American Indian Law Review

Volume 19 | Number 2

1-1-1994

Constructive Race: The Interaction of Personal, Social, and Legal Identity in an American Indian Experience with Title VII: Perkins v. Lake County Department of Utilities

JoHanna G. Flacks-Jatta

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

 Part of the Indian and Aboriginal Law Commons

Recommended Citation

JoHanna G. Flacks-Jatta, *Constructive Race: The Interaction of Personal, Social, and Legal Identity in an American Indian Experience with Title VII: Perkins v. Lake County Department of Utilities*, 19 Am. Indian L. Rev. 473 (1994), https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

NOTE

CONSTRUCTIVE RACE: THE INTERACTION OF PERSONAL, SOCIAL, AND LEGAL IDENTITY IN AN AMERICAN INDIAN EXPERIENCE WITH TITLE VII: *PERKINS V. LAKE COUNTY DEPARTMENT OF UTILITIES*

*JoHanna G. Flacks-Jatta**

I. Introduction

> *As with the joy of beauty, the ugliness of bias can be in the eye of the beholder.*[1]

The overriding goal of Title VII of the Civil Rights Act of 1964[2] is to eradicate workplace discrimination based on the categories of race, color, religion, sex, or national origin. These categories are called protected classes in the context of Title VII. Congress has codified its intent that courts shall broadly construe Title VII to achieve the Act's goal.[3]

In *Perkins v. Lake County Department of Utilities*, the court construed a segment of Title VII text: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's race* . . . ."[4] Courts have developed elements for prima facie employment discrimination cases.[5] One of these elements is central to

---

* Second-year student, University of Oklahoma College of Law. The author humbly dedicates this effort to the memory of Dave and Mildred Flacks, Dave Glazer, Lally and Morris Salz, Jim Secundy, and Beryl Thomas, and to all who are still moved by the spirit of Camp Trywoodie.

1. Perkins v. Lake County Dep't of Utils., 860 F. Supp. 1262, 1277-78 (N.D. Ohio 1994).
2. 42 U.S.C. § 2000e-2 (1988). The Act states, in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

3. *See infra* text accompanying note 66.
4. 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added). *See supra* note 2.
5. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), proposed a widely adopted test to establish a prima facie employment discrimination case:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of employment discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was

Published by University of Oklahoma College of Law Digital Commons, 1994

Perkins: a Title VII plaintiff must demonstrate "membership" in a protected class. In *Perkins*, the protected class is race; the plaintiff, Arthur Perkins, claimed his employer (the Department) racially discriminated against him because he is an American Indian.[6] The Department moved for summary judgment based on evidence tending to show that none of Perkins's ancestors were American Indians. The Department argued that this evidence precludes Perkins from successfully showing membership in the protected class of race.

The *Perkins* court denied the Department's summary judgment motion, holding that Perkins's membership (in the protected class of race) derives not from biological facts but from the Department's perception of Perkins's race.[7] This holding was founded explicitly in social construct theory and implicitly on legal construction.

Adherents of social construct theory could find the title of this note redundant. In social construct theory, race *is* a social construct. In his book *The Racialization of America*, Yehudi O. Webster explains social construct theory by quoting Sociologist Joseph Feagin:

> In most race relations texts it is admitted that objective or scientific definitions of races are arbitrary and inconclusive. Racial membership is susceptible to selective anatomical emphases, regional conventions, society-specific customs, and political imperatives. These configurations are captured in the thesis that race is a social construct. . . . Similarly, in the power-conflict model of race relations, the assignment of persons to racial categories is said to reflect political economic arrangements; it is a form of group mobilization in struggles over scarce resources. . . . "From the social definition perspective characteristics such as skin color have no unique or self-evident meaning; rather they primarily have social meaning , so much so that one might even speak of social races." . . . The basic point

---

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.

Id. at 802.

6. The term "American Indian" is at best outdated in the mainstream academic context, at least inaccurate, and at worst offensive. Since Perkins identifies himself as an American Indian and since the enormous amount of law relating to the indigenous peoples of North America uses the term "American Indian," this note will use the term "American Indian," for the sake of consistency.

7. *See* Linda A. Lacewell & Paul A. Shelowitz, Case Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823 (1987) (arguing for a behavior-based construction of race in 42 U.S.C. §§ 1981-1982 cases). Title 42 U.S.C. § 1981 prescribes equal rights to make and enforce contracts, while 42 U.S.C. § 1982 prescribes equal property rights.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

> is that race is, or may be, scientifically unacceptable, but is subjectively meaningful. Sociology must deal with the meaning of race for social actors.[8]

The concept of construction has a different meaning in the law: By legal dictionary definition, "constructive" means "not actual but accepted in law as a substitute for whatever is otherwise required. Thus anything which the law finds constructively will be treated by the law as though it were actually so."[9]

Therefore, even if one believes race to be biologically as opposed to socially based, one can still employ a legal construction of race: In lieu of a complainant's "actual" membership in a racial class, the law can substitute racially discriminatory behavior against that complainant.[10] By using this legal substitute, the law will have created a construction of race based on the discriminator's behavior.[11]

As illustrated in *Perkins*, courts need to construe race with regard to both social and legal construction in order to fully effectuate Title VII policy. In order to achieve racial equality under the law, the judicial construction of race must acknowledge the social construction of race.

After briefly discussing the facts of this case, this note will support the *Perkins* holding with three arguments: First, the history of American Indian experience with United States law cautions against a biologically based construction of race.[12] Second, the text of Title VII supports protection for

---

8. YEHUDI O. WEBSTER, THE RACIALIZATION OF AMERICA 80 (1992) (quoting JOSEPH FEAGIN, RACIAL AND ETHNIC RELATIONS 6-7 (2d ed. 1984).

9. BARRON'S LAW DICTIONARY 95 (3d. ed. 1991).

10. Since the law is part of society, the legal construction of race contributes to the social construction of race.

11. Many insightful authors have written about social construction theory, and variations on that issue. Professor Cornel West argues:

> [A]ny claim to black authenticity — beyond that of being a potential object of racist abuse and an heir to a grand tradition of black struggle — is contingent on one's political definition of black interest and one's ethical understanding of how this interest relates to individuals and communities in and outside black America. *In short, blackness is a political and ethical construct.* Appeals to black authenticity ignore this fact; such appeals hide and conceal the political and ethical dimension of blackness. This is why claims to racial authenticity trump political and ethical argument — and why racial reasoning discourages moral reasoning.

CORNEL WEST, RACE MATTERS 25-26 (1993) (emphasis added).

This construction acknowledges the interrelation of social conscience, and racial categorization. *See* Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747 (1994) (reviewing KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE (1992)). Scholars have also included gender and sexual preference in social construct theory. *See, e.g., Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989); Katherine Kruse, Comment, *The Inequality Approach and the BFOQ: Use of Feminist Theory to Reinterpret the Title VII BFOQ Exception*, 1993 WIS. L. REV. 261.

12. The distinctions between race, color and national origin can be elusive. *See Perkins*, 860

Published by University of Oklahoma College of Law Digital Commons, 1994

Perkins based on the meaning of race, and legislative history addressing Title VII policy encourages protection for plaintiffs such as Perkins. Third, courts have construed race and related Title VII concepts with regard for the indistinct definition of race, and the Equal Employment Opportunity Commission, charged with enforcing and interpreting Title VII, employs a perception-based construction of race. Through these arguments this note concludes that Arthur Perkins's claim is well within the protection of Title VII.

