

## COMMENTS

# A Class of One: Multiracial Individuals Under Equal Protection

*Desirée D. Mitchell*<sup>†</sup>

*When it comes to recognizing multiracial individuals under the Equal Protection Clause, courts have fallen short. Only rarely do courts explicitly identify multiracial plaintiffs as just that—multiracial. Instead, the majority of courts revert to a “one-drop” rule in which they view plaintiffs as only one part of their self-identified racial composition. In doing so, the unique identities and experiences of multiracial individuals remain unaddressed. This Comment builds off previous scholarship by arguing that courts can and should do better at recognizing multiracial plaintiffs in equal protection cases by using a “class-of-one” framework. Under that doctrine, the Supreme Court has held individuals that do not identify with some commonly recognized marginalized class may still assert discrimination claims as a class of one by alleging that they were treated differently from others similarly situated. Given our increasingly multiracial society, it is more important than ever that courts play this vital role in the country’s continued discussions about race by acknowledging the often-marginalized identities of multiracial individuals.*

INTRODUCTION.....	238
I. MULTIRACIAL IDENTITY IN THE UNITED STATES .....	242
A. Social History and the One-Drop Rule .....	242
1. Mixed-race persons in early U.S. history.....	243
2. Multiracial developments in the twentieth century.....	244
B. Legal History and the Development of Racial Classification.....	246
II. EQUAL PROTECTION AND MULTIRACIAL INDIVIDUALS.....	249
A. General Development of Equal Protection Jurisprudence.....	249
B. Court Recognition of Multiracial Plaintiffs for Equal Protection Purposes.....	252
III. UNADDRESSED MULTIRACIAL HARM .....	255
A. Multiracial Rejection in Society.....	257
B. Multiracial-Targeted Hostility.....	259
C. Remedying Multiracial Harms Through Recognition .....	260

---

<sup>†</sup> B.A. 2018, Brigham Young University; J.D. Candidate 2021, The University of Chicago Law School.

IV. COURT RECOGNITION OF MULTIRACIAL PLAINTIFFS AS A CLASS OF ONE.....	261
A. Justifications for the Class-of-One Doctrine .....	262
B. Structure of the Class-of-One Doctrine .....	264
1. Application of the class-of-one doctrine.....	265
2. Application of the class-of-one doctrine to multiracial plaintiffs. ....	268
CONCLUSION .....	272

My old man's a white old man  
 And my old mother's black.  
 If ever I cursed my white old man  
 I take my curses back.

If ever I cursed my black old mother  
 And wished she were in hell,  
 I'm sorry for that evil wish  
 And now I wish her well.

My old man died in a fine big house.  
 My ma died in a shack.  
 I wonder where I'm gonna die,  
 Being neither white nor black?

—LANGSTON HUGHES, “Cross,” *in* SELECTED POEMS OF  
 LANGSTON HUGHES 158, 158 (6th ed. 1990).

#### INTRODUCTION

For centuries, mixed-race Americans have felt a sense of isolation as unique as their racial makeup. Whether society perceived a multiracial person as White or non-White could determine everything from whom they could marry<sup>1</sup> to which jobs they could work<sup>2</sup> to which areas and homes they could live in.<sup>3</sup> The racially mixed nation that the United States has been since its foundation has resulted in a society in tension with entrenched notions of racial classification. The Equal Protection Clause of the U.S. Constitution—passed to promote equality of former slaves—

<sup>1</sup> See James R. Browning, *Anti-miscegenation Laws in the United States*, 1 DUKE BAR J. 26, 34–35, 37–38 (1951).

<sup>2</sup> See German Lopez, *Study: Anti-Black Hiring Discrimination Is as Prevalent Today as It Was in 1989*, VOX (Sept. 18, 2017), <https://perma.cc/Y6SB-W2S8>.

<sup>3</sup> See Nancy H. Welsh, *Racially Restrictive Covenants in the United States: A Call to Action*, 12 AGORA J. URB. PLAN. & DESIGN 130, 132–33 (2018).

says that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>4</sup> Yet there is reason to believe multiracial individuals are not offered equal protection under the law.

Perhaps unsurprisingly, courts have largely failed in classifying the cases of the multiracial plaintiffs before them. Particularly in the context of White-Black relations during the centuries-long era of anti-miscegenation laws, courts abided by a “one-drop” rule in which anyone with any traceable amount of Black heritage was legally considered Black.<sup>5</sup> But even since the days in which anti-miscegenation laws were deemed unconstitutional, courts have continued to falter in how they see multiracial people for legal purposes. Historically, courts have simply understood multiracial individuals to be akin to a single minority race of which they are at least partially composed.<sup>6</sup> For instance, in the infamous race-based case *Plessy v. Ferguson*,<sup>7</sup> the Supreme Court accepted the notion that the plaintiff—a man who was “seven-eighths Caucasian and one-eighth African blood”—was, for all legal purposes, Black.<sup>8</sup> Because of this limited understanding of racial identity, the legal system has largely failed to identify multiracial plaintiffs as they identify themselves, leaving many plaintiffs feeling unrecognized and alienated from society.<sup>9</sup>

Seeking to address this problem, some scholars have written about how courts might consider the multiracial identities of plaintiffs in ways such as ceasing to require some identification with a recognized racial category.<sup>10</sup> Professor Taunya Lovell Banks, for instance, has joined scholars like Professors Nancy Leong<sup>11</sup> and Lauren Sudeall Lucas<sup>12</sup> in arguing that the law should recognize individuals’ very personal multiracial

---

<sup>4</sup> U.S. CONST. amend. XIV, § 1.

<sup>5</sup> See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1174, 1187 (1997).

<sup>6</sup> *Id.* at 1174; see also A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1976 (1989) (“In Virginia, there were only three racial classifications of any legal significance. . . . Those three were ‘white,’ ‘Indian,’ and ‘Negro and mulatto.’”).

<sup>7</sup> 163 U.S. 537 (1896).

<sup>8</sup> *Id.* at 541.

<sup>9</sup> See Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 535–36 (2010).

<sup>10</sup> See, e.g., *id.* at 549.

<sup>11</sup> See *id.* at 546–48.

<sup>12</sup> See Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1277–79 (2014).

identities.<sup>13</sup> Relatedly, scholars like Professor John Tehranian and Bijan Gilanshah have called for a more fluid understanding of race under equal protection doctrine.<sup>14</sup> This Comment largely builds off those arguments by asserting that courts should recognize multiracial plaintiffs as just that—multiracial. In doing so, I suggest that courts should adopt a mindset in which they use a framework similar to the recognized “class-of-one” equal protection doctrine.

The class-of-one doctrine allows an individual to be recognized as a class of her own for equal protection purposes. Through this doctrine, courts have been receptive to the argument that an individual who does not identify with a recognized class has nevertheless been subject to unlawful discrimination in need of judicial review. I argue the unique experience of multiracial individuals should allow them to allege discrimination because of their membership within a class of one. This option would be fitting in the context of plaintiffs who are not monoracial because the multiracial experience varies significantly by racial makeup and self-identification. It is those experiences that are worthy of recognition by courts.

Consider the following hypothetical example given by Leong:

A plaintiff claims that he was discriminated against because he was Asian. He alleges that his coworkers called him a “chink,” asked him whether he ate dogs, and mocked the shape of his eyes. He was ultimately fired for what he believes were pretextual reasons masking racial animus. The first sentence of the court’s opinion is as follows: “Plaintiff alleges that he was discriminated against because he is Hispanic.” Undoubtedly, this plaintiff would feel that the court had disregarded his narrative. Not only did the court characterize him in a way that he had not characterized himself, but the way in which the court characterized him divests the other facts of their narrative impact because they are not associated with the category of “Hispanic” as they are with the category of “Asian.” My example is intentionally exaggerated, and the Reader’s reaction is likely that the court’s characterization was simply *wrong*. But that is exactly the point: just

---

<sup>13</sup> See Taunya Lovell Banks, *Multiracial Malaise: Multiracial as a Legal Racial Category*, 86 *FORDHAM L. REV.* 2783, 2791–92 (2018).

<sup>14</sup> See generally John Tehranian, *Changing Race: Fluidity, Immutability, and the Evolution of Equal-Protection Jurisprudence*, 22 *U. PA. J. CONST. L.* 1 (2019); Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 *LAW & INEQ.* 183 (1993).

as an Asian plaintiff may believe it to be wrong for a court to characterize him as Hispanic, a multiracial plaintiff may feel it was wrong for a court to characterize him as monoracial.<sup>15</sup>

A half-White, half-Black individual will have experiences of discrimination that differ in nature from the discrimination experienced by an individual who identifies as Black, White, Hispanic, or Asian. While these differences may not result in differing legal outcomes (meaning a multiracial plaintiff who is wrongly identified as monoracial may still succeed in her claim, irrespective of the court's error), each plaintiff before a court will still be unique and deserving of recognition. Further, as illustrated by Leong's example, to be meaningfully effective, courts must make an effort to truly understand the situations of claimants. Consequently, multiracial plaintiffs should have the option of having their unique discrimination claims heard and recognized as a class of one.

As described, articles chronicling the unique experiences of mixed-race individuals are not new. For the purposes of this Comment, I define "mixed-race" or "multiracial" individuals as anyone who identifies with more than one race.<sup>16</sup> In Part I of this Comment, I explore the history of multiracial individuals in the United States, including how society, and courts specifically, have classified mixed-race people. Part II then describes existing equal protection jurisprudence and how it has historically applied to multiracial people. I describe how courts have traditionally lumped multiracial individuals with other, clearer minority racial groups and ignored the unique identities of multiracial people. The Comment then goes on in Part III to exemplify the harms multiracial individuals face under current equal protection doctrine. Most notably, I argue multiracial individuals are subject to

---

<sup>15</sup> Leong, *supra* note 9, at 535 (emphasis in original).

