ON LOCS, "RACE," AND TITLE VII

RONALD TURNER*

In its recent and important decision in *EEOC v. Catastrophe Management Solutions* interpreting and applying Title VII of the Civil Rights Act of 1964, the United States Court of Appeals for the Eleventh Circuit held that an employer's grooming policy prohibiting the wearing of dreadlocks by and denying employment to Chastity Jones, a Black woman, was not racial discrimination under and within the meaning of the statute. In so holding the court, relying on mid-twentieth-century dictionary definitions, concluded that the Title VII term "race" refers to biological conceptions and not social constructions of that word. In addition, the court determined that locs are not an immutable racial characteristic subject to the statute's antidiscrimination mandate and protection. This essay critiques and rejects (1) the court's race-as-biology approach grounded in dictionaries reflecting centuries-old, pseudoscientific, and debunked understandings of the invention and myth of "race," and (2) the court's fundamentally flawed immutability analytic as applied to Black women's natural hair and, more specifically, locs in the workplace context. The article concludes that future court decisions addressing this subject should not rely on and replicate the Eleventh Circuit's impoverished interpretation of Title VII when determining the legality of employers' no-locs conformity commands.

INTRODUCTION

"My hair is something that, historically, has been shunned. I mean, how often do you hear, 'You can't get a job with hair like that.'"[1]

---

* A.A. White Professor of Law, University of Houston Law Center. J.D., University of Pennsylvania Law School; B.A. Wilberforce University.

1. Alanna Vagianos, *Lupito Nyong'o on Black Hair Being "Painted as Uncivilized,"* HUFFINGTON POST (Aug. 6, 2018), https://www.huffpost.com/entry/lupita-nyongo-black-hair_n_5b68630fe4b0de86f4a3ad1f [https://perma.cc/Q5W3-MM8Y].

In December 2018, sixteen-year-old Andrew Johnson, a New Jersey high school wrestler who happens to be Black,[2] was ordered by referee Alan Maloney, who is White, to cut his dreadlocks or forfeit his match.[3] Johnson offered to cover his hair as he had done all season with a net and headgear sanctioned by the New Jersey State Interscholastic Athletic Association.[4] Insisting that Johnson's hair "wasn't in its natural state," Maloney (who two years earlier had been suspended for using a racial slur against a Black colleague)[5] decided that Johnson was not in compliance with the association's rules and gave him ninety seconds to cut his locs or forfeit the match.[6] As can be seen in a viral video,[7] an anguished Johnson, cheered on by his team, complied and his hair was cut (sawed away) by an athletic trainer as Maloney watched.[8] Johnson won the match.[9] "When the referee grabbed Andrew's hand to raise it in victory, the young man snatched it down before turning away in disgust."[10] Emotionally drained by the incident, he did not travel with the team to its next scheduled event.[11] The sports director of a south

2. In this essay "the words 'Black' and 'White' are capitalized when used as nouns to describe a racialized group" and are not capitalized when used as adjectives. Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1086 (2010); *see also* NOURBESE N. FLINT, BLACK WOMEN FOR WELLNESS, NATURAL EVOLUTIONS: ONE HAIR STORY 8 (2016), *available at* http://www.bwwla.org/wp-content/uploads/2016/03/One-Hair-Story-Final-small-file-size-3142016.pdf [https://perma.cc/LA8F-3VX2] (defining as Black "all people who self-identify within the African Diaspora, including but not limited to: Africans, African Americans, Black Americans, Black Caribbeans and Afro Latinos").

3. Tony Norman, *The Unkindest Cut of All*, PITTSBURGH POST-GAZETTE (Jan. 4, 2019), https://www.post-gazette.com/opinion/tony-norman/2019/01/04/Tony-Norman-Andrew-Johnson-Alan-Maloney/stories/201901040018 [https://perma.cc/RG4S-Z543].

4. *Id.*

5. The suspension was later overturned by an ethics committee when Maloney appealed the suspension. Mark Trible, *Grappling with the N-word*, COURIER POST (Oct. 4, 2016), https://www.courierpostonline.com/story/sports/high-school/wrestling/2016/10/04/grappling-n-word/91208864/.

6. Norman, *supra* note 3.

7. *See* CBS New York, *NJ High School Wrestler Forced to Cut Dreadlocks or Forfeit Match*, YOUTUBE (Dec. 21, 2018), https:www.youtube.com/watch?v=6yEV6ibmFNk.

8. *See* Mark Trible, *Buena Wrestlers Get Back on Mat: Haircut Controversy Puts Chiefs in Spotlight at Hunterdon Central Invitational*, DAILY RECORD (Morristown, NJ), Dec. 28, 2018, at B2, 2018 WLNR 40064308; Shireen Ahmed, *The Cutting of a Teenage Wrestler's Hair was a Familiar Act of Violence for Black Athletes*, THE GUARDIAN (U.K.) (Dec. 23, 2018), https://www.theguardian.com/sport/2018/dec/23/andrew-johnson-high-school-wrestler-dreadlocks-cut [https://perma.cc/4LEJ-HFRQ]; Norman, *supra* note 3.

9. Norman, *supra* note 3.

10. *Id.*

11. *See* Kevin B. Blackistone, *Wrestler's Forced Cut Shows Historical Lack of Respect*, WASH. POST, Dec. 30, 2018, at D03, 2018 WLNR 40220289.