II. Statement of the Case

Arthur Perkins was a landfill laborer for the Lake County, Ohio, Department of Utilities. He claimed the Department discriminated against him because of his race.[13]

Perkins alleged that he was continually subjected to racist comments at work. He claimed the Department deprived him of employment privileges for which he was more qualified than the European Americans who received these privileges. Perkins claimed the Department's actions involved both disparate treatment and disparate impact on the number of minorities employed in supervisory, management, and administrative positions at the Department.[14]

F. Supp. at 1272-73 (stating that "the notion of 'race' as contrasted with national origin is highly dubious") (quoting Ortiz v. Bank of America, 547 F. Supp 550, 560 (E.D. Cal. 1982)); *id.* at 1273 (stating that "discrimination based on skin color creates an action based on race") (citing Abdulrahim v. Gene B. Glick Co., 612 F. Supp. 256, 263 (N.D. Ind. 1985)). This note often refers to race where issues of color and national origin are equally relevant; the reader is challenged to consider the intricacies of these distinctions in certain contexts. For a discussion of national origin discrimination under Title VII, see Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

13. The court acknowledges but does not address the possible state common law claim of intentional infliction of emotional distress. *Perkins*, 860 F. Supp. at 1265 n.1.

Illustrative of the lack of clarity between race and national origin discussed *supra* note 12, the *Perkins* court states that Perkins alleges discrimination by reason of national origin, *id.* at 1265, yet the exhaustive list of allegations refers to discrimination by reason of Perkins's race, *id.* at 1264. The court goes on to focus on race throughout its analysis. This note too will focus on race, conscious of the parallel implications for national origin.

14. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Disparate impact cases involve employment practices which appear nondiscriminatory on their face but have unfair effects on minorities. A disparate impact case does not require proof that employer intended the unfair results of the practice. Disparate treatment cases involve allegations of intentionally discriminatory employment practices. Perkins alleges intentionally discriminatory practices against himself. He also alleges promotion practices which disparately impact the number of minorities in higher level jobs. The focus of this note is the intentional discriminatory treatment of Perkins. *See generally* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983).

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

The Department moved for summary judgment. Its principal defense was its claim that Perkins was not an American Indian.[15] The Department's expert genealogist offered extensive evidence that Perkins was of African and European descent. Although Perkins's living family claimed to be of Indian descent, no one in Perkins's family tree *bureaucratically* claimed American Indian ancestry or membership in a recognized American Indian nation.[16] No one in the Perkins family tree either identified himself or herself as Indian in the census or enlisted on a tribal roll. Nonetheless, Perkins claimed in his deposition to be Cherokee Indian on his mother's side.

Perkins countered the bureaucratic evidence of his "non-Indian-ness" with affidavits from himself, his family, and his colleagues. Perkins and his family

---

15. The Department also moved for summary judgment based on the after-acquired evidence doctrine, which in circuits (including the Sixth Circuit) which employ the doctrine, mandates judgment as a matter of law "if evidence of the plaintiff employee misconduct surfaces at some time after the termination of the employee, and the employer can prove it would have fired the employee on the basis of the misconduct if it had known of it." McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 541 (6th Cir. 1993). The *Perkins* court found evidence of department policies in relation to Perkins's criminal record. The court found this evidence insufficient to merit summary judgment under the after-acquired evidence doctrine. *Perkins*, 560 F. Supp. at 1280. The Supreme Court is currently considering arguments in favor and in opposition to the after-acquired evidence doctrine. If the Department appeals this issue, the Court's decision will be meaningful. If the Court rejects the doctrine, it will demonstrate a commitment to the foremost principle of Title VII: elimination of race-based discrimination in the workplace, with a focus on the employer's behavior. Legislative history supports such a decision. Both houses of Congress rejected an amendment to Title VII that proposed to prohibit only discrimination based *solely* on race. 110 CONG. REC. 2728, 13,837-38 (1964), *reprinted in* 1 EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at apps. 4, 8 (photo. reprint 1978) (1968) [hereinafter LEGISLATIVE HISTORY OF TITLES VII AND XI]. On the other hand, should the Supreme Court continue to supply the Sixth Circuit with the ammunition to overturn a finding for Perkins based on the after-acquired evidence doctrine, this would show less commitment to discouraging employers' unlawful discriminatory behavior. The Department would suffer no consequences for its discriminatory behavior.

Does § 5 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071, supersede the after-acquired evidence doctrine? In § 5, Congress explicitly overturned that part of the Supreme Court decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held that an employer may avoid Title VII liability if she or he can prove by a preponderance of the evidence that she or he would have taken the same action regardless of discriminatory intent. *Id.* at 242. Congress condemned this holding as "threatening to undermine" Title VII because it allows intentional discrimination to go unpunished, thereby diminishing Title VII's power to deter discrimination. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 17, *reprinted in* 1991 U.S.C.C.A.N. 694, 710. This result follows with equal force in Perkins's case.

16. The genealogist noted that the Perkins name and some other family names appear on tribal rolls, but there is no indication that any of these persons are related to Plaintiff Perkins. The court notes the questionable accuracy of tribal rolls and the fact that some of the pages which would list ancestors of Perkins were not in evidence. For related discussion of Seminole Freedmen's racial status and resulting rights, see Aaron R. Brown, Note, *Judgments: "Brothers" Fighting Over Indian Money: The Right of Seminole Freedmen to a Portion of the Indian Claims Commission Judgment Fund*, 11 AM. INDIAN L. REV. 111 (1985).

Published by University of Oklahoma College of Law Digital Commons, 1994

affirmed his American Indian heritage. Perkins's colleagues affirmed that he appeared to be American Indian and had always claimed this heritage.

Perkins also defended his American Indian identity with the deposition of social worker Melton Fletcher, program coordinator for the North American Indian Cultural Center. Fletcher is a member of the Choctaw Tribe. Fletcher claimed to know a Perkins family from Arthur Perkins's hometown of Singer, Louisiana. The Perkins family Fletcher knew was of American Indian and African descent. Fletcher did not claim that Arthur Perkins was part of the Perkins family Fletcher knew, but he claimed to perceive Perkins as an American Indian.

The court denied the Department's motion for summary judgment. It found that determination of Perkins's American Indian "heritage" was a factual issue for a jury to consider.[17] The court based this decision on two grounds. First, the court did not consider the expert genealogist's presentation conclusive.[18] The Department conceded that despite the evidence presented, Perkins might still be one-sixteenth American Indian by blood. Since this quantum is sufficient to establish American Indian identity in certain contexts, the court left the issue to the fact finder.[19]

Second, and as the court suggests, perhaps more importantly, the court held that the employer's perception of the employee's race, as opposed to the employee's gene pool, controls on the question of Title VII standing.[20] The court based its conclusion in the "equalizing" purpose of Title VII as distinct from the "dissimmilat(ing)" purpose of the many federal laws applicable exclusively to American Indian people.[21]

The court defined the terms "equalizing" and "dissimilating" by dividing laws pertaining to American Indian people into two categories: first, rights American Indian people claim as heirs to treaties between Indian nations and the United States, and second, rights American Indian people claim as individuals deserving equal justice under United States law.

Where American Indian people claim rights under treaties, the claim is based on their membership in an Indian nation. Treaties are agreements between nation-states. Nation-states use their sovereign power to decide who are their subjects. Therefore, American Indian people claiming rights under

---

17. *Perkins*, 560 F. Supp. at 1277. The Department is merely accused of discrimination and has not been found liable. However, the *Perkins* court denied the Department's motion for summary judgement. Trial is scheduled to begin July 31, 1995.

18. *Id.*

19. *Id.* at 1276.

20. *Id.* at 1277.

21. *Id.* at 1274-76. Most American Indian law provides rights unique to American Indian people by virtue of their political and historical legacy. On the other hand, Title VII's purpose is to put American Indian people on equal footing with all other people. Therefore, the *Perkins* court concludes, American Indian status (in the Title VII context) requires "a lower threshold of proof than would be the case under entitlement legislation." *Id.* at 1276.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

treaties identify themselves as subjects of Indian nations, and distinguish themselves from exclusive subjects of the United States. This is what the court means by "dissimilating."[22]

On the other hand, by claiming injury under Title VII, American Indian people identify themselves as members of the work force with equal rights to equal employment opportunity. The focus is not on their relationship to an Indian nation, but on their equality with all members of the work force, of any background. This is what the court means by "equalizing."