<sup>16</sup> The U.S. Census identifies five main groups of races: "White," "Black or African American," "American Indian or Alaska Native," "Asian," and "Native Hawaiian or Other Pacific Islander." *Race: About*, U.S. CENSUS BUREAU, <https://perma.cc/M6WR-XBUU> (last updated Jan. 23, 2018). It is also worth noting that under the U.S. Census, "Hispanic or Latino" is not a racial category but an ethnic one. *About Hispanic Origin*, U.S. CENSUS BUREAU, <https://perma.cc/BRZ6-RCTZ> (last updated Oct. 16, 2020). Concededly, there is no general consensus as to whether "Hispanic or Latino" should be considered a racial group. For the purposes of this Comment, I perceive a Hispanic or Latinx-identifying multiracial plaintiff as one who would qualify as "multiracial" before a court. That is, a plaintiff who identifies as half-White and half-Hispanic could be considered multiracial, despite the fact that the Census would only classify her racially as "White." See Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RSCH. CTR. (June 15, 2015), <https://perma.cc/937U-9A67>.

isolation because of their “confused” identity and are subject to discrimination because of their multiracial composition itself, as opposed to the presence of some non-White heritage. Additionally, I discuss the psychological and symbolic significance of recognizing—or failing to recognize—multiracial identity. Finally, in Part IV, I discuss courts’ use of the class-of-one doctrine under equal protection and how its use could speak to the unique harms multiracial individuals face that are unaddressed under current application of equal protection.

## I. MULTIRACIAL IDENTITY IN THE UNITED STATES

### A. Social History and the One-Drop Rule

Because a mixed person embodies that rebuke to the logic of the system, race-mixing becomes a crime worse than treason.<sup>17</sup>

The existence of multiracial people in the United States extends as long as U.S. history itself, even though the regularity of multiracial recognition is a relatively recent phenomenon. Perhaps in line with the reality that the U.S. Census only began permitting respondents to select more than one race in 2000,<sup>18</sup> multiracial individuals in the United States have been misclassified as an unclassifiable “other” for centuries. This Section proceeds by broadly examining the history of multiracial people in America, beginning as early as the pre-Revolution Era through to the twentieth century and its corresponding developments for multiracial America. As discussed in greater depth in Part II.A, it is this social and legal history of multiracialism that has played a role in how multiracial individuals have been and should be viewed for equal protection purposes. Ultimately, the Supreme Court employs varying levels of judicial scrutiny in equal protection cases depending on the type of classification made. When a classification involves a racial group—like multiracial people—the Court exercises greater scrutiny in examining that classification.<sup>19</sup>

---

<sup>17</sup> TREVOR NOAH, *BORN A CRIME* 21 (2016).

<sup>18</sup> Faye Fiore, *Multiple Race Choices to Be Allowed on 2000 Census*, *L.A. TIMES* (Oct. 30, 1997), <https://perma.cc/6CVS-L9R8>.

<sup>19</sup> See *infra* Part II.A.

1. Mixed-race persons in early U.S. history.

Records from as early as the seventeenth century document common practices of miscegenation between indentured servants of White European and Black African descent.<sup>20</sup> In early America, those with parents of different races—typically one with lighter skin and one with darker skin—were called “mulattoes.” Because of their mixed ancestry, these individuals were considered lower-class citizens and denied classification among those who were “purely” White, regardless of how obvious their Black heritage was.<sup>21</sup> As a result of society’s general hostility toward racial mixing, the nation’s first anti-miscegenation law was passed in Maryland in 1661, criminalizing marriage between White women and Black men.<sup>22</sup> For all legal purposes, many mixed-race people—including those with any small but cognizable number of non-White ancestors—were classified as simply Black.<sup>23</sup>

This harsh one-drop rule was, at the time, essential in maintaining the social, political, economic, and psychological structures on which white supremacy was so dependent.<sup>24</sup> For centuries, a racial hierarchy persisted in which non-White individuals (broadly including those with even one drop of known non-White blood) were systematically subordinated by their White counterparts.<sup>25</sup> As explained by historian Paul R. Spickard, for mixed-race people,

[t]he function of the one-drop rule was to solidify the barrier between Black and White, to make sure that no one who might possibly be identified as Black also became identified as White. For a mixed person, then, acceptance of the one-drop rule mean[t] internalizing the oppression of the dominant group, buying into the system of racial domination.<sup>26</sup>

---

<sup>20</sup> Rainier Spencer, *New Racial Identities, Old Arguments: Continuing Biological Reification*, in *MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE “COLOR-BLIND” ERA* 83, 89–90 (David L. Brunnsma ed., 2006).

<sup>21</sup> See Hickman, *supra* note 5, at 1173.

<sup>22</sup> Eva Saks, *Representing Miscegenation Law*, in *MIXED RACE AMERICA AND THE LAW: A READER* 11, 11 (Kevin R. Johnson ed., 2003).

<sup>23</sup> See Hickman, *supra* note 5, at 1174–79.

<sup>24</sup> See *id.* at 1175–77.

<sup>25</sup> See C.J. Fuller, *Caste, Race, and Hierarchy in the American South*, 17 *J. ROYAL ANTHRO. INST.* 604, 607–08 (2011).

<sup>26</sup> Paul R. Spickard, *The Illogic of American Racial Categories*, in *RACIALLY MIXED PEOPLE IN AMERICA* 12, 19 (Maria P.P. Root ed., 1992).

However, even given the clear purposes of the racist one-drop rule, racial categorization in eighteenth- and nineteenth-century America bore its flaws early on. Between the many scientific and social views on race at the time, courts' logic in their racial categorizations was muddled and contradictory. In one opinion, Judge Spencer Roane of Virginia declared that "[t]he distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only."<sup>27</sup> That assumption later proved wildly untrue. Still, because of this confused and rigid organization of races, society classified most Black and multiracial individuals as non-White, while mistakenly classifying a narrow few as White because of their ability to pass as such. For, as conceded by Judge Roane in *Hudgins v. Wright*,<sup>28</sup> once races "intermingled," it became difficult, or even impossible, to distinguish White from Black.<sup>29</sup>

## 2. Multiracial developments in the twentieth century.

Unquestionably, the number of multiracial people in the United States grew significantly in the twentieth century.<sup>30</sup> This spike was due, at least in part, to the landmark legal developments of that century. Decisions holding that racial segregation and bans on interracial marriages were unconstitutional set the stage for more multiracial children and a consequential change in social perceptions regarding multiracialism.

It was not until nearly a century after the emancipation of all Black people in the United States that the Supreme Court ruled in its landmark decision *Brown v. Board of Education*<sup>31</sup> that racial segregation within schools was inherently unequal.<sup>32</sup> Subsequently, as a result of the flood of legal and political changes regarding race during the Civil Rights Era, the Court held in *Loving v. Virginia*<sup>33</sup> that laws prohibiting interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth

---

<sup>27</sup> *Hudgins v. Wright*, 11 Va. 134, 141 (1806).

<sup>28</sup> 11 Va. 134 (1806).

<sup>29</sup> *Id.* at 141.

<sup>30</sup> Kim Parker, Juliana Menasce Horowitz, Rich Morin & Mark Hugo Lopez, *Multiracial in America: Proud, Diverse, and Growing in Numbers*, PEW RSCH. CTR. (June 11, 2015), <https://perma.cc/TR3Q-VPKQ>.

<sup>31</sup> 347 U.S. 483 (1954).

<sup>32</sup> *Id.* at 495.

<sup>33</sup> 388 U.S. 1 (1967).

Amendment.<sup>34</sup> Unlike the *Brown* decision, the *Loving* decision was widely acknowledged by all and deemed final. As Professor Randall Kennedy noted, “opponents of *Loving* were unable to mount anything like a massive resistance.”<sup>35</sup>

In issuing its decision in *Loving*, the Court rejected the prevailing notions of racial purity and white supremacy. For the first time, the Supreme Court made clear that the intermixing of races was not a defect.<sup>36</sup> Understandably, the decades following the decision resulted in an increase in multiracial unions—in addition to an unsurprising increase in multiracial babies. Recent studies have found that interracial marriages have increased fivefold since *Loving*,<sup>37</sup> and, relatedly, the proportion of multiracial babies born in the United States has increased from 1%<sup>38</sup> to 14%.<sup>39</sup> That is, about one in every seven babies born in the nation is multiracial! Especially in recent decades, multiracial individuals have become more prominent in the public sphere—from entertainment<sup>40</sup> to sports<sup>41</sup> to politics.<sup>42</sup> And with the increase in diversity in the United States, there is reason to expect only an upward trend of multiracial unions and children.

---

<sup>34</sup> *Id.* at 12. Those clauses of the Constitution require, respectively, that states shall neither “deny to any person within [their] jurisdiction the equal protection of the laws” nor “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend XIV, § 1.

<sup>35</sup> RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 278 (1st ed. 2003) (quotation marks omitted).

<sup>36</sup> *See Loving*, 388 U.S. at 11–12.

<sup>37</sup> Gretchen Livingston & Anna Brown, *Intermarriage in the U.S. 50 Years After Loving v. Virginia*, PEW RSCH. CTR. (May 18, 2017), <https://perma.cc/YRB3-8SGH>.

<sup>38</sup> Parker et al., *supra* note 30.

<sup>39</sup> Gretchen Livingston, *The Rise of Multiracial and Multiethnic Babies in the U.S.*, PEW RSCH. CTR. (June 6, 2017), <https://perma.cc/KU9N-GSLF>.

<sup>40</sup> For example, actress-turned-princess Meghan Markle has been open about her mixed-race heritage. *See* Meghan Markle, *I’m More Than An ‘Other’*, ELLE (Dec. 22, 2016), <https://perma.cc/6TD3-8URL>.

<sup>41</sup> Golf legend Tiger Woods, for instance, has self-described as “Cablinasian” (a mix of Caucasian, Black, Indian, and Asian). Gary Younge, *Tiger Woods: Black, White, Other*, THE GUARDIAN (May 28, 2010), <https://perma.cc/5ZDU-4PA3>.

<sup>42</sup> Within the past four years, numerous multiracial individuals have run for (or been) president of the United States. Following former-President Barack Obama’s (half-White and half-Black) time in office, Vice President Kamala Harris (half-Indian and half-Black) and Senator Cory Booker (mainly Black with White ancestry) were only two of many multiracial presidential candidates for the 2020 election. *See* Astead W. Herndon & Jonathan Martin, *Democrats Have the Most Racially Diverse Field Ever. The Top Tier Is All White.*, N.Y. TIMES (Oct. 29, 2019), <https://perma.cc/9DLF-HGCV>.