New Jersey media outlet problematically hailed Johnson as the "epitome of a team player."[12] Disagreeing with that feel-good narrative, Professor and sports journalist Kevin Blackistone observed that what happened to Johnson "was the manifestation of decades of racial desensitization" and "a historical lack of respect for people of color—for whom hair style is a particularly significant part of culture and history—in promotion of norms decided upon by a majority population."[13]

The hacking of Andrew Johnson's locs is a recent exemplar of what Professor Wendy Greene calls the hyper-regulation of the Black body via hair.[14] A few months before that incident, a Florida school did not allow a six-year-old boy to begin first grade with his locked hairstyle.[15] In 2017, an assistant principal at a Florida school told Jenesis Johnson, an eleventh grade Black student, that Johnson's afro needed "to be fixed" and could not be worn at school.[16] Johnson responded to the school's action: "It hurts me. It's hurting me. For my people behind me, the younger ones, they're going to have hair like me. Why can't they wear their natural hair?"[17] In another incident Tyler House, a Black sixteen-year-old honor student, secured a job with Marcus Cinemas, an Illinois movie theater, after a telephone interview.[18] But House was fired when she attended orientation after a manager informed her "dreads are not allowed."[19] When House replied that she planned to wear her locs in a ponytail, she was told that she had to get rid of her locs; she refused to do so and the job was taken

12. Kellen Beck, *Twitter Rages at a High School Referee Who Forced a Wrestler to Cut off his Dreads*, MASHABLE (Dec. 22, 2018), https://in.mashable.com/culture/1549/twitter-rages-at-a-high-school-referee-who-forced-a-wrestler-to-cut-off-his-dreads [https://perma.cc/G7NN-4Q4H] (noting sports director's team player comment).

13. Blackistone, *supra* note 11.

14. *See* D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. MIAMI L. REV. 987, 992 (2017).

15. *See* Leslie Postal, *Boy's Hair Get Him Banned From Private School 6-Year-Old with Dreadlocks Turned Away on First Day of Classes*, ORLANDO SENTINEL (Aug. 15, 2018), 2018 WLNR 24860368.

16. *See* Lenetra Bennett, *Local Teen Told Afro is "Extreme" and Can't be Worn at School*, https://www.wctv.tv/content/news/Local-teen-told-cant-wear-hairstyle-at-school-423232994.html [https://perma.cc/R62C-9NYB].

17. *Id.*

18. *See* Desire Thompson, *Honor Student Fired From Movie Theater for Wearing Dreadlocks*, VIBE (Oct. 10, 2016), https://www.vibe.com/2016/10/honor-student-fired-from-movie-theater-for-wearing-dreadlocks [https://perma.cc/ZKX6-3T7Q].

19. *Id.*

away.[20] Most recently, in January 2019, the Midway Independent School District in Texas demanded that Jonathan Brown, a Black six-year-old first-grader, cut his locs before returning to school from the holiday break.[21] Refusing to do so, his mother stated:

> Children of color have been targeted for many years, because of what others see as the norms in our society. . . . Only recently, people of color/African descent have come to accept and love their natural hair. . . . My son's hair is a part of him. Hair grows from the scalp; this is a part of his body. How can parents teach kids to love themselves and then a school is telling them differently? The school is saying you're not enough! My son is not enough for them. Now they're asking him to alter his body, because they don't like it.[22]

In each of the aforementioned, a decisionmaker delineating what is and is not acceptable hair presented Black persons with a conformity command: comply with a no-locs mandate and gain acceptance and entry, or do not comply with the consequence of rejection and exclusion. Unfortunately, and unsurprisingly, some employers (as in the case of Tyler House)[23] have conditioned the employment of Black workers on their compliance with workplace no-locs policies and practices.

Consider a recent and significant illustration of the conformity command. In May 2010, Chastity Jones submitted an online employment application to Catastrophe Management Solutions (CMS), a provider of customer service support to insurance companies.[24] At that time, CMS had in place the following race-neutral grooming

---

20. *Id.* House's story went viral after her sister referred to it on social media. The theater contacted her a few days later with a job offer and apologized to her on its Facebook page. House rejected the offer and accepted a position with another theater. *See id*.

21. Erin Donnelly, *Mom Says Elementary School is Demanding That Her First-Grader Cut His Dreadlocks: "I won't conform to racist policies,"* YAHOO (Jan. 9, 2019), https://www.yahoo.com/lifestyle/mom-says-elementary-school-demanding-first-grader-cut-dreadlocks-wont-conform-racist-policies-120109868.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAABKtxprBIVbV8E9yxsBaZ5HQiCF4czYOFQSAtIWLbcfxWkrn40SKOZNtLPAqzHium6o0TAMyuBnUXatiNcf17U2TRQDP4w94hW3khrqT99BHVJZ9aURyeKEEeIqqU0ChQ0o-90AV67KhtwNclERy7qU4ytX-I6m793925wthsxbN [https://perma.cc/4K97-JP4H].

22. *Id.*

23. *See supra* note 20 and accompanying text.

24. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021 (11th Cir. 2016) (certain brackets added and omitted), *rehearing en banc denied*, 876 F.3d 1273 (11th Cir. 2017), *motion of Chastity Jones to intervene to file petition for writ of certiorari denied*, 138 S. Ct. 2015 (2018) (mem.).

policy: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyles should reflect a business/professional image. No excessive hairstyle or unusual colors are acceptable."[25]

Jones and other applicants were selected for in-person interviews with the company and Jones was hired as a customer service representative, a non-public contact position in which she would answer customers' telephone calls. Jones arrived for her interview wearing a blue business suit and her hair in short dreadlocks and interviewed with a CMS representative.[26] In a post-interview group meeting, Jones and other selected applicants were informed that they had been hired and would have to complete lab tests and paperwork before commencing their employment.[27] Jones then met privately with CMS' human resources manager, Jeannie Wilson, and because of a scheduling conflict requested and received a different date for her lab test. During that meeting, Wilson (who is White) asked whether Jones (who is Black) had her hair in dreadlocks. Jones answered yes; Wilson responded that CMS could not employ her, explaining that dreadlocks "tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[28] When Jones replied that she would not cut off her locs, Wilson rescinded the offer of employment.[29]

Challenging CMS' refusal to employ Jones, the Equal Employment Opportunity Commission (EEOC) filed suit against the company alleging that CMS intentionally discriminated against Jones on the basis of race in violation of Title VII of the Civil Rights Act of 1964 (Title VII).[30] The agency alleged, among other things, that race "is a social construct and has no biological definition"; that the concept of race is not defined by or limited to immutable physical characteristics; and that dreadlocks, like skin color, are a racial characteristic.[31]

CMS moved to dismiss the suit. Finding that the EEOC did not plausibly allege that CMS intentionally discriminated against Jones on the basis of race,[32] the district court granted CMS' motion, concluding, among other things, that Title VII prohibits discrimination on the basis of immutable characteristics such as race, color, or national origin; that

---

25. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022.

