Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification

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INTRODUCTION

Our story begins with the curious case of Eric Longmire, a biracial man who seemingly elected to live out his life at work as a white person.[1] Unfortunately, things took a bad turn for Longmire at work, and he turned to the court for relief, alleging that he had been subject to race discrimination. Specifically, Longmire brought a disparate treatment claim alleging that he was systematically undercompensated once he disclosed to his employer that he was a biracial man of white and African-American ancestry.[2] Additionally, he brought a racial-privacy claim alleging that his employer threatened to disclose the "secret" of Longmire's mixed racial background to his coworkers to coerce Longmire into assisting the employer in an unrelated legal proceeding.[3] The court appeared

1. Longmire v. Wyser-Pratte, No. 05 Civ. 6725 (SHS), 2007 WL 2584662, at *8 (S.D.N.Y. Sept. 6, 2007) (discussing black–white biracial plaintiff's disparate-treatment employment-discrimination claims under New York's Human Rights Law, the state law equivalent to Title VII). The plaintiff additionally brought a constitutional claim alleging violation of his right to privacy under the Fourteenth Amendment on the ground that the facts of his racial identity were sensitive information protected from involuntary disclosure. *Id.* at *9. The court dismissed all of the plaintiff's claims on the ground of legal insufficiency because it concluded that under New York law there is no liability for the unauthorized, public disclosure of a person's race or racial background. *Id.* at *8–10.

2. *Id.* at *8.

3. *Id.* at *6, *9.

deeply skeptical when presented with the facts of Longmire's case because the account he provided did not comport with the traditional account of "racial passing."[4] Longmire admitted that *he told his employer of his mixed-race background at the start of his employment*; the court questioned, why then would his employer hire him if the employer intended to discriminate against African-Americans or multiracials?[5] Additionally, the court noted, Longmire had publicly identified as African-American in other contexts and had disclosed his racial background to certain minority workers in his current workplace.[6] How then could he have any "racial privacy" interest in the information about his racial background if he was so open about the facts of his racial identity?

The court's concerns about Longmire's allegations foreshadowed the dismissal of his case, but for race scholars, the story lingers in the imagination. For some, the case is significant because it divides us into our respective camps in the ongoing debate about the descriptive and analytic power of post-racialism. The first camp, composed of post-racial scholars, argues that we have transcended race.[7] They would concede that Longmire's claims would have been valid had they been raised sixty or seventy years ago, in a time when racial boundaries were rigidly policed, and men and women validly believed that their economic, social, and educational opportunities were constrained by the color line. But post-racialists would argue that, today, this kind of racial deception is wholly unnecessary. Longmire's claim should fail, in their view, because he felt free to disclose his race to his employer and only decided to cry race discrimination when he grew dissatisfied with his career progress. Furthermore, they would explain, Longmire's strange decision to selectively disclose the facts of his racial identity to his coworkers reveals nothing more than his own pathological insecurities about race. Certainly, the employer's attempt to exploit Longmire's racial anxiety was morally wrong, they would explain, but the employer's threat sheds no light on either the validity of the post-racial account or the true state of race relations in Longmire's workplace.

The second camp, composed of traditional race-discrimination scholars, argues that Longmire's tale is not so strange at all. Instead, Longmire's story establishes the falsity of the post-racial account and confirms their claim that

4. For a traditional account of racial passing, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710–13 (1993) (describing her grandmother's decision to "pass" as white to her employer and coworkers in order to secure a job as a shop girl in the 1930s in a white department store). Harris compellingly describes the world of economic opportunities available to blacks that were able to engage in this kind of racial deception, as well as the attendant risks. As Harris's account shows, typically a person passing as white will not disclose the truth of her race to her employer or her coworkers.

5. *Longmire*, 2007 WL 2584662, at *9.

6. *Id.*

7. For examples of the post-racial account, see generally DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995); JOSEPH L. GRAVES, JR., THE RACE MYTH: WHY WE PRETEND RACE EXISTS IN AMERICA (2004). For critiques of the post-racial account, see generally Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

race continues to serve as a primary basis for social subordination.[8] Specifically, the traditional account of race discrimination posits that Longmire's employer hired Longmire knowing that he was a minority worker, but decided to *under-compensate* Longmire because of his race. Additionally, the traditional account of race discrimination counsels that we should take the employer's threat to disclose Longmire's racial secret quite seriously, as the threat reveals that both Longmire and his employer understood that whiteness provided significant social and material benefits in Longmire's workplace. These benefits made Longmire's decision to "pass" as white disappointing, but understandable. Also, traditional race-discrimination scholars less sympathetic to Longmire's account might describe *Longmire* as a modern morality tale, one that warns multiracials about the dangers of adopting a fluid approach to racial identification.[9] They would argue that Longmire, having made the decision to pass, to strategically disavow his minority status (and the associated burdens) in certain contexts, should not be surprised to find that the race-discrimination protections under antidiscrimination law were not available to him.

Longmire provides rich fodder for participants in the current debate over the

8. In this discussion, a "traditional" race-discrimination scholar is defined as a scholar that assumes: (1) that race and race discrimination continue to be central organizing principles that shape social life, and (2) that most race-discrimination conflicts concern relatively stable, clearly defined racial groups competing for resources and social standing in what social psychologists call group status contests. For representative examples of traditional scholars, see generally Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (arguing that federal civil rights laws fail to regulate many domains in which one sees race discrimination and acts of antipathy between established racial groups); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) (arguing that focus on intentional race discrimination prevents the Supreme Court from analyzing cases involving more subtle discrimination in status contests between racial groups); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996) (discussing white entrenchment and the absence of black lawyers in leadership positions at law firms as evidence of larger structural problems that prevent disempowered racial groups from accessing opportunity).

9. Critical Race Theory (CRT) scholars' work tends to privilege the traditional account of race discrimination, but some scholars in the field have embraced more fluid accounts of race that acknowledge the roles choice and voluntary action play in constructing racial identity. Typically, however, CRT scholars focus on the unrecognized social costs imposed by persons with fluid racial-identity models, a concern in direct contrast to my project here. My goal instead is to explore the productive antidiscrimination possibilities posed by the emergence of fluid understandings of racial identity. For representative examples of CRT scholars raising concerns, see, for example, Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998) (warning that the multiracial identity movement may cause multiracials to psychologically disconnect with persons of color and serve as a buffer class disconnected from racial equality efforts); Gustavo Chacon Mendoza, *Gateway to Whiteness: Using the Census to Redefine and Reconfigure Hispanic/Latino Identity, in Efforts to Preserve a White American National Identity*, 30 U. LA VERNE L. REV. 160 (2008) (arguing fluid definitions of Latino/Hispanic are being used to court Latinos into identifying as white); *cf.* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1293–98 (2000) (warning against the naïve celebration of fluid understandings of race because employers often cherry-pick between certain types or performances of racial identity to find models that more easily comport with established workplace norms); D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405 (2011) (exploring same).

validity of the post-racial account; however, the case is offered here in pursuit of a different, far richer opportunity. Close review of *Longmire* reveals a quietly competing ideological framework for understanding race, one that I believe will ultimately overshadow both the post-racial account and the traditional account of race discrimination. Specifically, *Longmire* reveals that we are currently living in the era of "elective race"—a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning.[10] The era of elective race will require judges and scholars to develop a nuanced understanding of the autonomy and privacy interests plaintiffs will raise concerning the control and deployment of "racial information"—information about an individual's racial background and racial-identity claims. The era of elective race will challenge courts and scholars to shift their focus because, during this era, many workplace discrimination conflicts will not involve anti-minority bias as it has been traditionally understood. The traditional account of race discrimination suggests that discrimination is primarily motivated by status contests between clearly defined and independent racial groups.[11] In contrast, the new elective-race cases will more often involve individuals that occupy the margins of racial categories, and their claims will concern attempts to control the deployment of race definitions and the terms on which their bodies are assigned racial meaning.[12]

The unique value the elective-race framework provides becomes apparent when one uses it to interpret the *Longmire* case because it produces novel insights and demonstrates the limitations of other models. Indeed, careful review shows that Longmire's allegations are based on two rights claims unique to the elective-race framework. Specifically, his claims stem from his desire for recognition of his right to racial autonomy—the right to control the terms on which his body is assigned a racial identity. Alternatively, his claims might be described as allegations concerning his "racial privacy interests." His pay discrimination claim, his claims of extortion, and his alleged constitutional

10. My earlier work touches on some of these themes, in particular the individual's desire to exercise agency in determining his socially recognized racial identity and the individual's interest in controlling the use of his racial information. *See, e.g.*, Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539 (2009) [hereinafter Rich, *Decline to State*] (discussing ethical responsibilities of individuals who refuse to identify by race during the admissions process and the consequences for educational institutions' diversity programming); Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010) [hereinafter Rich, *Marginal Whiteness*] (discussing the experiences of biracial whites and other whites with disfavored identity features as they attempt to socially identify as white and access "white privilege"). For further discussion of employers' legal and ethical responsibilities when managing worker's racial-identity claims while administering workplace affirmative action programs, see Camille Gear Rich, Essay, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179 (2013) [hereinafter Rich, *Affirmative Action*].

11. *See supra* note 8.

12. For further discussion of marginal whites, see generally Rich, *Marginal Whiteness*, *supra* note 10.

privacy claim all converge on a single theme: the employer's unauthorized disclosure and use of Longmire's racial information. In supplying this reading, the elective-race framework provides a strong rejoinder to the post-racial account because it debunks the claim that race is a conceptual relic, unnecessary for understanding contemporary realities. Instead, the elective-race framework recognizes the centrality of race: both Longmire and his employer were keenly sensitive to Longmire's autonomy interest and privacy interest in controlling his employer's use of facts about his race. Additionally, both understood the power the employer enjoyed because of its access to Longmire's racial information.

The readings produced under an elective-race framework also challenge traditional race-discrimination scholars. The elective-race framework rejects claims about the obdurate, all-encompassing nature of white privilege and the need for racial passing. Instead, the framework allows for a more nuanced account that explains why Longmire informed his employer of his mixed background at the start of his employment, and later, other coworkers as well. The elective-race framework suggests that, rather than attempting to pass as white, Longmire was exercising his privacy right and his autonomy right to orchestrate limited and controlled disclosure regarding the facts of his racial identity. Longmire's conduct suggests that he felt he should be able to control who was aware of the facts about his race, and further, that he had an autonomy interest in controlling how those facts were utilized by others.[13] Consequently, Longmire's right to relief under employment discrimination law must turn on whether we are willing to recognize his privacy and autonomy interests in shaping his experience of racialization.[14]

This Article posits that we are in a key moment of discursive and ideological transition, an era in which the model of elective race is ascending, poised to become one of the dominant frameworks for understanding race in the United States. Because we are in a period of transition, many Americans still are wedded to fairly traditional attitudes about race. For these Americans, race is still an objective, easily ascertainable fact determined by the process of involuntary racial ascription—how one's physical traits are racially categorized by third parties. The elective-race framework will challenge these Americans to recognize other ways in which people experience race, including acts of voluntary affiliation as well as selective and conditional affiliations. Importantly, even if one concludes that most Americans still hold traditional, ascriptive-based understandings of race, there is evidence that elective race is steadily gaining influence in certain quarters, shaping government institutions' formal proce-

13. Put differently, Longmire perhaps believed that he had the right to remain racially ambiguous at work with less trusted coworkers, while still being free to utilize his minority background as a resource in personal interactions with minority coworkers.

14. Racialization refers to the various means social actors use to identify a person's racial status. These processes include looking at the person's race-associated physical features, as well as voluntary features such as speaking style, dress, and other considerations.

dures as well as certain Americans' racial understandings.[15]

To improve the clarity and precision of discussions about elective race, this Article outlines the key premises and norms associated with this ideological framework. My primary goal is to help courts and scholars understand the basic tenets and tensions that are likely to be present in plaintiffs' elective-race claims. Although some scholars have trivialized racial self-identification interests or represented them as a threat to antidiscrimination law, my project is to show that racial self-identification decisions matter in concrete ways because they can trigger serious race-based social sanctions that are a core antidiscrimination law concern. Indeed, as we will see, voluntary racial-affiliation decisions can and do trigger race-based resentment, rejection, and social sanction when they do not match certain expected or established American understandings about the boundaries of racial categories.[16] Moreover, I predict that, though the number of cases that sound in the nature of elective race may be small at present, we should expect to see more cases of this kind given both the increased focus Americans place on the interest in racial self-identification and the shift toward institutional protocols that are intended to accommodate this interest. The elective-race cases will challenge courts, forcing them to decide whether Title VII of the Civil Rights Act of 1964 (Title VII) should recognize the autonomy claims of individuals who are injured in the workplace by the social and formal processes of involuntary racialization. Courts will be asked to rule on cases that suggest that an employee's dignity interests are unjustly frustrated when others fail to respect the employee's right to racial self-definition.

Part I of the Article examines the different ways the concept of elective race is understood by laypersons and institutions. I show that neither lay understandings nor institutional understandings of elective race are fully developed, but both rest on dignity, privacy, and autonomy norms that emphasize the importance of racial self-identification. Additionally, I show that each of the two approaches to elective race has something to teach the other in order to fully accommodate the individual autonomy and social justice needs at the heart of contemporary conflicts about race. Part II explores the elective-race framework's descriptive potential. Section A explores the way the construct allows us to see relationships between otherwise seemingly unrelated areas of employment-discrimination scholarship. Section B explores the framework's ability to render visible certain overlooked constituencies in need of antidiscrimination protections and better explains their interests and motivations.

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15. *See* discussion *infra* section I.B.2.

16. As I have observed in my other work, the specific definition of race individuals use may vary to some degree depending on the cultural context or setting in which the individuals find themselves. Consequently, though there are some more generally shared understandings about racial categories and definitions of race in America, there are also qualifications, exceptions, and reinterpretations in play in various workplaces that effectively renegotiate and reinterpret the boundaries of racial categories. The elective-race cases challenge courts to be attentive to these small variations in racial definitions and understandings. *See* Rich, *Marginal Whiteness*, *supra* note 10, at 1524–25.

Part III explores the elective-race cases, namely cases that turn on the dignity, autonomy, and privacy norms at the heart of the elective-race framework. I show that courts are dismissive and often hostile to plaintiffs' claims based on elective race despite evidence that state and federal administrative agencies are increasingly starting to recognize the importance of the right to racial self-definition. I explain that some courts appear committed to racial-identification norms that posit that an individual's race is her "social race"—the race she is involuntarily assigned by third parties based on her perceived appearance or social practices. However, this focus on the plaintiff's social race proves profoundly naïve and underinclusive in the era of elective race. In order to fully protect plaintiffs from race-based social sanction, courts will have to adopt a more comprehensive model that accounts for the multiple ways in which people are racialized, including self-identification. Additionally, courts must account for the multiple motivations discriminators have for imposing sanctions, some of which differ from classic racial animus. Racial hostility can be triggered when a person "elects" her race, demanding social or institutional recognition of membership in a given racial category for which her employer or coworkers believe she has no valid claim of belonging. Part III offers courts a series of principles, presumptions, and bright-line rules that can be used to more fairly adjudicate elective-race cases.

Part IV surfaces the background normative principles that must be considered if we are to give elective-race plaintiffs comprehensive protections. Although many intuitively recognize that elective-race claims are consistent with Title VII's goals, a deeper analysis of the values and norms that inform elective-race plaintiffs' claims must be developed if we are to offer these plaintiffs a consistent, principled set of protections. To this end, Part IV examines the dignity, autonomy, and privacy norms that inform elective-race plaintiffs' claims and examines their connections to, and differences from, the traditional Civil Rights Era account of discrimination that informs Title VII. Drawing from the work of antidiscrimination scholars working on the politics of self-identification in other areas of antidiscrimination law, Part IV explores critiques and concerns about the rise of elective race and their implications for Title VII cases. Part IV ultimately shows that many elective-race claims should be accommodated under Title VII, but they must be cabined in ways that acknowledge the continuing significance of social race and the need for government institutions and employers to privilege social race when collecting data and investigating patterns of discrimination. Part IV, however, also posits that Title VII should not singularly focus on discrimination triggered by social race. Rather, Title VII can and should protect employees from sanctions based on their self-identification decisions and hostile uses of employees' private racial data.

I. UNDERSTANDING ELECTIVE RACE

What is elective race? Why should scholars, courts, and practitioners care about this ideological framework's growing influence on Americans' views

about race and race discrimination? In order to unpack the explanatory power and explain the persuasive sway the elective-race framework has for many Americans, this section provides a roadmap of its key propositions. One caveat is necessary: many institutional actors and individuals who are influenced by elective race may not have a full understanding of the implications that flow from this model of race and racial identification. Consequently, the comprehensive description of the elective-race framework provided here could be criticized for bringing an artificial coherence to a group of currently circulating and largely unexamined ideological understandings. Indeed, not all institutional players or individuals influenced by an understanding of elective race will agree with all of the propositions provided here. As Michael Omi and Howard Winant explain,[17] we must understand that racial ideologies are constantly evolving and unfolding as they are being articulated. Therefore, we should expect that Americans will have various, disconnected and sometimes conflicting understandings of elective race. Mapping these discontinuities in ideological understandings is one of the key tasks scholars undertake when they study ideological shifts and "racial formation" dynamics. To facilitate this understanding, Part I introduces readers to the study of racial formation, an analytic approach that provides the context required for understanding the emergence of elective race. By examining elective race as an important development in contemporary racial-formation dynamics we can better understand the important role the construct of elective race will play in restructuring contemporary conversations about discrimination. Part I then proceeds to lay out both the layman's understanding of elective race and the understanding that is associated with government institutions.

A. UNDERSTANDING RACIAL FORMATION

The study of racial formation is an approach to studying race that was introduced by sociologists Michael Omi and Howard Winant more than twenty years ago. Omi and Winant explain that scholars should map "racial formations," the social, economic, and political forces that determine the ways we understand race, as well as the content and importance of racial or ethnic categories.[18] As they explain, the contemporary meanings and understandings associated with race are continually evolving and being reworked in a social enterprise called "racial signification." This process is inherently variable, conflictual, and contested at every level of society. Omi and Winant counsel that there is no end state in this competition between "racial projects," the different ideological frameworks for understanding race, as competing ideological frame-

17. *See infra* section I.A.

18. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 60–61 (2d ed. 1994); HOWARD WINANT, RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS 23–25 (1994). Omi and Winant discuss the importance of adopting both a macro- and micro-level approach to the study of racial formation, although the issue is addressed in more general terms than offered here. OMI & WINANT, *supra*, at 66–67.

works are always being offered and they continue to have persuasive sway even as newer models emerge. Indeed, Devon Carbado and Ian Haney Lopez, along with other race-discrimination scholars, have encouraged scholars to closely study shifts in influence between different racial projects or ideological frameworks for understanding race. Carbado and Lopez warn that the failure to closely analyze these changes risks conceding important ground in the struggle to shape antidiscrimination protections.[19] This insight is particularly instructive as we explore in the next section the emergence of elective race because this ideological framework has been extremely influential in shaping Title VII administrative policies, but ironically it has received far less scholarly attention than other competing ideologies, including post-racialism.

The macro-level approach is the primary method legal scholars have used to conduct racial-formation analysis—charting the shifts and changes within and between racial ideologies[20]—because scholars tend to focus primarily on changes in institutional definitions of race and racial categories. This macro-level inquiry is consistent with the "sociological approach" to antidiscrimination law as articulated by Robert Post; Post challenges antidiscrimination scholars to uncover the ways that institutions are involved in the sociological process of defining race for social actors, even as these institutions claim to simply be responding to the understandings of persons governed by antidiscrimination laws.[21] Omi and Winant explain that in studying institutional definitions, we must consider the wide range of sources that shape legal and institutional understandings; institutional definitions of race may be shaped by "elites, popular movements, state agencies, cultural and religious organizations, and intellectuals of all types . . . [that] interpret and reinterpret the meaning of race."[22] These institutional definitions and understandings are also the product of prior political contests over the definition of racial categories. This discussion of the ideological influence of elective race will touch on all of these potential sources of change.

The second, less well-known approach to the study of racial formation—the micro-level approach—requires us to consider the way institutional understandings about race are borrowed, modified, and redeployed by individuals to serve their own identity needs.[23] Although it is not typically featured in the

19. *See generally* Devon W. Carbado, Afterword, *Critical What What?*, 43 CONN. L. REV. 1593 (2011); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

20. OMI & WINANT, *supra* note 18, at 66–67.

21. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31 (2000) (explaining that the sociological approach recognizes that law is a social practice structuring our understanding of race that attempts to shape other social practices about race).

22. WINANT, *supra* note 18, at 24.

23. OMI & WINANT, *supra* note 18, at 66–67. For examples of scholars outside of the legal academy who have adopted this micro-level approach, see John Hartigan Jr., *Locating White Detroit*, *in* DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM 180, 182 (Ruth Frankenberg ed., 1997) (urging scholars to apply the racial-formation framework to more granular, local disputes that

antidiscrimination work in law reviews, this micro-level approach to the study of racial formation is well represented in other kinds of scholarship.[24] The discussion of elective race provided in Part II relies heavily on micro-level analysis. I show how studies in sociology and psychology can provide insight into how individuals respond to and redeploy formal definitions of race and institutional inquiries that require elaboration of racial definitions. Part III further explores these questions in the context of cases and considers how employers and coworkers can use institutional pressures to police and enforce lay definitions of race. Specifically, employers and coworkers may use state-authorized inquiries, regulations, and other vehicles to police individual workers' understandings about the definition and content of racial categories. By understanding the psychological motivations and structural incentives of employers and employees, we get a fuller sense of the stakes in elective-race workplace conflicts. In all of these discussions, particular emphasis is placed on understanding the experiences of multiracials, racial liminals, and phenotypically ambiguous workers. My goal is to chart the psychological conflicts and challenges they face as they negotiate administrative data-collection regimes and informal racial-categorization inquiries in the workplace.[25]

B. UNDERSTANDING ELECTIVE RACE: KEY PROPOSITIONS

The introductory roadmap to elective race provided in this section attempts to give some necessary organization to a field of relatively incoherent ideas in cultural circulation that are premised on the importance of racial self-

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concern "collective action and personal practice"); *see also* Ladelle McWhorter, *Where Do White People Come From?: A Foucaultian Critique of Whiteness Studies*, 31 PHIL. & SOC. CRITICISM 533, 534 (2005) (discussing the limitations of scholarship that solely relies on racial-formation theory at the national level and does not include attention to micro-level disputes). To the extent this approach is represented in the legal literature, it tends to inform primarily legal historians' work. *See, e.g.*, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteen-Century South*, 108 YALE L.J. 109 (1998).