## B. Legal History and the Development of Racial Classification

In the 1949 movie, *Pinky*, Jeanne Crain (a White woman) plays Pinky Johnson, a light-skinned, possibly mixed woman, who returns to the South after “passing” and spending time studying nursing in the North as a White woman.<sup>43</sup> While in the North, she is perceived as fair skinned enough that a relationship ensues with a White doctor who is unaware of her Black ancestry. Contrastingly, in the South, community members who know her true identity routinely harass her. When Pinky heads to court to fight for her property rights, the community ridicules and discounts her efforts against a (seemingly) White relative. At one point in the film, Pinky says, “I’m a Negro. I can’t forget it, and I can’t deny it. I can’t pretend to be anything else, and I don’t want to be anything else. Don’t you see?” As misguided as the film was in many aspects, it succeeded in some notable respects. Though Pinky’s actual racial composition is unknown to viewers, there is still a clear understanding of the fragility and fickleness of racial classifications. In one social setting—a nursing school in the North—society perceives Pinky as White, and she enjoys the same privileges as any other White person. But in the South, society harasses, demeans, and challenges Pinky because of her ancestry, particularly within the legal context. Albeit fictional, Pinky’s story exemplifies well some of the unique experiences of multiracial people as they have historically endured racial categorization.

As previously noted, general racial classification within the United States has tended to follow a one-drop rule, especially as it relates to White-Black mixed individuals.<sup>44</sup> However, despite the one-drop rule, courts (and society at large) have routinely struggled throughout history to accurately and meaningfully create racial classifications, particularly as they pertained to mixed-race individuals. Often, certain “defining” characteristics such as facial complexion, hair texture, and nose width helped to determine one’s ancestry.<sup>45</sup> In other cases, so-called experts’ extensive knowledge helped to demonstrate a particular individual’s race under racist statutory regimes.<sup>46</sup>

---

<sup>43</sup> PINKY (20th Century Fox 1949).

<sup>44</sup> See Hickman, *supra* note 5, at 1174–80.

<sup>45</sup> See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 2–3 (1994).

<sup>46</sup> See Hickman, *supra* note 5, at 1228–30.

Before the enactment of statutory regimes dictating a person's race, courts were left to their own devices in determining the race of the parties before them. In the nineteenth-century case *Thurman v. State*,<sup>47</sup> the defendant was convicted of the rape of a White woman and the court was forced to determine whether (for the purpose of punishment) the mixed-race defendant would be considered White or Black.<sup>48</sup> The implications of that determination were severe: the law declared, "Every slave, free negro, or mulatto, who shall commit, or attempt to commit the crime of rape on any White female, and be thereof convicted, shall suffer death,"<sup>49</sup> but Whites who committed the same crime were only subject to imprisonment.<sup>50</sup> The court determined that, despite Thurman's "kinky hair and yellow skin," the fact that his mother was White and his father was a mulatto made him "white"—at least under that law.<sup>51</sup> In another case from 1866, *People v. Dean*,<sup>52</sup> another Black-White mixed-race defendant was charged with illegally voting as a "white man."<sup>53</sup> In addressing the difficulties of ascribing race based on physical characteristics alone,<sup>54</sup> the court held that a person like the defendant was, under the relevant state constitution, "white" so long as he had less than one-fourth of African blood.<sup>55</sup>

The difficulty felt by the courts in *Thurman* and *Dean* in defining race became widely addressed by legislatures hoping to simplify the task of racial classification. Most commonly, states enacted laws measuring race by a blood quantum standard or mathematical fraction of racial blood.<sup>56</sup> Some states, like Virginia, passed laws strictly defining "whiteness" as having "no trace

---

<sup>47</sup> 18 Ala. 276 (1850).

<sup>48</sup> *Id.* at 278.

<sup>49</sup> *Id.* at 278–79 (quotation marks omitted).

<sup>50</sup> See C.C. Clay, *Penal Code—Offenses Against the Person*, in A DIGEST OF LAWS OF THE STATE OF ALABAMA § 14, at 414 (Marmaduke J. Slade 1843).

<sup>51</sup> *Thurman*, 18 Ala. at 278–79 (quotation marks omitted).

<sup>52</sup> 14 Mich. 406 (1866).

<sup>53</sup> *Id.* at 413–14.

<sup>54</sup> *Id.* at 422–23 ("There are white men as dark as mulattoes, and there are pure blooded Albino Africans as white as the whitest Saxons.").

<sup>55</sup> *Id.* at 425.

<sup>56</sup> See Destiny Peery, *(Re)Defining Race: Addressing the Consequences of the Law's Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1839–40 (2017). Interestingly, many of these statutes have only very recently been repealed. For example, in Louisiana, a statute defining race under a mathematical formula was not repealed until 1983, and even then, lawmakers faced pushback from critics who called the change in law "obscene." See Frances Frank Marcus, *Louisiana Repeals Black Blood Law*, N.Y. TIMES (July 6, 1983), <https://perma.cc/8S5E-SV97> (quotation marks omitted).

whatsoever of any blood other than Caucasian.”<sup>57</sup> Most, however, opted for more lenient standards of Whiteness, deeming those with less than one-eighth Black blood as White.<sup>58</sup> This approach to racial classification gave courts the appearance of rationality and objectivity, but it also aided in supporting racist ideology through “scientific” evidence.<sup>59</sup>

Nevertheless, this seemingly simple approach to racial identity proved to be just as difficult to utilize, particularly for prosecutors and plaintiffs who were burdened with proving the racial fractions of defendants.<sup>60</sup> For instance, in *Ferrall v. Ferrall*,<sup>61</sup> the plaintiff, a White male, sought to have his marriage to a mixed-race woman declared legally void on the grounds that she was Black.<sup>62</sup> Ultimately, the court ruled for the defendant, finding that the plaintiff failed to prove that his wife was “negro” per the statutory definition of one-eighth Black.<sup>63</sup> Relatedly, in *Knight v. State*,<sup>64</sup> a mixed-race man’s conviction for unlawfully marrying a White woman was reversed because the state could not “prove beyond all reasonable doubt that the defendant had one-eighth or more Negro blood.”<sup>65</sup>

To aid in the challenging task of proving racial identities, courts sometimes deferred to the knowledge of scientific experts.<sup>66</sup> In *Daniel v. Guy*,<sup>67</sup> for example, an expert testified regarding the physical makings of a “negro”—“negro hair[,] . . . [which] never becomes straight until after the third descent from the negro” and “[t]he flat nose[, which] remains observable for several descents.”<sup>68</sup> The court there affirmed the use of such scientists, determining that “[i]f they were skilled in the natural history of the races of men, it was competent for them to state the distinguishing marks between the negro and the white race.”<sup>69</sup>

---

<sup>57</sup> Walter Wadlington, *The Loving Case: Virginia's Anti-miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202 (1966).

<sup>58</sup> See Peery, *supra* note 56, at 1839–40.

<sup>59</sup> *Id.* at 1840.

<sup>60</sup> See Hickman, *supra* note 5, at 1226–27.

<sup>61</sup> 69 S.E. 60 (N.C. 1910).

<sup>62</sup> *Id.* at 60–61.

<sup>63</sup> *Id.* at 61–62.

<sup>64</sup> 42 So. 2d 747 (Miss. 1949).

<sup>65</sup> *Id.* at 748.

<sup>66</sup> See Hickman, *supra* note 5, at 1228–30.

<sup>67</sup> 19 Ark. 121 (1857).

<sup>68</sup> *Id.* at 127.

<sup>69</sup> *Id.* at 136.

\* \* \*

In essence, courts—and society more generally—have historically been in the business of (often wrongfully) making racial classifications.<sup>70</sup> Yet as explained later in Parts II and III, this phenomenon still exists, albeit in a less conspicuous fashion.

## II. EQUAL PROTECTION AND MULTIRACIAL INDIVIDUALS

Beyond social, legislative, and judicial attempts at racial categorization more broadly, the Constitution loomed large over how race was to be treated under the law. Shortly after the end of the Civil War, the Fourteenth Amendment was ratified together with the other Reconstruction Amendments, guaranteeing equal protection to recently freed slaves by declaring that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>71</sup> Despite this command, however, the law remained—and still remains—far from clear as to how exactly multi-racial individuals would properly fit within that equal protection doctrine.

### A. General Development of Equal Protection Jurisprudence

Following the highly controversial *Lochner* Era<sup>72</sup> of the early twentieth century, the Supreme Court held in 1938 that any law targeted against “particular religious, or national, or racial minorities [or] . . . discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.”<sup>73</sup> This well-known phrasing in footnote four of the *United States v. Carolene Products Co.*<sup>74</sup> opinion subsequently catalyzed modern equal protection jurisprudence in two distinct respects: first, as it related

---

<sup>70</sup> For an interesting and more extensive analysis of courts’ struggled attempts to define parties’ races and determine who could permissibly be categorized as White, see IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 163–68 (10th ed. 2008).

<sup>71</sup> U.S. CONST. amend. XIV, § 1.

<sup>72</sup> During the *Lochner* Era, the Court controversially struck down state economic policies “based on the Court’s own notions of the most appropriate means for the State to implement considered policies.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting); see also generally Stephen A. Siegel, *Understanding the Lochner Era: Lessons From the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984) (describing and criticizing the Supreme Court’s holdings and method of judicial interpretation during this period).

<sup>73</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (citations omitted).

<sup>74</sup> 304 U.S. 144 (1938).

to standards of judicial review in discrimination cases and second, in determining which types of individuals—or, more accurately, groups of people—would call for review of laws applying to them with strict scrutiny. For those who belonged to minority groups that were “discrete and insular” enough (like a minority racial group), any government classification based on membership in that group would need to “serve a compelling governmental interest, and must be narrowly tailored to further that interest,” in order to survive strict scrutiny.<sup>75</sup> Where the Court determined that the plaintiffs did not qualify for strict scrutiny because they could not meet the group requirement, the Court would defer to the legislative branch’s decision if the classification furthered some rational state interest.<sup>76</sup>

Regarding the cases that would call for strict scrutiny and a “more searching judicial inquiry,” the Court, in subsequent decades, struggled to concretely define qualifying minority groups. In the 1970s, Supreme Court justices voiced the idea that a “discrete and insular minority” is one whose group members are identifiable by a characteristic that they are powerless to change,<sup>77</sup> and that classifications based on race, nationality, or alienage would be considered highly suspect.<sup>78</sup> Almost fifty years after the famous *Carolene Products* footnote was written, Justice Lewis Powell explained it in the following way:

The theory properly extracted from Footnote 4 . . . is roughly as follows: The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be

---

<sup>75</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

<sup>76</sup> *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Importantly, this lower level of judicial scrutiny has typically been fatal to plaintiffs. As described by one court:

[T]he rational basis test is enormously deferential to the government, and only rarely have laws been declared unconstitutional for failing to meet this level of review. Under rational basis scrutiny, statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify its discrimination.