The court treated this issue as a matter of first impression,[23] citing scholars of sociology, history, and Indian law in support of its conclusion. It also cited case law addressing the classes of race, color and national origin protected by Title VII. The court acknowledged that strict formulas for determining race have generally been applied toward odious and erroneous ends such as proving the superiority of one race over another. The court considered case law acknowledging the personal and social nature of ethnic distinctions. These cases addressed the significance of the parties' subjective belief about the plaintiff's ethnicity and the plaintiff's identification with the corresponding culture.[24]

---

22. In reference to the concept of "full-blooded-ness," Lenore A. Stiffarm and Phil Lane, Jr., commented that "[i]nsofar as indigenous North Americans defined themselves in terms of specific socio-cultural and political membership . . . rather than in terms of racial category, the issue seems moot." Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival, in* THE STATE OF NATIVE NORTH AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 23, 40 (M. Annette Jaimes ed., 1992). The same could be said in the context of Title VII: American Indian people are members of a socio-political national origin category. Therefore categorization on the basis of race is moot. However, such a conclusion rests upon a biological definition of race as opposed to a definition of race that includes sociopolitical identity. This note explores the idea that politics and culture are part of the meaning of race. *See* WEST, *supra* note 11. Indeed, it has been suggested that the concept of race should be abandoned in favor of the more relevant concept of culture. *See* Lee, *supra* note 11.

23. The Fourth Circuit considered a very similar case. *See* Skeeter v. City of Norfolk, 898 F.2d 147 (4th Cir. 1990) (Table of Decisions Without Reported Opinions), *aff'g* 681 F. Supp 1149, 1153-54 (E.D. Va. 1987), *cert. denied*, 498 U.S. 838, *reh'g denied*, 498 U.S. 973 (1990) (holding that the issue relevant to the plaintiff's claim is not whether she is actually black or white but whether the plaintiff was discriminated against because she was perceived to be white). The defendant subjectively believed the plaintiff was black. The plaintiff failed to dispute this. Therefore, the court granted the defendant's summary judgment motion. *Id.*

24. *Perkins*, 860 F. Supp. at 1271-76. The *Perkins* court relied upon cases addressing the classification of Arab and Hispanic plaintiffs. In St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) the Court commented,

> Clear cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that the differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical,

Published by University of Oklahoma College of Law Digital Commons, 1994

The *Perkins* court also gave weight to analogy between the Code of Federal Regulations's definition of nation origin[25] and the Title VII meaning of race at issue in the instant case. The Code of Federal Regulations broadly defines national origin to include discrimination where one's physical, cultural, or linguistic characteristics resemble a national origin group. One need only show resemblance to a national origin, not blood traceable to that nation, to prove membership in that class. The court said subjective perception is equally relevant for racial classification in the context of Title VII discrimination.[26] In sum, the court held that in the Title VII context, "[I]t is the employer's reasonable belief that a given employee is a member of a protected class that controls this issue. . . . [W]hen racial discrimination is involved, perception and appearance are everything."[27]

III. Analysis: A Historical and Legal Map to Perkins

It is troubling to conclude that, consonant with Title VII's broad purposes, the Department may not discriminate against Perkins if he "is" an American Indian, but may discriminate against him if he merely looks the way the Department imagines that American Indian people look. Can the language and history of Title VII together with the common law construction of Title VII avoid this potentiality? Considered with other Title VII cases, *Perkins* makes it possible to answer this question affirmatively, although not unconditionally.[28]

---

rather than biological, in nature.

Id. at 610 n.4. In Bennun v. Rutgers State Univ., 941 F.2d 154 (3d Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992), the Court found the plaintiff to be Hispanic based on "his birth in Argentina, his belief that he is Hispanic, identifies with and continues to adopt Spanish culture in his life and speaks Spanish in his home," rather than on his ancestry. *Id.* at 173.

25. *Perkins*, 560 F. Supp. at 1273. Title 29 C.F.R. § 1606.1 (1980) states:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.

Id.

26. *Perkins*, 560 F. Supp. at 1273.

27. *Id.* at 1277.

28. The reasoning in many court opinions, taken together, provides ample ammunition to

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

Sound analysis led to the *Perkins* court's conclusion that Title VII protects victims of racist behavior, regardless of the discriminator's misperception of the victim's race. To support this conclusion it is necessary to develop a construction of race that reconciles Title VII text and the widely applied *McDonnell Douglas* test[29] with the broad Title VII application Congress intended. *Perkins* compels us to reassess Title VII policy with the unique status of American Indian people in mind.

Is it a Title VII policy to compensate individual employees when their employers discriminate against them in constitutionally unjustifiable ways?[30] Is it a Title VII policy to eliminate the effects on a particular class, of historical discrimination against that particular class?[31] Title VII includes both policies:[32] Title VII protects individuals from discriminatory treatment.

---

effectuate Title VII's policy. Nonetheless, until this policy is codified by Congress by amending the text of Title VII, courts might still construe Title VII underinclusively.

29. *See supra* note 5.

30. *See* Peter B. Bayer, *Rationality — and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 53 (1988). The author states:

> [T]he courts have held that an underlying purpose of the Fair Employment Act, Title VII of the Civil Rights Act of 1964, is the eradication of useless stereotypes which serve no purpose better than degrading persons and depriving them of employment opportunities for reasons unrelated to their actual abilities to work.

Id.

31. The legislative history of Title VII supplies clear statements of Title VII's various purposes:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after emancipation, Negroes, who make up 10 percent of our population, are . . . not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
>
> . . . A number of provisions of the Constitution of the United States clearly supply the means "to secure these rights" . . . .

H.R. REP. NO. 914, 88th Cong., 1st Sess. 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393, *and* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 15, at 2001, 2018.

> The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. . . .
>
> *Section 701(a)* sets forth a congressional declaration that all persons . . . have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination.
>
> *Section 701(b)* states that the title is necessary to remove obstructions to the free flow of interstate and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.

Id. at 26, *reprinted in* 1964 U.S.C.C.A.N. at 2401-02, *and* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 15, at 2001, 2026.

32. In enacting the Civil Rights Act of 1964, Congress explicitly acknowledged the plight of African Americans as a primary impetus for the legislation. *See supra* note 31. The purpose

Published by University of Oklahoma College of Law Digital Commons, 1994

Title VII also protects classes of people from discrimination by discouraging employers from discriminating on the basis of race. Thus it is curious that courts have focused more on plaintiffs' biological qualifications to sue and less on defendants' racist employment practices.[33]

To avoid dismissal of Perkins's claim, a broad construction of the term "membership" as used in Title VII cases is necessary. This note proposes a construction that parallels the *Perkins* construction that race is in the eye of the beholder: Race categorization is based on the perception of the beholder, and perception may include but is not limited to visual perception.

A. The History: "Eracing" Indian Rights and Government Responsibility

Federal Indian law often imparts exemptions, entitlements, and protections to American Indian people,[34] contingent upon racial classification. An inflexible biological construction of race cannot accommodate the diverse goals of laws affecting American Indian people. Consider the following observations about aspects of the American Indian experience with law: "Throughout much of the eighteenth century, law helped hold together the Cherokee nation. It gave a degree of unity and national identification . . . ."[35] And: "There is no longer any need to shoot down Indians in order to take away their rights and land . . . legislation is sufficient to do the trick legally."[36] An inflexible biological construction of race frustrates Indian unity and self-identification, depriving the Indian community of the right to determine the heirs to its land and treaty rights.

The previous quotations help to illustrate one colonization device that the United States employed against American Indian people with devastating consequences. Law was once a unifying force; a means to sustain (Cherokee) sovereignty. Law has also been a means to deprive American Indian nations

---

of the Civil Rights Act of 1991 includes the "twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination." H.R. REP. NO. 40, *supra* note 15, at 17, *reprinted in* 1991 U.S.C.C.A.N. at 710.