24. One of the primary goals of my work in this area is to demonstrate how a micro-level analysis of Title VII workplace discrimination disputes provides novel insight into contemporary racial-formation projects. *See, e.g.*, Rich, *Affirmative Action*, *supra* note 10; Rich, *Marginal Whiteness*, *supra* note 10 (showing how white plaintiffs' interracial association claims reveal antidiscrimination norms that privilege a restricted understanding of white racial identity); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1200–02 (2004) [hereinafter Rich, *Performing Racial and Ethnic Identity*] (showing how plaintiffs' claims involving voluntary racial-identity performance reveal unexamined discretion provided to employers to shape the definition of race).

25. Some definitions are required to discuss the multiple constituencies whose views on race are strongly influenced by elective-race understandings. Phenotypically ambiguous persons possess physical features that do not clearly link them to a particular racial group or possess features that cause them to be associated with more than one racial group. Racially liminal persons are those who find it difficult to pick an accurate choice in race-based data-collection inquiries because of the restrictive and underinclusive categories presented for their consideration. Multiracials have parents from different racial groups. White multiracials are persons who have parents from two different racial groups, and one of those parents is white. For a more comprehensive description of phenotypically ambiguous, racially liminal, and multiracial persons, see *infra* Part II.

identification. By presenting these different elective-race understandings in an aggregate form, I am inviting courts, practitioners, scholars, and even laypersons to consider the tensions between the various ways we articulate our understanding of elective race. These tensions must be resolved for the law to adopt a principled approach to elective-race claims. To this end, this discussion provides the reader with two accounts of elective race. One account is based largely on laypersons' understandings. I then demonstrate how these lay understandings are connected to certain propositions explored in Title VII scholarship concerning "race performance." The second account is largely culled from institutional rules—such as those created by the Equal Employment Opportunity Commission (EEOC)—and offers a more moderate, limited approach to the interest in racial self-identification. The more moderate, limited interest in elective race recognized by government may surprise those that perceive government to have fully shifted to an understanding of race that privileges racial self-identification decisions.

Some template is needed to allow us to investigate these two accounts of elective race in a principled fashion. Ian Haney López provides assistance in this regard. He explains that the significance of a particular ideological formation should be assessed by examining the answers it provides to four key, foundational questions: (1) What is race? (2) What is racism? (3) What is the relationship between race, racism, and inequality, and (4) What if anything is morally required of us as a society given these understandings?[26] This four-part analytic matrix brings a necessary discipline to our discussion as we identify the key propositions and implications of each approach to elective race and explore the different ways in which elective race is understood by laypersons and government institutions.

1. Lay Definitions of Elective Race

How do laypersons influenced by elective race define race? Laypersons influenced by an account of elective race will tend to see racial identity primarily as a result of individual racial self-identification decisions and secondarily as a product of ascriptive race—the racial identity one is involuntary assigned because of a third party's racial categorization judgments.[27] This recognition of the two processes by which individuals are racialized is consistent with the social constructionist view of race—the understanding that there is no firm biological foundation for the claims made about racial identity, and that social actors are involved in a complex, reciprocal interpretational process of give-and-take as they negotiate their understandings regarding their own racial identities and the identities of those around them.[28] Laypersons who have

26. *See* Ian F. Haney López, *Is the "Post" in Post-Radical the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011).

27. *See* Rich, *Performing Racial and Ethnic Identity*, *supra* note 24, at 1145–66.

28. *See id.*

adopted elective-race understandings acknowledge that the primary method used to assign people to racial categories is racial ascription based on a person's physical characteristics. However, they may also take the position that voluntary acts—what I have elsewhere referred to as "race and ethnic performance"—are equally, if not more, determinative of how an individual is racially categorized by others. Indeed, involuntary racial assignment or ascriptive race determinations may be triggered by an individual's clothing choices, speaking style, accent, associational choices, and other factors, in addition to his physical features.[29] Persons who adopt elective race as their model for racial understanding are particularly conscious of this part of the racial-ascription process. Indeed, phenotypically ambiguous persons, whether they are multiracial or monoracial, typically have had personal experiences in which race and ethnic performances have functioned as the primary basis others use to assign them to a given racial category.[30]

Performativity plays a second key role in laypersons' elective-race understandings, as performativity models posit that administrative inquiries about race are experienced as important identity-performance moments. Indeed, the act of self-identifying by race in an administrative inquiry can be experienced as an important and profound way of actualizing one's racial identity. This act, however, can have very different social effects, depending on how the person intends for the self-identification decision to be used. For example, when a person uses the racial self-identification decision to publicly signal his membership in a given racial category, it can trigger discrimination by causing others to treat him as a member of that racial category. That is, once a phenotypically ambiguous person chooses to identify on a form as Latino, when coworkers learn about his identification, they may discriminate against him, regardless of whether his physical appearance would place him in this racial category. In these circumstances, racial self-identification can become a powerful force in the racial-ascription process. However, another person may regard the racial self-identification decisions he makes in administrative inquiries as a wholly private identity-performance matter and, further, strongly believe that administrative disclosures about race should never be disclosed to third parties. An individual who intends for his racial-identification decisions to remain private may still believe that these decisions are a critical part of his identity construction. These elective acts allow a person who is ambivalent or insecure about the social validity of some of his racial-identity claims to still express allegiance or affinity with his chosen racial group.

Given the varied ways different Americans understand racial self-designation decisions, some more nuanced vocabulary is required to parse through these

29. *Id.* at 1158–66.

30. Jessica M. Vasquez, *Blurred Borders for Some but Not for "Others": Racialization, "Flexible Ethnicity," Gender, and Third-Generation Mexican American Identity*, 53 SOC. PERSP. 45, 53–54 (2010) (discussing Mexican waitress's experience of race discrimination after Persian employer determined that she was not Persian when she spoke Spanish to the busboys at his restaurant).

different interests.[31] Therefore, although laypersons' conceptual understandings regarding elective race may not be as well thought through or as organized as outlined here, persons who are influenced by elective race tend to identify multiple, discrete interests in different kinds of self-identification decisions. These interests typically concern issues related to (1) *documentary race*—the racial-identification decision one makes by checking a box in response to administrative data-collection efforts; (2) *social race*—the racial identity one tends to be assigned to by others via the process of involuntary racial ascription; (3) *private race*—the personal views one has about one's own racial identity; and (4) *public race*—the racial identity an individual is prepared to be recognized as having by others in social life. Though there has been a great deal of scholarly discussion and political activism regarding the role documentary race plays in constructing one's identity,[32] in many workplaces a person's coworkers will be unaware of his documentary racial self-identification decisions. Therefore, though persons motivated by an account of elective race tend to stress the importance of questionnaires and other instruments for collecting racial data, arguing that they cause trauma (when an individual is required to elect into a particular racial category),[33] they also recognize that more socially clear, public performative acts play a greater role in defining one's social race in the workplace.

Armed with this new terminology for understanding the various racial-identification decisions individuals make, we can now formulate questions to assist us in crafting effective antidiscrimination protections in the era of elective race. These questions include whether we should recognize that a person has experienced a dignity- or privacy-based harm when she intends her documentary race (the racial self-identification decision one makes on a form) to remain private. Additionally, to respect the individual's privacy interest, should employers be prohibited from using these documentary-race decisions for any purpose other than EEOC reporting? Indeed, careful review of individuals' racial self-

31. Sociologists have noted that multiracials tend to make distinctions between the various kinds of racial-identification decisions they are required to make, and will provide different answers in different contexts. *See* David R. Harris & Jeremiah Joseph Sim, *Who is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC. REV. 614, 615 (2002). In Harris and Sim's analysis, the individual's personally held views about his or her racial identity are called references to "internal racial identity." *Id.* (emphasis omitted). An observer or third party's view of one's race is called "external racial identit[y]." *Id.* (emphasis omitted). Additionally, they distinguish this with "expressed racial identit[y]," the words and actions that convey what one believes about one's race. *Id.* (emphasis omitted).

32. *See, e.g.*, Aaron Gullickson & Ann Morning, *Choosing Race: Multiracial Ancestry and Identification*, 40 SOC. SCI. RES. 498, 498–99 (2011) (explaining that multiracials with Asian ancestry are more likely to claim a multiracial identity than black–white or Native American–white mixed-race people and calling for more research into the identification patterns of mixed-race people); *see also* Carolyn A. Liebler, *Ties on the Fringes of Identity*, 33 SOC. SCI. RES. 702, 702 (2004) (noting that racial identification "among people with mixed-heritage is affected by the social world beyond individual psychology and racial ties within the family").

33. *See, e.g.*, Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM. L.J. 1 (2007).

definition practices also reveals that the election one makes with regard to documentary race may or may not accord with one's private race (the way one would like to see oneself),[34] social race (the race one is perceived to be by others), or public race (the race one is prepared to be recognized as publicly).[35] Previous scholarship has implicitly assumed that an individual's decision with regard to the establishment of documentary race will match the individual's public and/or social race, or the individual has engaged in a kind of racial fraud.[36] However, the sociological literature on multiracials and racially liminal persons suggests that there are far more complicated identity questions that should shape this inquiry. Policymakers also must consider whether an employee should be permitted to make documentary-race decisions that seem to contradict her social race. Should she be accommodated even if this documentary-race decision complicates our ability to measure diversity and discrimination in the workplace? What should we do with individuals who make inconsistent documentary-race declarations and inconsistent public-race identity choices? A rigorous discussion of an individual's interest in racial self-identification must take account of these four distinct components of racial identification in order to fairly resolve these questions.[37]

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34. Mary E. Campbell, *Thinking Outside the (Black) Box: Measuring Black and Multiracial Identification on Surveys*, 36 SOC. SCI. RES. 921, 934 (2007) ("It is important to note that although racial identification is closely related to racial identity (your thoughts about your race), these two concepts do not have perfect correspondence . . . ."). Campbell explains that racial identification can be influenced by both social and individual factors, as well as constrained by the structure and context of the survey questions. *Id.*

35. A few examples help illustrate this point. *Example 1*: A Moroccan may feel pressured to identify as white, for purposes of documentary race, as Middle Eastern persons are categorized as white by the federal government for data-collection purposes. However, this individual may know that his social race is nonwhite and that he is generally classified as a person of color or as a racialized Middle Eastern person. For purposes of private race, he may reject this Middle Eastern designation, instead seeing himself as North African and distinct from other groups socially categorized as Middle Eastern. He may be unsure about his public race, the race he is prepared to be identified as publicly, and consequently he may vacillate between a Middle Eastern or a North African identity. *Example 2*: A biracial white and black person may privately see herself as mixed race or multiracial and be prepared to be recognized as mixed race for purposes of documentary race as well. However, she may recognize that, because of her physical features, she is socially raced as black. For purposes of public race, she may vacillate back and forth between being recognized as white or black, concluding that the mixed-race designation only serves to marginalize her when she is in a group of blacks and when she is in a group of whites. *Example 3*: The most famous recent example of this problem is the current debate over Elizabeth Warren's decision to identify as Native American while she was employed at Harvard Law School. Warren was socially recognized as white, but decided to make her documentary race Native American on at least one occasion. Although she was prepared to publicly claim Native American identity, her claims were rejected. Chastened by her treatment in the press, in more recent press coverage her statements reveal that she has retained her Native American identity as an essential part of her private understanding of race, but has shown that for social-, public-, and documentary-race matters, she is a white person. For further discussion of Warren, see Rich, *Affirmative Action*, *supra* note 10, at 181–83.

36. *See, e.g.*, Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367 (2006).

37. Other scholars have noted that we must distinguish between different kinds of racial identity, particularly the distinction between self-selected racial identity and the racial identity one is assigned by others. *See* Nancy A. Denton, *Racial Identity and Census Categories: Can Incorrect Categories*

Ian Haney López's work also prompts us to assess the effects of elective race by considering how this ideological framework defines racism. Laypersons who have adopted an understanding of elective race tend to adopt a relatively uncontroversial definition of racism. They would agree that racism occurs when people make stereotype-based, opportunity-frustrating generalizations about an individual based on assumptions about an individual's racial background. More specifically, they would agree that racism occurs when a third party uses racial information to make assumptions about a phenotypically ambiguous individual that limit his economic opportunities, signal his social subordination, or discourage further social contact. However, because proponents of elective race are centrally concerned with the experiences of persons who can adopt a fluid approach to racial identification, they tend to be particularly concerned about discrimination triggered by documentary-race decisions. First, they are concerned about circumstances in which an individual's documentary-race claims are rejected because the person collecting racial information does not believe the individual has a fair basis for claiming membership in a particular racial or ethnic group. The strongest version of this claim is that the mere act of questioning the individual's decisions is an act of discrimination and is a kind of race-based subordination with which the law should be concerned.[38] The as-yet-unresolved question for Title VII scholars is, should the denial of a group-affiliation claim count as an adverse employment action for the purposes of Title VII? Should these denials be regarded as a kind of dignitary assault that permanently poisons the workplace and constitutes a hostile environment? Second, persons influenced by elective race are concerned about documentary-race evidence being used as a basis for racial categorization and social stigma in the workplace. The next unresolved question for Title VII scholars is, do individuals have a privacy interest in maintaining the confidentiality of their racial information? If there is a privacy interest in this information, under what circumstances is that interest defeasible and why?

The last set of responses to Haney López's foundational questions, which require that we explore the moral implications of elective race, will be the most controversial. Persons who adopt an understanding of elective race are not critical of the varying, shifting, and conflicting racial-identity decisions that individuals may make over the course of their lives. Rather, those who champion elective race recognize that individuals make strategic racial-identification decisions for a host of reasons, some of which may disappoint and surprise us, but these decisions should have no bearing on whether individuals may raise claims alleging discrimination based on their "minority" status. That is, a phenotypically ambiguous individual may situationally identify with a socially

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Yield Correct Information?, 15 LAW & INEQUALITY 83, 87 (1997) (articulating the importance of the difference between social and individual identity).

38. For an example of a case in which questioning a plaintiff's racial designation decisions was represented as a form of racial harassment, see Cooksey v. Hertz Corp., No. 00 CV 5921 (SJ), 2004 WL 1093674 (E.D.N.Y. Jan. 26, 2004).

privileged group (typically whites), and at other times with minority groups, but may still have a valid need to invoke antidiscrimination protections.

Importantly, most scholars who worry about the cultural ascendance of elective race have focused their anxiety on issues related to the fourth consideration: they are concerned that persons who adopt fluid approaches to racial self-identification fail to consider the moral and ethical implications of their behavior. Specifically, these scholars argue that elective-race plaintiffs' insistence on using antidiscrimination law to vindicate autonomy or self-expression interests threatens to distract us from the primary purpose served by antidiscrimination law: disrupting historically established patterns of racial subordination and inequality.[39] As these scholars explain, established racial inequality patterns are more often attributable to involuntary racial assignment based on a person's physical characteristics rather than the autonomous racial-identification choices of individual citizens.[40]

Yet skeptics' characterizations of elective-race plaintiffs' interests appear somewhat oversimplified upon closer examination. It is clear that proponents of elective race are invested in disrupting patterns of racial subordination; however, they approach the problem of established racial subordination from a vector unfamiliar to traditional antidiscrimination scholars. For example, elective-race plaintiffs who choose to identify as minority are subject to many of the same racial-subordination dynamics as persons involuntarily assigned to racial categories. A person who phenotypically appears to be black is often discriminated against in the same way as a person who, although phenotypically ambiguous, has publicly identified as black. Traditional race-discrimination scholars have little difficulty concluding that Title VII has a role to play in vindicating the interests of persons who voluntarily and publicly claim blackness. They understand that antidiscrimination law should protect those who voluntarily decide to adopt a minority identity.[41] Elective-race plaintiffs merely challenge us to extend this understanding a bit further. They ask us to consider whether we should protect individuals who make membership claims to more socially privileged racial groups on the ground that these individuals are also experiencing a form of racial subordination. They claim that when higher-status whites police the definition of whiteness in ways that exclude lower-status whites, the higher-status whites are engaged in discrimination. As I have elsewhere argued, these putative whites' claims challenging the definition of whiteness sound in an unfamiliar tone, but they can do important work in

39. *See, e.g.*, RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 122–25 (2005); Hernández, *supra* note 9, at 138; Yang, *supra* note 36, at 401.

40. *See, e.g.*, Hernández, *supra* note 9.

41. Indeed, to the extent there is debate about protecting these voluntary minority-identified plaintiffs, scholars merely question how strong, consistent, or public the individual's minority-identification patterns must be.

disrupting discrimination dynamics that cause racial inequality.[42] This proposition requires further discussion.

Elective-race theory would argue that Civil Rights Era norms counsel that we should be offended by discrimination dynamics that allow a person to be penalized for his decision to voluntarily identify with a particular group, regardless of the racial affiliation that he chooses. These plaintiffs force us to consider whether it counts as discrimination when an individual's claim of racial belonging to a socially powerful group is challenged, outright rejected, or inconsistently accommodated. To be clear, we understand that when a biracial man makes the decision to identify as Asian, he may thereafter be subject to illegal race discrimination based on his decision. However, elective-race plaintiffs would also argue that race discrimination has occurred when the same biracial Asian–white man is denied the opportunity to identify as white. The elective-race paradigm suggests that antidiscrimination norms require that we recognize any discrimination claim that is based on the involuntary racialization of people's bodies in ways that limit their social, economic, and political opportunities. Because this approach to antidiscrimination questions allows advocates of elective race to express a legal interest in having their connections to whites or other high-status groups recognized under the law, it is deeply disturbing to some antidiscrimination scholars.

These concerns about identification with whiteness are a typical part of conversations about multiracials' interests. Undoubtedly, some white multiracials who claim whiteness do so because they are attempting to access benefits socially reserved for whites. Yet this is only one aspect of white multiracials' claims. Multiracials' claims about whiteness might also function in ways that compromise and destabilize the category of whiteness. We have little understanding about how multiracials' demands regarding whiteness will work over the long term. Some scholars predict that multiracials' expansion of the category of whiteness may result in a mere realignment of interests, with a larger group of "near whites" and whites collaborating in efforts that ensure the subordination of more clearly racially marked minority persons. However, multiracials' claims to whiteness might also work to destabilize understandings regarding how the lines of benefit and burden can be drawn in particular spaces

42. See Rich, *Marginal Whiteness*, *supra* note 10, at 1572 (discussing the ways in which the destabilization of whiteness as a social category complicates high-status whites' ability to extend the benefits of white privilege); *id.* at 1573–74 (discussing how white multiracials' inconsistently recognized right to claim whiteness can politicize them around the problem of "white privilege"). By examining the experiences of white multiracials we can interrogate the reasons that the morphologically ambiguous (those with the power to voluntarily exit certain racial categories) continue to seek means to do so or fail to correct those that mistake them as being members of a seemingly privileged racial category. Discussion must move from claims about individual expression to the ways in which these expressive interests are shaped by structural conditions. As Martha Minow explains, "To identify fluidity, change, border-crossing, and unstable categories is not to deny the real force and power that some people have accorded group labels and categories, to the clear detriment of others." Martha Minow, Speech, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 662 (1996).

in service of "whites'" interests. As I have explained in my other work, the maintenance of whiteness can become a dangerous and fraught project when whiteness norms are in flux.[43] Persons whose whiteness claims are inconsistently accommodated can become politicized around issues of race in ways that make them more willing to disclose, challenge, and dislodge existing patterns of privilege in the workplace because they have a fuller understanding of the micro-dynamics that support and maintain this privilege. Moreover, even when these near whites or marginal whites choose to socially identify as white, they may still maintain connections to the minority communities of which they are also part and be highly invested in ensuring that the existing patterns of workplace privilege that currently accrue to whites are redirected in ways that channel some of these resources to minority communities as well.[44]

In summary, proponents of elective race suggest that, rather than casting moral judgment on persons who vacillate between racial categories, we should instead ask whether their claims are based on involuntary racial-ascription processes that have caused them to be racialized in a subordinating manner. If so, then Title VII has a vested interest in disrupting these discrimination dynamics. This more generous response to individuals who have a flexible approach to racial identity may seem more persuasive when we consider that many individuals who are making inconsistent documentary racial-identification decisions may simply be attempting to fit their own discordant understandings about race into ill-fitting data-collection options. This approach also seems more persuasive when we consider that the calculations an individual engages in when making decisions about racial self-identification may evolve over time, particularly as the individual has experiences with discrimination or develops ties with minority communities. With a full understanding of elective race, we learn that consistent identification with one's minority roots is not an essential precondition for needing the protection of antidiscrimination law. We also learn that consistent minority identification is not an effective proxy for understanding who is interested in promoting racial fairness in the workplace.[45]

The discussion of laypersons' understanding of elective race ends here, and

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43. *See* Rich, *Marginal Whiteness*, *supra* note 10, at 1531–32 (explaining that marginal whites may become politicized around discrimination issues as they have experiences in which their claims to whiteness are denied). Discriminating whites also may find it hard to identify who should be treated as white in a given context and may make discriminatory comments in the presence of a person that has morphological traits that appear to be white, but the person actually claims a minority identity. *See id.* at 1531.

44. For example, although Longmire self-identified as white at work, he maintained a relationship with the minority alumni organization at his university and actively offered his assistance in securing persons of color access to opportunities on Wall Street. *See* Longmire v. Wyser-Pratte, No. 05 Civ. 6725 (SHS), 2007 WL 2584662, at *2 (S.D.N.Y. Sept. 6, 2007).

45. For a discussion of the informal, nuanced ways in which whites continuously negotiate the membership of the category of whiteness and the scope of white privilege in a given workplace, see Rich, *Marginal Whiteness*, *supra* note 10.

the discussion shifts to an analysis of institutional actors influenced by elective race that tend to have a different understanding of elective-race issues. The institutional measures that recognize the dignity interest in racial self-definition also suggest that this interest in self-definition must be defeasible in certain circumstances to accommodate the state's compelling interest in ensuring the integrity of its data-collection procedures. These data-collection procedures are designed to test patterns for race discrimination based on American racial understandings. The institutional understanding of elective race, however, suffers from certain deficiencies not linked with the layperson's account of elective race. Specifically, institutional rules that reflect elective-race understandings often fail to contend with the fact that private race—one's personally held views about racial identity—often do not match up with an individual's social-race and documentary-race choices.