26. *See id.* at 1021.

27. *See id.*

28. *Id.*

29. *See id.* at 1022.

30. *See* 42 U.S.C. §§ 2000e-1 to -17 (2012).

31. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022.

32. As required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

a "hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic"; and that Title VII does not prohibit trait-based discrimination even when a trait has sociocultural significance.[33] On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the district court.[34] Focusing on "the country's zeitgeist . . . when Congress enacted Title VII half a century ago," the Court concluded that race is biological and is not a social construct and that Jones' locs were not an immutable racial characteristic protected from discrimination by Title VII.

This article critiques and rejects the biological race and locs-are-not-immutable aspects of the Eleventh Circuit's decision. As discussed in Part II, the court's acceptance and embrace of the view that "race" is biologically determined is problematically grounded in a mid-1960s dictionary understanding of race that is itself grounded in centuries-old and debunked pseudoscientific conceptions of biological race. Part III then turns to, interrogates, and finds fundamentally flawed the Court's immutability analysis and consequent conclusion that Chastity Jones was not protected by Title VII because her locs were not an immutable racial characteristic. The article concludes with brief closing remarks.

I. "RACE"

A. Dictionary Definitions

The EEOC's suit against CMS alleged that a "'prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent.'"[35] The Eleventh

33. *Catastrophe Mgmt. Sols.*, 11 F.Supp. 3d at 1143–44.

34. *Id.* at 1024. The court noted that the EEOC confirmed in the oral argument of the case that the agency was pursuing a disparate treatment and not a disparate impact case. In a disparate treatment case, a Title VII plaintiff must demonstrate that the defendant-employer intentionally discriminated against her because of a characteristic protected by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination "because of such individual's race, color, religion, sex, or national origin"). Proof of discriminatory intent is not required in a disparate impact case targeting "an employment practice that has an actual, though not necessarily deliberate, adverse impact on protected groups." *Catastrophe Mgmt. Sols.*, 852 F.3d at 1024; *see* 42 U.S.C. § 2000e-2(k)(1) (Title VII's disparate-impact provision).

35. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1023 (quoting EEOC's proposed amended complaint). The agency discussed the origin of the term "dreadlocks":

> During the forced transportation of Africans across the ocean, their hair became matted with blood, feces, urine, sweat, tears, and dirt. Upon observing them, some slave traders referred to the slaves' hair as "dreadful," and dreadlock became a commonly used word to refer to the locks that had formed during the slaves' long trip across the ocean.

Circuit focused, first, on the Title VII term "race," a word not defined in the statute or in EEOC regulations. Seeking the "ordinary understanding" of "race," the court turned to dictionaries existing at the time of the 1964 enactment of Title VII.[36] A 1961 edition of *Webster's* dictionary defined "race" as "'anthropological and ethnological in force, usu[ally] implying a distinct physical type with certain underlying characteristics, as a particular color of skin or shape of skull.'"[37] That dictionary also defined "race" as referring to "'place of origin . . . or common root language,'" as a "'division of mankind possessing traits that are transmitted by descent and sufficient to

---

Id. at 1022 (certain quotation marks omitted); *but see* BERT ASHE, TWISTED: MY DREADLOCK CHRONICLES 148 (2015) (describing as "nonsense" the view that locs were formed during the shipment of enslaved persons from Africa to the Americas since the "Middle Passage was rarely long enough for locking"). For more on the origins of the term "dreadlocks," see AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 126–31 (2014).

36. For a discussion on judicial resort to dictionaries in statutory interpretation, see WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 44 (Robert C. Clark, ed., 2016) ("Increasingly, judges are turning to dictionaries as external evidence of what words might mean."); ROBERT A. KATZMANN, JUDGING STATUTES 43 (2014) (explaining that dictionaries can be helpful in interpreting statutes, "especially when dealing . . . with a word's usage at the time of the law's enactment"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 415–24 (2012) (discussing the use of dictionaries in statutory interpretation). *But see Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (stating that dictionaries are "the last resort of the baffled judge"); RICHARD A. POSNER, REFLECTIONS ON JUDGING 200 (2013) ("Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless.").

37. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1017 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1870 (Philip Babcock Gove, ed., unabridged 1961)). Regarding skull shape, the pseudoscience of phrenology, relied on to justify supposed Black inferiority, has now been discredited. *See* Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 886–93 (1987); Charles E. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 374 (1987). During the first half of the nineteenth century, Philadelphia scientist and physician Samuel George Morton collected more than one thousand skulls prior to his death in 1851, stuffed them with pepper seeds and lead shot to determine the volume of the braincase, and divided the skulls into five racial categories. *See* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 83–86 (revised and expanded 1996); *There's No Scientific Basis for Race—It's a Made-Up Label*, NAT'L GEOGRAPHIC (Apr. 2018), https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/. Morton claimed that braincase volume revealed racial differences in average brain size and that the intelligence of races, based on cranial size, was ranked as follows: Caucasians, Mongolians, Native Americans, Malays, and Negroes. *See* JULIET HOOKER, THEORIZING RACE IN THE AMERICAS: DOUGLASS, SARMIENTO, DU BOIS, AND VASCONCELOS 73–74 (2017); *A History of Craniology in Race Science and Physical Anthropology*, U. PA. MUSEUM ARCHAEOLOGY AND ANTHROPOLOGY, https://www.penn.museum/sites/morton/craniology.php [https://perma.cc/W6EH-4PRH].

characterize it as a distinct human type (Caucasian=) (Mongoloid=),'" and as "'the descendants of a common ancestor: a family, tribe, or nation belonging to the same stock.'"[38] In addition, the Court cited social science dictionaries defining "race" as "'a subdivision of a species, individual members of which display with some frequency a number of hereditary attributes that have become associated with one another in some measure through a considerable degree of in-breeding among the ancestors of the group during a substantial part of their recent evolution,'"[39] and as a "'population sharing a gene-pool giving rise to a characteristic distribution of physical characteristics determined by heredity.'"[40] And, the Court stated, a 1951 edition of *Black's Law Dictionary* defined "race" as

> an ethnical stock: a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source. A tribal or national stock, a division or subdivision of one of the great racial stocks of mankind distinguished by minor peculiarities. Descent.[41]

Relying on these dictionary definitions, the Eleventh Circuit concluded

> it appears more likely than not that "race," as a matter of language and usage, referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time. Although the period dictionaries did not use the word "immutable" to describe such common characteristics, it is not much of a linguistic stretch to think that such characteristics are a matter of birth, and not culture.[42]

The Court did note that "today 'race' is recognized as a social construct . . . rather than an absolute biological truth."[43] However, "our possible current reality does not tell us what the country's collective zeitgeist

---

38. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1017.