33. Apparently courts have felt constrained by the "such individual" language in Title VII and the "belonging to" and "membership" language in *McDonnell Douglas*. *See supra* notes 2, 5.

34. For example, Title VII provides an exemption for Indians, allowing employment preference for American Indian people on or near reservations. *See* Morton v. Mansfield, 417 U.S. 535, 547 (1974) (finding constitutional a hiring preference for American Indian people in the Bureau of Indian affairs). American Indian people are entitled to monetary compensation for illegal taking of their land under the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946). American Indian people are protected as a racial, religious, national origin, and color class under Title VII.

35. JOHN PHILIP REID, A LAW OF BLOOD 10 (1970).

36. M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE 123, 123-38 (M. Annette Jaimes ed., 1992) (quoting Josephine C. Mills, a Shoshone activist).

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

of sovereignty, by depriving Indian nations of the sovereign right to identify their subjects.[37] The federal government historically usurped the power of Indian nations by passing laws determining who is Indian.

One of this note's conclusions is that under Title VII, it should not matter whether the federal government or an Indian government considers an individual "Indian." Nonetheless, the history of American Indian identity under the law is relevant because it demonstrates the dangers of narrow government definitions of race.

From the blood quantum documentation requirements of General Allotment Act of 1877[38] to the "Certificate of Degree of Indian Blood" required under the Indian Arts and Crafts Act of 1990,[39] the federal government has imposed a definition of "Indian-ness" on American Indian people with the intent and effect of excluding numerous self-identified and community-identified American Indian people from the benefits of the law.[40] The Code of Federal Regulations, in addressing immigration issues, provides a glaring modern example of United States assertion of supremacy over the sovereignty of Indian nations:

> The term "American Indian born in Canada" as used in section 289 of the Act includes only persons possessing 50 per centum or more of the blood of the American Indian race. It does not include a person who is a spouse or child of such an Indian or a person whose membership in an Indian tribe or family is created by adoption, unless such person possesses at least 50 per centum or more of such blood."[41]

In this context it is ironic that the Department sought to deny Perkins his heritage by focusing almost exclusively on paper-trail evidence (birth certificates and tribal rolls). In a culture where assimilation has been deemed

---

37. *Id.*

38. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1988 & Supp. V 1993)). The Act is also known as The Dawes Act or Dawes Severalty Act.

39. Pub. L. No. 101-644, 104 Stat. 4662. The Act requires people holding themselves out as Indian artists to either possess a certificate of degree of Indian blood or belong to a federally recognized tribe. Jaimes observes that three categories of Indians are excluded by this act: First, those who do not meet or cannot demonstrate the required blood-quantum degree; second, those who belong to tribes which the federal government does not recognize; and third, those who those who, for "politico-philosophical reasons," refuse to participate in bureaucratic definitions of their identity. Jaimes, *supra* note 36, at 131.

40. *Id.* at 126-31.

41. 8 C.F.R. § 289.1 (1964). The *Perkins* court cites United States v. Curnew, 788 F.2d 1335, 1338 (8th Cir.), *cert. denied*, 479 U.S. 950 (1986) (strictly enforcing the blood quantum requirements of a related immigration law, against a Canadian-born alien claiming American Indian ancestry), as an occasion where Congress has delineated qualifications for claiming Indian legal status. *Perkins*, 860 F. Supp. at 1275.

Published by University of Oklahoma College of Law Digital Commons, 1994

a virtue, it is possible that Perkins's ancestors chose not to enroll in order to avoid the kind of discrimination at issue in the instant case. The Department seeks to deny Perkins the right to nondiscriminatory treatment in the workplace because he and his ancestors may not have participated in a system originally created to shrink the number of "certified" American Indian people and the federal government's debt accordingly.[42]

Some federal laws have reserved the task of Indian identification to the Indian tribes.[43] Many laws pertaining to American Indian people involve allocation of scarce resources among the class of Indian people. Since Indians must share these resources they are entitled to decide with whom they will share. However, scholars have suggested that federal deferment to tribes on the issue of Indian identity is not necessarily benign. Stiffarm and Lane observe that:

> in many modern Indian communities, it appears that far more time has come to be spent endlessly debating exclusivist and divisive questions as to "who's Indian enough to be Indian" — that is, endlessly squabbling with one another in a way that diminishes our potential strength, both numerically and in terms of unity — than with confronting the governmental and corporate sources of our mutual oppression.[44]

Jaimes attributes the "squabbling" Stiffarm and Lane refer to, as part of a:

> classic divide and conquer strategy of keeping Indians at odds with one another, even within their own communities. . . . What has occurred is that the limitation of federal resources allocated to meeting U.S. obligations to American Indians has become so severe that Indians themselves have begun to enforce the race codes excluding the genetically marginalized from both identification as Indian citizens and consequent entitlements.[45]

While Jaimes acknowledges the value of keeping scarce Indian entitlements for "bona fide" Indians, she focuses on the argument of American Indian Movement activist Russell Means:

> [W]hen the federal government made its guarantees to our nations in exchange for our land, it committed to provide certain services to us as we define ourselves. As nations, and as a *people*. This seems to have been forgotten. Now we have Indian people who spend most of their time trying to prevent other Indian people

---

42. Jaimes, *supra* note 36, at 126-27.

43. *See, e.g.*, Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1903, 1911-1923, 1931-1934, 1951, 1952, 1961-1963 (1988)).

44. Stiffarm & Lane, *supra* note 22, at 44-45.

45. Jaimes, *supra* note 36, at 129.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

> from being recognized as such, just so a few more crumbs — crumbs from the federal government may be available to them personally. . . . The Indian way would be to get together and demand what is coming to each and every one of us, instead of trying to cancel each other out. We are acting like colonized peoples . . . .[46]

Title VII however, is equalizing; it does not involve sharing resources. Thus the injustice of defining American Indian people bureaucratically is amplified in the Title VII context. Despite Title VII's equalizing purpose, non-Indian Title VII complainants have a head start over Perkins and other American Indian people: The law defines only American Indian people with so much weight given to documentation.[47]

Perkins suggests that Congress did not intend American Indian people to have unequal access to Title VII protection. This is well-supported: First, Title VII's purpose is to equalize racial access to employment. Second, the Supreme Court acknowledges that racial categorization defies "bright line" tests. The *Perkins* decision follows necessarily from Title VII policy and case law enforcing it. *Perkins* reaffirms Title VII's commitment to eradication of *all* racial discrimination in the workplace.

B. The Law[48]

1. A Direct Route: Title VII Text, Policy, and Treatment by the Courts

The first landmark on the way to finding Perkins's standing to sue under Title VII is the meaning of the statutory text in question. The text of Title VII does not include a definition of the meaning of race. However, Congress commands the courts to construe the text of Title VII broadly, to effectuate its intent.[49] Finding relief for Perkins is consistent with Title VII's intent: It would remedy the effects Perkins suffered as a victim of racial discrimination and deter the Department from such discrimination, thus helping to eliminate the effects of discrimination against the class of American Indian peoples. In the Title VII context, the meaning of race is based on perception rather than biology because only a perception-based construction of race can fully effectuate the intent of Title VII to eradicate racial discrimination in the workplace. The social construct theory of race treats *all* racial classifications

---

46. *Id.* at 130 (quoting Russell Means, Speech at the Law School of the University of Colorado at Boulder (Apr. 19, 1985)).

47. In *Bennun*, the court gave great weight to appearance and cultural identification in determining the plaintiff's membership in the Title VII protected class of Hispanic people. *See supra* note 24.

48. For an overview of law on the issue of race and employment discrimination, see generally 3 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION §§ 65.00-90.50 (1992).

49. *See infra* text accompanying note 66.