2. Institutional Definitions of Elective Race

a. Formal Rules Changes. The institutional shift towards elective race is most clear when one reviews the racial-data-collection regulations the EEOC has issued to govern employers as they engage in their annual Title VII-mandated collection of demographic data to identify patterns of discrimination in the workplace. As most employment-discrimination scholars know, these regulations require each employer with more than 100 employees to collect and report information about the racial composition of its workforce.[46] In 2007, the EEOC issued instructions requiring employers to collect racial data from their employees by surveying the employees and asking them to self-identify, to elect into a racial category.[47] Typically this inquiry process takes the form of a written survey that requires an employee to check off a box (or boxes) to record his or her claimed racial identity.[48] The EEOC then compiles the data and uses it for a variety of purposes, including research. However, the data's most important purposes are to assist the EEOC in identifying the employers it must investigate for potential race and sex discrimination and to provide data to employees bringing employment-discrimination suits—to inform them about potentially broader workplace discrimination trends of which they might otherwise be unaware.[49] Importantly, prior to 2006, the EEOC had adopted a fundamen-

46. Contractors who do business with the federal government and have more than fifty employees or do more than $50,000 in business with the federal government are also subject to these requirements. *See* EEO-1 JOINT REPORTING COMM., EQUAL OPPORTUNITY EMP'T COMM'N, O.M.B. NO. 3046-0007, STANDARD FORM 100, REV. JAN. 2006, EMPLOYER INFORMATION REPORT EEO-1: INSTRUCTION BOOKLET 1 (2006) [hereinafter EEO-1: INSTRUCTION BOOKLET], *available at* http://eeoc.gov/employers/eeo1survey/upload/instructions_form.pdf.

47. These changes were made as part of changes to the EEO-1 reporting procedure. Although the changes were announced in 2005, the EEOC gave employers until 2007 to implement the announced changes. *See* Joseph Z. Fleming, *I Believe There is Something Out There Watching Us; Unfortunately, It's the Government: An Analysis of the EEOC's "EEO-1" and OFCCP Reporting Requirements*, *in* ALI-ABA COURSE OF STUDY: ADVANCED EMPLOYMENT LAW AND LITIGATION 1209, 1211–13 (2006).

48. EEO-1: INSTRUCTION BOOKLET, *supra* note 46, at 2.

49. *See generally id.*

tally different approach to racial-data collection. That is, it specifically warned employers not to ask their employees questions about racial identity; instead employers were to conduct a visual survey of each employee and assign him to a racial category based on the employer's perceptions regarding the employee's racial status.[50] The reasons for prohibiting inquiries about racial status were clear: the view of the agency was that such inquiries would invade an employee's sense of dignity and privacy.

This seismic shift in the EEOC's approach to collecting racial data took place quietly; there was no sustained outcry from litigators, employers, or workplace discrimination scholars despite the significance of this change in approach.[51] This change in EEOC policy signaled a fundamental change in the norms governing the EEOC's approach to racial-data collection and understandings of dignity and privacy. That is, prior to 2006, the EEOC concluded that dignity norms required that employers dutifully avoid making inquiries of their employees about race.[52] The EEOC believed it was far better for the employer to make these determinations about racial status based on its perceptions and report these observations to the EEOC. After 2006, however, the dignity norms shifted to protect employees' new right to racial self-identification, a dignity interest that was effectively violated if an employer made this decision for the employee. The EEOC's new view was that any discomfort caused by inquiries about racial status was something the individual should endure in order to ensure that her autonomy interests and racial-designation decisions were respected. The most significant aspect of this change for the purposes of this Article is that the old EEOC regulations privileged social race—social perceptions about an individual's racial status—over private race—an individual's personally held views about her racial identity. Additionally, the new EEOC regulations treated documentary race as identical to public race—the race the employee wanted to claim as part of his or her public identity.

Why did the EEOC shift course in 2006, privileging private race over social-

50. Fleming, *supra* note 47, at 1212.

51. First word of the proposed shift was announced in a June 11, 2003 notice. At that time, some employer groups raised questions about the change. *See* Letter from Equal Employment Advisory Council to Frances M. Hart, Exec. Secretariat, Equal Emp't Opportunity Comm'n (June 18, 2003), *available at* http://www.eeac.org/public/03-133a.pdf. In addition, Fleming reports that a few public commentators were concerned about potential employee discomfort with racial and ethnic self-identification, Fleming, *supra* note 47, at 1212, and one public commenter questioned the legality of self-identification under Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246, as amended, *see id.* at 1225 (citing Written Comments of Affirmative Action Consulting; Written Comments of Associated Industries of the Inland Northwest (on file with the author)).

52. The Office of Management and Budget indicated that its efforts since 1999 to re-examine its racial-identification policies have been guided by its desire to demonstrate respect for individual dignity and the need to facilitate racial self-identification when possible. *See* Fleming, *supra* note 47, at 1226 (citing Standards for the Classification of Federal Data on Race and Ethnicity, 59 Fed. Reg. 29,831 (June 9, 1994)). The EEOC's discussion of its decision to implement OMB recommended changes does not explicitly use the word respect, but focuses on the need to respect respondents' preferences and wishes. *Id.* at 1225–26. It explains that employers now for the first time are therefore "strongly encouraged" to rely on employee self-identification. *Id.*

race understandings?[53] An understanding of racial formation signals that we should be keenly interested in this shift in administrative understandings. The simplest answer is that the EEOC was responding to changes in the Office of Management and Budget's (OMB) Directive 15—the policy that controls racial-data-collection efforts for all federal agencies.[54] Specifically, in 1997 the OMB made changes to Directive 15 that required federal administrative agencies to adopt data-collection processes that respected individuals' interest in selecting (or electing) a racial status. Federal agencies specifically were informed that "[r]espect for individual dignity should guide the processes and methods for collecting data on race and ethnicity."[55] The OMB explained that "ideally, respondent self-identification should be facilitated to the greatest extent possible."[56] Although OMB had previously used hortatory language to this effect in other reports, in its 1997 revised directive it explicitly "underscore[d] that self-identification [had become] the preferred means of obtaining information about an individual's race and ethnicity."[57]

Although it is superficially persuasive, this story about the effect of Directive 15 is insufficiently nuanced to account for the EEOC's policy shift nearly a decade after the revised Directive 15 was issued. In fact, OMB went on record explaining that federal civil rights enforcement entities had a special interest in collecting data based on social race, and therefore they should be exempt from the new data-collection policies privileging racial self-identification. The OMB explained that although "self-identification is important to many people," it was "not the preferred method [of data collection] among Federal agencies concerned with the monitoring and enforcement of civil rights."[58] Rather, it explained, these civil rights agencies "prefer[red] to collect racial and ethnic data

53. *EEOC Revises EEO-1 Reporting Form*, EMP. BENEFITS ALERT (Willis Legal & Research Grp., New York, N.Y.), Aug. 2006, at 1, *available at* http://www.willis.com/Documents/Publications/Services/Employee_Benefits/Alerts_2006/EEOC_Revises-EEOC-1_Reporting_Form-Alert--81.pdf ("In the past, the EEOC permitted employers to determine an employee's race or ethnicity by visual observation. The revisions strongly encourage employers to ask their employees to self-identify their race or ethnicity and to rely on visual identification of an employee's race or ethnicity only when an employee refuses to self-identify."); *see also* Ross Carlson, *What You Need to Know About the EEO-1 Report*, HR TRAINING CENTER, http://hrtrainingcenter.com/readArticle.asp?AID=1000022 (last visited Jan. 28, 2014) ("Beginning with the next EEO-1 Report, the EEOC strongly endorses self-identification of race and ethnic categories, as opposed to visual identification by employers. It is no longer enough for an employer to rely on visual identification by the employer to set forth the race or ethnicity of its employees.").

54. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788–90 (Oct. 30, 1997) [hereinafter Revised Directive 15] (issuing Office of Management and Budget directive to federal agencies requiring future racial-data-collection efforts to rely on individual's racial self-identification decisions rather than third-party observation).

55. *Id.* at 58,782.

56. *Id.*

57. *Id.* at 58,785.

58. Standards for the Classification of Federal Data on Race and Ethnicity, 60 Fed. Reg. 44,674, 44,676, 44,679 (Aug. 28, 1995) (Interim Notice of Review and Possible Revision of OMB's Statistical Policy Directive No. 15).

by visual observation."[59] The OMB approved of this view, explaining that, "[s]ince discrimination is based on the perception of an individual's race or Hispanic origin," this was the best approach to data collection for organs charged with responsibility of enforcing laws prohibiting discrimination.[60] This understanding appears to have persisted for several years after the 1997 changes because the EEOC did not change its data-collection policies to privilege elective race until 2006. Consequently, there must be other factors that account for the shift in understanding, rather than a simple story about the EEOC deciding to follow the requirements of the revised version of Directive 15.

Racial-formation scholars would next look to the influence of social movements to explain the EEOC's shift in policy. That is, they would point to the numerous multiracial social advocacy groups petitioning for accommodations in the 2000 Census as having spurred the EEOC's change in policy. These multiracial advocacy groups specifically petitioned the federal government to create a multiracial category for the 2000 Census to allow individuals more choice in making elective-race decisions. Certainly, it is possible, given the multiple public hearings on these issues, that these advocacy groups shaped the opinions of EEOC officials in addition to shaping the OMB's perspective.[61] Finally, one might cite America's ugly history of forced racial assignment and litigation protecting the status of whiteness as motivating EEOC officials to move away from involuntary categorization regimes. Ariela Gross's work on the whiteness trials of the nineteenth century uncovers the painful history of forced racial assignment and the material and social consequences of being denied the ability to self-identify into a privileged racial category.[62] Similarly, Ian Haney López's immigration history documenting the exclusion of brown bodies based on their failure to qualify for whiteness reveals America's painful past of not honoring individuals' racial-election decisions.[63] Angela Onwuachi-Willig's work, as well, emphasizes this point, as everything from citizenship to immigration to the legal enforceability of one's marriage[64] turned on race determinations in which the individual's racial-election choices carried little weight and were

59. *Id.* at 44,679.

60. *Id.* Interestingly, the need to collect information about social race even affected the OMB's decisions regarding which racial categories they recognized under Directive 15, because the "[civil rights] agencies oppose[d] any changes that would make it more difficult to collect data by observation." *Id.* It was argued that, if Directive 15 included a multiracial category, it would be nearly impossible for data collectors to make determinations about who properly belonged in this category. *Id.*

61. *See* Scot Rives, *Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1305 & n.3 (2011) (contextualizing the victory for recognition of multiracial status in light of former legal categories for octoroons and quadroons).

62. *See generally* Gross, *supra* note 23 (analyzing court definitions of "whiteness" in racial-determination cases concerning slave codes in the late nineteenth and early twentieth centuries).

63. *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (analyzing court-constructed definitions of race in citizenship cases in the late nineteenth and early twentieth centuries).

64. *See, e.g.*, Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CALIF. L. REV. 2393 (2007); *see*

routinely rejected. Consequently, even if policymakers at the EEOC had reservations about the shift to elective race, they may also have had reservations about preserving a regime that forced people into racial categories without their consent.

The EEOC's new-found discomfort with involuntary racial classification marks the EEOC's current data-collection regulations in significant ways. First, employers are advised to premise their inquiries with some form of qualification, explaining that they are only soliciting information about race because they are required to maintain statistics by the federal government.[65] Additionally, employers are strongly advised to segregate the information about an employee's race from the employee's employment file to ensure that these elective-race decisions do not become a basis for discrimination. Inquiries at the pre-employment stage are tightly controlled, as are those that are made post-hiring.[66]

Importantly, however, though the EEOC's discomfort with involuntary classification shapes the new data-collection regulations in important ways, the EEOC did not entirely abandon its understanding about the importance of social race. Employers are still permitted to racially classify employees, but only in exigent or special circumstances. First, the regime permits an employer to racially classify an individual on its own if the individual declines to state or refuses to identify himself by race. It also permits employers to racially classify employees when it is impractical to collect self-identification data from workers.[67] Last, and perhaps most controversial, the new regulations give employers the ability to reclassify an employee if he or she is engaged in racial fraud[68]—when the employee has no credible basis for making certain claims about his or her racial identity. The EEOC, however, has declined to provide specific

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generally Kevin Noble Maillard, *The Multiracial Epiphany of* Loving, 76 FORDHAM L. REV. 2709 (2008) (discussing pre-*Loving* miscegenation cases as evidence of legally prohibited interracial unions).

65. Fleming, *supra* note 47, at 1213.

66. The strongest evidence that elective-race decisions give rise to discrimination are cases in which employees complain that documentary evidence about racial status became a basis for discrimination, even when the employer never had the chance to physically see a given employee. *See infra* note 179 and accompanying text.

67. *See* EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 632.3, VIOLATIONS INVOLVING ADVERTISING, RECORDKEEPING, OR POSTING OF NOTICE, CCH-EEOCCM ¶ 5403, 2009 WL 3608161 (2012) [hereinafter EEOC COMPL. MAN.] (noting that when an employee fails to provide racial information after being requested to do so, the employer may rely on visual observation); *see also* Fleming, *supra* note 47, at 1226 ("Employers may use employment records or visual observation to gather race and ethnic data for EEO-1 purposes only when employees decline to self-identify.").

68. *See* EEOC COMPL. MAN., *supra* note 67. The manual explains that "the person attempting to secure information regarding race, sex, or ethnic affiliation should not second guess or in any other way change a self declaration made by an applicant or employee as to race, sex, or ethnic background. *An exception to this rule can be made where the declaration by the applicant or employee is patently false.*" *Id.* (emphasis added).

guidance on when an employer is authorized to make a claim of racial fraud.[69]

The residual right that an employer has to challenge racial fraud is a product of America's antidiscrimination history. Indeed, the employer's right to challenge racial fraud most likely derives from early contests over affirmative action programs, when "socially white" persons began to mine their genealogical backgrounds to identify a minority relative to qualify for affirmative action benefits. The most famous and possibly most notorious example was that of the Malone Brothers, two firefighters who were socially white but claimed to have a black grandmother to qualify for an affirmative action program.[70] There were numerous cases involving such claims in the 1980s. To prevent a resurgence of this problem, employers were given authority and power to challenge employees' racial-classification claims in certain circumstances. Yet many of today's contests over racial self-identification and affirmative action do not bear any similarity to the strategic gamesmanship associated with the Malone Brothers. Rather, they often reveal difficulties with defining and administering regimes recording documentary race, as opposed to social race—the concept of race to which affirmative action programs historically have responded.

b. Interpreting the Formal Rules: Institutional Elective-Race Understandings. What can we learn about elective race from the EEOC's changes in data-collection efforts? First, the regime recognizes an extremely strong interest in self-determination and dignity. We have moved from a "Don't Ask, Don't Tell" regime—one that allowed the employer free reign to racially categorize employees with no requirement of disclosure to the employees—to one that gives an employee sole power to define his or her racial identity for administrative purposes, as long as no allegations of malfeasance are involved. As noted, the EEOC regulations explain that, in most circumstances, an employer may not reclassify an employee absent evidence of malfeasance or racial fraud.[71] This understanding about the strong right an employee has to racial self-definition

69. This problem is not particular to workplace affirmative action programs. One sees similar inconsistent patterns of identification in the education context because admissions officers are aware that multiracial persons often elect to be counted as black or minority in their admissions materials to selective schools but opt out of the racial minority category once enrolled. *See* A. T. Panter et al., *It Matters How and When You Ask: Self-Reported Race/Ethnicity of Incoming Law Students*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 51, 58 (2009) (describing a study in which a sample of mixed-race LSAT takers changed their individual racial-identity selections by the time they enrolled in law school). In my earliest work on race, I argued that, as it begins to appear that benefits accrue to a person as a consequence of being a member of a racially subordinate group, one can expect to find that greater numbers of people will publicly claim membership in that group. Rich, *Performing Racial and Ethnic Identity*, *supra* note 24, at 1157. Half a decade later, I amend this claim to note that individuals are more likely to recognize a connection to a subordinated group as it gains resources, particularly if they can do so in a manner that does not have broad social implications. Documentary-race decisions are perfect in this regard, as the individual's racial-election choice does not have to be disclosed to third parties other than her employer, and her selective, semi-private disclosure to her employer allows her to secure affirmative action or diversity program benefits.

70. *See* Rich, *Affirmative Action*, *supra* note 10, at 198–208.

71. *See supra* note 68.

can be seen as proof of the influence multiracial groups had on EEOC officials. However, these rules may also be a reaction to the United States' ugly history of enforcing whiteness standards. By discouraging employers from challenging employee's racial-identification decisions, the EEOC arguably attempted to prevent its new regulations from being used by employers to enforce whiteness standards or other standards for racial categories under the guise of data-collection efforts.

Second, the EEOC shift to a self-identification regime signaled a shift in the government's understanding of racial privacy. The old understanding of racial privacy—that employees had a right not to be questioned about racial matters—was retired. What arose in its place was a different understanding of racial privacy, one that made privacy a procedural matter, ensuring that racial data was carefully solicited and segregated from a worker's employment file. For example, employers were cautioned about questioning employees about racial-identification information pre- or post-hiring in an inappropriate manner, and they were encouraged to explain that a government mandate required them to collect this information. Additionally, employers were cautioned to segregate any racial information collected from a worker pre- or post-hiring, lest the employee's racial identification become a basis for discrimination.

Third, though the new data-collection regime privileges employee dignity and privacy over other important issues, it is also equally clear that the government has a countervailing interest in eliminating racial discrimination that limits its willingness to accommodate employees' dignity claims in certain circumstances. For example, when the individual declines to identify his racial status, or it becomes impracticable for an employer to collect this information, the employer is required to address the government's need for a complete data set by resorting to visually surveying his workers. The employer cannot simply decline to provide information about a particular group of employees. The regime therefore implicitly recognizes that an individual can be required to bear the burden of involuntary racial classification to assist the state in its goal to eliminate discrimination. In addition, the EEOC's decision to allow employers to challenge racial fraud reveals that the employee's right to self-identification is limited. In these circumstances, the government is apparently protecting its interest in an accurate data count from individuals engaged in making strategic identity claims. These understandings about the limits on employees' right to self-identification would provide fertile ground for discussion of countervailing interests and pressures that counsel against an understanding that an employee should have broad, unfettered rights to determine how his racial identity is understood.[72] However, thus far they have not been a part of the discussion

72. What is troubling about the current data-collection regime is that it ends up conceptually muddying the racial data collected because it ensures that the data will be a mix of different kinds of racial-identification information. Under the current standards, the data will include certain employees' understandings of public race (the race these employees claim publicly), as well as documentary-race

about elective-race understandings.

Fourth, the new EEOC data-collection regime seems to create a right to racial self-definition with a strange underlying valence. By requiring the government and the employer to honor the employee's identification choices, this right is premised on the idea that the employee is entitled to quasi-public recognition of her chosen racial status. However, the regulations also seemingly demand that an employer respect the employee's right to racial privacy by segregating the employee's racial information. Indeed, some experts read the regulations as placing an affirmative duty on the employer to prevent an employee's racial-identity choices from being discovered.[73] These warring demands for recognition and privacy would not be inconsistent if the employer was simply viewed as a temporary custodian, forwarding the employee's private identity claims to the government. However, this is not the way that the racial data the EEOC requires to be collected is ultimately used by the employer. Rather, employers are expected to pay attention to this data to head off discrimination patterns once they see them developing. Consequently, the employer negotiates a strange process which both charges him with making use of this racial data while simultaneously keeping it confidential from other decision makers.[74]

In short, the EEOC data-collection efforts show clear evidence of the influence of elective race, but the regime also reveals certain tensions in the interests elective-race plaintiffs bring to bear when they claim a privacy interest in racial information.

II. ELECTIVE RACE'S DESCRIPTIVE POWER

Part II explores elective race's descriptive power, arguing that it promises to enrich rather than compromise conversations about antidiscrimination law. Specifically, I show how a better understanding of the fundamentals of the elective-race framework allows us to (1) recognize connections between important areas of workplace race-discrimination scholarship concerning the social construction of race, and (2) render visible constituencies that thus far have been underrepresented in the antidiscrimination literature.

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decisions (private views about race that the employees may only be willing to disclose on a form that provides confidentiality protections), and social race (reports based on an employer's visual assessment of certain employees).

73. *See* Fleming, *supra* note 47, at 1213. Responding to a proposal that would offer a multiracial box followed by the additional question of the respondent's component racial ancestry, Susan Graham of Project RACE stated that it would be an "invasion of privacy with no justification" to have mixed-race people mark the component categories of their racial ancestry. *Review of Federal Measurements of Race and Ethnicity: Hearings Before the Subcomm. on Census, Statistics & Postal Pers. of the H. Comm. on Post Office & Civil Serv.*, 103d Cong. 120 (1993) (statement of Susan Graham, Executive Director, Project RACE).

74. Fleming, *supra* note 47, at 1238 (explaining that racial information should be "kept separately from the employee's basic personnel file or other records available to those responsible for personnel decisions").

A. SCHOLARSHIP

In order to provide a nuanced account of elective race, one must draw on seemingly disparate areas of race-discrimination scholarship that would otherwise appear unrelated. However, elective race provides us with a unifying framework that demonstrates important connections between these different fields. Unfortunately, most of the scholarship that has engaged with themes in elective race has thus far focused on how the rising interest in racial self-identification threatens accurate census counts and thus threatens enforcement of antidiscrimination law.[75] However, one sees evidence of the growing ascendance of elective-race understandings in many other areas of research as it shapes EEOC enforcement guidelines and Title VII doctrine. Additionally, similar elective-race questions have surfaced in cases in which racially ambiguous persons are the subject of *Batson* challenges or juror disqualification disputes, and in Title VI racial-data-collection disputes involving colleges and other institutions of higher learning.[76] By focusing our attention on the growing significance we attach to the right of racial self-identification across various contexts, we can provide a more comprehensive account of the influence of this ideological shift, as well as think more critically about the spaces in which racial self-identification interests pose challenges and how we might accommodate these concerns.