*Bowman v. United States*, 512 F. Supp. 2d 1056, 1067 (N.D. Ohio 2007) (quotation marks and citation omitted).

<sup>77</sup> *Nyquist v. Mauclet*, 432 U.S. 1, 18 (1977) (Rehnquist, J., dissenting).

<sup>78</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting).

trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government:

First to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and

Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.<sup>79</sup>

While this insight was helpful in determining which groups would be considered discrete and insular, it was still unclear where the line should be drawn in deciding who was deserving of extra judicial scrutiny.

Perhaps as a result of the difficulty in determining which groups were discrete and insular enough for extra judicial protection, courts began using other factors to measure “suspectness.”<sup>80</sup> In *Mathews v. Lucas*,<sup>81</sup> for example, the Court considered the immutability of being a child born out of wedlock and held that such a characteristic ultimately did not call for strict scrutiny.<sup>82</sup> Accordingly, the Court deferred to the rational decision made by the government to deny benefits to certain children born out of wedlock.<sup>83</sup> Ten years later in *Lyng v. Castillo*,<sup>84</sup> the Court refused to find that a “class” of close relatives (or “household[s]”) was a discrete and insular minority in need of increased judicial protection because there was no history of discrimination for that category of individuals.<sup>85</sup> Finally, in *Frontiero v. Richardson*,<sup>86</sup> the Court considered the group’s political powerlessness and general ability to contribute to society in assessing whether a case called for strict scrutiny.<sup>87</sup> These factors—immutability, history of discrimination, political powerlessness, and ability to contribute to society (along with others)—played and, to a certain extent, continue

---

<sup>79</sup> Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088–89 (1982).

<sup>80</sup> See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 148, 150–68 (2011).

<sup>81</sup> 427 U.S. 495 (1976).

<sup>82</sup> *Id.* at 506.

<sup>83</sup> *Id.* at 510–11.

<sup>84</sup> 477 U.S. 635 (1986).

<sup>85</sup> *Id.* at 638.

<sup>86</sup> 411 U.S. 677 (1973).

<sup>87</sup> See *id.* at 686 n.17.

to play a role in courts' attempts to define discrete and insular classes.<sup>88</sup>

For the purposes of this Comment, it is important to establish that almost unquestionably courts would find that multiracial individuals are a discrete and insular group deserving of some form of extra judicial protection (through strict scrutiny). While a multiracial person (for example, half-Black and half-White) may be politically represented by people with interests serving both races, it is unclear that multiracial individuals as a distinct group are adequately protected in their unique interests. Also, while there is no racial "cohesion" among multiracial individuals as a group, they are distinguishable in that they identify as more than one race. This, in turn, poses unique constraints upon them. Further, the Supreme Court has consistently found that any racial classification—including as applied to multiracial people—by the government is inherently suspect and is subject to a higher level of scrutiny.<sup>89</sup>

#### B. Court Recognition of Multiracial Plaintiffs for Equal Protection Purposes

Despite the fact that multiracial plaintiffs fall within a protected class for Fourteenth Amendment purposes, formal judicial recognition of multiracial plaintiffs' specific identity is uncommon.<sup>90</sup> This is likely because, as recognized by Professor Leong,

---

<sup>88</sup> See Strauss, *supra* note 80, at 148–68.

<sup>89</sup> See Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring); see also *Adarand Constructors*, 515 U.S. at 227.

<sup>90</sup> See Leong, *supra* note 9, at 510:

Plaintiffs explicitly identified as multiracial or biracial are a rarity within anti-discrimination jurisprudence. Searching Westlaw for federal cases brought within the past two decades yielded only three Equal Protection claims and five Title VII claims brought by explicitly identified mixed-race plaintiffs. All were district court cases, and five of the eight were unpublished.

Perhaps unsurprisingly, though, court recognition of multiracial plaintiffs seems to be slightly more common than in the year 2010, when Professor Leong's article was published. A search on Westlaw using Leong's terms for only the years 2018 and 2019 revealed an additional seven cases in which the court explicitly recognized the plaintiff as being multiracial in an equal protection case. As Leong found, however, the majority of these cases were at the district court level. Only one in those two years took place at the appellate level. See *generally* *Robinson v. Perales*, 894 F.3d 818 (7th Cir. 2018); *Richard v. Digneau*, 332 F.R.D. 450 (W.D.N.Y. 2019); *A.A. v. Ill. Cent. Sch. Dist.*, No. 18-cv-0098, 2019 WL 4750538 (S.D. Ill. Sept. 30, 2019); *Czerwinski v. N.Y. State Dep't of Corr. and Cmty. Supervision*, 394 F. Supp. 3d 210 (N.D.N.Y. 2019); *Springs v. City of New York*, No. 17-CV-451, 2019 WL 1429567 (S.D.N.Y. Mar. 29, 2019); *Martin v. Dotson*, No. 16-cv-58, 2019 WL 1140224 (M.D. Ala. Jan. 29, 2019); *Beecham v. Roseville City Sch. Dist.*,

“courts have generally lumped individuals identified as multiracial together with other members of conventional categories, reformulating the narrative of discrimination of those identified as multiracial to avoid disruption of the prevailing racial classification scheme.”<sup>91</sup> Further, and importantly, for many equal protection cases, the exact racial makeup of the plaintiff does not matter. As the Court explained, “When a classification denies an individual opportunities or benefits enjoyed by others *solely because of his race* or ethnic background, it must be regarded as suspect.”<sup>92</sup> In practice, that means that a judge may not need to recognize a multiracial plaintiff as multiracial to find that she was impermissibly treated differently because of her race (whatever race that is) under the Fourteenth Amendment. Judges can ascribe to the status quo of monoracialism without negatively affecting the outcomes of some multiracial plaintiffs’ cases because it is largely just viewed as background information. Still, these possible explanations do little to diminish the fact that throughout American history, judges have largely ignored the personal racial identities of innumerable multiracial plaintiffs.

In the most telling example of this tendency of the courts, a plaintiff in one case who self-identified as a “multiracial person of Black, Native American, Jewish and Anglo descent” was unsuccessful in bringing a discrimination claim against his employer, perhaps due in part to the fact that the court refused to recognize his claim as one particularly of a multiracial person.<sup>93</sup> In refusing to do so, the court said that it would be “impracticable to apply and could be so self-limiting that a particular person is the only identifiable member of the group.”<sup>94</sup> Even more, assuming court recognition of the plaintiff as multiracial would not have changed the legal outcome in this case, the plaintiff was still worse off because the court refused to recognize him as he saw himself.

---

No. 15-CV-01022, 2018 WL 1941670 (E.D. Cal. Apr. 25, 2018). Even acknowledging the growth in recognition of multiracial plaintiffs, however, the recognition is still minimal and has yet to account for how a multiracial plaintiff’s felt discrimination is unique precisely *because* they are multiracial.

<sup>91</sup> Leong, *supra* note 9, at 511; *see also* Jayne Chong-Soon Lee, Review Essay, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 774 (1994) (“Criteria that we use loosely in daily life can become rigid tests in the courtroom.”).

<sup>92</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (emphasis added).

<sup>93</sup> *Walker v. Univ. of Colo. Bd. of Regents*, CIV. A. No. 90-M-932, 1994 WL 752651, at \*1 (D. Colo. Mar. 30, 1994); *see also* Leong, *supra* note 9, at 511–12.

<sup>94</sup> *Walker*, 1994 WL 752651, at \*1.

Between 2000 and 2019, federal district courts, collectively, recognized multiracial plaintiffs fewer than forty times in equal protection cases. This is noteworthy considering that a Westlaw search of all equal protection cases during that same time period produces almost ten thousand results.<sup>95</sup> Even more stark, the totality of federal appellate courts in the United States have only recognized multiracial individuals in three equal protection cases.<sup>96</sup> A discussion of all forty-two federal multiracial equal protection cases would be impractical for a Comment of this scope. Still, the following discussion of the three federal appellate cases illustrates the often insufficient approaches taken by courts in fully recognizing multiracial plaintiffs, even in the rare cases when the plaintiffs' racial identity is explicitly mentioned.

In the first case, *Marshall v. Mayor and Alderman of Savannah*,<sup>97</sup> the plaintiff, Tiffany Marshall, sued her former employer under Title VII and the Equal Protection Clause after she was fired.<sup>98</sup> While the plaintiff had initially sued alleging racial discrimination, the lower court had dismissed that claim because the plaintiff did not file with the Equal Employment Opportunity Commission or address the issue in the response to the motion for summary judgment.<sup>99</sup> In fact, the appellate court only mentioned the plaintiff's racial discrimination claim as part of the procedural history and only described her mixed-race identity in a footnote.<sup>100</sup>

In the second case, the plaintiff, Carla Karlen, sued a local school on behalf of herself and her two children, claiming they had been discriminated against because of their respective races.<sup>101</sup> Here, the court mentioned the possibility that one child had been discriminated against because she was biracial (or, rather mentioned that the child's father had framed this possibility) but

---

<sup>95</sup> To identify these cases, I conducted the following search in Westlaw based on Leong's previous searches on the same issue: (biracial multiracial "mixed race" "racially mixed") & ("equal protection") & DA(aft 01/01/1990) & DA(bef 12/31/2019). I then filtered the results to only include cases in federal district courts. This search yielded 265 cases. After examining each case, I determined 39 equal protection claims explicitly identified the plaintiff as multiracial.

<sup>96</sup> I conducted the following search in Westlaw: (biracial multiracial "mixed race" "racially mixed") & ("equal protection") & DA(aft 01/01/1990) & DA(bef 12/31/2019). I then filtered the results to only include cases in the Supreme Court or federal courts of appeals. This search yielded 103 cases. After examining each case, I determined only 3 explicitly identified the plaintiff as multiracial.

<sup>97</sup> 366 F. App'x 91 (11th Cir. 2010).

<sup>98</sup> *Id.* at 96.

<sup>99</sup> *Id.* at 96–97.

<sup>100</sup> *Id.* at 96 n.4.