39. *Id.* (quoting *Race*, DICTIONARY SOC. SCI. 569 (Julius Gould & William Kolb eds., 1964)).

40. *Id.* (quoting *Race*, DICTIONARY OF SOC. 142 (G. Duncan Mitchell ed., 1968)).

41. *Id.* (quoting BLACK'S LAW DICTIONARY 1423 (4th ed. 1951)).

42. *Id.*

43. *Id.* On the social construction of "race," see *infra* notes 118–139 and accompanying text.

was when Congress enacted Title VII half a century ago."[44] Observing that courts "are tasked with interpreting Title VII . . . and not with grading competing doctoral theses in anthropology or sociology," the Court opined that any calls for a different understanding of "race" should be resolved "through the democratic process."[45]

The Eleventh Circuit's resort to and reliance on dictionary definitions of "race" problematically indulges dubious assumptions that legislatures consult dictionaries when writing statutes and that Congressional drafters do the same.[46] Moreover, the assumption that ordinary meaning or understanding "is the right lodestar from which to chart an interpretive path for statutory language" is questionable, for it is "far from self-evident that the legislators who enact statutes and the entities and individuals who seek to abide by them rely primarily on their own linguistic judgments as to what constitutes statutory meaning."[47] Emphasis on ordinary meaning or understanding thus "seems seductively simplified."[48]

The Eleventh Circuit's posited and dictionary-based definition of the Title VII term "race" raises important and unavoidable questions: Is (why is) the Court's view regarding the nation's supposed half-century-old "collective zeitgeist" reflected by the dictionaries selected by the Court, (with no reference to other sources), analyzing the complicated and multidimensional subject of "race"? Did the court correctly choose to give primacy of place to its understanding that "race" is biological even though, as the court concedes, today it is acknowledged that "race" is a social construct and not a biological truth?[49] And why is and should "race" be tethered to centuries-old conceptions of "race" as "stock," "Caucasian" or "Mongoloid," skull shape, in-breeding, and gene-pool sharing[50] when the social construction of race, itself a

---

44. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1028.

45. *Id*. at 1034–35.

46. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320 (1990) ("Another fiction indulged in by the textualist is that Congress writes and votes on statutes with a dictionary by its side."); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1318 (2018); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 938 (2012).

47. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 574 (2013).

48. *Id.* at 575.

49. *See supra* note 43 and accompanying text.

50. *See supra* notes 37–39 and accompanying text.

decades-old method, is a viable and (as the court noted) a contemporary alternative?

B. The Invention and Myth of Biological Race

In response to the last question in the preceding paragraph, this section argues that the Eleventh Circuit's dictionary analysis wrongly ties the "fatal invention" of "race"[51] to centuries-old biological conceptions of that term, thereby perpetuating in Title VII law the use and misuse of antiquated notions of "supposed innate biological predisposition[s]."[52]

Prior to the invention of "race," "perceived differences between human populations were often demarcated on religious and geographical grounds."[53] That understanding gave way to biological-based notions of "race." For instance, in 1508 Scottish poet William Dunbar, a member of King James IV's court, referred to the "bakbyttaris of sindry races" ("backbiters of sundry races") and understood "race" to mean "family lineage—kinship groups descended from the male line."[54] Writing in 1684, French physician Francois Bernier identified four races: Europeans, Africans, East Asians, and Lapps (the people of northern Finland).[55] Swedish taxonomist and monogenesist[56] Carl Linnaeus' "racist ladder" divided *homo sapiens* into four racial categories listed in descending order: (1) *H. sapiens europaes*, (2) *H. sapiens americanus*, (3) *H. sapiens asiaticus*, and (4) *H. sapiens afer*.[57] Anatomist Georges Culver divided human beings into three categories (Caucasian, Mongolian, and Ethiopian),[58] physician and scientist Johann Freidrich Blumenbach into five categories

51. DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY (2011).

52. Michael Yudell et al., *Taking Race Out of Human Genetics*, SCI. 564, 564 (2018) (bracketed material added).

53. Christian B. Sundquist, *The Technologies of Race: Big Data, Privacy, and the New Racial Bioethics*, 27 ANNALS HEALTH L. 205, 212 (2018).

54. ROBERTS, *supra* note 51, at 6.

55. *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 55–56 (2016).

56. Monogenesist theory posited that "all human beings" are "descendants of a White Adam and Eve," *id.* at 84, and "are a single species with a common origin." DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE, AND EXTERMINATE OTHERS 120 (2011).

57. KENDI, *supra* note 55, at 82–84; ALONDRA NELSON, THE SOCIAL LIFE OF DNA: RACE, REPARATIONS, AND RECONCILIATION AFTER THE GENOME 14 (2016).

58. *See* ROBERTS, *supra* note 51, at 30.