Another key intervention the elective-race framework makes in existing antidiscrimination scholarship is that it disrupts dated accounts that posit that individuals who make controversial racial self-identification decisions are engaged in acts of racial passing[77] and racial fraud.[78] These terms are simply too reductionist to account for the complicated and fraught racial-identification decisions contemporary workers make as they negotiate race in the workplace.

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75. *See infra* notes 158–59.

76. *See generally* Leong, *supra* note 33; Rich, *Decline to State*, *supra* note 10.

77. *See, e.g.*, Kevin Noble Maillard & Janis L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 LAW & INEQUALITY 305, 312–13 (2008) (describing traditional accounts of passing and recognizing need for more complex models); Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL'Y REV. 297 (2000) (arguing passing, as originally conceptualized, is built on norms that support white supremacy); Yang, *supra* note 36, at 377–80 (exploring the complex data-collection problems created by multiracial individuals or phenotypical individuals who pass for white or as members of another racial group).

78. *See, e.g.*, Yang, *supra* note 36, at 387–97 (using the lens of fraud to discuss conundrum faced by legal decision makers and administrators when an individual claims a racial identity that does not match how she is regarded in the community). The most famous case involving racial fraud in the employment-discrimination literature is *Malone v. Civil Service Commission*, 646 N.E.2d 150 (Mass. App. Ct. 1995), in which the City of Boston terminated two firefighters who secured employment pursuant to a court-mandated affirmative action program because they claimed to be "black." *Id.* at 151. Because the fire-fighters' sole basis for their claim rested on tenuous evidence that they had a black great-grandmother, the court affirmed the decision terminating their employment and ruled they had engaged in a kind of racial fraud. *See id.* at 154–55. For further discussion of the Malone case, see generally Rich, *Affirmative Action*, *supra* note 10 (comparing the Malone brothers' racial-identity claims with Elizabeth Warren's racial-identity claims and exploring employers' discretion and responsibility to define racial categories).

Multiracials, phenotypically ambiguous persons, and racial liminals weigh numerous factors when they decide to racially identify in a particular way. Their resort to fluid approaches to self-identification seem less morally culpable when we consider our tolerance of fluid identification patterns in other areas. For example, many people recognize that a gay person may identify as straight during a period of life when partnered in a heterosexual relationship, or as bisexual, or questioning, or gay. These labels change depending on context and life circumstances. Indeed, similar to multiracials, an individual's response regarding his sexual orientation may change depending on the specific questions asked, the context in which answers are given, or recent life events that shape the individual's consciousness. There are similar patterns in religious identities. Persons from families of two faiths may choose a mono-faith label in certain contexts and may change their answers depending on the level of religious practice in which they engage or in response to life events. The elective-race framework allows us to understand that the same dynamics shape Americans' racial-identification choices, relying on scholarship from sociology and psychology about the lived experiences of multiracials, racially liminal persons, and phenotypically ambiguous persons to flesh out a portrait of these persons' experiences. In this way, it allows for more nuanced conversations about the challenges and opportunities Americans' new emphasis on racial self-identification create for the enforcement of workplace race-discrimination statutes.

Additionally, the elective-race framework highlights the thus far unappreciated connections between the autonomy, dignity, and privacy questions raised in several categories of race scholarship. Specifically, it contextualizes the work of employment-discrimination scholars interested in the unique discrimination faced by multiracials. The elective-race framework allows us to contextualize multiracials' concerns as simply one set of problems that individuals face as they negotiate regimes requiring racial self-identification. Specifically, scholars focused on multiracials contend that Title VII doctrine is insufficiently nuanced to attend to the dignity interest in being legally and socially recognized as multiracial and the unique kinds of discrimination that claiming a multiracial identity can trigger.[79] The elective-race framework allows us to understand that these cases are related to other cases in which plaintiffs experience workplace

79. The number of law review articles specifically exploring the unique discrimination issues faced by multiracials is relatively small. *See, e.g.*, Hernández, *supra* note 9 (arguing in the context of census data-collection efforts that multiracials' fluid approaches to racial identity threaten to compromise the enforcement of civil rights laws); Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 508–18 (2010) (discussing courts' inadequate analyses of mixed-race Title VII plaintiffs' claims because of courts' refusal to seriously credit self-identification claims and their use of rigid racial categories); Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1753 (2003) (arguing in context of census data-collection efforts that multiracials' emphasis on racial self-identification compromises the effort to accurately assess the prevalence of racial discrimination); Rives, *supra* note 61, at 1334–40 (urging more serious recognition of individuals' racial self-identification claims and the recognition of multiracials' interests as distinct from biracial persons).

conflict when they challenge institutional mechanisms for assigning racial identity. My approach to elective race, however, also sounds a corrective note because only a small fraction of mixed-race persons are affected by discrimination stemming from the fact that they specifically identify as multiracial. Again, the social science literature clearly indicates that multiracials opt, in various contexts, to be counted as monoracial rather than multiracial, and they often claim membership in different monoracial groups depending on the timing and context of inquiries about their racial status.[80] It also establishes that many multiracials shift between monoracial identities and gravitate (sometimes passively, sometimes actively) into the racial category that is most comfortable or socially advantageous in a given context.[81] Consequently, the elective-race framework assumes that many individuals will fluidly move between racial identities.

By recontextualizing the work on multiracials, the elective-race framework forces engagement with some of the serious background questions that thus far have not been engaged with by scholars of multiracial discrimination. These questions include: (1) How should antidiscrimination law parse through individuals' inconsistent, strategic identification patterns when they bring discrimination suits? (2) Should persons with inconsistent self-identification patterns be eligible for all or only some antidiscrimination protections or benefits, and under what circumstances should their claims of racial identity be honored? Perhaps most important, it forces engagement with unarticulated questions at the heart of scholarship on multiracialism in the workplace: does Title VII provide any relief for the special racial autonomy or racial-privacy claims raised by persons who insist that their interests in racial self-identification have been thwarted?

The elective-race framework also brings additional insight to the legal literature on the performative or voluntary aspects of racial and ethnic identity. Indeed, scholars working in this area have argued that courts should respect the dignity interests individuals have in voluntary or elective race-associated behaviors, particularly those that clearly signal that one identifies as a member of a particular racial group. Elective race will enrich this scholarship on race perfor-

80. David L. Brunsma, *Public Categories, Private Identities: Exploring Regional Differences in the Biracial Experience*, 35 SOC. SCI. RES. 555, 573 (2006) (explaining that there is a difference between how "biracial people understand themselves racially and the ways that the[y] wish to present and manifest themselves in other contexts" (emphasis omitted)); Harris & Sim, *supra* note 31, at 623 (discussing inconsistent and context-dependent racial self-identification decisions of multiracials); Marie L. Miville et al., *Chameleon Changes: An Exploration of Racial Identity Themes of Multiracial People*, 52 J. COUNSELING PSYCHOL. 507, 514–16 (2005) (discussing mixed-race persons' tendency to shift between monoracial identities in a strategic fashion).

81. Sociologists also note that multiracials' identification patterns are highly contingent on the form and content of racial-data-collection form questions. *See* Leong, *supra* note 33, at 4 (discussing multiracials' inconsistent reactions to data-collection forms when identification options are overly restrictive). Latinos also make different identification decisions depending on the questions posed in racial-data-collection forms. ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, C2KBR/01-1, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF (2001) (discussing Census officials' attempt to revise forms to secure responses from Latinos that accord with American definitions of race).

mance by highlighting the way that administrative inquiries about race serve an important identity-performance role for many persons. The account offered here, however, complicates the current discussion of administrative identity-performance moments, for these administrative decisions about racial identity may play the same role as public declarations of race, or they may function quite differently. For example, like any other public declaration of race, when a worker discloses information about his racial self-identification choices in the data-collection context, this information can play a key role in racially marking his previously phenotypically indeterminate body and trigger workplace race discrimination.[82] However, in other circumstances, the worker may choose to keep his administrative racial-identification decisions private from everyone save his employer, but still value this act as a key symbolic act or identity-performance moment. The question is, does the employer engage in race discrimination when he deprives an employee of this key, private, and symbolic interest? Does the employer have an obligation to respect this interest even if the employee's racial-identification claims compromise our ability to measure diversity and discrimination in the workplace? In order to negotiate these questions, we require a vocabulary to understand the discrete interests individuals have in public versus private acts of racial identification. Part II provides this framework.

Scholars familiar with my work will also recognize that elective race functions as an umbrella that unites several of the research questions that I have engaged with over the years, namely theorizing about the experiences of persons with partial access to white privilege, who find that their relationships with whiteness shift and change across time and context. These individuals may have a relationship to white privilege because they phenotypically "accidentally" fall into that category because of multiracial heritage, or because American systems of racial classification make them technically white though the label has little meaning for them. Elective race provides another framework for discussing these near-white persons' experiences in a way that stresses the importance of personal agency, while simultaneously recognizing the social subordination that may be triggered by these expressive acts. Additionally, the elective-race framework connects these voluntary acts of racial and ethnic self-identification with issues of social structure, demonstrating that, rather than being merely expressive in nature, acts of racial self-identification are always political and always a signaling mechanism providing evidence of the extent

82. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 131 (2006) (describing penalties suffered by minority workers who fail to conform to white assimilationist workplace norms); Carbado & Gulati, *supra* note 9, at 1306 (discussing workplace institutional and structural constraints that tend to disadvantage persons who engage in racially marked voluntary practices); Rich, *Performing Racial and Ethnic Identity*, *supra* note 24, at 1158–66 (discussing voluntary or elective features of racial identity as a trigger for discrimination); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 154 (1997) (noting the clash between the state's regulatory judgment and one's right to "define one's own conception of the self").

and nature of race-based discrimination in a given social context.

B. CONSTITUENCIES RENDERED VISIBLE BY ELECTIVE RACE

The elective-race framework provided in this discussion relies heavily on social science literature accounts of race that thus far have not been synthesized in legal antidiscrimination literature; consequently, it functions as a powerful descriptive tool, rendering visible the interests of three currently under-theorized groups that rely on antidiscrimination protections: (1) multiracials; (2) monoracial persons with phenotypically ambiguous characteristics; and (3) racial liminals (or conscientious objectors to American racial and ethnic categories). Section B treats each constituency in turn. As explained below, in some cases these three groups will overlap. For example, multiracial workers may be phenotypically ambiguous, or racial liminals may also be phenotypically ambiguous. However, the categories are offered as a way of understanding the primary animating concerns of persons in each group and how their interests are attended to by discussions of elective race, which privilege the importance of individual agency in racial self-definition and ways in which elective race or racial self-identification decisions can trigger race-based social sanction.

1. Multiracials and Elective Race

The first constituency that will benefit from elective-race discussions is multiracials—persons who have parents who each identify with a different monoracial group but, for various reasons, find themselves identifying with one or both monoracial categories in different contexts or claiming a distinct multiracial label for themselves. Given the attention multiracials have received in popular press in recent decades, it seems relatively surprising that the number of legal scholars discussing the discrimination experiences of multiracials is relatively small. Nancy Leong offers the most detailed treatment of multiracials' discrimination claims, focusing on the challenges they face in Title VII workplace discrimination cases.[83] Her work provides us with the first rigorous treatment of multiracials' discrimination experiences and their concerns about racial-data-collection regimes. In this way, her scholarship helps render visible some of the challenges multiracial people face when they attempt to honor their multiracial heritage. Leong's goal is to demonstrate how the decision to self-identify as multiracial can have material consequences and, further, that Title VII has been interpreted in ways that make it unable to address multiracials' needs.

Leong's analysis, however, is based on the proposition that multiracials often trigger discrimination precisely because they identify as multiracial, and this decision threatens persons who claim monoracial labels.[84] Although persons who are multiracial do face this kind of adverse treatment because of their

83. *See generally* Leong, *supra* note 79, at 508–20.
84. *Id.* at 520–21.

elective-race decisions, many other persons experience discrimination because of their racial-identification patterns as well. Additionally, Leong's analysis fails to directly address what many scholars argue is the primary approach multiracials take with regard to racial self-identification. As the sociological research on racial identity indicates, rather than self-identifying as multiracial, multiracials tend to shift between monoracial and multiracial identities depending on context.[85] Indeed, when their physical characteristics allow them to do so, they will elect into one of several different monoracial racial categories, opting into whatever monoracial category best serves their needs in a particular context. As one might expect, this constituency's approach to the process of racial identification presents special challenges for antidiscrimination law.

This proposition requires further discussion. In their seminal article, *Chameleon Changes*, Miville, Constantine, Baysden, and So-Lloyd suggest that multiracials' elective-race decisions present challenges for courts expecting individuals to adopt a stable, consistent approach to racial identity.[86] The researchers conducted detailed interviews with ten multiracial adults and found that many of their interview subjects freely admitted to variously identifying as monoracial or multiracial depending on the context in which they found themselves.[87] The researchers also discovered that several individuals seemed disinclined to openly identify as multiracial because the multiracial designation was primarily a way they privately described themselves, not a label they claimed in public contexts. The authors also discovered that a wide range of factors affect multiracials' decisions about racial identity, including demographic variables, social habitus (the racial composition of the social network one lives in), and the presence of a visible multiracial community. The interview subjects explained that, when they found themselves in contexts that did not seem to support racial ambiguity, they tended to opt into a monoracial category. Finally, the interviewees noted that experiences with racism tended to play a key role in motivating those who might otherwise have identified as white to choose to adopt the same racial identity as a minority parent.[88]

Although the Miville sample size was small, their results have been confirmed in larger scale studies. In perhaps the most comprehensive study of the subject, sociologists David Harris and Jeremiah Sim reviewed the conflicting racial self-identification decisions of multiracial teenagers by examining the survey results from a representative sample of 18,924 teenagers who responded

85. *See* sources cited *infra* notes 86–89 and accompanying text.

86. *See* Miville et al., *supra* note 80, at 512–14.

87. *See id.* at 509–12 (describing some multiracials' strategy of gravitating back and forth between monoracial identities). As Kerry Rockquemore and David Brunsma explain, some multiracials "move fluidly between black, white, and/or biracial identities, calling forth whatever racial identity seems situationally appropriate in any particular interactional setting and cultural community." Kerry Ann Rockquemore & David L. Brunsma, *Socially Embedded Identities: Theories, Typologies, and Processes of Racial Identity among Black/White Biracials*, 43 Soc. Q. 335, 338 (2002).

88. Miville et al., *supra* note 80, at 514–15.

to the National Longitudinal Study of Adolescent Health.[89] The survey requires respondents to complete multiple questions that ask individuals to identify by race and to complete these identity questions in different environments. Consequently, Harris and Sim were able to use the survey to track whether multiracials tended to adopt a consistent approach in answering self-identification questions.[90] Harris and Sim discovered that many individuals who claimed a multiracial identity in at least one context chose a monoracial identity when asked the same question in another environment.[91] For example, while 6.8% of the teenagers in the national sample identified as multiracial when asked about race at school, only 3.6% reported being multiracial when asked to identify by race while they were at home. Interestingly, only 1.6% of their sample identified as multiracial in both contexts (in home and at school). Additionally, only 1.1% of the sample identified themselves as having the exact same racial ancestry when asked these same self-identification questions in different contexts. Taken together, the data reveals two problems multiracials present for antidiscrimination law, neither of which has been analyzed in the antidiscrimination literature. First, multiracials make different racial-identity selection decisions in different environments.[92] Second, multiracials often choose single-race identity categories to describe themselves in data-collection forms, despite their private commitment to describe themselves as multiracial.[93]

Further proof of multiracials' migration between different race categories was provided by other data in the study. Harris and Sim discovered that some apparently multiracial teenagers did not identify as multiracial at all, but instead signaled that they had a mixed-race background by shifting which monoracial identity they claimed when asked to racially self-identify in different social contexts.[94] Importantly, the researchers noted that this mixed-race population tends to be wholly invisible in studies where individuals' responses are not compared across contexts; they are silently absorbed in statistics reporting the

89. Harris & Sim, *supra* note 31, at 616–18.

90. *Id.* at 618–19. Specifically, the teenagers surveyed were asked to complete racial self-identification questions at home and at school, and a third response was to be generated by the primary caregiver of the child. *Id.* at 616.

91. *Id.* at 619. The authors found that 8.6% of survey respondents reported being multiracial when questioned at school or at home. In contrast, only 1.6% reported themselves as being multiracial across two surveys—one delivered at school and the second delivered at home. *Id.* Moreover, only 1.1% selected the same combination of racial categories in both their home and school responses; 75% of the persons reporting that they were multiracial at school were not reporting that they were multiracial when polled at home. *Id.* Finally, 54% of those who reported that they were multiracial at home did not report that they were multiracial at school. *Id.*

92. *See* Rockquemore & Brunsma, *supra* note 87, at 338.

93. *See, e.g.*, Panter et al., *supra* note 69, at 63–65.

94. When home and school responses were examined, 2.8% of respondents shifted the monoracial group with which they identified. The authors note that this group of multiracials is wholly invisible (indistinguishable from monoracial respondents) in studies that do not compare racial self-identification decisions across contexts. Harris & Sim, *supra* note 31, at 619.

number of persons in monoracial categories.[95] Again, this phenomenon has not been remarked upon in the law review literature on multiracials and their experiences of discrimination. Instead, discussion has focused on the consequences of identifying as multiracial at work and the doctrinal problems multiracials encounter when they raise discrimination claims.

The research on multiracials shows the compelling need for an account of antidiscrimination law that incorporates plaintiffs' fluid racial-identification decisions. Courts that encounter plaintiffs with shifting claims about racial identity are likely to be skeptical of claimants in the absence of a descriptive account that normalizes and contextualizes these racial-identification decisions. Moreover, the research suggests that the shifting patterns of racial identification among multiracials is not purely expressive but may provide insight into larger cultural and structural dynamics that interplay with racism. Specifically, Natalie Masuoka explains that demographic factors account for some of the variations they found in multiracials' identification patterns, with multiracial identification being far more common in the West in the United States.[96] They also noted that different testing instruments can shape the responses a multiracial respondent will provide. However, their most important insight was that individuals seemed more willing to claim a mixed-race identity in circumstances in which they believed that the identity claims they were making could not be easily attributed

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95. *See* Vasquez, *supra* note 30, at 62–65. Vasquez quotes a mixed-race white–Hispanic woman as saying:

> If it's the Junior League or something like that I . . . probably would put white and ignore the Hispanic part. Because I just feel like the people there would judge me, "Oh, a Hispanic, how nice, what diversity" [sticky sweet and sing-song voice]. In high school I played tennis a lot and we'd go to the tennis club in Montecito [high-class neighborhood], I wouldn't highlight the Mexican part. . . . I don't need that kind of judgment. In those situations, I'd probably just put white. Then white-slash-Mexican American probably for job applications or [if] I feel like people really would have an open mind or encourage diversity.

Id. at 61 (alterations in original).

96. *See* Natalie Masuoka, *Political Attitudes and Ideologies of Multiracial Americans: The Implications of Mixed Race in the United States*, 61 POL. RES. Q. 253, 257 (2008). For example, family structure plays a role. Harris & Sim, *supra* note 31, at 623 ("[W]e cannot reject the hypothesis that neighborhood effects are a proxy for unobserved aspects of family culture and socialization."). Persons not living with their biological parents were more likely to identify as multiracial when compared with those living with their biological parents. *Id.* at 620. Other researchers, concentrating on adult multiracials, have found evidence that social class plays a critical role, with wealthier individuals being more likely to claim mixed-race or white identities. Finally, all of these self-identification decisions are deeply affected by the individual's phenotype; the morphologically ambiguous apparently feel better able to make complex and shifting racial self-definition decisions. For further discussion, see Gullickson & Morning, *supra* note 32, at 505 (explaining that multiracials with Asian ancestry are more likely to claim a multiracial identity than mixed-race people of combined black and white or white and Native American ancestry); *see also* Harris & Sim, *supra* note 31, at 622 (finding support for the hypothesis that "the relatively small social distance between whites and Asians provides white/Asian youth with the freedom to choose between monoracial identities in contexts where a multiracial identity is unacceptable"); Liebler, *supra* note 32, at 702 (noting that "racial identification among people with mixed-heritage is affected by the social world beyond individual psychology and racial ties within the family").

to them. That is, individuals were more willing to identify as multiracial when they believed that there would be no social or material consequences that flowed from invoking a mixed-race identity. Indeed, the lack of willingness to be forthcoming about one's mixed-race background may be a clear signal that there is a concern about race discrimination in a particular space.

This proposition requires further discussion. Specifically, the Harris and Sim study encourages us to read multiracials' fluid racial-identification claims through a political lens because voluntary identification with a particular racial group is directly tied to contemporary social structure and political culture. For this reason, the elective-race account punctures the expressive claims made by those invested in procedures that allow for racial self-identification. Certainly, one finds that many of these multiracial individuals choose whiteness and see their decisions as purely innocent and expressive in nature. However, Harris and Sim's analysis encourages us to see these identity claims as a product of social experience and social location. Indeed, multiracials' racial-identity decisions may be the most profound evidence we have of the continuing influence of white privilege—that is, that we still live in a society in which individuals believe that there is value in being recognized as a white person.[97] Tanya Hernández expands on this claim, arguing that there is a desire for whiteness behind individuals' desire to choose a *multiracial* identity because the multiracial category preserves the individual's partial link to whiteness, and this partial hold on whiteness is still perceived to confer status benefits.[98]

Indeed, the elective-race framework will bring new clarity to many workplace skirmishes around the definition of whiteness. For example, it makes clear why a biracial white person may wish to bring suit when he finds out that his white employer has counted him as minority in order to bolster the employer's diversity statistics, despite the fact that the worker has consistently socially identified as white in his workplace. Additionally, the framework allows us to better understand cases in which a multiracial worker experiences sanction or retaliation from white coworkers because of her failure to identify as a

97. The literature on mixed-race phenotypically ambiguous persons who socially identify as white has typically been discussed under the rubric of passing. Passing is described as an active process of self-definition, one that requires selective disclosure and concealment. *See, e.g.*, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 285 (2003) (arguing that "passing requires that a person be consciously engaged in concealment"); *see also* Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001) [hereinafter Kennedy, *Racial Passing*] ("Passing is a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct."); Maillard & McDonald, *supra* note 77, at 315–16 (distinguishing between active and passive "passing"); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 70 (1997) ("Passing reflects the individual's attempt to gain acceptance by hiding his or her identity and conforming to the dominant culture's expectations."); Westley, *supra* note 77, at 307 ("'Passing' has been defined as crossing the race line and winning acceptance as [W]hite in the [W]hite world.").

98. Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the "Diversity" Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 266 (2007); Hernández, *supra* note 9, at 115–21.

minority person. In both of these hypothetical cases, the whites involved in sanctioning the employee are policing the definition of whiteness. Importantly, in both of these hypothetical cases, the harassing parties involved may be using data-collection inquiries as a vehicle for discrimination. The general proposition illustrated by these examples is simple: an individual's "elective act" (demanding recognition of his right to claim a particular racial identity) may be the primary trigger that causes him to experience race discrimination in a variety of circumstances. The elective-race framework allows us to identify these various discrimination threats and assess changes that could be made to Title VII doctrine to better address elective-race plaintiffs' needs. The discussion in this way provides concrete assistance to courts as it outlines and explains the interests at stake in elective-race conflicts in a way that makes their connection to antidiscrimination norms clearer.

Thus far, biracials or multiracials in these cases have often had their claims folded into a category of discrimination described as "intra-racial" conflicts—conflicts triggered when members of a particular racial or ethnic group reject the membership claims of a perceived interloper who asserts that he is racial kin.[99] Historically, most of these cases have concerned conflicts between members of minority groups. The paradigmatic example in the law review literature tends to involve a group of black workers refusing to permit a light-skinned black person to identify as black.[100] The elective-race framework will involve similar claims but radically different plaintiffs. Intragroup discrimination can also involve white multiracials who claim to have suffered discrimination when their claims of whiteness are rejected by an employer or other workers in the workplace. I have elsewhere described these legal conflicts as suits involving marginal whites, low-status mixed-race or ethnic whites denied the ability to claim a white identity by other whites.[101]

The data on multiracials also suggest that our understanding of the elective-race framework must include a more nuanced vocabulary for understanding

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99. *See, e.g.*, Kendall v. Urban League of Flint, 612 F. Supp. 2d 871, 871 (E.D. Mich. 2009) (discussing claims of biracial woman applying for job as CEO of the Urban League concerning challenges from her interviewer as to the validity of her claim to identify as black); Walker v. Sec'y of the Treasury, 713 F. Supp. 403, 404 (N.D. Ga. 1989) (reviewing Title VII color discrimination claim brought by light-skinned black woman against dark-skinned black female supervisor); *cf.* Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988) (rejecting § 1981 claim of Nigerian employee against light-skinned black supervisor as noncognizable race-discrimination claim). Some scholars touch on these issues in the course of discussing color discrimination as a way of understanding intraracial group discrimination claims. *See generally* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000). Other scholars have explored similar intragroup conflicts as experienced by Latinos. Hernández, *Latino Inter-Ethnic Employment Discrimination*, *supra* note 98, at 276–81 (discussing the erasure of intergroup Latino discrimination claims).

100. Leong, *supra* note 79, at 511 (discussing Callicutt v. Pepsi Bottling Grp., Inc., No. CIV. 00-95DWFAJB, 2002 WL 992757 (D. Minn. May 13, 2002)). In *Callicutt*, a biracial employee was told by a coworker that "he was not [really] black." *Callicutt*, 2002 WL 992757, at *4.

101. *See generally* Rich, *Marginal Whiteness*, *supra* note 10.

multiracials' racial-identification decisions. This is because respondents' identification patterns indicated that many preferred to use data-collection processes to reflect on how they defined themselves (private race) rather than to use these processes to describe how they intended to be racially identified in public settings (public race). This insight should raise concerns about whether the EEOC's current racial-data-collection procedures are actually testing for the racial self-identification information that they are most interested in securing. Even if the EEOC feels that it is important to collect information about public race as opposed to social race, it is not at all clear that the focus on documentary-race responses will provide the agency with the information it seeks.

Additionally, multiracials' tendency towards chameleon changes—their shifting claims about racial identity—may turn out to be a behavior pattern that is more common than currently believed. There is some evidence that multiracials' increasingly complex identity claims are prompting technically monoracial people to mine their personal histories in search of some minority or ethnic connection as well. In light of this evidence we must recognize that there have been changes in how many Americans understand racial identity, and these changes are affecting the approach these Americans take when making decisions about racial self-identification. Individuals appear to be less influenced by ascriptive race, namely racially associated physical traits or publicly observable racially marked actions. Instead, racial self-definition has become a far more subjective, complicated process. Some of these complicated identity claims made by seemingly monoracial individuals are aspirational;[102] they are made by white persons attempting to flee from the culturally bleached-out existence associated with whiteness. In other cases, apparently monoracial whites who make complex racial-identity claims may be involved in a more suspect kind of process: mining their past for evidence of minority roots with the hope of securing affirmative action benefits.[103] Yet the other apparently monoracial whites who engage in this behavior may simply be confused, ambivalent, or noncommittal, and envy the chameleon changes multiracials can engage in as they move between contexts. However, as more technically monoracial individuals make complex racial self-identification claims, Title VII will have to accommodate these new elective-race understandings.

Armed with this understanding of the multiracials' and others' responses to questions about documentary race, the EEOC's data-collection procedures raise some concerns. The EEOC data-collection regime apparently conflates four different interests: private race, documentary race, social race, and public race, and assumes that asking about any of these four racial self-identification

102. *See* Rich, *Affirmative Action*, *supra* note 10, at 181, 216–18 (discussing Warren's honestly held belief that she had Native American ancestry). The ability to publicly acknowledge her Native American background allowed Elizabeth Warren to distinguish herself from merely being a monoracial white person.

103. *See id.* at 182–83 (discussing the strategic gamesmanship concerns that informed the public response to the *Malone* case).

interests will always cause individuals to make the same racial self-identification decisions.[104] That is, the government assumes that if one is asked about one's privately held racial beliefs, these views easily can be collected in the standard data-collection form used to record documentary race. However, as the above discussion shows, individuals often experience frustration and confusion when presented with racial-data-collection instruments. Additionally, their answers to these questions change depending on the form and content of the data-collection form.

Although research suggests that the responses given for the purposes of documentary race do, to some degree, reflect an individual's private views about his or her race, this is only true as long as the identification decisions being solicited are deemed by respondents to not have any significant social consequences. Individuals may make different decisions about how to racially represent themselves in response to a particular racial-data-collection inquiry depending on how they believe their responses will be used. These considerations about private race and documentary race also counsel that an individual's racial self-designation decisions may not match up with his or her social race. As Part I illustrates, the EEOC historically has been primarily concerned with social race, but it can no longer assume that the employee data it collects will provide it with information about social race in its traditional form. Finally, the current data-collection regime apparently does not collect data about public race—the race one is willing to present oneself as in public life—because when people produce answers about documentary race, they tend to focus on private-race considerations. All of these insights suggest that we should approach the racial-data-collection procedures used by the EEOC inquiry with a more careful eye because the EEOC may be testing for a variety of important issues, but these issues are not the ones that the EEOC perhaps intended.

2. Phenotypically Ambiguous Persons and Elective Race

The second group rendered visible by our discussion of elective race is phenotypically ambiguous persons. These are workers who self-identify with a particular racial group but are often misrecognized by their coworkers as members of a different racial group. These individuals may find themselves in workplace conflicts when other workers or the employer disagree with their racial-identification choices, or when, out of confusion or insensitivity, coworkers subject the ambiguous worker to discriminatory comments without knowing the individual is a member of the negatively referenced racial group. The phenotypically ambiguous worker may thus find himself subject to discrimination based on the misapprehension that he is a member of one disfavored minority group when he is in fact a member of another. Sociologists call this the

104. *Cf.* Denton, *supra* note 37, at 87 (articulating the importance of the difference between social and individual identity).

experience of "flexible ethnicity."[105]

The elective-race framework allows us to render visible this group's experience, and further, to consider the complex racial-identification questions their experiences pose for courts interpreting antidiscrimination law. One must consider whether the racially ambiguous have an obligation to correct third parties when they are misrecognized as a member of another racial group, even if they do not perceive themselves to be actively "hiding" evidence of their true racial identities. At present, the antidiscrimination literature might describe these individuals as attempting to "racially pass"; however, I believe that the identity issues involved here are more complex than provided for in an account of passing.

Sometimes a phenotypically ambiguous individual discovers that she has been racially misrecognized and consequently has enjoyed social privileges otherwise unavailable to her group but has never made a conscious decision about passing. For example, sociologist Jessica Vasquez reports on the problems encountered by Mexicans in the workplace as they are confused with other racial groups. One young woman explained:

> I've had some . . . really uncomfortable situations with people thinking that I was not Mexican. . . . I was hired as a waitress by a Middle Eastern family and they hired me thinking I was Greek or Persian. I started speaking Spanish to the busboys once and they were like, "Why the hell are you speaking Spanish? You can't be Mexican." And basically went off on me about how they probably wouldn't have hired me if they had known I was [Mexican].[106]

The question is whether phenotypically ambiguous individuals have an obligation to correct others' misperceptions when they are racially misclassified. Do they have an obligation to "come out" as a member of a particular minority group even when they know that they may be subject to discrimination after correcting this kind of mistake?[107] If we create a duty to continuously and perpetually remind persons about his race in order to provide a clear record about his experiences of discrimination, what kind of burden does this create for the racially ambiguous person? Charging a phenotypically ambiguous individual with this kind of responsibility seems strange, especially when it may be clear to many workers in his workplace that he is a member of a given minority group. Also, we must consider: would a worker that took this obligation of

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105. *See* Vasquez, *supra* note 30, at 46–47. Vasquez explains: "'Flexible ethnicity' acknowledges that although actors may assert racial/ethnic identities, their intended audience may not accept these claims. Although 'flexible ethnicity' may enable individuals to access resources and privileges, it cannot always be wielded to attain specific ends." *Id.* at 47. This understanding distinguishes flexible ethnicity from situational ethnicity or strategic ethnicity, constructs which are used to explore the ways in which individuals may actively mobilize racial-identity claims in particular contexts or to secure particular advantages. *Id.* at 46.

106. *Id.* at 54 (alterations in original).

107. *See id.* at 53–54.

disclosure seriously look to us like a normal, average worker, or would he look like a worker who was inappropriately preoccupied and anxious about race?

Additionally, it is helpful to consider why a racially ambiguous worker might fail to correct third parties' erroneous assumptions about his social race, because these insights might help us determine how to address discriminatory dynamics in the workplace. Numerous antidiscrimination scholars have discussed the role aversive racism and implicit bias play in shaping minority workers' experiences. The racially ambiguous worker can avoid these problems as long as he does not take on the mischaracterization of his race directly. Relatedly, the racially ambiguous worker has the ability to avoid stereotype threat because he does not feel the anxieties caused by knowing others are making stereotypical assumptions about his racial group.[108] Additionally, some employers and employees still engage in old-style explicit racism (as opposed to aversive racism), and psychologists report that these groups are far more explicit about their racist attitudes in a perceived monoracial environment.[109] Consequently, it is reasonable to conclude that racially ambiguous workers that allow themselves to be misrecognized may do so because of their superior knowledge regarding the extent of racially discriminatory animus in a given workplace.[110] That is, by virtue of their phenotypic ambiguity, these individuals are often specially privy to facts establishing the extent and nature of race discrimination in their place of employment. In this context, one may rationally fear "coming out" to one's coworkers and making a disclosure about one's true racial identity. Therefore, the accusation of racial passing that might be levied against such individuals by traditional race scholars seems unhelpful in understanding contemporary workplace dynamics and the incentives they create. Rather, we might understand these individuals' behavior as a response to concrete evidence that some form of white privilege has been established in a particular workplace. If antidiscrimination scholars and Title VII plaintiffs can find another language to describe these racially ambiguous workers' experiences, they may discover that these racially

108. *See* Diana T. Sanchez & Courtney M. Bonam, *To Disclose or Not to Disclose Biracial Identity: The Effects of Biracial Disclosure on Perceiver Evaluations and Target Responses*, 65 J. SOC. ISSUES 129, 139–40 (2009) (recognizing that biracial persons often are subject to negative stereotypes after disclosure of biracial status and are vulnerable to stereotype threat after disclosure); Margaret Shih et al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 125, 131–33 (2007) (same).

109. Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993, 995–96 (1994) (noting racism effects were strongest when individuals were in monoracial white environments and were surrounded by prejudiced persons and did not have regular contact with minorities). Aversive racism refers to a model of racism in which individuals do not make explicit racially discriminatory comments but instead mask their negative racial views by finding seemingly colorblind or race neutral ways to sanction persons from disfavored minority groups. For further discussion of aversive racism, see Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61, 61–62 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

110. As one light-skinned Mexican-American man explained, "I'm usually perceived white. So I hear all the jokes. That's not an advantage." Vasquez, *supra* note 30, at 60.

ambiguous workers often will be able to provide strong evidence establishing the presence of racism in a given workplace.

3. Racially Liminal Subjects: Conscientious Objectors to American Definitions of Racial Identity.

The third constituency rendered visible by the elective-race framework is racially liminal workers, those who complain that employer-mandated race-based data-collection efforts trigger psychological conflict. These data-collection inquiries make psychological conflict inevitable, they argue, because structured, descriptively underinclusive racial categories force many workers to make imperfect racial-identity choices depending on the options offered on a given form.[111] Over time, these repeated racial-data-collection inquiries can cause a worker to make inconsistent and conflicting racial-identification choices as he tries different alternatives in an effort to assure his accurate self-representation in the American system of racial classification.[112]

Immigrants to the United States are perhaps the paradigmatic case of racial liminals because they often have an understanding of race that fundamentally contradicts American administrative and social racial-classification norms. Indeed, the sociological literature is replete with examples of Latino immigrant groups that interpret the category of whiteness in expansive ways, inflected by particular notions of skin color and class that have no clear parallel in the United States.[113] Members of these immigrant communities may elect to identify as white socially and in administrative data-collection efforts, despite the fact that their understandings contradict American racial norms.[114] Individuals in this group simply do not feel that the current configuration of racial categories adequately describes their personal (private) views about race. Consequently, they are forced to describe themselves imperfectly, and they do so in ways that may cause problems if they later raise discrimination claims. They

111. *See* Leong, *supra* note 79, at 471 (discussing the consequences rigid racial distinctions have for multiracials' ability to assess their claims); Rives, *supra* note 61, at 1304–06 (arguing courts should recognize workers' need for greater flexibility in racial-identification choices).

112. *See* Brunsma, *supra* note 80, at 573; Leong, *supra* note 33, at 4–5 (discussing multiracials' reactions to data-collection forms that fail to fully address their complex racial-identity claims).

113. *See, e.g.*, Jorge Duany, *Reconstructing Racial Identity: Ethnicity, Color, and Class Among Dominicans in the United States and Puerto Rico*, 25 LATIN AM. PERSP. 147, 147–48 (1998); Bernardo M. Ferdman & Plácida I. Gallegos, *Racial Identity Development and Latinos in the United States*, *in* NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT: A THEORETICAL AND PRACTICAL ANTHOLOGY 32, 33 (Charmaine L. Wijeyesinghe & Bailey W. Jackson III eds., 2001).

114. There has long been concern about whether Latinos' self-identification patterns conflict with American definitions of race and consequently compromise racial-data-collection efforts. *See generally* Hortensia Amaro & Ruth E. Zambrana, *Criollo, Mestizo, Mulato, LatiNegro, Indígena, White, or Black? The US Hispanic/Latino Population and Multiple Responses in the 2000 Census*, 90 AM. J. PUB. HEALTH 1724 (2000); Jose Itzigsohn & Carlos Dore-Cabral, *Competing Identities? Race, Ethnicity and Panethnicity Among Dominicans in the United States*, 15 SOC. F. 225 (2000); Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick 'Other,'* N.Y. TIMES, Nov. 9, 2003, http://www.nytimes.com/2003/11/09/nyregion/going-beyond-black-and-white-hispanics-in-census-pick-other.html?pagewanted=all&src=pm.

may make different racial-identification decisions at different times in response to discrimination events, social context, and the language used on data-collection forms. Antidiscrimination law, at present, has not considered how we can balance racially liminal immigrants' interest in accurate self-representation with the government's need to document workplace discrimination triggered by American racial understandings.

Although immigrants may be the standard case of racial liminals,[115] many native-born Americans in smaller, phenotypically diverse ethnic groups should be recognized as racially liminal persons as well. For example, Americans of Middle Eastern descent often complain that the federal government's definitions for racial categories provide that Middle Eastern persons are legally required to identify as white, but they argue that their experiences with race discrimination make their experiences more similar to racial minorities.[116] Given these discrimination experiences, Americans of Middle Eastern descent may resist electing into the white category on a data-collection form. Instead, a Middle Eastern person may identify as "African" depending on his family's country of origin. On another form he may opt to identify as "Other" if African is not an available option or if he concludes that his discrimination experiences are significantly different from the subcontinent Africans he may believe comprise the majority of this category. The key issue is that the same worker may make very different racial-identification decisions over time depending on the options on a given form, his evolving understanding of racial categories, and his experiences with discrimination. At present, Title VII has no account that explains how courts should treat plaintiffs that make these kinds of conflicting or complex racial-identity claims. As a consequence, plaintiffs' inconsistent or seemingly inaccurate racial-identification choices can be used as the basis for dismissing their claims.[117]

This same problem affects Latinos who, for cultural reasons, may not want to make the racial-election decisions required by American racial categories. Specifically, currently most racial-data forms ask Latinos to indicate if they are Hispanic first, and then to choose a racial category, with the expectation that those who are socially recognized as white will choose to self-identify as white.[118] Yet many Latinos resist being categorized as white, and they elect or choose "other race" when it is an available option.[119] Other Latinos (particularly

115. *See* Harris & Sim, *supra* note 31, at 622 (citing study results showing that "8.5 percent of white/black adolescents . . . respond[ed] to the best single-race question by saying either that they d[id] not know which single race best describe[d] them or by simply refusing to give one").

116. *See, e.g.*, John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 4 (2007).

117. *See* D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 101 (2013).

118. *See, e.g.*, Ian Haney López, *Race on the 2010 Census: Hispanics & the Shrinking White Majority*, 134 DAEDALUS 42, 45 (2005) (detailing the Census Bureau's efforts to refine census form language to elicit expected responses to the race question from Hispanics).

119. *See* GRIECO & CASSIDY, *supra* note 81, at 10; *see also* Navarro, *supra* note 114.

newer immigrants) may answer racial-data-collection inquiries using their own culturally specific definitions of whiteness, but their views may not match up with American cultural expectations for whiteness.[120] Courts that subsequently encounter these individuals have trouble understanding their allegations when they claim they were discriminated against on the basis of race because, technically, they are in the same racial category as the non-Hispanic whites they allege received better treatment. The potential for Latino plaintiffs to incorporate culturally specific definitions of race into their responses to racial-data-collection inquiries raises further questions about the integrity of the EEOC's current data-collection efforts. Here again we see that the communities and constituencies being asked to self-identify by race draw our attention to elective-race struggles that are not well addressed by the current antidiscrimination literature.

III. APPLYING AN ELECTIVE-RACE FRAMEWORK: NEW HORIZONS FOR ANTIDISCRIMINATION LAW

Part III explores the primary claims that thus far have surfaced involving elective race and shows how plaintiffs motivated by this understanding of race raise complex conceptual questions about racial identity—including concerns about racial autonomy, dignity, privacy, and the risk of racial commodification. Although the discussion focuses on cases involving formal administrative inquiries about racial self-identification, these procedures are not always at issue in the elective-race cases. Rather, in some elective-race cases, the individual's social race fails to match his private conception of race, and the discovery of the disconnect triggers social sanctions. In other cases, an individual reveals his public sense of race, only to have that claim rejected by others who perceive a different social race. Collectively, however, all of these cases raise similar dignity, autonomy, and privacy questions that unite them as elective-race cases.

Many courts appear hostile to elective-race cases, and though this hostility may stem from a number of sources, Part III focuses on three key issues that have stymied the development of a doctrine attendant to concerns based on elective race. First, most courts appear unaware of the dramatic theoretical shift that has occurred in the EEOC's understanding of the importance of racial self-identification and the ways in which data-collection regimes condition (or discipline) workers to expect legal recognition of this interest. Second, courts lack important information regarding how individuals negotiate data-collection regimes requesting racial information, and therefore tend to treat a plaintiff's history of inconsistent identification decisions as evidence of bad faith. Third, courts fail to recognize the multiple and distinct self-identification interests at

120. José Itzigsohn et al., *Immigrant Incorporation and Racial Identity: Racial Self-Identification Among Dominican Immigrants*, 28 ETHNIC & RACIAL STUD. 50, 58 (2005) ("Dominicans move from a society in which they define themselves as non-black to a society that defines many of them as black and almost all of them as non-white.").

stake when individuals respond to requests for racial information, conflating these interests in ways that compromise the accuracy of their legal decisions. Each of these themes resurfaces as we work through the elective-race cases.

A. MULTIRACIAL PLAINTIFFS AND ELECTIVE RACE: REVISITING *LONGMIRE*

How would an understanding of elective race assist in the analysis of the *Longmire* case?[121] First, the elective-race account would recognize Longmire's claim as alleging a dignity interest in controlling the terms on which his body was racialized in the workplace, a common theme with multiracial and phenotypically ambiguous persons. It explains why Longmire believed that he had the right to disclose his mixed-race background in discrete contexts, yet maintain a right to racial privacy with regard to certain coworkers. The self-definition interests core to elective race help us explain why Longmire believed that his employer's threat of disclosure was a legally sanctionable action. Forced disclosure of private racial information strikes deep at the dignity interest he has in racial privacy. Finally, elective race focuses our attention on the timing and consequences of "voluntary" disclosure of racial information. Longmire's disparate treatment claim concerning his pay started when his employer learned his "true" racial identity.

With this more nuanced understanding of the nature of his claim, the court's analysis should turn to whether Longmire's right to racial self-definition was violated in a way that offends the equality norms of workplace discrimination laws like Title VII. The touchstone issue, as in all race-discrimination cases, is whether he was subject to discriminatory treatment because of his race. Our understanding of elective race, however, counsels that, contrary to existing court doctrine, his racial identity is not a "fact" that must be decided by the court.[122] Instead, the only question in Longmire's case is what race his employer regarded him as being and whether the employer's abusive treatment stemmed from that understanding. With these understandings, Longmire's case becomes a simple pay equity case, requiring that his compensation be compared to the compensation of similarly situated white coworkers. Additionally, his so-called racial-privacy claim is converted into a hostile-environment claim, which examines whether his employer's threats about the disclosure of his mixed-race background were undertaken because of a desire to subordinate him based on race or because his race made him uniquely vulnerable to this kind of coercion.