Published by University of Oklahoma College of Law Digital Commons, 1994

as culturally created. However, it is not necessary to adhere to social construct theory to find that Title VII protects Perkins.

The law should deem Perkins a member of a protected class simply because the Department perceived Perkins to be a member of a protected class and adversely discriminated against him accordingly. It is therefore irrelevant that Perkins considered himself to be American Indian. With an employer behavior-based construction of race it is enough that the Department *perceived* Perkins to be American Indian. It is in this sense that this note employs the legal concept of "constructive race." Indeed, this legal construction acknowledges social construction: It is the way society treats Perkins that defines his race.

In its brief, the Department argued that Congress did not include language about "perceived race" in the text of Title VII and therefore courts should not include perceived race as a protected class. The Americans with Disabilities Act (ADA) does include language about perceived disability as grounds for protection.[50] The Code of Federal Regulations discusses perceived ancestry as grounds for membership in the protected class of national origin.[51] Why does race go undefined? We can learn why race goes undefined by drawing parallels between the treatment of race and the treatment of national origin and disability classes.

Legislative history demonstrates confusion about the definition of national origin.[52] Indeed the Supreme Court has questioned the difference between race and national origin. This confusion merited clarification that the Code of Federal Regulations and Supreme Court case law provides.[53] These authorities hold that national origin classification can be based on perception.

---

50. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990). Section 2102(2) of the ADA defines *disability* thus: "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK 24 (1990).

51. *See supra* note 25.

52. *See* 110 CONG. REC. 2548-49 (1964), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 15, at 3179-81. The congressional debate illustrated confusion in the House of Representatives as to what national origin is: Rep. Paul C. Jones (D.-Mo.) commented, "Mr. Chairman, some of us may be a little dense and can not understand these things. Maybe you can help out . . . ." *Id.* at 3180 (statement of Rep. Jones). Rep. John H. Dent (D.-Pa.) responded, "National origin, or course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person." *Id.* (statement of Rep. Dent). In this context, a definition of national origin was clearly in order.

There is disagreement among Justices on the Supreme Court about how much weight should be afforded to legislative history. Congress has commanded the courts to construe Title VII text in accord with Title VII's purpose. Therefore legislative history must be considered to find articulations of policy behind the statutory language. For a discussion of legislative history and statutory construction, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

53. *See supra* notes 24-25.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

Consistent with the admittedly overlapping concepts of race and national origin, the law should also base race on perception.

The language of perceived disability in the Americans with Disabilities Act distinguishes two aspects of disability: Some people with disabilities suffer workplace discrimination because they have real physical and/or mental obstacles to major life activities. On the other hand, some people suffer workplace discrimination merely because employers erroneously associate a certain obstacle with a discernible trait. For instance, an employer may discriminate against an obese individual[54] who is not in fact foreclosed from any major life activities.[55] Thus section 3(2)(C) of the Americans with Disabilities Act protects people with real obstacles to major life activities, and those for whom the only obstruction to the major life activity of employment is an ignorant employer.

The latter concept, perceived disability, mirrors the prevailing meaning of race in the Title VII context: weight, like race, is meaningful only so far as cultural actors deem it to be meaningful. Congress had to articulate the concept of perceived disability in order to distinguish it from disabilities with objective significance. This distinction was not necessary in the context of race and Title VII.

The concept of perceived race is redundant in the context of law based on the equality of all ethnic backgrounds. In the context of legal equality, racial distinctions are based entirely on perception since equalizing law gives no objective value to racial distinctions. This is why Congress did not define race as such. Race discrimination is by its nature based on *perception* by one party of another party's difference.[56] "Given that race relations unfold in a normative social order, they cannot be defined independently of culture and actors' perceptions."[57]

---

54. *See, e.g.*, Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993), Horton v. Delta Air Lines, No. C-93-0225-VRW, 1993 WL 356894 (N.D. Cal. Sept. 3, 1993); Smaw v. Virginia, 862 F. Supp. 1469 (E.D. Va. 1994).

55. PERRITT, *supra* note 50, at 27.

56. As our culture becomes more racially mixed, perception will be increasingly important; people of mixed racial ancestry may be discriminated against based on one aspect of their racial identity as opposed to another, and this may be largely due to the discriminator's perception. *Perkins* is a case in point: Perkins apparently has African ancestry. Yet the Department allegedly discriminated against Perkins because it perceived him to be American Indian. Perkins is "Indian-manifest," according to Anthropologist Lally Thomas Salz. Telephone Interview with Lally Thomas Salz, anthropologist (Oct. 31, 1994).

57. WEBSTER *supra* note 8, at 79. The Anglo-American historical context may partially explain North American cultural perception-based construction of race. Great Britain as an island was historically isolated from interaction with different cultures. Spain and Portugal on the other hand, interacted with peoples of the Middle East and North Africa for centuries before colonization of the Americas. Great Britain's isolation may have amplified its sense of difference from other cultures. This historically heightened awareness of difference based on lack of exposure to others may still affect North America's racial awareness today. *See* GARY B. NASH,

Published by University of Oklahoma College of Law Digital Commons, 1994

Discrimination is one aspect of race relations. In the context of discrimination race cannot be defined independently of the acting employer's perceptions. Employer perception and behavior is implicit in the Title VII meaning of race.

In Perkins's brief to the trial court, he persuasively quotes Justice Douglas: "One thing is not vague or uncertain . . . those who discriminate against members of this and other minority groups have little difficulty in isolating the objects of their discrimination."[58]

There have been few legal occasions to address the definition of race.[59] Litigants' perceptions have not often been questioned.[60] However, the Equal Employment Opportunity Commission, to whom the courts afford substantial deference,[61] recommends reliance on subjective visual perception of race for documentation purposes.[62]

RED, WHITE, AND BLACK: THE PEOPLES OF EARLY AMERICA 274-75 (1982).

58. Plaintiff's Response to Motions for Summary Judgment at 9, *Perkins* (No. 1:92CV0725) (citing Tijerina v. Henry 398 U.S. 922, 923-24 (1970) (Douglas, J., dissenting)).

59. Professor Ian F. Haney Lopez criticizes "continued reliance on blood as a metonym for race." Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 17 (1994). He cites Congress's definition of race in the Genocide Convention Implementation Act of 1987: "[T]he term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent." *Id.* at 16 (quoting Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093 (1988)). This is indeed one occasion where Congress has explicitly defined race. Nonetheless, perception is implied in this context as well as in the context of Title VII; the reference to racial identity deriving at times from physical characteristics — as opposed to biological descent — makes this plain. However, the Convention on the Punishment and Prevention of Genocide, 78 U.N.T.S. 277, 277 (1948) as implemented in the United States in 1988, includes *ethnic* groups in its protected classes: "[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group . . . . " Ethnicity, a concept which acknowledges social identity, is absent from Title VII text. However, it is protected in the Title VII context because it is one bridge, between the imperfect categories of race and national origin, which helps to effectuate Title VII's express purpose. *See infra* notes 63, 66 and accompanying text. It would be an absurdly narrow reading of Title VII to protect race and national origin classes and not ethnic classes.

60. Anthropologist Lally Thomas Salz qualifies racial terms with the concept of *manifestation*; for example, one may physically be "Afro-manifest" or "Anglo-manifest." However, one's physical manifestation of race may be unrelated to one's ethnic identity. Members of the Hispanic community are often physically Anglo-manifest or Afro-manifest; yet their ethnic identity is neither. Once one's perception expands beyond the physical, one can perceive ethnic manifestation which differs from physically racial manifestation. This terminology acknowledges the interrelation of social perception, ethnic identity, and racial categorization. Perkins is physically "Indian-manifest" although he may be of African and European genetic stock. His identity and experiences have been affected by his racial manifestation. Telephone Interview with Lally Thomas Salz, *supra* note 56; Lally Thomas Salz, Addiction and the Family (n.d.) (unpublished manuscript in progress, on file with author).