(Caucasian, Mongolian, Ethiopian, American, and Malay),[59] and anthropologist Joseph Deniker into twenty-nine categories.[60]

Developments during the Enlightenment period solidified concepts of racial difference.[61] The French writer, historian, and philosopher Voltaire, a polygenesist,[62] expressed his view that the races were separately created species and that the "'negro' race is a species of men as different from ours as the breed of spaniels is from that of [the] greyhound. . . . If their understanding is not of a different nature from ours it is at least greatly inferior."[63] Philosopher Immanuel Kant viewed "races" as biological and immutable.[64] He wrote that there were "only four races of man" (White, Negro, Hunnic (Mongolian or Kalmuck), and Hindu), and believed that "Negroes and Whites are not different species of humans (for they belong presumably to one stock), but they are different *races*, for each perpetuates itself in every area, and they generate between them children that are necessarily hybrid, or blendlings (mulattoes)."[65] Kant thought that the "race of Negroes . . . can be educated but only as servants (slaves),"[66] and in 1764 declared the "fact that someone who was 'completely black from head to foot' was a 'distinct proof that what he said was stupid.'"[67] Scottish

---

59. *See* Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 29, 29 n.29 (2013) (citing Johann Friedrich Blumenbach, *On the Natural Variety of Mankind, in* THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 99–100 n.4 (Thomas Bendyshe ed. & trans. 1965)). Blumenbach "regarded the Caucasian race . . . not only as the original form of humankind, but also as 'the most handsome and becoming.'" CHRISTOPHER B. KREBS, A MOST DANGEROUS BOOK: TACITUS'S *GERMANIA* FROM THE ROMAN EMPIRE TO THE THIRD REICH 194–95 (2011).

60. *See United States v. Thind*, 261 U.S. 204, 212 (1923) (noting Deniker's classifications).

61. *See* Sundquist, *supra* note 53, at 213.

62. Polygenesism refers to "the notion that the various races of mankind had separate origins and were genetically distinct species." Herbert Hovenkamp, *Social Sciences and Segregation Before* Brown, 1985 DUKE L.J. 624, 634 n.58; *see also* JENNY REARDON, RACE TO THE FINISH: IDENTITY AND GOVERNANCE IN AN AGE OF GENOMICS 182 n.20 (2005) ("[T]he theory of polygenism held that human differences derived from different physical origins" and that "humans did not come from a common stock, but from different (i.e., racial) origins").

63. KENDI, *supra* note 55, at 82.

64. Sundquist, *supra* note 53, at 215.

65. Immanuel Kant, *On the Different Races of Man, in* RACE AND THE ENLIGHTENMENT: A READER 40–41 (Emmanuel Chukwudi Eze ed., 1997). Kant also developed a racial taxonomy dividing humans into four categories: "the noble blond (northern Europe); copper red (America); black (Senegambia); and olive-yellow (Asian-Indians)." Sundquist, *supra* note 53, at 215 (footnote omitted).

66. Charles W. Mills, *Kant's Untermenschen*, *in* RACE AND RACISM IN MODERN PHILOSOPHY 169, 174 (Andrew Valls ed., 2005).

67. KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY 117 (2018) (quoting IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE

philosopher David Hume, in his essay *Of National Characters*, wrote, "I am apt to suspect the negroes, and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation."[68]

At the beginning of the nineteenth century Thomas Jefferson "advance[d] as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind."[69] Jefferson contended that

> the black of the negro resides in the reticular membrane between the skin and scarf-skin, or in the scarf-skin itself; whether it proceeds from the colour of the blood, the colour of the bile, or from that of some other secretion, the difference is fixed in nature, and is as real as if its seat and cause were better known to us.[70]

Black persons "secrete less by the kidnies, and more by the glands of the skin, which gives them a very strong and disagreeable odour," said Jefferson, and "in memory they are equal to the whites; in reason much inferior . . . and that in imagination they are dull, tasteless, and anomalous."[71]

Harvard University Professor Louis Agassiz—"arguably the most distinguished racist in the history of science"[72]—was disgusted by the "horror that he might share a common ancestor with Africans," and "maintained that each race had its unique forefather and foremother and had arisen independently and forked out independently over space and time."[73]

BEAUTIFUL AND SUBLIME *in* OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME AND OTHER WRITINGS 11, 61 (Patrick Frierson & Paul Guyer eds., 2011)).

68. Andrew Valls, *"A Lousy Empirical Scientist": Reconsidering Hume's Racism*, *in* RACE AND RACISM IN MODERN PHILOSOPHY 127, 132–33 (Andrew Valls ed., 2005) (quoting Hume). Hume's belief in Negro inferiority was approvingly quoted in a 2005 entry on the website of Stormfront, a White-supremacist Internet forum. *See* https://www.stormfront.org/forum/t238177/ [https://perma.cc/R3RW-3L8H].

69. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 281 (First Hot-Pressed Edition 1801) (bracketed material added).

70. *Id.* at 269.

71. *Id.* at 270, 272.

72. SIDDHARTHA MUKHERJEE, THE GENE: AN INTIMATE HISTORY 331 (2016).

73. *Id.* Agassiz was not a polygenesist prior to emigrating from Sweden to the United States in the 1840s; at that time, he converted to polygenism based upon his experiences with American Blacks. *See* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 75 (revised and expanded 1996).

Notably, the invention and myth of race focused, with negative connotations, on Black persons' hair. "Whites frequently referred to blacks' hair as 'wool' (the association with animals was hardly accidental), in order to differentiate it from the supposedly superior white variety."[74] In 1806, the Virginia Supreme Court of Appeals opined that a "wooly head of hair" is "so strong an ingredient in the *African* constitution."[75] Peter A. Browne, addressing attendees at the 1850 meeting of the American Association for the Advancement of Science, remarked that Whites had "hair" while Blacks had "wool," with "'the hair of the white man . . . more perfect than that of the negro.'"[76] During his 1850s travels in South Carolina, Frederick Law Olmstead reported that he saw "an old negro . . . with his head bowed down over a meal sack, while a negro boy was combing his wool with a common horse-card."[77] The description of Black hair as wool is also found in the 1957 edition of Webster's dictionary entry for "Negro": "of a dark-skinned race having woolly hair, flat nose, thick protruding lips, and a prognathous form of skull."[78]

The invention and myth of "race" served as the pseudoscientific foundation for invented racial differences before and after the Civil War. Chattel slavery was legitimated by "race science" and "its manifestations in anthropometrics, phrenology, eugenics, intelligence assessment, craniology, and physical anthropology."[79] In 1851, physician Samuel Cartwright wrote, "black blood distributed to the brain chains the mind to ignorance, superstition and barbarism, and bolts the door against civilization, moral culture and religious truth."[80] Cartwright, an owner of enslaved persons,[81] believed that "negroes" suffered from "drapetomania, or the disease causing slaves to run

74. Shane White & Graham White, *Slave Hair and African American Culture in the Eighteenth and Nineteenth Centuries*, 61 J.S. HIST. 45, 56 (Feb. 1995); *see also* MONTAGU, *supra* note 62, at 45 (anthropologists considered hair in dividing different populations into distinct races).