As shown above, the primary benefit elective race brings to *Longmire* is that it reduces the amount of background noise that unnecessarily complicates the

121. *See* Longmire v. Wyser-Pratte, No. 05 Civ. 6725 (SHS), 2007 WL 2584662 (S.D.N.Y. Sept. 6, 2007).

122. *See, e.g.*, United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130, 153 (E.D.N.Y. 2000) (rejecting plaintiff's claims for eligibility for employer's affirmative action program because the workers had identified as white).

court's analysis. The court was seemingly distracted by the fact that Longmire had inconsistently identified as white and black and seemed to interpret these facts as demonstrating that his claim regarding coercion about his racial identity was inauthentic. However, the elective-race framework counsels that we should expect these varying racial-identification decisions from multiracial persons, and we should expect a biracial black person to shift to a black or African-American identity after he concludes that he has experienced discrimination.

Additionally, the court appeared offended by the idiom Longmire used to articulate his claim, namely a racial-privacy interest. The court explained that it could identify no federal or state authority that established that the employer's disclosure of the plaintiff's racial background violated a legally protected interest.[123] Yet this conclusion ignores substantial legal authority recognizing that plaintiffs do enjoy such an interest. Courts have recognized racial-privacy claims under Title VII when employees allege that facts regarding their documentary race were improperly disclosed and led to employment discrimination.[124] These claims are based on the above-discussed EEOC guidelines, which provide that records pertaining to an individual's racial-identification decisions should be kept separate from his employment records to ensure that his disclosure does not give his coworkers a basis for race discrimination.[125] Finally, other aspects of the data-collection procedures provide further evidence to support the view that employees do have some right to racial privacy. The detailed guidelines regarding the manner in which employees may be questioned and the confidential maintenance of racial data would be unnecessary if we believed that employees had no privacy interest in racial information.

Courts prepared to recognize a racial-privacy interest under Title VII will face challenges in sorting through the scope of this interest and the implications of racial-privacy claims. Yet the tenor of this racial-privacy claim, the idea that one has a right to keep one's race a secret, will strike some readers as disturbing

123. The court notes that the plaintiff does not point to any authority that suggests that New York State's Human Rights Law or Section 1981 protects one's interest in keeping racial identity private. It further rejects the constitutional claim he raises, alleging that racial-identity issues fall within a zone of privacy. *Longmire*, 2007 WL 2584662, at *8.

124. Although these claims have not always succeeded, courts recognize that negligent disclosure of race could provide a basis for subsequent discrimination. *Compare* Robinson v. Adams, 847 F.2d 1315, 1316–17 (9th Cir. 1987) (arguing that employer's negligent decision to leave his race on his employment forms provided basis for concluding race tainted decision-making process), *and* Abrams v. Kelsey-Seybold Med. Grp., Inc., 178 F.R.D. 116, 121–22 (S.D. Tex. 1997) (discussing class action claims based on allegation that negligent inclusion of race on employment forms permitted basis for discrimination), *with* CBS, Inc. v. Partee, 556 N.E.2d 648, 653 (Ill. App. Ct. 1990) (rejecting state-law-based information request for individualized racial information about state prosecutors, relying in part on EEOC regulations and concluding employees have a "reasonable expectation that they will have some say as to 'when, how or to what extent [such racial] information about them is communicated to others'" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 n.16 (1989))). For another case exploring whether racial-identity questions invade the right of privacy, see Smith v. State, 59 So.3d 1107, 1114–15 (Fla. 2011) (concluding that ethnicity-based questions did not invade privacy, but further inquiries might be intrusive).

125. *See Robinson*, 847 F.2d at 1317; *Abrams*, 178 F.R.D. at 121–22.

or profoundly strange given its apparent link to the idea of racial shame. However, these concerns about shame are inapposite because *Longmire* shows that the plaintiff was not "ashamed" of his race. Rather, Longmire was making a more sophisticated claim that he should be entitled to share his racial identity with those he believed would not subject him to race discrimination and to keep this information from those he believed might subject him to bias. The question courts must resolve is: does this understanding of privacy sufficiently comport with the vision of equality protected by Title VII? Does the notion of racial privacy seem consistent enough with Civil Rights Era norms to justify interpreting Title VII to attend to these concerns? What should the contours of this privacy right be? The discussion returns to these racial-privacy questions in Part IV.

B. CONSCIENTIOUS OBJECTORS TO AMERICAN DEFINITIONS OF RACE: *PADILLA V. NORTH BROWARD HOSPITAL DISTRICT*

Our next elective-race case concerns a conscientious objector to American norms regarding racial categorization. In *Padilla v. North Broward Hospital District*, a Hispanic worker brought several Title VII claims against his employer after the employer terminated him in connection with an "efficiency-induced" reduction in workforce study.[126] Padilla alleged that he was subject to discrimination based on his race, as a white person and as a Latino. He also filed a retaliation claim, arguing that he was terminated for challenging his employer's attempt to police his expression of racial identity. The dispute in the case centered on events in connection with certain diversity reports the Broward Hospital periodically generated. When the plaintiff was asked to racially self-identify for one of these reports, he indicated that he was a white person. His employer, believing that this racial designation was a mistake, contacted Padilla's manager and had Padilla reclassified as Latino. The employer copied Padilla on the email indicating the change. Padilla was offended and filed a formal complaint about the change with Human Resources several months later. When the employer decided to terminate certain employees in connection with the reduction-in-force study, it terminated Padilla. The employer then reallocated Padilla's responsibilities to two white workers: an Israeli white person and a nonethnic white person. The employer also retained another IT worker in Padilla's department who identified as Latino. Padilla alleged that he was terminated because he opposed his employer's attempt to reclassify him as Latino. He argued that because he refused to submit to the employer's power to determine his race, he was deemed expendable.

Moving swiftly through the elements of the *McDonnell Douglas*[127] test for disparate treatment claims, the court explained that Padilla's disparate treatment claim should fail because he had not shown that he suffered an adverse

126. No. 06-CIV-60934, 2007 WL 2364332, at *1–2 (S.D. Fla. Aug. 14, 2007).

127. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

employment action.[128] Rather, the court explained, his responsibilities were merely reallocated. Stated simply, the court found that Padilla had not shown that he was denied a position because he was Latino because his position was not given to a person outside of his protected class. Also, the court explained, Padilla had not shown that discriminatory animus motivated any potential adverse employment action that had occurred because his employer had retained people from both of the protected groups he claimed membership in: two white employees and a Latino person. Finally, it disposed of Padilla's retaliation claim by holding that he had not shown that his employer retaliated against him for engaging in "protected activity." In the court's view, Padilla had no right to challenge his employer's determination that he was Latino because his employer was wholly within his right to reclassify Padilla as Latino to ensure that the racial data it collected for EEOC reporting purposes was technically accurate.

How does the elective-race framework assist us in analyzing Padilla's case? First, the framework draws our attention to the *Padilla* court's hostility to complaints about reclassification and its frustration with the plaintiff's seemingly complex racial-identity claims. The court noted that it was "puzzling that the Plaintiff would complain about being classified as Hispanic as opposed to white; then base a retaliation claim on that complaint; all the meanwhile, allege reverse discrimination against individuals classified both as Hispanic *and* white."[129] The court explained: "This makes little sense. If the Plaintiff claims that both Hispanics as well as whites were equally discriminated against—as he does—the change in the Plaintiff's classification from white to Hispanic is meaningless in the context of the discrimination claim."[130] Importantly, the court appears to believe that Padilla was engaged in gamesmanship, invoking minority identity when it seemed advantageous to him even though his shifting identity claims seemed to make his complaint unintelligible. An understanding of elective race reveals, again, that individuals may settle on a minority identity after having experienced discrimination. Additionally, the elective-race framework teaches that plaintiffs may make the decision to invoke a particular racial identity out of necessity, even if the identity claim does not match with their personal views about race. Here, because the employer's perception that Padilla was Latino was an important part of the case, Padilla may have concluded that his claim was more likely to succeed if he complied with this social-race understanding. This issue requires further discussion.

The *Padilla* court is plainly confounded by Padilla's self-identification decisions at work and in his filings with the court. Yet the confusion in this case evaporates when we break down Padilla's self-identification decisions into their component parts. Padilla filed his suit based on his social race, which was

128. *Padilla*, 2007 WL 2364332, at *2–3.
129. *Id.* at *4.
130. *Id.*

central to his allegations. However, for personal identity reasons, he likely also felt compelled to file a claim based on his public race, the identity he wanted to be recognized as in public settings. Indeed, Padilla's investment in being recognized as white—his desire to control his public race—helps us to understand why Padilla was so shaken by his employer's decision to force him to be counted as Latino because the employer effectively publicly refused his claim to whiteness. The employer publicly policed Padilla's identity claims and racially subordinated him by forcing him to comply with the employer's understanding of his racial identity. One could also describe the case as one involving status contests between high-status whites and low-status or marginal whites.[131] However, here we concentrate on the autonomy issues raised by racial self-identification, the core of the elective-race framework.

The elective-race framework also focuses our attention on the employer's power to redesignate an employee as a possible source of abuse. The court states that it was not reasonable for Padilla to believe that he was engaged in protected activity when he opposed his employer's redesignation decision.[132] As the court explains, it is not "'protected activity' for an employee to oppose accurate diversity reporting."[133] Citing the pre-2006 regulations, the court explains that employers have the right to visually survey and classify employees. Consequently, the court explains, the employer here was wholly within his rights to reclassify a worker. Yet what the court fails to recognize is that the EEOC regulations say nothing about circumstances in which an employee has specifically been asked to racially self-identify and then has his racial-identity decision publicly rejected and involuntarily changed. Because the court fails to recognize the potentially injurious nature of this treatment, it fails to understand the dignity injury that was the basis for Padilla's claim. Moreover, Padilla may have been the victim of bad timing because the EEOC guidelines changed in 2006, prohibiting such changes to an individual's self-identification decisions in the absence of racial fraud. Although not binding on the earlier dispute, these guidelines are persuasive evidence that there was a real dignity interest at stake in the *Padilla* dispute and that the employer's action raised valid questions. Indeed, in other cases, filed apparently after the change in regulations, employees have contended that employers have changed their racial self-identification forms in an offensive, aggressive, and hostile manner.[134]

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131. In my other work, I discuss how there are gradations within the category of whiteness, with some whites having lower status than others. The *Padilla* court failed to recognize that discrimination can occur when employers make distinctions between low-status ethnic whites (Hispanics) in favor of higher-status whites (here non-ethnic or Israeli whites). Using this framework, one sees that the discriminatory adverse employment action in *Padilla* was that the employer decided to reallocate Padilla's responsibilities to two arguably higher-status white persons. *See generally* Rich, *Marginal Whiteness*, *supra* note 10.

132. *Padilla*, 2007 WL 2364332, at *4.

133. *Id.*

134. *See, e.g.*, Njenga v. San Mateo Cnty. Superintendent of Sch., No. C-08-04019 EDL, 2010 WL 1261493 (N.D. Cal. Mar. 30, 2010) (regarding an African employee's allegation as part of a national-

Unfortunately, the *Padilla* court failed to engage with the core legal questions in the dispute. These questions include: Did the employer favor employees who made racial-election decisions that conformed with its view of race? Did it penalize employees who challenged these understandings? Was the employer motivated to challenge Padilla's racial-election decisions because of its interest in posting strong numbers in its diversity report? Was Padilla effectively commodified and then disposable once he failed to serve the employer's diversity needs? These questions suggest that Padilla was subordinated based on his putative racial status, a claim that Title VII thus far has not directly addressed. The elective-race framework focuses our attention on the autonomy interest central to the case. Even if one concludes that Padilla's employer's action was wrongful, it is not clear that the indignity he suffered is the kind of legally protected interest Title VII covers. Part IV returns to these questions about the autonomy interests in racial identification and how to develop principled ways for Title VII to reach these autonomy concerns.

C. PHENOTYPICALLY AMBIGUOUS PERSONS AND ELECTIVE RACE

1. Discrimination Against "Another" Group—Conflicts Between Self-Definition and Social-Race Definitions

In our final set of elective-race cases, we consider employers' strategic use of documentary-race evidence. Specifically, in these cases, an employer typically attempts to use an employee's prior racial self-identification decisions in an adversarial manner—to bind or commit the employee to a position that will compromise his or her claim.[135] This strategic use of documentary-race evidence is particularly useful in cases in which a phenotypically ambiguous person alleges that he or she has been subject to race or national origin discrimination.[136] For example, in *Nieves v. Metropolitan Dade County*, the plaintiff raised a national origin discrimination claim alleging that his employer

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origin hostile-environment claim that supervisor changed her designation from African to African-American); Cooksey v. Hertz Corp., No. 00 CV 5921 (SJ), 2004 WL 1093674 (E.D.N.Y. Jan. 26, 2004) (regarding a Native American plaintiff's allegations that she was terminated for deficient performance after employer questioned why she did not identify as Native American on racial self-identification form).

135. One of the most controversial strategic ways in which employers use an employee's prior racial self-identification decisions is to bind the employee to his previous decision and use it as a bar to participation in affirmative action programs. *See, e.g.*, United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130, 153 (E.D.N.Y. 2000) (excluding parties from affirmative action program settlement involving interests of blacks, Latinos, and Asians because the individuals had self-identified as white in employment data forms). A more detailed discussion of the proper use of racial self-identification information in affirmative action programs is provided in the companion Essay to this Article, Rich, *Affirmative Action*, *supra* note 10.

136. *See, e.g.*, Todd v. Waste Mgmt. of Tex., Inc., No. Civ.A.SA-03-CA-314-X, 2004 WL 1465771, at *3 (W.D. Tex. June 30, 2004) (recognizing employer's claim that it was ignorant of Latino employee's racial/ethnic self-identification choices because forms recording her choices were kept confidential and were not reviewed until after she was terminated and filed discrimination claim with EEOC); *cf.* Lopez v. Micro Ctr. Sales Corp., No. 02 C 5004, 2003 WL 22706957, at *4 (N.D. Ill.

failed to promote him to a Metro Bus Transit supervisor's position because the employer was biased against Hispanics.[137] The court questioned whether the plaintiff had even established a prima facie case because the employer showed that Nieves "never listed himself as [Hispanic] on his employment application" and there was no credible evidence that he had ever disclosed his Hispanic background to his supervisors.[138] The court explained that "[p]laintiff may indeed be Hispanic, but it is difficult to see how [his supervisor] could have discriminated against him on that basis if he was never made aware of the fact."[139]

To its credit, the court's analysis appears to be an attempt to inquire about social race; the court focused on whether there was sufficient evidence presented to establish that the employer *perceived* that Nieves was Hispanic or Latino, rather than making inquiries about Nieves's *true* racial identity. Consequently, it considered *both* Nieves's documentary race (his self-identification decisions in racial-data-collection forms) and his public declarations about race as important evidence to determine whether Nieves's employer perceived Nieves to be Latino. However, curiously, as the court's analysis progressed, it began to substitute its own judgments about race for the more relevant set of considerations: the racial lexicon of Nieves's employer.[140] The court concluded that, based on its examination of the plaintiff's "speech patterns, mannerisms and pronunciation of the English language" it was not apparent that Nieves was Hispanic.[141] Indeed, the court concluded that "[t]here was no outward indication of this fact."[142] A more nuanced understanding of social race would have caused the court to frame this issue less as an objective judgment and more as a subjective inquiry about how Nieves was perceived in his workplace.

Here again we see how the elective-race framework helps to quiet background noise that otherwise threatens to compromise the court's analysis of the *Nieves* case. First, the court was of the view that Nieves's decision at the start of his employment to check off white in his self-identification form (without also including that he was Hispanic) counted as persuasive evidence that he shielded information about his racial and ethnic background from his employer. However, the elective-race framework teaches that employees may make inconsistent identification decisions for a host of reasons: they may react negatively to

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Nov. 17, 2003) (regarding racial self-identification evidence reviewed to assess employer's claim that it was unaware of plaintiff's racial identity).

137. *See* 598 F. Supp. 955, 960 (S.D. Fla. 1984).

138. *Id.* at 962.

139. *Id.*

140. The term "racial lexicon" was introduced in my article Rich, *Performing Racial and Ethnic Identity*, *supra* note 24. The term refers to the physical characteristics, mannerisms, behaviors, and cultural performances that an individual associates with a particular racial group. This racial lexicon determines whether and how a person will racially categorize another person, and potentially subjects the individual to sanctions or some form of social stereotyping. *See id.* at 1158.

141. *Nieves*, 598 F. Supp. at 961.

142. *Id.*

the questionnaire format, they may be confused, or they may be reacting to their own culturally specific racial understandings, and consequently they fail to fully describe themselves when responding to data-collection inquiries. The court also concluded that Nieves's failure to explicitly tell his employer that he was Hispanic or document that he was Hispanic suggested that the employer had no concrete basis for concluding that Nieves was Hispanic. The elective-race framework, in contrast, teaches us that documentary decisions regarding race can influence an employer understanding, as do personal statements about race, but they are not the most important consideration that determines the social race one is assigned. Moreover, the court failed to take seriously Nieves's claims that he had disclosed his racial identity to *other* supervisors and coworkers and that he could not recall if he informed this specific supervisor of his racial identity. Importantly, the court did not consider how its decision effectively placed the burden on racially liminal employees to consciously and affirmatively announce their race to every person they encounter in the workplace in order to protect their rights to allege discrimination.

Finally, some might also be disturbed by the court's effort to make an objective determination about whether Nieves's voluntary behaviors established that he was an ethnically marked employee.[143] Indeed, as suggested above, the elective-race framework suggests that the more appropriate inquiry in this case was whether Nieves's employer had enough information—based on its subjective views—to conclude Nieves was Hispanic. Again, had the court engaged in a more studied inquiry regarding how Nieves's supervisor identified Hispanic workers and the resources he tended to use to make these determinations, it might have given more weight to one of the more obvious indicators of racial status in the case—Nieves's Spanish surname. The court concluded that despite its Spanish spelling, Nieves had pronounced his name in an Anglo fashion, and therefore the employer did not have a basis for concluding the name was Latino. More specifically, an inquiry into the supervisor's racial lexicon would have triggered the following questions: Did the employer consider a Spanish surname as evidence of Hispanic background? Was it reasonable to conclude that he never considered Nieves was Latino, despite the obvious spelling of his name? Furthermore, the allegations in the case regarding why Nieves was not qualified for the position raise the concern that Nieves was being raced even as the supervisor denied being aware of Nieves's Hispanic background. That is, the court recognized that Nieves had a different personality, that he was "outspoken and aggressive" where his supervisor was "cautious and deliberate."[144] Although it may have been reasonable to deny Nieves a desired promotion if his behavior violated some objective standard for appropriate deportment, the court

143. The most prominent case in which a court has engaged in this kind of race-performance inquiry, to determine if the plaintiff's voluntary behaviors provided sufficient basis to recognize him as a member of a racial category, is *Perkins v. Lake County Department of Utilities*, 860 F. Supp. 1262, 1276–77 (N.D. Ohio 1994).

144. *Nieves*, 598 F. Supp. at 963.

would have been well served to examine these allegations as evidence of racial stereotyping or bias.

2. *Wood v. Freeman Decorating Services, Inc.*: Standing Challenges Based on Employee's Racial Self-Identification Choices

In other cases, an employee's documentary-race decisions are strategically deployed by the employer as a basis for challenging the plaintiff's standing to bring a claim. For example, in *Wood v. Freeman Decorating Services, Inc.*, an employer alleged that a plaintiff's hostile-environment claim alleging discrimination against Native Americans should be dismissed because he had identified as Hispanic on his employment form.[145] The plaintiff alleged that employees in his workplace clearly regarded him as Native American because they continually insulted him using epithets about Native Americans. The court rejected the employer's claim of ignorance regarding Wood's race, explaining that the plaintiff's voluntary race-performance behaviors raised a question of fact about whether he was regarded as Native American.[146] Certainly, *Wood* is a happy case because the court permitted the plaintiff to move forward with his discrimination claim. However, one wonders whether Wood would have been successful if he, like Nieves, had not engaged in the race-performance behaviors that the court deemed to clearly signal racial or ethnic status. What would have happened to Wood if he was required to rebut the presumption that he was regarded as Latino based on his self-identification decisions?

This final set of elective-race cases similarly requires that courts think more deeply about the contours of the right to racial self-identification and whether employees' dignity interests are offended when their racial information is used in an adversarial process.[147] It seems relatively uncontroversial that an employer can establish notice of an employee's race based on his documentary-race decisions. However, it is far more controversial for the employer to establish its ignorance of the employee's race solely as a consequence of the employee's documentary racial-identification choices. The government must adopt some position on the role these documentary-identification decisions play and the proper role for an understanding of social race in the Title VII discrimination analysis. If we believe that the right to racial self-identification is intended to respond to a dignity interest in racial information, the inconsistent adversarial use of such information in the litigation process raises deep concerns.

145. *See* No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010).

146. *Id.*

147. For another adversarial use of parties' racial self-identification data, see generally Christian v. City of Annapolis, No. JFM-06-1119, 2006 WL 2294539, at *1 (D. Md. Aug. 9, 2006) (rejecting white plaintiff's disparate treatment claim because identified comparator was actually a biracial man who identified as white on employment forms). The court in *Christian* explained that it was not its job to "look behind" the racial designation choices of employees. *Id.*

IV. RESPONDING TO RACE DISCRIMINATION IN THE ERA OF ELECTIVE RACE: CRAFTING PRACTICAL AND INSTITUTIONALLY DEFENSIBLE RESPONSES

Part III demonstrated that courts could find ways to channel elective-race plaintiffs' interests into existing Title VII causes of action; however, the mere fact that the statute *could* be interpreted to cover elective-race claims is insufficient to justify that it *should* be interpreted to include such coverage.[148] None of the approaches to statutory construction provide a clear answer. Textualism provides no assurances because the plain text of Title VII is entirely silent on this question, neither encouraging nor negating the basis for elective-race plaintiffs' claims. Legislative history provides no clear answer because these controversies over the right to racial self-definition and racial privacy simply did not develop until decades after Title VII's passage. Furthermore, although the "right" to racial self-definition appears in the EEOC's data-reporting regulations,[149] Congress has never commented on the contours of this alleged right or indicated approval of its creation. The most prudent course for courts is to turn to a purposivist analysis to determine whether the interests raised in elective-race cases are consistent with the antidiscrimination norms that motivated Title VII's passage.[150] Part IV therefore engages the larger normative question: whether elective-race claims are sufficiently connected to the Civil Rights Era norms that inform Title VII to justify covering elective-race plaintiffs' interests.