61. *See, e.g.*, Griggs v. Duke Power Co. 401 U.S. 424, 433-34 (1971).

62. *See* LARSON & LARSON, *supra* note 48, § 68.20 (discussing EEOC, Employer Information Report EEO-1, Instruction Booklet).

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

Employers keep records of employee race for various purposes. One purpose is to keep track of the disparate impact facially neutral policies may have on minority employees or applicants. It is logical to conclude that the perception standard should likewise apply to discouraging racially motivated disparate treatment of employees.

The Supreme Court has looked beyond the text of a statute where a literal application of it would lead to an absurd result. The Court's first responsibility is to the legislative policy.[63] In a literal sense, race is based on perception. Perception precedes behavior. A Title VII plaintiff's membership in the class of race depends upon the defendant's perception, which can be deduced from behavior.

Nonetheless legislative policy supports Perkins's standing to sue under Title VII regardless of a social construction of race: Racist behavior is condemned by the purpose of Title VII to eradicate race-based discrimination in the workplace, with equal concern for remedying wrongs to individuals and discouraging discrimination against a class.

Members of Congress have eloquently stated the express purpose of Title VII:

> [T]his bill can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice. This is of paramount importance and is long overdue. The practice of American democracy must conform to the spirit which motivated the Founding Fathers of this nation — the ideals of freedom, equality, justice, and opportunity. The entire Nation must meet this challenge and it must do it now.[64]

In this context, Congress has codified its intent that courts must construe Title VII broadly, in accordance with its purpose.

> Section 11 . . . codifies a well established canon of statutory construction that remedial statutes, such as civil rights laws, be broadly construed. . . . The several cases overruled by this

---

63. *See, e.g.*, United States v. Scrimgeour, 636 F.2d 1019, 1023, *quoted in* Brown, *supra* note 16, at 116. The court stated:

> The Supreme Court has looked beyond the plain meaning of the words used in a statute to the purpose of the act where that meaning produced an unreasonable result "plainly at variance with the policy of the legislation as a whole." United States v. American Trucking Assns., *supra*, 310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted). Where the policy of the act is at such variance with the plain meaning of the words of the statute, the Court has followed the purpose of the statute rather than the literal words.

Id.

64. H.R. REP. NO. 914, *supra* note 31, pt. 2, at 2, *reprinted in* 1964 U.S.C.C.A.N. at 2488, *and* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 15, at 2123.

Published by University of Oklahoma College of Law Digital Commons, 1994

> legislation[65] suggest the court is no longer guided by this principle.
>
> In codifying this rule of construction, the Congress intends that when the statutory terms in civil rights laws are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose of that law.[66]

Congress clearly expressed its dissatisfaction with cases that failed to broadly construe Title VII. Failure on the part of higher courts to adopt the concept of constructive race in *Perkins* would defy Congress's express language.

Since enacting Title VII in 1964, Congress has renewed its commitment to ending employment discrimination through broad application of Title VII. The House of Representatives rejected an amendment that would define the meaning of the terms race, color, religion and national origin.[67] Leaving the meaning of the terms open-ended effectuates Congress's explicit commitment to the eradication of discrimination in the workplace, unconstrained by restrictive definitions. Explicit definition of the terms could result in the toleration of discriminatory behavior where individuals fail to fit into racial pigeonholes. Congress's commitment to broad language justifies courts' focuses on individuals' injuries, not injuries to classes.[68]

The Equal Employment Opportunity Act of 1972[69] broadened the scope of employer behavior subject to Title VII. "All personnel actions affecting employees . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."[70] The Civil Rights Act of 1991[71] provides monetary relief not only to Title VII plaintiffs claiming denial of promotion, discriminatory termination or unequal pay, but also to employees claiming discrimination in the "terms, conditions, or privileges of

---

65. Most pertinently *Price-Waterhouse*. *See supra* note 15.

66. H.R. REP. NO. 40, *supra* note 15, at 34, *reprinted in* 1991 U.S.C.C.A.N. at 727-28.

67. 110 CONG. REC. 2728 (1964), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 15, at 3127.

68. Bayer, *supra* note 30, at 80 n.247 (documenting the Supreme Court's commitment to Title VII's purpose of protecting individuals).

69. Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 5 U.S.C. and 42 U.S.C. (1988)). Under this Act, Congress created the Equal Employment Opportunity Commission and vested the commission with broad power to enforce Title VII toward the goal of ending employment discrimination.

70. Walker v. Secretary of the Treasury, IRS, 713 F. Supp. 403, 405 (1989) (citing 42 U.S.C. § 2000e-16(a)).

71. Pub. L. No. 102-166, 105 Stat. 1071. The Act amended several civil rights statutes, including Title VII.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

employment."[72] The Act also includes a clarifying provision for recovery of attorney fees for prevailing Title VII plaintiffs.[73]

As discussed previously, there are two ways to find standing for Perkins to sue based on membership in a protected class. First, Perkins is a member of a protected racial class because the department perceived him to be American Indian by race. Race is perception-based in a literal sense. Second, the policy of Title VII requires Title VII to be construed in such a way that discrimination based on race is discouraged and remedied.[74] Therefore, even if one does not believe that race is always perception-based, one can understand that Title VII policy is concerned with treatment based on perception of race. This distinction illustrates the difference, yet interrelation, between a sociological construction of race and a legal construction of race. Courts have construed novel Title VII cases consistently with the Act's purpose.

2. The Scenic Route: Analogous Case Law

Perkins may find support for his claim in case law confirming European American standing to sue under Title VII based on relationships to people in protected classes. These cases fall into two categories. First, there is standing when a defendant discriminates against an individual based on the individual's association with members of protected classes.[75] In this line of cases the courts granted relief to persons whose relationships with members of protected classes ranged from friendship to marriage. Perkins's perception of his entire family's ethnicity may satisfy this ground.

Second, courts have granted relief where European American plaintiffs observed discrimination against protected classes. For this standing category, there are different grounds in different circuits. Some circuits base standing on European American plaintiffs' interest in associating with minorities.[76] As

---

72. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1491 (1994) (citing 42 U.S.C. § 2000e-2(a)(1)).

73. H.R. REP. NO. 40, *supra* note 15, at 32, *reprinted in* 1991 U.S.C.C.A.N. at 725.

74. Perkins seeks a remedy for denial of promotions and overtime privileges as well as emotional harm. As to the latter claim, one who perceives herself of himself to be American Indian may have a claim to more emotional damages than one who does not personally identify with the class of which the discriminator perceives her or him to be a member. An insult to a class with which a victim self-identifies is arguably more upsetting than an insult to a class with whom a victim has no personal connection.

75. *See, e.g.*, Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); McGowan v. General Dynamics Corp., 794 F.2d 361 (8th Cir. 1986); Watson v. Nationwide Ins. Co., 823 F.2d 360 (9th Cir. 1988). *But see* Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 208 (N.D. Ala. 1973) (holding that the plaintiff failed to state a claim that he was discriminated against because of his *own* race, as opposed to his *spouse's* race); Adams v. Governor's Comm. on Post-Secondary Educ., 26 Fair Empl. Prac. Cas. (BNA) 1348 (N.D. Ga. Sept. 3, 1981) (same). The court in *Ripp* expressed concern that Anglo-Americans might abuse Title VII if courts permitted them to sue because of social attitudes about or association with African Americans. *Ripp*, 366 F. Supp. at 209-10.