75. *Hudgins v. Wrights*, 11 Va. 134, 139 (1806) (emphasis added).

76. KENDI, *supra* note 65, at 89 (quoting PETER A. BROWNE, THE CLASSIFICATION OF MANKIND, BY THE HAIR AND WOOL OF THEIR HEADS (1852)); *see also* WINTHROP P. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 at 220–21 (1968) (noting Carl Linnaeus's description of African hair as black and frizzled).

77. White & White, *supra* note 74, at 46 (quoting FREDERICK LAW OLMSTEAD, THE COTTON KINGDOM: A TRAVELLER'S OBSERVATIONS ON COTTON AND SLAVERY IN THE AMERICAN SLAVE STATES 162 (Arthur M. Schlesinger ed., 1953)).

78. Sherry Howard, *How One Webster Dictionary Defined 'Negro' in the 1950s* (Mar. 2, 2015), http://myauctionfinds.com/2015/03/02/how-one-webster-dictionary-defined-negroes-in-the-1950s/ [https://perma.cc/S9QU-YEZH].

79. Sundquist, *supra* note 53, at 218.

80. Samuel A. Cartwright, *Report on the Diseases and Physical Peculiarities of the Negro Race*, NEW ORLEANS MED. AND SURGICAL J. 691, 714 (May 1851).

81. *See* TONI MORRISON, THE ORIGIN OF OTHERS 3 (2017).

away," and "dysaesthesia aethiopica" (also called "rascality"), a "disease peculiar to negroes" causing them "to be like a person half asleep."[82] As Toni Morrison notes, "These terms surely have contributed to racism and its spread, which even now we take for granted."[83]

The purported inferiority of Black people was trumpeted by the United States Supreme Court in its infamous 1857 decision in *Dred Scott v. Sandford*,[84] wherein the Court stated that "that unfortunate race"

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at the time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[85]

Dred Scott's declaration of supposed Black inferiority legalized what the Court believed to be an ordinary, indeed a fixed and universal, understanding used to justify the oppression of Blacks.

Race-as-biology was essential to the enforcement of the segregationist Jim and Jane Crow regimes. "One-drop" and "traceable amount" laws and rules identified as Black a person with "a single drop of 'black blood.'"[86] The one-drop rule[87] "jettisoned the perceptible

---

82. Cartwright, *supra* note 71, at 707, 709. For more on Cartwright's views, see Christopher D. E. Willoughby, *Running Away from Drapetomania: Samuel A. Cartwright, Medicine, and Race in the Antebellum South*, 84 J.S. HIST. 579 (2018).

83. MORRISON, *supra* note 81, at 58.

84. 60 U.S. 393 (1857).

85. *Id.* at 407.

86. Amos N. Jones, *Black Like Obama: What the Junior Illinois Senator's Appearance on the National Scene Reveals about Race in America, and Where We Should Go from Here*, 31 T. MARSHALL L. REV. 79, 86 (2005).

87. This rule was "disturbing even to Nazi commentators, who shuddered at the 'human hardness' it entailed." JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI LAW 127 (2017).

reality of skin tone for the dream of racial essence; it made the physical metaphysical" as it was impossible "to know whether you had one drop of black blood . . . ."[88] As Dean Angela Onwuachi-Willig notes, the "enduring strength of the 'one-drop' rule in our society means that the mere existence of biracial people destabilizes our notion of neat, clean, clear, and fixed categories of race."[89] The related rule of hypodescent assigned to a "mixed-race" child the race of the socially-subordinated parent; thus, the child of an enslaved Black woman and a White man was assigned the race of the mother and not the father.[90] These rules of recognition "defined and perpetuated the dominant understanding of race in the United States."[91]

Judicial acceptance of notions of biological race and "black blood" was also on display in *Plessy v. Ferguson*,[92] a decision in the Supreme Court's anti-canon.[93] Homer Plessy challenged Louisiana's Separate Car Law mandating racially segregated railway accommodations for Black and White passengers.[94] Plessy's petition to the Court stated that he "was [seven-eighths] Caucasian and one-eighth African blood" and that "the mixture of colored blood was not discernible in him."[95] (Interestingly, Thomas Jefferson believed that a person who was seven-eighths White was "legally, magically, white.")[96] Plessy also argued, and the Court conceded, "in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property."[97] Validating Louisiana's separate-but-equal law, the Court concluded that Plessy was not White.[98]

Like the mid-twentieth-century dictionaries quoted by the Eleventh Circuit, late nineteenth-century dictionaries defined "race" as

---

88. SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 356 (2000).

89. ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 274 (2013).

90. Destiny Peery, *(Re)Defining Race: Addressing the Consequences of the Law's Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1844 (2017).

91. K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 115 (1996).

92. 163 U.S. 537 (1896).

93. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412–17 (2011).

94. *Id.* at 379.

95. *Plessy*, 163 U.S. at 541.

96. JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 175 (2018).

97. *Plessy*, 163 U.S. at 549. For discussion of reputational and property aspects of Whiteness, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

98. *Plessy*, 163 U.S. at 539–40, 552; *see also* Harris, *supra* note 97, at 1749.

"'a continued series of descendants from a parent called the *stock*,'" as the "'lineage of a family,'" and as "'descendants of a common ancestor; a family, tribe, people or nation believed or presumed to belong to the same stock.'"[99] And encyclopedias published in that time period identified a number of "races," including Finns, gypsies, Arabs, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spanish, Mongolians, Russians, and Hungarians, that are not considered or recognized as races today.[100] History is thus "littered with dead 'races' (Frankish, Italian, German, Irish) later abandoned because they no longer serve their purpose—the organization of people beneath, and beyond, the umbrella of rights."[101]

Race-as-biology was directly implicated in this nation's eugenics movement and that movement's "racial hygiene" and forced-sterilization "purification" efforts.[102] "[M]any states developed and adopted eugenic programs that sterilized tens of thousands of people for various 'degenerate' traits in programs that barely masked the racial prejudice at their root,"[103] and the work of United States eugenicists was used by Germany and Great Britain in those countries' development of their eugenics programs.[104] Unsurprisingly, racial minorities bore the disproportionate brunt of this noxious practice.[105] In addition, invented "race" was also the foundation of the abominable Tuskegee Experiment in which researchers purposefully refused to treat syphilis in Black males "in order to determine whether the disease had the same biological effects in Black people as in whites."[106]

---

99. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 611 (1987) (quoting from three different dictionaries from the middle years of the 19th century).