A. UNMASKING THE HIDDEN NORMATIVE INQUIRY

Part III showed how existing Title VII disparate treatment claims could serve as vehicles to address the wrongful treatment alleged in elective-race cases. However, simple review of these claims reveals that there are hard questions at the heart of these plaintiffs' allegations that should be answered before Title VII can be interpreted to protect these plaintiffs' interests. For example, in *Nieves*, the Latino plaintiff's basic claim was that his employer had discriminated against him because it denied Nieves the right to identify as white. An employment-discrimination lawyer could easily craft this claim into a basic hostile-environment claim, alleging variously that Nieves's employer knowingly exceeded its authority under the EEOC's regulations to inquire about the plaintiff's race, exercised its right of inquiry in a negligent fashion, or alternatively used its right of inquiry as a cover for race-based harassment. Also, an employment-discrimination lawyer might argue, using a standard disparate

148. *Cf.* Elizabeth Garrett, *Legislation and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 360, 360–77 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008) (recognizing that a textualist interpretation might permit a conclusion that a novel issue is covered if it is not specifically prohibited by the plain text of a statute, but purposivist and intentionalist readings would require clearer indication that an interpretation is consistent with the statute's design and goals).

149. Revised Directive 15, *supra* note 54, at 58,788–90 (explaining the interest in racial self-identification must be accommodated whenever possible).

150. *Cf.* Garrett, *supra* note 148, at 369–72.

treatment analysis, that Nieves, unlike other white employees, was denied the right to identify as white because of the employer's racially discriminatory attitudes about Latinos. The disparate treatment claim here would be based on the understanding that federal law would allow Nieves, as a Latino person, to identify as white,[151] but his employer, because of his discriminatory attitudes about Latinos (or what I call marginal- or low-status whites), refused to recognize Nieves's right and interest in doing so.

Again, on the surface, Title VII seems flexible enough to accommodate these claims; however, the core proposition on which they are based should raise serious questions. At bottom, the plaintiff in *Nieves* is arguing a more controversial normative point: that Title VII provides him with a legally cognizable right to racial self-definition, one that must be compensated with damages when it is violated. To recognize the elective-race claim in this case, we must ask whether the autonomy interests elective-race plaintiffs have attached to the right of racial self-definition should be recognized as a legally protected interest under the statute. Additionally, we must ask whether a reasonable legislative body would recognize the companion privacy interest required to make these identification claims because privacy is essential to the ability to maintain control over the use and deployment of one's racial information. Part B engages with these normative questions, exploring the basis for the autonomy and privacy interests most commonly invoked by elective-race plaintiffs in Title VII cases.

B. TITLE VII AND RACIAL-AUTONOMY CLAIMS

The first key question courts will face as they encounter claims in elective-race cases is whether Title VII recognizes a plaintiff's autonomy interest in racial self-determination as a legally protected interest. Plaintiffs may believe that, in the absence of any other adverse employment action, the denial of the right to racial self-identification has deprived them of an important resource in self-realization. Courts are likely to see a broad range of Title VII cases that solely concern disputes over categorization, without any *other* adverse employment action. Plaintiffs will allege a number of injuries, including injuries stemming from challenges to their racial-identity decisions, or circumstances in which the employer changes their racial designation without their consent. These claims are based on the proposition that a worker's dignity interests are offended when he is involuntarily assigned to a racial category or questions are raised about his racial-identification choices.

The traditional Civil Rights Era framework that informs Title VII does not directly address the right to racial self-identification because the framework seems to assume that one's social race, the race one is involuntarily assigned by others, is the same as the race one claims for oneself—whether as a private or

151. *See* Agency Information Collection Activities: Notice of Submission for OMB Review; Final Comment Request, 70 Fed. Reg. 71,294, 71,297 (Nov. 28, 2005) (recognizing that Latinos should choose ethnicity first and then select a white or black racial designation).

public matter. Consequently, the traditional Civil Rights Era framework suggests that most discrimination conflicts stem from social stereotyping triggered by others' recognition that one is a member of a disfavored racial group. Arguably, one might conclude that, by rejecting the racial-identity claims of a worker, the employer is engaging in a kind of racial stereotyping, but this is not the kind of stereotyping that Title VII historically has considered an issue. However, conversely, the adverse treatment an employee may receive after making a disputed racial-identity claim seems to effect the same subordination efforts that should be covered as hostile environment under a traditional Title VII analysis.

Perhaps because of these ambiguities and the understanding that the traditional Civil Rights Era account is silent on these questions, scholars writing in this tradition are deeply troubled by elective-race claims. Tanya Hernández has been a vocal critic of the new, more fluid approach to racial identification adopted by elective-race plaintiffs.[152] She argues that their insistence on regimes that acknowledge a complex racial background should not be regarded as proof of racial progress, but rather an obdurate desire by multiracials to preserve their right to access white privilege, even as they acknowledge minority heritage that, in another era, would have counseled that they should be categorized as a member of a disfavored racial minority.[153] D. Wendy Greene, though she maintains an agnostic position on the increasingly complex approach to racial identification used by elective-race plaintiffs, argues that antidiscrimination law should continue to focus on social race as the primary trigger of discrimination.[154]

Much of the scholarly commentary on autonomy claims about the right to racial self-definition was produced in response to the battles multiracials waged in the first decade of this century to secure a multiracial category option on the census. Although this effort ultimately failed, the concerns raised about the threat self-definition regimes pose to the accuracy of racial-data-collection efforts equally holds for Title VII. These scholars' work also speaks to the larger normative concerns that should inform our analysis of whether racial-autonomy interests should be recognized under Title VII. Ford explains, "[T]he goals of the reformed census are arguably dangerous in and of themselves. The reform shifts attention away from 'how others see me' to 'how I see myself.' This is an improvement only if one assumes that 'how I see myself' is somehow pure and uncorrupted by racial power."[155] Specifically, Ford worries that individuals exercising the right to racial self-definition will be tempted to opt into the category of whiteness rather than face the challenges or the risk of oppression

152. *See, e.g.*, Hernández, *supra* note 9.

153. *See id.* at 121.

154. *See generally* Greene, *supra* note 117, at 88 (arguing that courts should allow plaintiffs to bring claims based on the race they are perceived as being in the workplace (social race) rather than imposing an "actuality requirement" or proof of "true" racial status).

155. Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1808 (2000).

they will face if they identify as minority.[156] As he explains, "[T]he new census attempts to know its subjects as they have been produced by racial power while deemphasizing the fact of that racial power. It thereby reifies the effects of racial power, representing those effects as the voluntary election of the individual."[157]

Naomi Mezey's critique raises the concern that the self-identification process in the current census confuses the project of identifying discrimination with the project of self-expression. She explains that "[p]eople discriminate based on who they think you are and not on how you understand yourself."[158] Consequently, the state gains little by collecting data on racial self-identification decisions when its primary concern is social race.

Ford and Mezey raise valid concerns about the ways in which the autonomy-based self-identification account masks the operation of contemporary race-discrimination dynamics, which tend to focus on social race. Additionally, as Ford and Hernández warn, the attraction of whiteness, even if one has a relatively low- or marginal-white status, will cause many individuals to make the "innocent" decision to identify as white without proper acknowledgement of the role racial-subordination dynamics play in this seemingly voluntary decision.[159] Yet there are many reasons to believe that social race cannot be Title VII's sole focus if it hopes to capture all of the ways race is used to subordinate workers in the workplace. As the cases in Part III show, sometimes the act of self-definition will trigger discrimination, either in the form of old-fashioned stereotypes about the capacities of a particular group, or because a discriminator is attempting to police the boundaries of a racial category by rejecting a plaintiff's self-identification claims. Though Title VII should be understood, as a historical matter, as attempting to disrupt workplace dynamics that preserve white racial privilege, the claims of "interlopers" to whiteness can have a disruptive effect on white privilege as well. As I have explained in my other work, when whites cannot count upon who is included in the category of whiteness, and who will take offense at exclusion, the operation and maintenance of white privilege in the workplace becomes more difficult. However, as a practical matter, by maintaining antidiscrimination protections for plaintiffs who drift in and out of whiteness, minorities may find themselves with co-plaintiffs that have unusually well-developed information regarding how white privilege operates in a particular workplace.

Certainly, not all legal scholars are critical of autonomy interests at the heart of elective-race plaintiffs' racial self-definition claims. Cristina Rodríguez is one of the scholars who favors a more autonomy-affirming approach, arguing that we should credit the self-identification choices of individuals as a way of

156. *See id.* at 1808–10.
157. *Id.* at 1809.
158. Mezey, *supra* note 79, at 1753.
159. *See* Ford, *supra* note 155, at 1808–10; Hernández, *supra* note 9, at 118–19.

defining the membership of a given racial category. She argues that this is preferable to having the state or private actors responding to federal laws and attempting to delineate the boundaries of racial categories because these actors tend to make authenticity judgments that are deeply divisive to the civil rights community.[160] Drawing from the comments of Justice Kennedy in *Parents Involved*, she notes that some individuals believe that it is a deep indignity to be assigned to a racial group when one is powerless to change that designation.[161] Randall Kennedy makes similar claims, arguing that the costs of denying the right to racial self-identification are too great to allow employers and government to exercise this power.[162] Although he recognizes a pure elective approach will cause some problems, the risks of government oversight and enforcement of racial definitions are far greater. Rodríguez and Kennedy's comments are insightful, but they appear to be based on the proposition that individuals make consistent identity choices, or that the "choice of race" is a single moment in which identity becomes fixed. As Part I shows, however, racially liminal persons and multiracial persons more often have a variable and even ephemeral attachment to a given racial label. Neither Kennedy nor Rodriguez consider how Title VII or other antidiscrimination regimes should manage the conflict caused by an individual's conflicting self-identification decisions.

Furthermore, scholars who have written about the dangers associated with racial-autonomy arguments seem somewhat reluctant to explore the primary normative concern that informs laypersons' anxieties about volition-based, fluid approaches to racial identification.[163] Yet they also recognize that individuals with fluid approaches to race risk being socially irresponsible given the challenges that they create as we try to accurately count and gauge the degree to which minorities continue to experience discrimination in different contexts.[164]

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160. *See* Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1408–09 (2008).

161. *See id.* at 1414.

162. *See* Kennedy, *Racial Passing*, *supra* note 97, at 1192 (arguing that "the prospect of a new wave of racial identification laws is frightening to contemplate. It would be better to tolerate some or even considerable racial fraud under a regime of racial self-identification than to police affirmative action programs by subjecting individuals to racial identity tests").

163. *See* Kennedy, *Racial Passing*, *supra* note 97, at 1190–93 (using *Malone* to explore the risk of strategic deployment of race definitions by individuals); John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49, 52–53 (1995) (raising concerns about affirmative action programs administered with loose racial-identity definitions and that fail to adequately protect against abuse); Kim Forde-Mazrui, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2197 (2003) (reviewing KENNEDY, INTERRACIAL INTIMACIES, *supra* note 97); Chris Ballentine, Note, *"Who is a Negro?" Revisited: Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. FLA. L. REV. 683 (1983) (raising concerns about affirmative action programs administered with loose racial-identity definitions and that fail to adequately protect against abuse).

164. *See, e.g.*, Hernández, *supra* note 9 (arguing in the context of census data-collection efforts that multiracials' fluid approaches to racial identity threaten to compromise the enforcement of civil rights laws).

Again, although these concerns thus far have not been explicitly stated in these terms, the concern is that if there is no moral sanction imposed on persons that adopt fluid approaches to racial identification, the racially ambiguous subject will be further incentivized to shift between racial identities—calling upon his or her claim to membership in a given racial group whenever it provides a strategic advantage and abandoning that designation whenever it appears to carry social costs. Additionally, employers will be further incentivized to invite employees to make tenuous racial-identity claims so that they may more easily satisfy their perceived social obligation to maintain a diverse workforce.

Although these concerns about the potentially unprincipled and irresponsible exercise of racial-autonomy interests are quite valid, it seems equally troubling to use antidiscrimination laws to impose negative sanctions on individuals who demonstrate a tendency toward seemingly unreflective and troubling racial-identification patterns. Denying antidiscrimination protection to persons who have a fluid approach to racial identification is not an appropriate way to punish or disincentivize what some see as morally or socially troubling behavior. Rather, antidiscrimination law's primary purpose is to sanction persons who socially subordinate others based on race. Therefore, we should not ask whether the discrimination target is "worthy" of protection—that is, whether he has engaged in a consistent pattern of racial identification. Rather, if the discrimination target's temporary decision to publicly identify with a group triggers discrimination, or his physical appearance automatically triggers adverse treatment, we must remember that our goal is to sanction the racially biased person who has subjected the target to sanction. Moreover, if antidiscrimination law were interpreted in a manner that denies legal protections to an elective-race plaintiff merely because of his inconsistent racial-identification choices, the law itself would effectively punish and subordinate elective-race plaintiffs because of their views about race. We would effectively create legitimacy or adequacy tests that inquired into a plaintiff's fidelity and allegiance with particular racial groups before providing an individual with antidiscrimination law's protection.

In reality, the likelihood that courts will grant plaintiffs broad racial-autonomy rights seems slim, given the existing legal authority on this issue. Although antidiscrimination law recognizes a right to racial definition, the right recognized is limited, waiveable, and even defeasible in certain circumstances. Specifically, the EEOC's decline-to-state provision (similar to other government data-collection regimes)—which authorizes employers to racially assign employees to a particular legal category—establishes that the racial self-determination right must fall to the state's administrative interests in some cases. The EEOC regulations that permit challenges in the context of racial fraud establish the same rule. Relatedly, there continue to be a steady stream of affirmative action cases that recognize employers' and the government's right or interest in policing individuals' self-reported racial-identification definitions in order to

properly allocate affirmative action benefits.[165] Indeed, even the census, which typically is represented as the paradigmatic example of the move towards privileging an individual's right to racial self-identification, is not as autonomy-focused as it might initially appear. The head of household (or whoever is home at the time of inquiry) is allowed to racially identify everyone in the household when a census-taker solicits information, and census workers are authorized to assign a respondent to a particular racial category if he declines to self-select into a racial category. Indeed, if census workers cannot secure access to a particular family or resident, a neighbor may be asked to report the race of a individual and or her family.

The current patchwork of provisions granting a limited right to self-definition is consistent with the idea that the government retains an interest in understanding both social-race and public-race choices. This interest is reasonable and well-founded, given the risk of discrimination posed by both forms of identification. The harder project will be to convince elective-race plaintiffs that their rights should be limited in some way. At present, they are at risk of hijacking government data-collection efforts to serve their personal-identity interests in a way not contemplated by Title VII and without considering the long-term consequences of this maneuver. However, there is ample basis to conclude that government can and should give employers the right to determine an employee's social race without threatening the employee's racial-determination process. As elective-race plaintiffs are socialized to recognize this distinction, they are unlikely to bring the same fraught concerns about the racial-identification process required by the EEOC.

Further insight into this proposition is revealed by Ariela Gross's work on Mexican-Americans in the twentieth century. She explores the ways in which Mexican-Americans during the 1930s and 1940s strategically and conditionally used their legal designation as white persons and continued their own autonomous racial self-identity projects alongside those conducted by the state.[166] The alternating patterns of divergence and overlap between Mexican-Americans' own conceptions of their race and the state's conception of it were reflected in litigation of Mexican-Americans' whiteness in issues ranging from naturalization[167] to the politics of marriage[168] and access to

165. *See, e.g.*, Peightal v. Metro. Dade Cnty., 26 F.3d 1545 (11th Cir. 1994) (reviewing plaintiff's challenge to allegedly overinclusive employer definition of Hispanic for affirmative action program based on racial self-identification); United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130 (E.D.N.Y. 2000) (same); *cf.* Jana-Rock Constr., Inc. v. N.Y. Dep't of Econ. Dev., 438 F.3d 195 (2d Cir. 2006) (reviewing plaintiff's challenge to allegedly overly restrictive definition of Latino used to qualify for minority-owned-business program). For earlier cases, see CATHERINE R. SQUIRES, DISPATCHES FROM THE COLOR LINE: THE PRESS AND MULTIRACIAL AMERICA 75–124 (2007) (discussing similar challenges brought by putative beneficiaries of affirmative action benefits in the 1980s and 1990s).

166. Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 360–70 (2007).

167. *Id.* at 348.

168. *Id.* at 348–54.

schools.[169] Gross is a legal historian, but her work provides essential insight to help us sort through today's elective-race challenges. The state should not assume that the racial-designation decisions it causes individuals to make for administrative purposes prevent the individual from preserving her private-race understandings and the ability to control her public race.

C. ELECTIVE RACE AND RACIAL-PRIVACY NORMS

Plaintiffs that base their Title VII claims on an alleged invasion of their interest in racial privacy are effectively asking courts to recognize these privacy infringements as a kind of adverse employment action cognizable under Title VII. These privacy-infringement allegations can take a variety of forms. For example, the employee's interest in racial privacy may be violated when an employer negligently discharges his data-collection responsibilities under Title VII. The employer may disclose private racial data and cause the employee to be permanently identified as a minority and subject to race discrimination. Alternatively, the right to racial privacy may be violated when an employer, in the course of diversity-promotion efforts, publicly represents the employee as a minority employee. In these circumstances, the employer effectively racially commodifies the employee by using private facts about an employee's racial status to meet diversity targets or in recruiting efforts to attract minority candidates.[170]

Racial privacy is a challenging concept. Thus far, it simply has not been considered in detail by antidiscrimination scholars.[171] However, the arguments raised in response to this idea provide us with a fruitful opportunity to think more deeply about the purposes of antidiscrimination law. Our inquiry into the case for racial privacy reveals a fundamental tension at the heart of American antidiscrimination discourse. Specifically, for some readers, the idea of racial privacy will seem fully consistent with traditional Civil Rights Era norms because it is necessary to ensure colorblindness.[172] As Robert Post explains,

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169. *Id.* at 373–84.

170. For further discussion of racial commodification concerns, see generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

171. For writing on this issue, see, for example, Anita L. Allen, *Race, Face, and Rawls*, 72 FORDHAM L. REV. 1677 (2004); Chris Chambers Goodman, *Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws*, 88 MARQ. L. REV. 299 (2004) (discussing privacy initiatives that seek to prevent the state from gathering racial information); Jonathan Kahn, *Controlling Identity:* Plessy, *Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755 (2005) (analyzing history of racial defamation actions and privacy interests in racial information for its role in maintaining racial hierarchy).

172. Indeed, taken to the extreme, the colorblindness trope has been interpreted to support the view that the state should altogether be prohibited from gathering and cataloguing racial information. Ward Connerly's failed attempt to have the California electorate certify a so-called "Racial Privacy Initiative" represents this viewpoint, as he offered for California voters' consideration Proposition 54, which would prohibit the state from collecting racial information. The racial-privacy interest discussed here is distinct from the approach offered by Connerly, as this racial-privacy interest does not suggest that the state should be prevented from collecting racial data. Instead, this racial-privacy argument posits that

"[T]he important trope of blindness . . . has played a dominant role in the interpretation of antidiscrimination prohibitions. Blindness renders forbidden characteristics invisible; it requires employers to base their judgments instead upon the deeper and more fundamental ground of individual merit or intrinsic worth."[173] If we take seriously the norms that inform this "trope of blindness," the idea of recognizing a worker's privacy interest in her racial information seems necessary to assist Title VII in achieving its goals. After all, what better way to ensure that coworkers and supervisors remain blind to the racial identity of a worker than to provide that worker with a protected privacy interest in her racial information?[174] What better way to enforce colorblindness in the workplace than to penalize employers when they disclose the race of an employee and thereby increase the risk that she will be subject to discrimination?

Others, however, would interpret traditional Civil Rights Era norms to require that we reject the idea of recognizing a legal right to racial privacy. In their view, the colorblindness trope in antidiscrimination law should not be interpreted to mean that one's employer or coworkers should literally be blind or unaware of a worker's race. Rather, they should be aware of the employee's racial status but ignore it except in those rare instances when race might be a resource. According to this view, one should be able to proudly disclose one's race without fear that this disclosure will trigger social sanctions. Proponents of this view would question whether we can ensure that employers, supervisors, and coworkers embrace the values of racial tolerance and racial inclusion if coworkers' racial identity is treated as a closely guarded, legally protected secret. Additionally, they would argue that, to the extent antidiscrimination law embraces the value of diversity, it assumes that race is a resource that enriches the workplace. In order for race to perform in this fashion, coworkers must be aware of the diversity in their ranks. Finally, many antidiscrimination scholars would be offended by the idea of a legally protected racial-privacy interest because it sends a disturbing symbolic message—namely, that we are still in an era in which it is reasonable to experience "racial shame"[175] or that the law recognizes an interest in racial passing.

Longmire, the case featured at the start of our discussion, provides a rich opportunity for considering the privacy interests in elective-race cases. As the

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the individual has a valid claim of injury when the state or private actors disclose racial information without an individual's consent. For discussion of the Connerly privacy initiative see Goodman, *supra* note 171, at 302–05.

173. Post, *supra* note 21, at 11 (footnotes omitted) (internal quotation marks omitted).

174. Indeed, employers have been successful in defeating plaintiffs' Title VII claims by simply alleging that they were unaware that a given employee was a minority because the relevant decision makers did not have access to the documentary files that established the plaintiff's racial identity. *See, e.g.*, Todd v. Waste Mgmt. of Tex., Inc., No. Civ.A.SA-03-CA-314-X, 2004 WL 1465771 (W.D. Tex. June 30, 2004).