76. Most relevantly, the Sixth Circuit has held in favor of standing on this ground. *See*

Published by University of Oklahoma College of Law Digital Commons, 1994

noted by Larson, at least one circuit based standing on the ground that discrimination against minority colleagues creates a hostile work environment for European American employees.[77] Arguably, even if the court deemed Perkins to be European American, he would have standing to sue based on his interest in associating with American Indian people at work and the disruptive impact the discrimination had on his work experience. Under this analysis, the Department fostered a hostile work environment: Since Perkins empathizes with American Indian people, he found racist comments about American Indian people upsetting. As a general rule, the constitutional right to free expression protects merely upsetting speech. However, by directing racist comments toward Perkins, the Department created an unlawfully hostile work environment. What may be protected speech addressed to friends in one's living room, or to crowds on the street corner, amounts to the unlawful act of harrassment in the workplace, as explained in the Senate's analysis of the Civil Rights Act of 1991:

> The substantive definition of harassment set out in Section 3 of this Act makes it an offense for an employer or its agents to harass any employee *because of race,* color, religion, sex, or national origin. The term "harass" encompasses "the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person."[78]

According to this standard, once Perkins proves the alleged racist comments, he need only prove that the comments would be offensive, hostile, or intimidating to a reasonable person. According to the emphasized text, it appears irrelevant whether the comments were about Perkins's particular race.

The cases finding European American standing to sue where employers discriminate against minorities rely on analogy to a *Trafficante v. Metropolitan Life Insurance*,[79] in which the Supreme Court allowed European Americans to sue under a housing discrimination statute[80] when their landlord

---

EEOC v. Bailey Co., 563 F.2d 439, 452-53 (1977), *cert. denied*, 435 U.S. 915 (1978) (citing *Trafficante* as controlling on the proposition that Anglo-Americans can be aggrieved persons under Title VII where they claim their employer deprived them of valuable of association with minorities at work); *see also* EEOC v. Beaver Gasoline Co., 14 Fair Empl. Prac. Cas. (BNA) 1343 (W.D. Pa. Apr. 22, 1977), *vacated* 584 F.2d 1263 (3d Cir. 1978), *cert. denied*, 443 U.S. 915 (1977); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); Stewart v. Hannon, 675 F.2d 846 (7th Cir. 1982); Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976) *cert. denied*, 443 U.S. 915 (1977); Otero v. Mesa County Valley Sch. Dist., 568 F.2d 1312 (10th Cir. 1977).

77. *See* LARSON & LARSON, *supra* note 48, § 69.12 (citing Clayton v. White Hall Sch. Dist., 875 F.2d 676 (8th Cir. 1989), *reh'g denied* (June 29, 1989)).

78. 137 CONG. REC. S3025 (1991) (emphasis added).

79. 409 U.S. 205 (1972).

80. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

discriminated against minorities. The Court held that European Americans have a statutorily protected interest in associating with minorities for social and professional reasons, including relief from the embarrassing stigma of living in a white ghetto.[81]

In *Parr v. Woodmen of the World Life Insurance Co.*,[82] the Court made a particularly persuasive argument but did not carry the analogy to its logical conclusion. Plaintiff Parr claimed the defendant insurance company denied him a job because he was married to an African American woman. The district court held Parr failed to state a claim because the discrimination was based on Parr's wife's race, not Parr's race. Therefore Parr failed to satisfy the language of Title VII which requires discrimination to be based on "such individual's" race. The Eleventh Circuit reversed, holding: "Where a Plaintiff claims discrimination based on interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."[83]

The court reasoned that in association cases, the plaintiff's race is the basis of discrimination because the defendant disapproves of interracial association. Under this reasoning, if a plaintiff was of the same race as her or his friends, the defendant would not disapprove.[84]

However, on the *Parr* facts, the insurance company *would* have discriminated against Parr even if he was of the same race as his wife. Parr claimed the insurance company did not sell insurance to African Americans. One can infer from the facts that the insurance company would not hire African American salespersons. The insurance company may not object to interracial marriage per se but merely to association with African Americans through its salespersons.

Analogy to *Trafficante* would not foreclose Parr's standing to sue even if the insurance company did not dismiss Parr based on his race being different than his wife's race. Complete analogy to *Trafficante* supports Parr's standing not based on Parr's race but based on the insurance company's racist behavior toward African Americans and its effect on Parr. This is a behavior-based approach as opposed to a purely perception-based approach to race. Yet in a broad sense, behavior is preceded by perception; the insurance company perceived Parr to be related to a disfavored race, and thus behaved with improper discrimination. The defendant included the plaintiff in a preconceived racial category, demonstrating how political connection to a class can socially construct a race.

In *Trafficante* the Court used a behavior-based approach in the context of housing discrimination. At the very least, consistency, if not stare decisis,

---

U.S.C. §§ 3601-3619 (1988)).

81. *Trafficante*, 409 U.S. at 207.

82. 791 F.2d 888 (11th Cir. 1986).

83. *Id.* at 892.

84. *Id.* at 891.

Published by University of Oklahoma College of Law Digital Commons, 1994

admonishes the court to take this approach in the employment context where similar policies are at issue. However, the Sixth Circuit provides Perkins with more ammunition than the policy of consistency.

In *EEOC v. Bailey Co.*, the Sixth Circuit held that "the purposes and effects of Title VII in the employment field are identical to the purposes and effects of Title VIII in the housing field. (citations omitted) Both Titles VII and VIII are aimed at outlawing discrimination based on race . . . ."[85] The Sixth Circuit found persuasive the Supreme Court's citation of employment discrimination case law in the housing discrimination case of *Trafficante*.[86] The Sixth Circuit also defined the EEOC interpretation of Title VII protecting employees' "right to a working environment free from unlawful employment discrimination."[87]

Perkins suffered the effects of the Department's alleged discrimination against American Indian people. By analogy to *Bailey*, Perkins is an aggrieved party under Title VII with standing to sue, even if the court does not classify him as American Indian. As in *Trafficante*, the focus should not be on categorizing Perkins, but on the Department's racist behavior and its consequences.

The *Parr* court quotes *Culpepper v. Reynolds Metal Co.* in support of a behavior-based construction of race. "It is . . . the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in a battle with semantics."[88] Perkins should not be a victim of semantics. Clearly Perkins associates with American Indian people because he believes himself to be an American Indian. If his allegations prove accurate, the Department discriminated against American Indian people. If society has not fully settled its definition of the word "race," Perkins should not bear the brunt of society's ambivalence. Since the Court has construed ambiguous language in favor of statutory policy,[89] Perkins is entitled to a construction of race that effectuates Title VII policy: A construction that protects him from various effects of discrimination against American Indian people does just that.

IV. Implications: Toward Defining the Scope of Constructive Race

The concept of constructive race is not particularly controversial in the *Perkins* context. In *Perkins*, a man thought he was American Indian. He may in fact have had some biological claim to the class. He appeared to have such a claim and his family confirmed his belief. In addition to the legal authority

85. EEOC v. Bailey Co., 563 F.2d 439, 453 (1977), *cert. denied*, 435 U.S. 915 (1978).

86. *Id.* at 452.

87. *Id.* at 453.

88. Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970), *cited in Parr*, 791 F.2d at 892.

89. *See supra* note 61.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

supporting Perkins's standing, it seems only fair to give Perkins the benefit of the doubt, given the decided lack of clarity as to how race is defined. Applying constructive racial class membership[90] also makes sense when employers discriminate based on their unilateral misperception of an employee's race. However, the concept of constructive race has more complicated implications.

Consider whether employees should be protected under Title VII when they suffer discrimination because they object to racist jokes in the workplace. Is the employer's "humor" protected speech so that the culturally underdeveloped employer can deny the "humorless" employee employment privileges due to her or his unsociable personality? It would arguably chill free speech, as with minority complainants, to allow nonminority employees to sue under the hostile environment theory. It would likewise chill speech to forbid suit when employees suffer pecuniary loss for voicing their objection to racism at work; employees would have to feign alliance with bigotry to save their jobs.[91] Does Title VII intend to discourage this kind of "passive racism?"[92]

A palatable middle ground is to allow employees to sue when they have lost tangible job opportunities. This is consistent with the Supreme Court's holding in *Asarco Inc. v. Kadish*[93] that "purely abstract" injuries are not

---

90. The concept of constructive membership is not limited to racial classifications. Unlawful behavior can be based on discrimination against any protected class.