100. *See id.* at 611–12 and sources cited therein.

101. TA NEHISI COATES, BETWEEN THE WORLD AND ME 115 (2015).

102. *See* Osagie K. Obasogie, *The Return of Biological Race? Regulating Innovations in Race and Genetics Through Administrative Agency Race Impact Assessments*, 22 S. CAL. INTERDISC. L.J. 1, 5, 14, 17 (2012); Bridges, *supra* note 59, at 30. *See also Buck v. Bell*, 274 U.S. 200 (1927) (holding that Virginia law authorizing the involuntary sterilization of "mental defectives" and the "feeble minded" did not violate the Fourteenth Amendment's Due Process and Equal Protection Clauses).

103. Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1424 (1999).

104. *See id.*

105. *See* Obasogie, *supra* note 102, at 18 (noting the use of federal funds to sterilize Puerto Rican women and that Black and Native American women were targeted for eugenic sterilization); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 203 (2006) ("When the North Carolina Eugenic Commission sterilized 8,000 mentally retarded persons throughout the 1930s, 5,000 were black.").

106. "For forty years, researchers told poor sharecroppers that they were being treated for 'bad blood' and performed painful spinal taps for non-therapeutic

Consider an additional example of invented and mythical race. Three years after the enactment of Title VII, the Supreme Court issued its canonical decision in *Loving v. Virginia*.[107] The Court reviewed a Virginia state high court ruling upholding the conviction of Mildred Jeter, a Black woman, and Richard Loving, a White man, for marrying in violation of the state's anti-miscegenation laws.[108] Jeter and Loving pleaded guilty and the trial judge, sentencing them to one year in jail, stated:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[109]

A unanimous Supreme Court held that the challenged laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution,[110] for the laws prohibiting only interracial marriages involving White persons demonstrated "that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[111] *Loving* thus struck down Virginia's racial and racist regulation of marriage; that it did so as late as 1967 illustrates the way in which invented and mythical "race" affected, indeed criminalized, Black persons who stepped outside the boundaries of then-extant law.

As previously noted, the mid-twentieth century dictionaries relied on by the Eleventh Circuit defined "race" in biological terms.[112] Like descriptions and understandings are found in the 1828 and 1913 editions

---

purposes." E. Christi Cunningham, *Exit Strategy for the Race Paradigm*, 50 HOW. L.J. 755, 768 (2007). For more on the Tuskegee Experiment, see WASHINGTON, *supra* note 105, at 157–85; Larry A. Palmer, *Paying for Suffering: The Problem of Human Experimentation*, 56 MD. L. REV. 604 (1997).

107. 388 U.S. 1 (1967); Melissa Murray, Loving*'s Legacy: Decriminalization and the Regulation of Sex and Sexuality*, 86 FORDHAM L. REV. 2671, 2695 (2018) ("*Loving* is a stalwart of the constitutional law canon.").

108. The Court noted that the "Lovings have never disputed . . . that Mrs. Loving is a 'colored person' or that Mr. Loving is a 'white person' within the meanings given those terms by the Virginia statutes." *Loving*, 388 U.S. at 6. The statutes defined a "white person" as an individual with "no trace whatever of any blood other than Caucasian" and "persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood . . . ." A "colored person" was defined as any person "in whom there is ascertainable any Negro blood . . . ." VA. CODE ANN. §§ 20-54, 1-14 (Michie 1960) (repealed 1968).

109. *Loving*, 388 U.S. at 3.

110. *Id.* at 1; *see also* U.S. CONST. amend. XIV, § 1.

111. *Loving*, 388 U.S. at 11.

112. *See supra* notes 36–52 and accompanying text.

of *Webster's* dictionary.[113] Acceptance of those definitions "makes it easy to believe that many of the divisions we see in society are natural" even though the "differences we *do see* with our eyes, such as hair texture and eye color, are superficial and emerged as adaptations to geography; there really is no race under the skin."[114] In the words of Professor Dorothy Roberts, "there are no biological races in the human species. Period."[115] This view is confirmed by the Human Genome Project's finding that "all persons, without regard to racial ascription or identification, share 99.9 percent of the same genes" and "could not be divided into coherent biological races."[116] In sum, "the human species is not grouped in discrete, genetically distinct units scientists can identify as races."[117]

C. Socially Constructed "Race"

Race-as-biology was not the only understanding of "race" existing before, at, and after the enactment of Title VII in 1964. Another conception of "race"—that it has no biological essence but is a social construct—was noted by the EEOC in its complaint against CMS.[118] "To say that race is socially constructed is to argue that it varies according to time and place. Concepts and ideologies of race have shifted over historical time and differ according to the sociohistorical conditions in which race is embedded."[119] The idea of the social construction of race holds that notions of racial difference are created by humans and are not unchanging essential categories and naturally existing facts.[120] "That is, human interaction rather than natural

113. *See Race*, WEBSTER'S DICTIONARY 1828—ONLINE EDITION, http://webstersdictionary1828.com/Dictionary/race [https://perma.cc/296U-WVXX]; *Race*, WEBSTER-DICTIONARY.ORG, https://www.webster-dictionary.org/definition/Race [https://perma.cc/6DRD-9ADV].

114. ROBIN DIANGELO, WHAT DOES IT MEAN TO BE WHITE: DEVELOPING WHITE RACIAL LITERACY 98 (rev. ed. 2016) (citation omitted).

115. ROBERTS, *supra* note 51, at 77.

116. *See* Bridges, *supra* note 59, at 32.