<sup>101</sup> *Karlen v. Landon*, 503 F. App'x 44, 45 (2d Cir. 2012).

ended the analysis there because of a lack of factual support.<sup>102</sup> In this case, although the court did not engage in an analysis of whether the child's mixed racial identity was key in the discrimination, it at least seemed to note the possibility that it was the case.<sup>103</sup>

Finally, in the most recent case the search yielded, *Robinson v. Perales*,<sup>104</sup> the plaintiff, Anthony Robinson, sued his former supervisor for racial discrimination under the Equal Protection Clause.<sup>105</sup> Near the beginning of the opinion, the court briefly made mention of Robinson's biracial self-identification; however, the inquiry into this aspect of the plaintiff ended there.<sup>106</sup> Perhaps due to the nature of the case and available facts, the court only examined the effect of the plaintiff's claims that he had been repeatedly subjected to racial epithets and intimidation tactics typically associated with Black or African American individuals.<sup>107</sup> While this case may be an example of ignorance by the court in being unwilling to truly understand the experiences of multiracial people, it might just as likely be one in which the plaintiff was discriminated against because of his perceived race rather than his self-identified race, so his multiracial identity was irrelevant.

Importantly, however, these cases emphasize a too-common practice in courts: In none of these appellate-level cases did the court satisfactorily recognize the plaintiff's *multiracial identity* and assess whether it might have played a role in the plaintiff's racial discrimination case. Regardless of whether recognition would have made a difference in what the plaintiff could recover, lack of recognition was at least harmful in that it denied a basic right of any person—acknowledgment.

### III. UNADDRESSED MULTIRACIAL HARM

The lack of recognition of multiracial people in courts has undoubtedly led to adverse effects upon those plaintiffs. By failing to recognize multiracial plaintiffs as multiracial, courts—ironically—discriminate against plaintiffs whose discriminatory claims they seek to address. Anti-miscegenation laws probably

---

<sup>102</sup> See *id.* at 47.

<sup>103</sup> See *id.*

<sup>104</sup> 894 F.3d 818 (7th Cir. 2018).

<sup>105</sup> *Id.* at 823, 825.

<sup>106</sup> See *id.* at 823.

<sup>107</sup> *Id.* at 823–26.

first arose in the 1600s,<sup>108</sup> and at one point, thirty-eight states had laws banning interracial relations.<sup>109</sup> As a consequence of these long-standing ideas, some people, even today, may be reluctant to accept interracial relationships and the children that are a consequence of them.<sup>110</sup> The negative historical perceptions of racial mixing mean that many multiracial individuals feel ostracized by groups in which they only partially belong.<sup>111</sup> Perhaps the question most often heard by multiracial individuals is, “What are you?” While seemingly harmless, this question is, in a way, representative of the discriminatory experiences faced by multiracial people. Because they lack membership in one clear category, multiracial individuals are subject to treatment as misfits. This Part aims to specify some of the unique harms faced by multiracial individuals that are left unaddressed by current equal protection application.

As discussed earlier, the United States has a long history of disapproving mixed-race relations—particularly because those relations involved dilution of the White race—and continues to exist in a state of uncertainty when it comes to multiracial individuals. When courts fail to recognize multiracial plaintiffs as multiracial, they perpetuate confused and often negative ideas regarding racially mixed individuals. Inevitably, there is a substantial overlap between multiracial and monoracial animosity. However, as is true for any distinct group of marginalized individuals, and particularly within the context of race, there are important distinctions between single-race discrimination and multiracial discrimination, including prejudices that only multiracial individuals face. The rest of this Part discusses some of those harms: specifically, multiracial ostracism and harm directed toward multiracial individuals because of their mixed racial makeup. I argue that in recognizing multiracial plaintiffs’ self-described identity,

---

<sup>108</sup> See Leong, *supra* note 9, at 487.

<sup>109</sup> *Id.*

<sup>110</sup> For example, in a recent Pew Research Center survey, only 83% of respondents agreed with the statement, “[I]t’s all right for blacks and whites to date.” *Trends in Political Values and Core Attitudes: 1987–2007*, PEW RSCH. CTR. (Mar. 22, 2007), <https://perma.cc/Z254-49EG>. Presumably, then, nearly two out of every ten respondents had reservations about interracial relationships, at least in the context of Black and White people. See also Leong, *supra* note 9, at 494–95 (describing various public surveys regarding public attitudes toward interracial relationships).

<sup>111</sup> See Leong, *supra* note 9, at 496–500 (describing the experiences of multiracial individuals being treated as “less than” in their respective groups).

courts also recognize the unique problems faced by those who do not fit within any monoracial category.

#### A. Multiracial Rejection in Society

A first harm faced by multiracial individuals is that they are highly susceptible to the notion that they do not belong within specified groups or even society more generally. A lack of recognition in court reinforces this notion. Unfortunately, this oppression happens to multiracial individuals both because they are people of color and by other individuals of color who do not fully accept them.<sup>112</sup> While a person who identifies as fully Black may at least find refuge within the Black community, if not also society at large, a multiracial individual may not receive the same welcome into those groups. The fact that a multiracial person does not clearly belong to one group may prevent acceptance into any group. As explained by Leong, “[a] mixed-race person may be viewed as polluted, defective, confusing or confused, passing, threatening, or—in our diversity-obsessed society—as opportunistic, gaining an advantage by identifying with a group in which he is at best a partial member.”<sup>113</sup>

Some scientific studies have shown that society tends to consider multiracial people more confused or defective than other groups. For instance, in a psychological study, researchers gave a scenario to 102 participants in which they were asked to identify possible causes of a fictitious child’s misbehavior.<sup>114</sup> The character in the fictitious example was randomly assigned to be either a White boy, a Black boy, or a boy with mixed-race parentage.<sup>115</sup> Surprisingly, 85% of those assigned to the mixed-race boy attributed his behavioral problems to an identity crisis compared to 59% and 25% of those who had the Black and White boys, respectively.<sup>116</sup> These ideas likely stem from deep-rooted beliefs in the “inherent” inferiority of multiracial people. For instance, the once-popular theory of “hybrid degeneracy” held that mixed-race people were inferior to monoracial people because of decreased

---

<sup>112</sup> See Maria P.P. Root, *Within, Between, and Beyond Race*, in RACIALLY MIXED PEOPLE IN AMERICA, *supra* note 26, at 3, 9.

<sup>113</sup> Leong, *supra* note 9, at 484.

<sup>114</sup> Kwame Owusu-Bempah, *Confronting Racism in the Therapist’s Office*, in MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE “COLOR-BLIND” ERA, *supra* note 20, at 313, 318.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

physical, mental, emotional, and moral ability.<sup>117</sup> Alternatively (or perhaps additionally), it may just stem from the idea that multiracial people are inherently confused rather than confused because of the pressure society places on them.<sup>118</sup> These ideas are both wrong and offensive, yet they persist within society.<sup>119</sup>

Relatedly, another study of adolescents found that those who identified with more than one race were more likely to be at risk of feeling depressed, having trouble sleeping, skipping school, smoking, and drinking alcohol.<sup>120</sup> It is not unreasonable to think these results may have been, at least partially, a consequence of the external pressure and confusion many multiracial people feel to choose one of their races as their self-identified race. Coincidentally, many times when a multiracial person is forced to choose (or is told) the race she presents herself as, it misaligns with the race or races with which she identifies in public.<sup>121</sup> Further, the physical appearance of a multiracial individual, in itself, can lead to a variety of troublesome and uncomfortable encounters for the multiracial person, from exaggerated emphases on appearance to questions on the origin of physical features.<sup>122</sup> Multiracial people will experience situations in which their own sense of self is questioned more often than will individuals of a single race.<sup>123</sup> In addition to the discomfort a multiracial person may feel when asked “what” she is, the uneasiness may only continue when, upon giving an honest answer, the inquirer reacts with astonishment, declaring her disbelief because the multiracial person does not “look” a certain way.<sup>124</sup> It is experiences like these that exacerbate

---

<sup>117</sup> Cynthia L. Nakashima, *An Invisible Monster: The Creation and Denial of Mixed-Race People in America*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 26, at 162, 165–66.

<sup>118</sup> See Robin L. Miller, *The Human Ecology of Multiracial Identity*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 26, at 24, 31–34.

<sup>119</sup> See Anita Kathy Foeman & Teresa Nance, *From Miscegenation to Multiculturalism: Perceptions and Stages of Interracial Relationship Development*, 29 *J. BLACK STUD.* 540, 546–48 (1999) (discussing researchers that have advocated for the position that non-Whites, including mixed-race individuals, are inferior to Whites as recently as 1994).

<sup>120</sup> J. Richard Udry, Rose Maria Li & Janet Hendrickson-Smith, *Health and Behavior Risks of Adolescents with Mixed-Race Identity*, 93 *AM. J. PUB. HEALTH* 1865, 1868 (2003).

<sup>121</sup> See Nakashima, *supra* note 117, at 176.

<sup>122</sup> See Carla K. Bradshaw, *Beauty and the Beast: On Racial Ambiguity*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 26, at 77, 81–82.

<sup>123</sup> See Raushanah Hud-Aleem & Jacqueline Countryman, *Biracial Identity Development and Recommendations in Therapy*, 5 *PSYCHIATRY* 37, 41–44 (2008).

<sup>124</sup> See Bradshaw, *supra* note 122, at 83.

the alienation from mainstream values felt by multiracial individuals.<sup>125</sup>

### B. Multiracial-Targeted Hostility

Second, multiracial individuals often face prejudice because of their racial composition itself, rather than, or in addition to, the underlying negative assumptions that come with being multiracial. Certainly, a half-White, half-Black individual might be subject to racial slurs typically targeted to Black people,<sup>126</sup> but she would also face epithets unique to the multiracial category.<sup>127</sup> The same is true when it comes to discriminatory behavior targeted toward someone because of her racial composition. Some might act with hostility toward multiracial individuals for no other reason except for the fact that they are multiracial. In one notable case from Utah, a school bus driver was alleged to have racially discriminated against a 14-year-old biracial student when he apparently intentionally closed the door on the child as he was exiting the vehicle and began to drive, dangling the child along for 150 feet.<sup>128</sup> To make matters even worse, there had been at least three other reports against that driver alleging racial discrimination against biracial individuals.<sup>129</sup>

In a study conducted by the Pew Research Center, researchers found that *because of their multiracial identity*, more than half of multiracial individuals have been subject to jokes or slurs; more than 15% were teased or made fun of as a child; just under half had received poor service in restaurants or other businesses; and 33% had been treated unfairly by an employer.<sup>130</sup> These hostile interactions may be the result of inappropriate judgments made by people in general or even critical assumptions made by minorities, who often see multiracial people as “traitors” or

---

<sup>125</sup> See Cookie White Stephan, *Mixed-Heritage Individuals: Ethnic Identity and Trait Characteristics*, in RACIALLY MIXED PEOPLE IN AMERICA, *supra* note 26, at 50, 58–59.