175. *See generally* J. H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable*, 46 A.L.R.2d 1287 (1956) (recognizing a period when legal authority established that it was per se libelous to call a white man a black man).

court reviewed the plaintiff's racial-privacy claim, it rejected the various resources plaintiff pointed to to establish the existence of a racial-privacy interest. However, a more measured evaluation of plaintiffs' claims, as well as the additional EEOC resources on racial privacy, taken together, counsel in favor of recognizing this interest. Specifically, Longmire pointed to long established constitutional doctrine that recognizes an individual's informational privacy interests, allowing a person to bring suit when government officials fail to properly maintain sensitive information.[176] Courts in cases other than the Title VII context have extended this understanding of racial privacy to recognize individuals' interest in maintaining as private the facts an employer has collected about an employee's racial status.[177] These authorities establishing the interest in racial privacy could be supplemented by the long-standing provisions in EEOC regulations that advise employers to maintain employees' racial information in a confidential manner and segregate this information from employees' personnel files.[178] This authority, along with Title VII cases concerning employers' negligent disclosure of racial information, strongly suggests that a reasonable legislative body would conclude that Title VII does recognize some privacy interest in maintaining control over the deployment and publication of one's racial information.[179]

Privacy scholar Anita Allen provides a philosophical counterargument, suggesting that the existing legal doctrines protecting informational privacy are insufficient to establish a basis for recognizing a legal right to privacy in racial information.[180] She explains, "[T]o argue that basic liberties include rights of informational privacy, as they surely do, does not lead in any straightforward manner to claims for the protection of racial privacy."[181] Instead, Allen argues, in considering whether to respect a preference like racial privacy:

> it is important to consider why the preference is held. Why do the people who prefer racial privacy prefer it? They do not prefer it out of modesty or shame or a sense of intimacy—that's the territory of sexual privacy. They are indifferent to racial disclosures as such, I believe; they care about racial disclosures only to the extent that they believe racial information will be used to harm or disparage. Concerns about racial discrimination and disparagement

176. *See* Longmire v. Wyser-Pratte, No. 05 Civ. 6725 (SHS), 2007 WL 2584662, at *9 (S.D.N.Y. Sept. 6, 2007).

177. Allen, *supra* note 171, at 1683–85 (discussing a state court's denial of FOIA request seeking disclosure of specific employees' racial-identity information as violating privacy interests).

178. *See* EEO-1: INSTRUCTION BOOKLET, *supra* note 46, at 4; *see also Todd*, 2004 WL 1465771, at *3 (discussing maintenance procedures).

179. *See* Abrams v. Kelsey-Seybold Med. Grp., Inc., 178 F.R.D. 116, 121–22 (S.D. Tex. 1997) (concerning a class action alleging employer's negligence in leaving racial self-identification sheets attached to employment form triggered discrimination in hiring process); *see also* Robinson v. Adams, 847 F.2d 1315, 1318–21 (9th Cir. 1987) (Pregerson, J., dissenting) (recognizing that disclosure of racial information on data-collection form could have served as basis for discrimination against plaintiff).

180. Allen, *supra* note 171, at 1693.

181. *Id.*

> are not irrational. Racial information has been used in the U.S. and other countries as a instrument of public evil.[182]

Allen's analysis is limited by the fact that she presumes that in most cases, one's racial identity is easily discernable by the average viewer, and therefore that the idea of racial privacy has limited value in most social interactions.[183] However, the phenotypic ambiguity of many multiracials and some monoracials makes racial privacy far more relevant than she assumes. Allen's analysis also suffers from her failure to recognize the fertile comparisons between racial privacy and sexual privacy. Although Allen sees the two interests as being substantially different, there is more commonality than might be assumed with regard to intimacy and modesty concerns. Intimacy bonds, although traditionally associated with sexuality, are critical to workplace interactions. Workers may rightly conclude that workplace advantages are distributed based on intimacy bonds and in-group racial preference, rather than primarily being shaped by so called negative racial animus. Consequently, there are incentives for a person to stand mute and assert her interest in racial privacy to maximize her chance to develop intimacy bonds with as many individuals as are willing to recognize her as a racial in-group member. This does not mean that she intends to pass. Rather, those who subsequently learn about her "true" racial status may do so because of her disclosure, and they may be forced to confront their racist attitudes and assumptions in a context in which they have already developed intimacy and respect bonds with a self-identified minority coworker. Additionally, although Allen assumes that modesty concerns are unique to sexual-privacy interests, racial modesty is a phenomenon as well. Multiracials sometimes report that when their racial information is disclosed in the workplace, they are subject to immodest and coercive identity-performance demands or demands of association.[184] Multiracials and phenotypically ambiguous persons often complain that they are subject to racial-authenticity tests in the workplace to prove their belongingness, issues more likely to arise when persons dispute their confidential racial-identification choices. In light of these considerations, the philosophical basis for racial privacy is more complex than it might initially seem.

The above-described legal authorities and the complex philosophical considerations supporting an interest in racial privacy suggest that Congress would have strong basis for recognizing a privacy interest under Title VII that limits the use of an employee's racial information. At a minimum, a reasonable legislative body would want to protect an employee from an employer's malicious or exploitative use of an employee's racial information, as it would recognize such

182. *Id.* at 1690–91.

183. *Id.* at 1689.

184. For a discussion of this phenomenon in both the workplace and in institutions of higher learning, see Ursula M. Brown, *Black/White Interracial Young Adults: Quest for a Racial Identity*, 65 AM. J. ORTHOPSYCHIATRY 125, 127–29 (1995).

action as a form of race-based subordination. Negligent disclosures raise a different set of questions, but case law suggests that there would be some relief for this kind of privacy violation if it increased the risk of discrimination. Importantly, none of these privacy interests rest on the notion of shame but instead on Allen's astute observation that the privacy interest could be respected if it were based on an understanding that race is being used to subordinate, regardless of the individual's own feelings of pride regarding his or her racial status. However, in order for the racial-privacy interest to make conceptual sense, it must be aligned with the diversity-based account of traditional civil rights law that informs Title VII because the diversity rhetoric associated with Civil Rights Era norms rests on certain assumptions about free and open racial disclosure. Courts seeking to align the racial-privacy interest with the logic of affirmative action may find it necessary to conclude that an employee should forfeit his interest in racial privacy if he benefits from diversity or affirmative action programs. As I explain in my other work, affirmative action programs do not serve the representativeness and antidiscrimination purposes they are intended to serve when the recipients are allowed to remain racially anonymous.[185]

D. PRACTICAL APPLICATION: ELECTIVE RACE AND BRIGHT-LINE RULES

Some will argue that the questions explored here are too complex for courts to negotiate with any degree of sophistication. Courts that are convinced by the analysis will still be reluctant to make distinctions between private, public, social, and documentary race, and may be confused about the elective-race framework's implications. As a consequence, elective-race plaintiffs will find that these courts are invariably hostile to their claims, demanding that plaintiffs either accept the consequences of their documentary-race decisions or provide affirmative evidence of their racial status before they may bring suit. Additionally, these courts may continue to reject elective-race plaintiffs' privacy and autonomy claims in all but the most abusive cases out of a desire to exercise deference to employer discretion in data-collection disputes. However, many insights produced by the framework described above can be distilled into a few simple bright-line rules, presumptions, or guidelines that lower courts can and should be expected to follow. These guidelines will help courts avoid certain common pitfalls and mistakes made when analyzing the evidence in elective-race cases. Over time, lower courts less comfortable with the specifics of the elective-race framework will find that appeals court doctrine in this area reflects clear rules and standards that will allow them to better negotiate elective-race

185. This proposition will likely be a source of controversy because school admissions officials and employers have, in recent years, been quite willing to allow persons who identify as mixed race to be recategorized or counted as minorities in order to allow an institution to reach its racial diversity target. For discussion of this phenomenon, see Susan Saulny & Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES, June 13, 2011, http://www.nytimes.com/2011/06/14/us/14admissions.html?pagewanted=all&_r=0.

cases. To begin this process, section D provides some guidance to courts interested in improving their treatment of elective-race cases in the near term.

First, courts should recognize that there are at least four distinct categories of cases that can be more fairly resolved by using insights from the elective-race framework: (1) cases in which an employee is discriminated against because of her chosen public race; (2) cases in which an employee faces discrimination because of her refusal to accept the public-race designation desired by others; (3) racial-misrecognition cases, in which an employee is discriminated against based on the perception that she is a member of a race other than the race she has chosen as her public race; and (4) documentary-race disputes concerning the employer's desire to count an employee as a member of a particular minority group.

Although elective-race cases may appear complicated, many problems can be avoided if courts employ certain baseline assumptions. First, courts should adopt the rule that an employer cannot rely on documentary-race decisions as dispositive evidence of the employee's social or public race. In some cases, employers have attempted to claim that they have no notice of the employee's claimed racial identity because the information was not disclosed in the administrative documents the employee was required to fill out as part of her employment. However, the sociological literature indicates that individuals will change their racial self-identification decisions depending on the format of the question, the context in which it is asked, and a host of other reasons. Moreover, there are many other ways that employers encounter information about an employee's racial-identification choices, including race performance, verbal statements, and physical characteristics. All of these considerations must play a role in establishing whether the employer is aware of the employee's claimed or ascribed racial identity.

Second, courts should establish a bright-line rule that a plaintiff's history of inconsistent racial-identification decisions is insufficient to establish that she has engaged in gamesmanship with regard to her racial-identification decisions. As discussed above, the social science literature demonstrates that both multiracials and racially liminal persons are likely to have changed the category with which they identify over a given time horizon. Additionally, they are likely to have identified with different racial groups in different contexts. Consequently, we should expect to see some variation in their racial self-identification decisions over time. Indeed, for the same reason, courts should avoid drawing on evidence of the plaintiff-employee's racial-identification decisions from unrelated contexts. Certainly, documentary-race decisions can be made public and can come to play a role in social-race understandings; however, the literature also suggests that employees may choose to identify themselves in different ways in different contexts.

Third, courts handling elective-race cases should adopt a general rule that adverse employment actions shortly after disputes over racial categorization disputes should be viewed with heightened skepticism. Employers may accede

to an employee's request to be counted in a particular way, but subsequently conclude that the employee is no longer as valuable if he does not consent to being racially commodified in a particular fashion. For example, if a Middle Eastern man challenges his employer's decision to identify him as "other" instead of white and is terminated shortly thereafter, courts should pay close attention to whether the offered justification is mere pretext to hide sanctions imposed as a result of the categorization conflict.

Fourth, courts should adopt the presumption that, simply because an employee adopts a particular race for the purposes of pursuing his employment claim, this does not mean that the employee has conceded that he is a member of that racial category. Rather, in order to render visible how biracial Asians are being excluded from the category of whiteness, the plaintiff-employee may claim to be Asian when filing his claim to make it clear that persons from this group are being excluded from the category of whiteness.

Fifth, and perhaps most important, courts should be mindful that elective-race cases often will not concern classic negative racial animus or benign intentions as these motivations are traditionally understood. Rather, employers and coworkers will have a broad range of reasons for policing the boundaries of racial categories, including concerns about their own ability to make a claim to a particular racial identity. For example, employers may wish to categorize an employee as minority instead of white for instrumental and practical reasons—to make its workforce look more diverse to the EEOC or to potential customers. Alternatively, the employer may simply refuse to allow an employee to identify as white because he believes that, in doing so, it lowers the status of white persons. For example, an employer may resist a white-skinned Mexican's claims of whiteness because he believes that recognizing Latinos as white diminishes the status of his racial group. Other employers may bear no specific negative animus towards outgroups but are uncomfortable with racial redistricting, a current phenomenon in American culture described by Charles Gallagher. He argues that we are in a historical moment in which certain mixed-race persons, white-skinned Latinos, and white-skinned Asians are coming to be accepted as socially white.[186] Employers and coworkers may simply reject the claims of whiteness because they believe the employee's claim compromises the racial paradigm with which they are most comfortable.

Importantly, these skirmishes over whiteness and the claims of racial fraud made against minorities should not be regarded as minor merely because they tend to concern EEOC-related inquiries. Although the racial declarations actually made during these inquiries have little broad legal significance, these decisions have a larger symbolic significance for many workers as a formal declaration of race. Additionally, these racial declarations may affect the employer's calculations regarding who is qualified for affirmative action benefits

186. *See* Charles A. Gallagher, *Racial Redistricting: Expanding the Boundaries of Whiteness*, *in* THE POLITICS OF MULTIRACIALISM 59, 60 (Heather M. Dalmage ed., 2004).

and lead to "showcasing," effectively compelling minority employees to appear at events and assist the company in communicating messages about diversity. Employees accused of racial fraud for refusing to identify as minority may fear the intimacy and race-performance demands that might be imposed upon them if they publicly acknowledge their membership in a given racial category. They may also be worried that their responses in EEOC data-collection materials may trigger discrimination. Consequently, fights in elective-race cases over the contours of whiteness and other racial categories are often fraught and have real social significance. Indeed, courts will find that these decisions matter in any number of concrete ways.

E. THE IMPENDING CONFLICT BETWEEN ELECTIVE-RACE VALUES AND EEOC POLICY NORMS

The elective-race cases described in Part III should prompt the EEOC to reconsider the approach it has adopted to racial-data-collection processes under Title VII. The regime it has created has taken an ironic turn. That is, the EEOC's apparent goal was to give each employee more agency in determining how she is assigned a racial identity in the workplace.[187] In doing so, however, it has created a fundamental conflict between the employer's interest in counting raced bodies and the identity-performance interests of employees. The employer, worried about diversity statistics, may need employees who appear to be socially recognizable as Asian, black, or Latino to self-identify in data-collection forms in ways that match their socially perceived identity categories. The employer may be frustrated by his employees' documentary-race decisions if they decide to identify as white. Even worse, the employer may engage in strategic decision making, encouraging an employee with a tenuous connection to a racial group to identify as a member of that racial group in order to improve his diversity statistics reported to the EEOC. In both of these circumstances, by giving the power to the employee to define his or her racial identity, we have created a source of friction between the employer and the employee. In an effort to create more freedom, we have placed the employee in a position where she feels the full force of an employer's need or desire to effectively commodify her racial identity.[188]

Having recognized the importance of racial self-definition, the EEOC cannot now disavow the importance of this interest. However, it can do so in ways that fend off the unnecessary conflicts that now occur between the employer, interested in producing a positive diversity record, and the employee's autonomy interests in accurate racial self-identification. These conflicts can be avoided if the EEOC adopts a two-part data-collection process for collecting

187. Yang, *supra* note 82, at 154 (noting the clash between the state's regulatory judgment and one's right to "define one's own conception of the self").

188. For a discussion of the potential commodification effects of workplace diversity programs, see Rich, *Performing Racial and Ethnic Identity*, *supra* note 24, at 1235–36.

racial information in the workplace. This process will first require the employer to do a visual survey and assign employees to a racial group, and second, collect racial self-identification data from its employees. This change will only increase employer's administrative costs at the margins. Moreover, this two-part process is important in the era of elective race to ensure we catch discrimination triggered by voluntary affiliation as well as involuntary racial assignment.

CONCLUSION

This Article introduces the ideological framework I call "elective race" as a way of documenting the growing influence of models of race that privilege the right of racial self-definition, as opposed to privileging involuntary racialization triggered by physical traits and social ascription. Persons who have adopted elective race as their dominant frame for understanding discrimination are primed to take offense at hostile acts triggered by voluntary acts of racial identification. These voluntary racial-identification acts can be casual verbal declarations in a social context or more formal responses given in the context of administrative data collection. As this discussion has shown, the biggest contrast between elective race and other models of racial identity is that this framework assumes that racial identity will be fluid for many social actors. Consequently, individuals may make shifts in racial-identity claims as a result of discontinuities between physical appearance and self-concept or in response to particular structural concerns and social discrimination. In this way, the model of elective race treats racial identification as being more akin to the choices individuals make with regard to sexual orientation, which is more widely recognized to be an identification pattern that varies for an individual depending on context, life period, and even life chances. Alternatively, it might be compared to the choices individuals make with regard to religious identification, which similarly may vary based on life circumstances, the manner in which a question is asked, one's current social practices, or class position.

The description of elective race provided here will provide essential assistance to courts and scholars analyzing future elective-race cases under Title VII and other areas of antidiscrimination law.[189] As explained above, persons influenced by elective race emphasize the dignity and privacy injuries that can arise in this process of racial self-identification and the state's obligation to protect individuals who subject themselves to this process. The EEOC's regulations on this issue suggest that these elective-race understandings are reasonable

189. *See* Justin DeSautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 52 (2012) (questioning effects of multiracial discourse in discussion of racial equality issues); Hernández, *supra* note 9, at 101–03 (suggesting that the deployment of multiracial discourse in the quest for racial equality is potentially hiding the racial impact of supposedly race-neutral laws). Because a discussion of elective race gives us a better sense of what motivates racial-election decisions and how these self-identification decisions change over time and in certain contexts, elective race will allow scholars to more precisely identify data-collection problems that threaten Title VII's enforcement and propose solutions.

but defeasible. This Article further explores this proposition, demonstrating that the dignity, autonomy, and privacy interests elective-race plaintiffs raise must be weighed against the equally critical antidiscrimination purposes racial-data collection serves for the state.

My ambitions in this piece are multiple. One goal is to show how the elective-race framework can enrich antidiscrimination discussions. Indeed, the elective-race framework is a powerful descriptive tool allowing us to better understand the experiences and concerns of racially liminal,[190] multiracial, and phenotypically ambiguous persons, and resolve those concerns on a fair and principled basis. It will also allow us to better describe the injuries these individuals suffer as they negotiate administrative inquiries and race-related data-collection efforts in the workplace. Additionally, the framework will help elective-race plaintiffs render visible the core antidiscrimination interests at stake in some of the seemingly minor antidiscrimination claims alleging injury from what employers would describe as technical mistakes or misclassifications with regard to racial identity.[191] The Article shows that, at present, many courts and scholars are skeptical of plaintiffs' claims that sound in elective race, without fully understanding the basis for the plaintiffs' claims of injury or considering whether their claims are linked to important values and norms at the heart of American antidiscrimination law. By offering a comprehensive description of elective race, this Article attempts to provide courts and scholars with a better basis for understanding the justice and fairness claims raised by plaintiffs in elective-race cases.

The Article also provides independent value to employment-discrimination scholars. My goal is to help scholars move past the impasse on post-racialism and the traditional account of discrimination to recognize contemporary race dynamics that simply are not well-represented in the literature. Additionally, the framework is offered to help antidiscrimination scholars recognize connections and contextualize scholarship that otherwise does not appear to share a common

190. A racially liminal person is a person that self-identifies as monoracial, but has difficulty choosing between the racial and ethnic categories used in the United States because she believes that these categories do not fully or accurately describe her group. For example, Filipinos may be characterized as Asian, American Pacific Islander, or even Latino under American definitions of race, but many Filipinos would argue that none of these racial categories gives them a truly accurate option for racial classification. *See* KEVIN L. NADAL, FILIPINO AMERICAN PSYCHOLOGY: A HANDBOOK OF THEORY, RESEARCH, AND CLINICAL PRACTICE 68–70 (2009) (discussing categorization problems and explaining that if race is defined purely based on physical characteristics, Filipinos do not fit seamlessly into any one group).

191. The Article reveals that these "mistakes" concerning racial classification have social and material repercussions. *See, e.g.*, Padilla v. N. Broward Hosp. Dist., No. 06-CIV-60934, 2007 WL 2364332 (S.D. Fla. Aug. 14, 2007) (regarding a putative white employee's elimination during reduction-in-force decision after he resisted his employer's attempt to categorize him as Latino); Cooksey v. Hertz Corp., No. 00 CV 5921 (SJ), 2004 WL 1093674 (E.D.N.Y. Jan. 26, 2004) (regarding a putative Native American employee's allegation that coworkers abandoned her during her training period after she expressed offense at her employer's concerns that she had not racially self-identified as Native American on her employment form).

theme. Scholarship on multiracialism, performativity, and whiteness studies have common points of interest, particularly as more white multiracials bring antidiscrimination claims. Finally, my hope is to begin a broader philosophical discussion about what it means, as a normative matter, to recognize autonomy and privacy interests related to race. By doing so, we can ensure that the elective-race framework brings analytic clarity to our discussions as we examine the injuries alleged by persons who, for various reasons, hold views about race discordant with traditional American racial-categorization norms, and therefore have difficulty navigating American racial-data-collection regimes.

Courts and practitioners should also find value in the Article because it provides a series of concrete tools to assist in adjudicating cases. Although the core principles associated with elective race are articulated in fairly broad and abstract terms, the discussion instrumentalizes many of the elective-race principles. Additionally, the discussion covers the necessary understandings, presumptions, and bright-line rules that courts and practitioners need to make sense of more thorny elective-race disputes. Finally, the Article also speaks to policymakers. I show that the growing influence of elective race does not necessarily require that we abandon all data-collection efforts that require employers to identify and count employees based on perceived social race, even if this counting offends the sensibilities of their workers. Rather, the era of elective race instead requires that the government offer cogent and persuasive reasons why social race matters, and why racial-data-collection efforts based on social race are essential to the public good. Certainly, policymakers are right to have lingering concerns about regulations that require employers to involuntarily racially classify employees, but we must also recognize that racial assignment for administrative purposes has little effect on the freedom one exercises to define oneself. Being involuntarily racially labeled or categorized by an employer or a state official simply is not, and should not be regarded as, an act that becomes constitutive of one's own experience of racialization. Indeed, most of the employer-determined documentary-race decisions that are made will be kept private. There is no reason to assume that they will dominate a person's experience of social race or prevent the individual from maintaining his or her own private understanding of racial identity.

In summary, by providing a broad conceptual map that organizes the terrain before us, it is my hope that we will develop more principled understandings of the elective-race cases, and in this way respect the identity claims and experiences of a broader range of workplace discrimination plaintiffs. One thing is clear: we can no longer afford to treat the individual's interest in racial self-identification as a mere annoyance or unnecessary complication in data-collection efforts. Rather, these self-identification decisions can trigger racial skirmishes in the workplace over the boundaries of racial categories that should be a core Title VII concern. We also should not presume that a new focus on voluntary racial identity will necessarily detract from efforts to assist persons subject to racialization based on their physical features. Rather, our goal must

be to actively engage with the growing discourse on elective race and ensure that it develops in a manner that continues to recognize the importance of racially-associated physical characteristics and the established sedimented patterns of social subordination in minority communities. Only in this way can we ensure that all constituencies that experience race discrimination in the workplace are adequately served.