawful discrimination on these grounds; or by retaliation for participation in proceedings related to such discrimination.[359]

However, in *Thompson v. North American Stainless, LP,* the Supreme Court demarcated the scope of Title VII's "persons aggrieved" language.[360] Under similar factual circumstances to *Fogleman*, the Court concluded that the plaintiff in *Thompson* alleged a cognizable claim of retaliation on different, yet related, grounds.[361] The petitioner, Thompson, and his fiancée worked simultaneously for the defendant-employer.[362] Thompson's fiancée sued the defendant-employer for sex discrimination under Title VII. Three weeks later, the defendant-employer terminated Thompson. According to Thompson, even though he did not engage in statutorily protected activity (e.g., Thompson did not file a claim of discrimination nor did he oppose the discrimination his fiancée allegedly experienced), Thompson's former employer terminated him in retaliation against his fiancée because of her protected conduct. Therefore, Thompson's termination constituted unlawful retaliation under Title VII.[363]

The Supreme Court interpreted Title VII's "persons aggrieved" language to hold that Thompson's retaliation claim was actionable under the statute. The court pronounced that "the term 'aggrieved' in Title VII . . . enable[s] [a] suit by *any* plaintiff with an interest 'arguably [sought] to be protected by [Title VII],' while excluding

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358. Congress also did not define the term "discrimination." This Article demonstrates that the term discrimination was primarily intended to cover invidious, differential treatment. However, the Supreme Court has also interpreted unlawful intentional discrimination or disparate treatment to envelop an employer's benign consideration of a protected classification in an employment decision that infringes upon the legitimate expectations of an employee. *See* Ricci v. DeStefano, 557 U.S. 557, 583 (2009). See also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 78–83 (1977), wherein the Supreme Court held that an employer's duty to accommodate an employee's religious observances and practices cannot override other employees' legitimate expectations established pursuant to a non-discriminatory collective bargaining agreement or other valid employment contract. The court reasoned that accommodating one employee's religious obligations by denying another employee her shift preferences and depriving the employee her contractual rights under a collective bargaining agreement constitutes "unequal treatment" or discrimination that "Title VII does not contemplate." *Id.* at 81.

359. *See supra* Part I.

360. Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 863 (2011).

361. It is important to note that *Thompson* did not advance the perception theory the Third Circuit adopted in *Fogleman. But see* Gerri L. Plain, *I'll Get You My Pretty . . . and Your Little Associate Too—the Expansion of Employee Protection in Title VII Retaliation Claims*, 42 CUMB. L. REV. 549, 564 (2012) (positing that the Supreme Court implicitly adopted the perception theory in *Thompson*).

362. *Thompson*, 131 S. Ct. at 867.

363. *Id.*

plaintiffs . . . whose interests are unrelated to the statutory prohibitions in Title VII."[364] Moreover, the Court reasoned that Thompson was a person aggrieved with standing to sue his former employer for unlawful retaliation because he was not an "accidental victim" of the employer's retaliatory animus against his fiancée.[365] According to the court:

> injuring [Thompson] was the employer's intended means of harming [Thompson's fiancée]. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.[366]

The Court allowed Thompson to maintain his retaliation action even though he did not actually engage in protected activity. In doing so, the Supreme Court, like the Third Circuit in *Fogleman*, implicitly denounced a showing of actuality as a prerequisite to maintain a Title VII action. Therefore, at a minimum, an individual who alleges that she is the victim of a covered employer's categorical discrimination on the basis of protected characteristics or protected conduct is a "person aggrieved" under Title VII and has standing to sue. In both instances, such plaintiffs are asserting claims that clearly fall "within the zone of interests protected by Title VII."[367] Thus, to maintain an action under Title VII, plaintiffs need not demonstrate that a covered employer's invidious, differential treatment was animated by their actual protected status or protected activity. Plaintiffs must allege that they suffered categorical discrimination on Title VII's proscribed grounds.

Unequivocally, a categorical discrimination plaintiff contends that she suffered employment-related harms of central importance to Congress when it enacted Title VII of the 1964 Civil Rights Act. Plaintiffs in misperception and conventionally framed discrimination cases are asserting parallel claims "within the zone of interests protected by Title VII,"[368] in that they are seeking to remedy invidious, differential treatment on the basis of Title VII's proscribed characteristics. Furthermore, plaintiffs like Mr. Burrage, Mr. El, Mr.

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364. *Id.* at 870 (emphasis added) (quoting Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 495 (1998)).

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

Afshar, and Mr. Butler, who experience invidious, differential treatment because of their misperceived identities, are no more accidental victims of an employer's categorical discrimination than plaintiffs alleging discrimination because of their self-ascribed identities. Rather, both sets of plaintiffs are intended victims[369] of discrimination that emanated from the employer's perceptions about their race, religion, color, sex, or national origin.

These individuals are "persons aggrieved" and therefore entitled to Title VII protection. They should not be forced to satisfy an actuality requirement to vindicate their rights to be free from discrimination in the workplace. Indeed, the plain language of Title VII,[370] Supreme Court, Fifth Circuit, and Third Circuit precedent, and longstanding EEOC directives, affirm that an actuality requirement is not a prerequisite for Title VII protection. Thus, the deployment of an anti-anticlassificationist interpretation and an attendant actuality requirement in categorical discrimination cases is categorically wrong and should be ceased.

CONCLUSION

This Article unearths an alarming movement within antidiscrimination law, theory, and praxis. Some courts have employed an anti-anticlassificationist interpretation of Title VII in misperception and conventionally framed discrimination cases and, in the process, have imposed upon plaintiffs an unnecessary actuality requirement before they can benefit from Title VII protection. Per some federal courts, plaintiffs in misperception discrimination cases are automatically deemed unprotected because the discriminatory treatment they suffer is not on the basis of their actual protected status. The imposition of an actuality requirement in conventionally framed discrimination cases has afforded employers a minimalist actuality defense to escape Title VII's requirements and imposed upon plaintiffs an onerous burden to prove their actual identity in order to maintain their case when their identity is challenged. Neither of these developments addresses the central issue in Title VII intentional discrimination cases: whether an individual suffered

369. *See id.* (holding that the plaintiff who did not engage in protected conduct but was allegedly terminated because of his fiancée's protected activity was a "person aggrieved with standing to sue" his former employer under Title VII because he was "not an accidental victim of . . . the employer's unlawful act").

370. Title VII's statutory language provides that an employer violates the Act when a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S. C § 2000e-2(m) (2006).

invidious, differential treatment on the basis of race, color, national origin, religion or sex.

Therefore, courts' anti-anticlassificationist statutory interpretation is categorically wrong: it defies human categorization, ignores the innate interaction between individual perception and resulting discrimination, and deprives discrimination plaintiffs of the very protection against categorical discrimination that Title VII is meant to provide. Indeed, rather than protecting individuals against invidious, differential treatment engaged in by covered employers, courts' anti-anticlassificationist interpretation of Title VII fosters irremediable race, color, sex, national origin, and religious discrimination in the workplace. Thus, the continued reification of an actuality requirement in intentional discrimination cases must cease before Title VII's meaning, purpose, and protection are further impaired. Towards that end, in its presentation of Third Circuit, Fifth Circuit, and Supreme Court jurisprudence, Title VII's statutory language, and the EEOC's interpretive guidance, this Article firmly establishes that all individuals who suffer categorical discrimination at the hands of a covered employer on the basis of race, color, sex, national origin, or religion—regardless of whether the discriminatory treatment emanates from their self-ascribed or mistaken identity—*are protected* under Title VII.