<sup>126</sup> See, e.g., *Robinson*, 894 F.3d at 823–26; see also Leong, *supra* note 9, at 495 n.105.

<sup>127</sup> See, e.g., Leong, *supra* note 9, at 496 n.106 (listing examples pertinent to the half-Black, half-White individual, including “mulatto,” “oreo,” and “chigger,” and more generally used terms including “half-breed,” “mutt,” and “zebra”).

<sup>128</sup> Courtney Tanner, *A Biracial Utah Boy Was Shut in the Doors of a School Bus and Left Dangling Outside as It Drove Forward. Now His Family Is Suing.*, SALT LAKE TRIB. (May 8, 2019), <https://perma.cc/23TH-9G2C>.

<sup>129</sup> *Id.* When the bus driver was asked by the media if he was racist, he responded by saying, “Not at all. No. Look at my dog. He’s as black as could be.” *Id.* This in no way proves that he was hostile toward multiracial people simply because they existed. However, it is plausible that was the case.

<sup>130</sup> See Parker et al., *supra* note 30.

“whitewashed.” As some people act discriminatorily toward Black people simply because of their skin color, some may act unfairly toward multiracial people because they are not “pure” in terms of their racial composition.

Relatedly, multiracial people are subject to the unique and complex phenomenon of discrimination based on “situational race,”<sup>131</sup> which involves a person “act[ing] upon prejudice against a mixed-race individual under the false belief that the person is of a certain racial background.”<sup>132</sup> For example, a half-Mexican, half-Filipina woman may suffer racial discrimination as a perceived Middle Eastern woman, although she has no identification with the Middle East.<sup>133</sup> To be sure, discrimination of any sort is inexcusable, but discrimination based on a characteristic with which a person does not even identify is perhaps even more deplorable because of the increased lack of recognition the discriminated person feels. As current recognition of multiracial plaintiffs in court stands, these acute experiences go unaddressed with the identities of the plaintiffs. Without recognizing *who* a person is, a court can hardly be expected to understand and remedy *what* that person is experiencing.

### C. Remediating Multiracial Harms Through Recognition

In accord with the notion that multiracial people deserve acknowledgment, it is only by properly recognizing multiracial individuals as just that—multiracial—that courts (and, subsequently, we as a society) validate their existence and experiences as a group and individually. As explained by one author, “[b]eing able to control racial representations of oneself or one’s group marks a securing of symbolic power in the face of a racial system that relies on symbolic means for the maintenance of inequality.”<sup>134</sup> Recognizing multiracial people as such is powerful in that it aids in eliminating the discriminatory racial hierarchical system that, for so long, has oppressed non-Whites—even more

---

<sup>131</sup> See, e.g., Maria P.P. Root, *The Multiracial Experience: Racial Borders as a Significant Frontier in Race Relations*, in *THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER*, at xiii, xxi (Maria P.P. Root ed., 1996).

<sup>132</sup> Ken Nakasu Davison, Note, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 *ASIAN L.J.* 161, 180 (2005).

<sup>133</sup> *Id.* at 180–81.

<sup>134</sup> Benjamin Bailey, *Black and Latino: Dominican Americans Negotiate Racial Worlds*, in *MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE “COLOR-BLIND” ERA*, *supra* note 20, at 285, 295.

notably within the legal system.<sup>135</sup> Inversely, though, misaddressing or failing to address entirely the racial identity of multiracial individuals can have detrimental effects on the mental well-being of those individuals.

One may wonder why the more obvious possibility of adding a separate class of “multiracial people” to the generally accepted racial categories<sup>136</sup> would not be enough. Importantly, creating a multiracial category might cause animosity among racial groups or might perpetuate existing racial classifications by deeming multiracial individuals as the result of two people of “pure” races.<sup>137</sup> Additionally, creating a single classification for all multiracial people ignores the vast differences among multiracial individuals. One should hardly argue that the experiences of a Black-White, mixed-race individual would mirror the experiences of an Asian-White, mixed-race individual.<sup>138</sup> Instead, adopting a separate class-of-one approach would avoid these difficult problems that would result from creating a “multiracial” category in addition to other racial categories.

Ultimately, under the current application of equal protection doctrine to multiracial individuals, courts fall short. By incorrectly categorizing the racial identity of—and thereby refusing to acknowledge the unique experiences of and harms faced by—multiracial people, mixed-race people do not receive equal protection under the law.

#### IV. COURT RECOGNITION OF MULTIRACIAL PLAINTIFFS AS A CLASS OF ONE

Because of the unique recognition problems faced by multiracial individuals, I argue courts should be willing to expand the equal protection doctrine of class-of-one plaintiffs to assess the discrimination claims of multiracial individuals. Doing so would acknowledge multiracial plaintiffs in a way that allows the plaintiffs to assert their identity in the way they see fit, even if use of the doctrine results in few changes in legal outcomes. This Part explains the historical justifications and applications of the

---

<sup>135</sup> Concededly, recognition of multiracial individuals as distinct might further entrench the racial hierarchies that have persisted throughout U.S. history. A multiracial identity might be viewed as an intermediary between ideal Whiteness and despicable non-Whiteness.

<sup>136</sup> See *supra* note 16.

<sup>137</sup> See Leong, *supra* note 9, at 546–47.

<sup>138</sup> See *id.* at 547.

class-of-one rule before describing how courts might be able to apply it to the cases of multiracial plaintiffs.

The Supreme Court's slowly expanding understanding of equal protection inevitably forced the Court to address the validity of the class-of-one doctrine. Specifically, it was asked to determine whether single individuals—those that do not identify as members of any prejudiced group—would qualify under equal protection. As explained by Hortensia S. Carreira, this “latest frontier” in equal protection jurisprudence was inherently controversial because of its contradiction to the law's tendency to classify people.<sup>139</sup> By allowing class-of-one claims, the Court would “run[ ] the risk of constitutionalizing every arguably different application of law and requiring absolutely equal treatment in every instance.”<sup>140</sup> Despite this risk, however, the Court found class-of-one claims to be constitutional, at least in some contexts. In its first class-of-one case, *Sioux City Bridge Co. v. Dakota County*,<sup>141</sup> the Court remarkably held that individuals that do not identify with some discriminated-against class can still assert discrimination claims as a class of one by alleging they were treated differently from others similarly situated.<sup>142</sup>

This Part proceeds by first discussing the justifications and structure of the class-of-one doctrine. It then discusses the Court's application of the class-of-one doctrine and how courts might apply the doctrine to multiracial plaintiffs. Importantly, implementation of the class-of-one doctrine in multiracial plaintiffs' cases would not be seamless—some alterations would be required. Still, those changes would be minor and worthwhile considering the potential benefits to be acquired by multiracial individuals and, more generally, society.

#### A. Justifications for the Class-of-One Doctrine

In her article, Carreira extensively illustrates the justifications behind allowing class-of-one equal protection claims.<sup>143</sup> First, she explains that the doctrine is consistent with a textualist reading of the Equal Protection Clause.<sup>144</sup> Unlike in the other

---

<sup>139</sup> Hortensia S. Carreira, *Protecting the “Class of One”*, 36 REAL PROP. PROB. & TR. J. 331, 339–40 (2001).

<sup>140</sup> *Id.* at 340.

<sup>141</sup> 260 U.S. 441 (1923).

<sup>142</sup> *Id.* at 446–47.

<sup>143</sup> See Carreira, *supra* note 139, at 340–51.

<sup>144</sup> *Id.* at 340–41.

Reconstruction Amendments, the Equal Protection Clause makes no mention of racial groups or slavery.<sup>145</sup> For instance, the Thirteenth Amendment deems illegitimate “slavery [and] involuntary servitude”<sup>146</sup>—both historically intertwined with Black people. Similarly, the Fifteenth Amendment protects the right to vote for those discriminated against “on account of race, color, or previous condition of servitude.”<sup>147</sup> In sharp contrast, the Fourteenth Amendment offers to “any person within [the United States] jurisdiction the equal protection of the laws.”<sup>148</sup> Consequently, there is reason to believe that even those who do not fit within a concretely defined discrete and insular group may be able to assert equal protection claims.

Second, Carreira suggests that the language the Court has used in its equal protection decisions—specifically, hesitating to offer equal protection only to *groups* of marginalized individuals—leaves the possibility of classes of one open.<sup>149</sup> *Brown*, for example, was decided without any mention of the suspect classification of racial groups.<sup>150</sup> And as explained by Carreira, subsequent cases like *City of Cleburne v. Cleburne Living Center*<sup>151</sup> even seemed to hold that a group was not required at all.<sup>152</sup> In that case, the Court said that the Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.”<sup>153</sup>

Finally, Carreira suggests that public choice theory—or examining equal protection in light of public processes—supports class-of-one claims.<sup>154</sup> The class-of-one doctrine, she posits, does not limit the scope of “discrete and insular” minorities protected; rather, it aligns with public choice theory in “welcom[ing] judicial intervention when democratic processes are unlikely to check government action . . . vis-à-vis an individual person.”<sup>155</sup> This includes individuals we might consider vulnerable that would otherwise not be protected under equal protection. Especially because individuals are typically too powerless to effect change

---

<sup>145</sup> *Id.* at 340.

<sup>146</sup> U.S. CONST. amend. XIII, § 1.

<sup>147</sup> U.S. CONST. amend. XV, § 1.

<sup>148</sup> U.S. CONST. amend. XIV, § 1.

<sup>149</sup> Carreira, *supra* note 139, at 341–42.

<sup>150</sup> *Id.* at 342.

<sup>151</sup> 473 U.S. 432 (1985).

<sup>152</sup> Carreira, *supra* note 139, at 342.

<sup>153</sup> *Cleburne Living Ctr.*, 473 U.S. at 439.

<sup>154</sup> Carreira, *supra* note 139, at 348.