91. Consider how this inquiry compares to the issue of speech codes on university campuses. Are we more or less concerned about protection of speech in academia than in the workplace? The question of protecting racist speech has been addressed in various contexts. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); *see also* Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709 (1994); Gregory M. Heiser & Lawrence F. Rossow, *Hate Speech or Free Speech: Can Broad Campus Speech Regulations Survive Current Judicial Reasoning?*, 22 J.L. & EDUC. 139 (1993); Josephine Chow, Comment, *Sticks and Stones Will Break My Bones, but Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor*, 14 LOY. L.A. INT'L & COMP. L.J. 851 (1992); Deborah R. Schwartz, Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733 (1989/1990); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

92. Term used by George Mullican, a law student at the University of Oklahoma College of Law, in reference to unconscious or unquestioned racist behavior. Passive racism is not less harmful than overt racism. The employee who acquiesces to a racist environment validates it by failing to protest. Passive sexism and homophobia are logical corollaries to passive racism. Consider men who take offense at sexist comments. Surely they could have broad protection under constructive membership, since everyone has a female biological mother: "The question of my identity often comes up. I think I must be a mixed blood. I claim to be male, although only one of my parents was male." JAIMES, *supra* note 36, at 123 (quoting Cherokee Jimmie Durham).

93. 490 U.S. 605 (1989).

Published by University of Oklahoma College of Law Digital Commons, 1994

sufficient to confer standing to sue,[94] although the kind of psychological injuries alleged in *Trafficante* are not too abstract.

But is this enough? As society changes, more and more "reasonable" persons in the work force may take offense at bigoted behavior aimed at "others." By analogy to *Trafficante* these employees have a right to work where they are not stigmatized as racists by their acquiescence to their employers' racist behavior. This stigma is analogous to the stigma of living in a "white ghetto"; thus it is sufficiently tangible to confer standing to sue.[95]

Should the empathetic employee get constructive membership in a Title VII protected class since the harm alleged was racially motivated? It was racially motivated in the sense that plaintiff employee's sensitivity to racial issues resulted in discrimination against her or him.

Certainly failure to appreciate "knock-knock" jokes does not qualify for Title VII protection. But does failure to appreciate "blue humor" qualify for Title VII protection? Would not protection of the culturally empathetic employee serve both goals of Title VII? It would provide relief to the unjustly deprived employee, and it would discourage the employer from requiring "passive racism" in the workplace. Congressional expansion of remedies for harassment discrimination[96] indicates an evolving intolerance for racism in the workplace regardless of the (biological)[97] race of the offended party.

A culturally empathetic employee could be protected by analogy to the Code of Federal Regulations definition of National Origin Discrimination:[98] An employer who deprives a "humorless" employee of equal treatment may associate the employee with "an organization identified with or seeking to promote the interests of a national origin group."[99]

---

94. *Id.* at 616.

95. For a discussion of the applicability of *Trafficante* to Title VII work environment discrimination, see Note, *Work Environment Injury Under Title VII*, 82 YALE L.J. 1695 (1973).

96. *See supra* text accompanying notes 70-73, 78.

97. The *Perkins* court cites ample authority for the proposition that biological race is little more than a myth. *Perkins*, 860 F. Supp. at 1271-73.

98. *See supra* note 25.

99. 29 C.F.R. § 1606.1(b) (1980). *See supra* note 25. The Code does not indicate whether the organization must be formally recognized. Construing this ambiguity in favor of those protected by it, organizations include not only the Native American Law Students Association, but the class of people generalized as "politically correct," and the more general class of people dubbed "liberals" or "left wing." The former class has been accused of sacrificing free speech in favor of oversensitivity to the feelings of protected classes. As perceived by their critics, "politically correct" people are organized to promote the interests of protected classes at the expense of "politically incorrect" expression. At the center of the dispute between the "politically correct" and the "politically incorrect" is the issue of the extent to which the Constitution protects racist speech. To whatever extent racist speech has been protected in other contexts, the law should and does provide a remedy to those for whom racist speech rises to the level of harassment in the workplace. *See supra* note 78 and accompanying text. Under the CFR definition of national origin discrimination, which is implicit in the Title VII definition of race discrimination, those who object to racist humor at *work* should be protected within the

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6

The words of Professor Patricia Williams are a warning: "It seems an extraordinarily narrow use of 'equality,' when it excludes from consideration so much clear inequality."[100] It is uncomfortably inconsistent to construe the law to protect an employee who belongs to the Spanish American Law Students Association (national origin classification), but not to protect an employee who belongs to the Native American Law Students Association (racial classification). An employer who disfavors employees who lack appreciation for racist humor is in fact disfavoring employees whom the employer associates with racial causes. Under the Code of Federal Regulations definition of national origin discrimination, this would not be justifiable. This note submits that the plain meaning of race discrimination includes the meaning of national origin discrimination clarified by the Code of Federal Regulations. Thus the legal construction of race can protect the culturally empathetic employee.

V. Conclusion

As long as a Title VII defendant's discrimination against a protected class has injured the plaintiff in a way condemned by Title VII, the law must deem the plaintiff to be a member of that protected class. Case law, including *Perkins*, validates the concept of constructive race.[101] More importantly, The Civil Rights Act of 1991 requires courts to broadly construe the text of Title VII, which includes language about race and protected classes.[102]

By employing constructive membership in a protected class, Title VII plaintiffs such as Perkins can now show membership in a protected class. This satisfies the language of Title VII and *McDonnell Douglas* at issue in *Perkins*.[103]

An employer behavior-based construction of membership furthers the broad policy of Title VII to provide relief to individual plaintiffs, to enforce equal employment opportunity for all classes of people, and to discourage discrimination. First, a behavior-based construction compensates employees whom employers injure by discriminating on the unjustifiably arbitrary basis of race. If the fact finder determines that the Department discriminated against Perkins on the basis of race, Perkins will be entitled to compensation.

---

congressional definition of harassment. *See* EEOC v. Eagle Iron Works, 367 F. Supp. 817 (D.C. Iowa 1973) ("The Civil Rights Act of 1964, which enacted this subchapter, and the Equal Employment Opportunity Act of 1972, which amended this subchapter, . . . are to be given the broadest possible interpretation consistent with their benevolent purpose.").

100. Patricia A. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2129 (1989).

101. *See supra* notes 75-76.

102. *See supra* text accompanying note 66.

103. *See supra* notes 2, 5.

Published by University of Oklahoma College of Law Digital Commons, 1994

Second, a behavior-based construction helps to eliminate the effects of historical discrimination against protected classes by discouraging employers from discriminating against protected classes.[104] At trial the fact finder may find the Department liable to Perkins for discriminating against him based on his membership in the *legal* class of American Indian people. If so, the Department may be discouraged from discriminating against American Indian people whether their membership is founded biologically, bureaucratically, or in personal, social, or legal construction.

Courts have a duty to help effectuate the goals of Title VII by employing an inclusive construction of Title VII. Title VII law provides protection to Perkins and to the class of American Indian people; it does so with conviction, if not clarity. Victims of discrimination deserve protection under Title VII, regardless of society's ambivalent understanding of the racial categories it has constructed. Congress has unambiguously condemned discrimination in the workplace. Therefore the focus should be on discriminating behavior rather than on racial definition.

Employing constructive membership status in Title VII lawsuits effectuates Congress's intention. This is especially important for American Indian peoples as unique political sovereigns who defy racial categorization and whose rights have been severely disparaged by federal categorization.

104. Even if Title VII involved only the purpose of eliminating the effects of historical discrimination against certain classes, constructive race would still be necessary to deter employers from discriminating against that class.

https://digitalcommons.law.ou.edu/ailr/vol19/iss2/6