<sup>155</sup> *Id.* at 349.

on their own, it seems fitting for the law to cover them apart from group identities.<sup>156</sup>

### B. Structure of the Class-of-One Doctrine

Given the desire to avoid an excessive number of unfounded equal protection cases, the structure of class-of-one equal protection claims differs from the typical equal protection claim. In order to bring a class-of-one claim, a plaintiff with no membership in a distinct class or group relevant to that claim must allege that she has been intentionally treated differently from others similarly situated.<sup>157</sup> Notably, the “similarly situated” requirement has often demanded “an extremely high degree of similarity between themselves and the persons to whom they compare themselves.”<sup>158</sup> Further, the plaintiff must show that there is no rational basis for differential treatment.<sup>159</sup> This is where the class-of-one doctrine substantially differs from established race-based antidiscrimination law. Instead of the traditional strict scrutiny application to racial discrimination claims, the Court has, so far, only applied rational basis review to class-of-one claims. As one court explained: “While the principal target of the equal protection clause is discrimination against members of vulnerable groups, the clause protects [a] class-of-one plaintiff[ ] victimized by ‘the wholly arbitrary act.’”<sup>160</sup> However, courts have limited the scope of the treatment that qualifies under the class-of-one equal protection doctrine. Importantly, the discriminatory treatment must be shown to be an act of “illegitimate animus” as opposed to mere “inadvertence or some kind of permissible governmental classification.”<sup>161</sup> Even more, the differential treatment must be *because of* that individual’s membership (or perceived membership) in the class of one—singling out an individual, in itself, does not create a class.<sup>162</sup>

A class-of-one plaintiff may demonstrate that the governmental action lacks a rational basis in two ways.<sup>163</sup> They can either

---

<sup>156</sup> *See id.*

<sup>157</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

<sup>158</sup> *Ruston v. Town Bd. for Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (quotation marks omitted) (quoting *Clubsides, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)).

<sup>159</sup> *Olech*, 528 U.S. at 564.

<sup>160</sup> *Ind. State Tchrs. Ass’n v. Bd. of Sch. Comm’rs of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (quoting *City of New Orleans v. Duke*, 427 U.S. 297, 304 (1976)).

<sup>161</sup> *Levenstein v. Salafsky*, 414 F.3d 767, 776 (7th Cir. 2005).

<sup>162</sup> *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992).

<sup>163</sup> *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005).

“negativ[e] every conceivable basis which might support’ the government action or [ ] demonstrat[e] that the challenged government action was motivated by animus or ill-will.”<sup>164</sup> Ultimately, plaintiffs cannot succeed on an equal protection claim simply by stating the words “class of one”; rather, they must point to evidence that other, similarly situated individuals were treated more favorably.<sup>165</sup>

Importantly, however, courts have distinguished between appropriate class-of-one cases and those that necessarily must be dismissed because of the need for discretion. As discussed in more detail in the next Section, in *Engquist v. Oregon Department of Agriculture*,<sup>166</sup> the Supreme Court explained that some state actions inherently involve discretionary decision-making.<sup>167</sup> In those cases, “allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”<sup>168</sup> This is particularly true in the context of employment decisions where, sometimes, individualized decisions are made in a seemingly arbitrary manner.<sup>169</sup> Still, the Court in *Engquist* and the lower courts since that decision have regularly upheld plaintiffs’ abilities to bring a class-of-one equal protection claim before the court when they feel they have been irrationally and unjustifiably discriminated against.

#### 1. Application of the class-of-one doctrine.

Admittedly, few class-of-one cases have found their way to the Supreme Court. Still, an analysis of those cases is instructive in showing when the Court has accepted class-of-one claims. In 1918, the Sioux Bridge Company was surprised to discover that the county, in taxing its bridge in South Sioux City, assessed the property at 100%. This element of surprise was justified, considering the issued assessment had historically been only 55%, and, further, the 55% assessment continued to be issued to other owners of similar property in the county.<sup>170</sup> The Nebraska Supreme Court had previously affirmed the district court’s ruling for the

---

<sup>164</sup> *Id.* (quoting *Klimik v. Kent Cnty. Sheriff’s Dept.*, 91 F. App’x 396, 400 (6th Cir. 2004)).

<sup>165</sup> *Rankel v. Town of Somers*, 999 F. Supp. 2d 527, 545 (S.D.N.Y. 2014).

<sup>166</sup> 553 U.S. 591 (2008).

<sup>167</sup> *Id.* at 603.

<sup>168</sup> *Id.*

<sup>169</sup> *See id.* at 604.

<sup>170</sup> *Sioux City Bridge Co.*, 260 U.S. at 442, 445.

defendant, finding that the assessment was arbitrary, though reasonable.<sup>171</sup> When the case reached the Supreme Court, however, Chief Justice William Howard Taft, writing for the court, held that the lower court's affirmation upheld a plausible violation of the Fourteenth Amendment by taxing property in the same class non-uniformly.<sup>172</sup> In doing so, the Court seemed to expand its understanding of antidiscrimination law—according to the Court, the Sioux Bridge Company, a single entity not belonging to any specific prejudiced class, could allege unlawful discriminatory practices on its own.

Sixty-six years later in *Allegheny Pittsburgh Coal Co. v. County Commissioner*,<sup>173</sup> the Court again allowed a small “class” of landowners not belonging to a specified prejudiced group to pursue an equal protection claim when their land was unjustifiably taxed higher than similar property.<sup>174</sup> Specifically, the Court held that state failure to achieve rough equality in taxation among similarly situated property owners—instead using “arbitrary” and “capricious” taxation—violated the Equal Protection Clause of the Fourteenth Amendment.<sup>175</sup> In doing so, the Court said, “The [E]qual [P]rotection [C]lause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.”<sup>176</sup>

It was not until 2000 that the Supreme Court explicitly articulated what is now the class-of-one doctrine. In *Village of Willowbrook v. Olech*,<sup>177</sup> respondent Grace Olech claimed the Village of Willowbrook violated the Equal Protection Clause of the Fourteenth Amendment when it demanded she grant a thirty-three-foot easement in exchange for access to the municipal water supply.<sup>178</sup> Olech contended that the easement demand was “irrational and wholly arbitrary” when compared to the fifteen-foot easement the Village sought from other property owners.<sup>179</sup> Olech claimed the Village was specifically targeting her because of a previous

---

<sup>171</sup> *Id.* at 443–44.

<sup>172</sup> *See id.* at 446–47.

<sup>173</sup> 488 U.S. 336 (1989).

<sup>174</sup> *Id.* at 345–46.

<sup>175</sup> *Id.* at 343–46.

<sup>176</sup> *Id.* at 345 (alteration in original) (quotation marks omitted) (quoting *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)).

<sup>177</sup> 528 U.S. 562 (2000).

<sup>178</sup> *Id.* at 563.

<sup>179</sup> *Id.* (quotation marks omitted).

lawsuit she had filed (and won) against it.<sup>180</sup> Although *Olech* was the only member of the “class” she sought to sue under, the Court recognized claims by classes of one in which “the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”<sup>181</sup> Consequently, it upheld the lower court’s determination that *Olech* could recover under equal protection doctrine.<sup>182</sup>

Eight years after it first explicitly recognized the class-of-one doctrine, the Supreme Court issued its last word to date on the topic, substantially narrowing the doctrine in the process. In *Engquist*, the plaintiff, Anup Engquist, was laid off from her position within the Oregon Department of Agriculture after repeated altercations with her supervisors and coworkers.<sup>183</sup> Engquist alleged her employer had violated the Equal Protection Clause both by discriminating against her on the basis of her race, sex, and national origin and by acting “arbitrar[ily], vindictive[ly], and malicious[ly].”<sup>184</sup> Although the Court reaffirmed the existence of the class-of-one doctrine, it refused to find that it was appropriate within state employment decisions and other discretionary decision-making areas.<sup>185</sup> In doing so, it analogized employment decisions to a traffic officer giving tickets—an officer can only give tickets to some, not all, speeding drivers, yet we would hesitate to allow an equal protection claim for that “class of one” ticketed driver.<sup>186</sup> Allowing an equal protection claim on the ground that one person was given a ticket (or fired) and not others, “even if for no discernable or articulable reason, would be incompatible with the discretion inherent in the challenged action.”<sup>187</sup> Consequently, in contexts requiring discretionary choices (mostly clearly present in employment decisions), the Court found that the class-of-one doctrine was inapplicable.

The Court’s decision in *Olech* forced lower courts to reconcile precedent with an influx of potential litigation. Some courts opted for higher pleading standards, while others required an

---

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 564.

<sup>182</sup> *Olech*, 528 U.S. at 565.

<sup>183</sup> *Engquist*, 553 U.S. at 594–95.

<sup>184</sup> *Id.* at 595 (quotation marks omitted).

<sup>185</sup> *Id.* at 605.

<sup>186</sup> *Id.* at 603–04.

<sup>187</sup> *Id.* at 604.

“extremely high”<sup>188</sup> level of similarity between plaintiffs<sup>189</sup> and those treated more fairly or proof of animus.<sup>190</sup> Post-*Engquist*, lower courts, unsurprisingly, began dismissing class-of-one employment cases.<sup>191</sup> Additionally, many of those same courts began to analyze cases through the discretionary decision-making lens used in *Engquist*, making class-of-one claims substantially more difficult for plaintiffs.<sup>192</sup> Nevertheless, class-of-one claims still may provide a successful framework for multiracial plaintiffs in that they would allow individuals with a mixed racial composition to be recognized as distinct by courts.

## 2. Application of the class-of-one doctrine to multiracial plaintiffs.

To adequately address the concerns of multiracial individuals, courts should apply the class-of-one approach to the claims of mixed-race individuals. Doing so would not entail instituting a new racial category in equal protection claims per se, but would accommodate the unique identities brought forward by multiracial plaintiffs who, as of now, are only partially recognized by courts’ understanding of racial discrimination. Additionally, recognition of multiracial individuals as classes of one would allow courts to have a more open understanding of race and discrimination by viewing discriminatory experiences from the perspective of those who do not cleanly fit within a traditional racial group. Perhaps more importantly though, allowing multiracial plaintiffs to be heard as classes of one would encourage courts to recognize plaintiffs’ identities as they view them instead of how society would narrowly construe them. This Section proceeds by describing a hypothetical case in which a multiracial plaintiff alleges an equal protection violation as a class of one. I then discuss some natural limitations that would flow from permitting multiracial individuals to use the class-of-one doctrine. Finally, I assess

---

<sup>188</sup> William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 445–46 (2013).

<sup>189</sup> See, e.g., *Grider v. City of Auburn*, 618 F.3d 1240, 1264 (11th Cir. 2007) (holding that “[t]o be similarly situated, the comparators must be *prima facie identical in all relevant respects*” (emphasis in original) (quotation marks omitted)); *Ruston*, 610 F.3d at 59 (establishing a higher pleading standard); *Hu v. City of New York*, 927 F.3d 81, 94 (2d Cir. 2019).

<sup>190</sup> See Araiza, *supra* note 188, at 445–46.

<sup>191</sup> *Id.* at 450; see also, e.g., *Carney v. Miller*, 842 N.W.2d 782, 796–97 (Neb. 2014).

<sup>192</sup> See Araiza, *supra* note 188, at 450–51. As explained by Professor William Araiza, courts began dismissing claims based on parole board decisions, government contracting, and other law enforcement decisions.

potential counterarguments to the claim that multiracial plaintiffs should be able to assert class-of-one equal protection claims.

Notably, the class-of-one doctrine would not cleanly and perfectly apply in the context of multiracial individuals. At least some minor alterations would be needed to ensure that multiracial people, as a discrete and insular minority, would remain protected under the law. Perhaps most importantly, this new understanding of racial discrimination under the class-of-one doctrine would only apply to those multiracial individuals who desire it. Race is an incredibly personal subject that courts should avoid determining on behalf of parties.<sup>193</sup> Accordingly, traditional understandings of monoracial discrimination would still be an option if a multiracial plaintiff preferred to identify with a traditional racial group. Identifying as a class of one would be opt-in only. To exemplify how a court might apply this class-of-one mentality to multiracial plaintiffs, consider a theoretical case in which a multiracial plaintiff brings an equal protection claim.

In this hypothetical case, the plaintiff brings a suit against the government, claiming it violated her right to equal protection under the law. In doing so, she would allege that the discriminator treated her differently than those similarly situated because of her multiracial identity. Notably, while a high degree of similarity would still need to be shown between the plaintiff and those similarly situated, this would proceed in a fashion that is in many ways indistinguishable from any other racial discrimination case.<sup>194</sup> The plaintiff could then go on to strengthen her claim with concrete evidence of racial discrimination. At this point, the court would deviate from the traditional structure of the class-of-one doctrine. Instead of using only rational basis review as courts normally would in a class-of-one case, the court would employ strict scrutiny, as the plaintiff's case involves the use of suspect racial classifications.<sup>195</sup> The state, then, would be burdened with showing that the governmental actions were narrowly tailored to

---

<sup>193</sup> See Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 426–27, 430 (2012).

<sup>194</sup> See, e.g., *Cleburne Living Ctr.*, 473 U.S. at 439.

<sup>195</sup> See *Carolene Prods.*, 304 U.S. at 152 n.4; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that racial classifications are subject to strict scrutiny because the government may only make such classifications for the most compelling reasons). It seems appropriate that even though there would be no racial *group* at issue in a class-of-one claim, strict scrutiny would be appropriate because the claim still derives from a racial classification of some sort.

achieve a particular government interest.<sup>196</sup> If it fails to do so, the plaintiff would then win on her claim.

Unfortunately, because of the nature of class-of-one cases, it is still highly impracticable for even multiracial class-of-one cases within the employment context to proceed. Here, too, it would likely be inappropriate for courts to review cases involving purely discretionary decisions, as the Court held in *Engquist*. In those cases, multiracial plaintiffs would need to seek recourse under existing equal protection doctrine, if possible. While many equal protection claims will involve employment decisions, there still remain ample government decisions that could be challenged under class-of-one equal protection claims. For instance, claims based on discriminatory statutes or even quasi-discretionary decisions (like those made in *Olech* or *Allegheny Pittsburgh Coal*) might be challenged. Moreover, the use of the class-of-one doctrine would be a step in the right direction in recognizing the experiences of mixed-race individuals and would assist in breaking open the rigid racial classifications that have traditionally been the default in our society. As explained by Professors Richard Delgado and Jean Stefancic, rigid racial paradigms are harmful in at least two ways: first, they often purport racial progress as a “linear progression” by supporting the notion that Race X may not have the same benefits as Race Y but at least it is better off than Race Z; second (and particularly in cases of binary racial categorization), they harm minority groups by weakening interracial solidarity and increasing reliance on White approval.<sup>197</sup> In other words, by rejecting rigid racial categories, courts would aid in eradicating the long-lasting effects of our nation’s history of white supremacy.

Instead of viewing multiracial plaintiffs as non-White, monoracial individuals (as is done too often), courts would be forced to view multiracial plaintiffs as just that—multiracial. Doing so would be symbolic in that it would lead us to question the racial categorizations we have historically used. Further, by remedying the silencing of multiracial plaintiffs through a class-of-one application, their “[s]tories [will] give them a voice and reveal that other people have similar experiences. Stories can name a type of

---

<sup>196</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

<sup>197</sup> RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 80–82 (3d ed. 2017).

discrimination (e.g., microaggressions, unconscious discrimination, or structural racism); once named, it can be combated.”<sup>198</sup>

In response to this proposal, some might argue that allowing multiracial individuals to be recognized as a class of one would allow for innumerable claims to be filed that otherwise could not be. This may be of particular concern considering the rise of genetic testing, in which many White-identifying people discover they are multiracial.<sup>199</sup> However, the nature of the class-of-one doctrine makes it no less difficult to succeed—and perhaps even more so—than a traditional equal protection claim. As a single person alleging discriminatory actions, the plaintiff may need to do more to show that the behavior was truly discriminatory and not random or a matter of discretion. Further, demonstrating a difference in treatment from similarly situated people could involve exhaustive effort. Even if a flood of claims is the result, though, that might just be a consequence that we must accept as a multicultural society.

Another challenge to this approach might be that increased recourse for equal protection violations will lead to tension within the multiracial community, including through the existence of “distancing.” In one article, Professor Christine Hickman describes distancing as “the creation of unnecessary and pernicious distinctions between light-skinned and dark-skinned” people.<sup>200</sup> If some racial minorities (multiracial individuals) are permitted extra opportunities to seek legal recourse, so the argument goes, monoracial individuals will harbor increased animosity toward those individuals. This critique mistakenly assumes that current relations between monoracial and multiracial people are satisfactory. In many cases, as shown in previous Parts, multiracial individuals are ostracized from groups that they are at least partial members of. In fact, it seems just as likely that allowing multiracial individuals to identify as separate and unique will positively affect interracial-group relations. Implementing the class-of-one doctrine for multiracial plaintiffs might encourage

---

<sup>198</sup> *Id.* at 51.

<sup>199</sup> See Antonio Regalado, *More Than 26 Million People Have Taken an At-Home Ancestry Test*, MIT TECH. REV. (Feb. 11, 2019), <https://perma.cc/S85P-NXJU>; see also Antonia Noori Farzan, *A DNA Test Said a Man Was 4% Black. Now He Wants to Qualify as a Minority Business Owner.*, WASH. POST (Sept. 25, 2018), <https://perma.cc/XE5J-NLSJ>. Concededly, this Comment does not engage with any analysis aiming to define who should be considered “multiracial” under the law. However, as interracial unions increase, that may be an inevitable question that courts are forced to answer.

<sup>200</sup> Hickman, *supra* note 5, at 1231.

monoracial minority groups to see multiracial individuals, not as confused or defective, but as unique combinations of multiple, full racial identities. Further, it seems reasonable to suspect that any sort of positive change for one group of racial minorities would likely further the overall progress for all racial minorities. Especially given the nature of my proposal, which demands greater and more accurate recognition of minority plaintiffs, such a change might benefit all minority plaintiffs in changing the habits and perspectives of courts and society.

### CONCLUSION

As Professor of sociology G. Reginald Daniel explained, “[o]ur society is racially illiterate in general, and the greatest illiteracy is to be in the presence of a multiracial person.”<sup>201</sup> So, too, are our courts racially illiterate when they misidentify mixed-race plaintiffs. Under the courts’ current understanding and application of equal protection, the unique identities and experiences of mixed-race people go unrecognized and perhaps even unaddressed. As society changes and becomes increasingly more diverse, it is crucial that our courts, too, reflect the people they intend to protect through the law. An effective way in which courts can remedy this problem is to consider multiracial plaintiffs as a class of one when they sue under equal protection.

Some might argue that allowing class-of-one claims could completely undermine current understandings of race and discrimination. While this could certainly be a possibility, one must consider the possibility that we live in a society whose racial categorization schemes ought to be questioned.<sup>202</sup> Rather than perceiving race as clear-cut (and often binary), it might be more useful and accurate to perceive racial categories as fluid. Nevertheless, existing categories would remain untouched by this new application of the class-of-one doctrine. The altered understanding of multiracial equal protection claims would serve as an addition to—not a substitute for—current equal protection jurisprudence.

---

<sup>201</sup> Kristal Brent Zook, *Universities Are Still Struggling to Provide for Mixed-Race Students*, ZORA (Sept. 23, 2019) (quotation marks omitted), <https://perma.cc/796J-QX5D>.

<sup>202</sup> One scholar has explained, “[R]evolutionizing a culture begins with the radical assessment of it.” John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2145 (1992).

In the past, the judicial system has played a vital role in shaping American thought and opinion on race. After the Court's holding in *Brown*, Americans thought about race differently and eventually adopted an overwhelmingly egalitarian attitude.<sup>203</sup> Through a landmark decision, the Court set a model for society. I argue that by adopting a class-of-one approach, courts will once again lead society by acknowledging the often-marginalized identities of the multiracial plaintiffs before them instead of viewing the experiences of multiracial individuals as typical for those of the groups to which they belong. As a result and as will prove crucial to our ever-evolving society, courts—and conceivably society at large—might begin to affirm the self-identities of multiracial individuals.

---

<sup>203</sup> See Clayborne Carson, *Two Cheers for Brown v. Board of Education*, 91 J. AM. HIST. 26, 26 (2004) ("The Court's ruling against school segregation encouraged African Americans to believe that the entire structure of white supremacy was illegitimate and legally vulnerable."); Cass R. Sunstein, *Did Brown Matter?*, THE NEW YORKER (Apr. 26, 2004), <https://perma.cc/N2JA-VQC4> ("Brown ruled that, under the Constitution, states may not humiliate a class of people. . . . It may have taken a while, but this ruling, at least, has stuck.").