117. ROBERTS, *supra* note 51, at 77.

118. *See supra* note 31 and accompanying text.

119. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 13 (3d ed. 2015); *see also* Audrey Smedley & Brain D. Smedley, *Race as Biology is Fiction, Racism as a Social Problem is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (2005); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 114 (1998) ("[T]he *social meaning* of race—which cultural attributes are attached to racial designations, which rights and disabilities accompany racial status, and so on—has changed over time and varied across space.").

120. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 8 (5th ed. 2018);

differentiation must be seen as the source and continued basis for racial categorization."[121]

The social construction of "race" has its own historical pedigree long predating the 1964 enactment of Title VII. In 1911, W.E.B. Du Bois observed that "physical characteristics are . . . too indefinite and elusive to serve as a basis for any rigid classification or division of human groups."[122] In the 1940s, socially constructed race was recognized and ascendant.[123] For Swedish lawyer and economist Gunnar Myrdal the "definition of the 'Negro race' is . . . a social and conventional, not a biological concept."[124] That "social definition and not the biological facts actually determines the status of an individual and his place in interracial relations"[125] and with it "comes the whole stock of valuations, beliefs, and expectations . . . constituting the order of color caste in America."[126] And the United Nations Educational, Scientific, and Cultural Organization's 1950 statement on race distinguished the "biological fact of race and the myth of 'race' . . . The myth of 'race' has created an enormous amount of human and social damage."[127] In 1987, the Supreme Court noted that the "common popular understanding that there are three major human races"—

Joshua Sealy-Harrington & Jonnette Watson Hamilton, *Colour as a Discrete Ground of Discrimination*, 7 CAN. J. HUM. RTS. 1, 7–8 (2018).

121. Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L.L. REV. 1, 27 (1994). Professor Lopez, using the term "racial fabrication," highlights four facets of the social construction of race: (1) "humans rather than abstract social forces produce races"; (2) races, as human constructs, "constitute an integral part of a whole social fabric that includes gender and class relations"; (3) the "meanings-systems surrounding race change quickly rather than slowly"; and (4) "races are constructed relationally, against one another, rather than in isolation." *Id.* at 28. Professor Tanya Kateri Hernandez has proffered an interesting intervention in the biological and social construction discussion of race: "socio-political" race, "a group-based social status informed by historical and current hierarchies and privileges." TANYA KATERI HERNANDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED RACE STORIES OF DISCRIMINATION 117 (2018). Socio-political race "jettisons the emphasis on personal identity in favor of a focus on the societal and political factors that structure opportunity by privileging and penalizing particular phenotypes and familial connections viewed as raced across groups," and "does not examine a claimant's individual racial identity in a vacuum but rather the context of how the claimant was treated within any existing racial hierarchies." *Id.* at 117, 118.

122. W.E.B. Du Bois, *Races*, CRISIS, Aug. 1911, at 158.

123. *See* Bridges, *supra* note 59, at 30.

124. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 115 (1944).

125. *Id.* at 115 (footnote omitted).

126. *Id.* at 117 (bracketed material added).

127. Statement by Experts on Race Problems, UNESCO Doc. SS/1, at 3 (July 20, 1950), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000126969. For the full text of the UNESCO statement, see STATES' LAWS ON RACE AND COLOR 544-48 (Pauli Murray ed., 1951).

Caucasoid, Mongoloid, and Negroid—has been criticized by "modern biologists and anthropologists," and "some, but not all scientists" have concluded that "racial classifications are for the most part sociopolitical, rather than biological, in nature."[128]

For a social constructivist, "race" is not biologically determined, fixed, and immutable.[129] It is not hereditary since "our parents do not impart to us our race."[130] Rather, "race" is an unscientific idea,[131] a "conceptual and aspirational term, signifying a desire to fit persons or traits into a particular social order."[132] It is a "biologically arbitrary grouping of individuals" with "no fundamental moorings in biology or genetics,"[133] an ideology existing at a certain moment of time and for certain historical reasons and is changeable for historical and sociopolitical reasons.[134] Signaled by phenotype,[135] assignations of "race" are imposed upon Blacks and other people of color who, having been raced, experience the lived realities and discriminatory manifestations of negative ascriptions and stereotypes.[136] "Race"

---

128. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

129. *See* DEVON CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN POST-"RACIAL" AMERICA 78 (2013).

130. Lopez, *supra* note 121, at 38.

131. *See generally* NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE (2010); ROBERT WALD SUSSMAN, THE MYTH OF RACE: THE TROUBLING PERSISTANCE OF AN UNSCIENTIFIC IDEA (2014).

132. Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 213 (2014) (footnote omitted).

133. Bridges, *supra* note 59, at 28, 30.

134. *See* KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 121 (paperback ed. 2014).

135. *See* Cheryl L. Wade, *Corporate Law, Governance, and Purpose: A Tribute to the Scholarship of Lyman Johnson and David Millon*, 74 WASH. & LEE L. REV. 1187, 1218 (2017) (stating that phenotypes are "distinguishing physical characteristics" and are "not biologically determinative of personality, traits, intelligence, or other important personal characteristics").

136. Reducing "race" to phenotype and skin color and forbidding differentiation between individual on that basis alone can lead one to adopt the simplistic notion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality opinion). Going beyond that view and taking into account the past and present lived realities of persons of color provides a fuller background and bases for a more nuanced analysis of the social meanings of "race." As recently observed by Justice Sonia Sotomayor, "Race matters . . . because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities." *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equal. by any Means Necessary*, 572 U.S. 291, 380 (2014) (Sotomayor, J., dissenting). In her view, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." *Id.* at 381. The judiciary should "not sit back and wish away" the realities of this nation's racial inequality; that passive approach "works harm, by

"happens in the gap between appearance and the perception of difference. It is about what we see and what we think we see and what we think about when we see. In that sense, it's bigger than personal affinities, preferences, tastes, and bonds."[137]

Adoption of a social constructivist approach in interpreting and applying "race" by the Eleventh Circuit in *Catastrophe Management* would have avoided the court's static textualism[138] and frozen-in-time/1960s dictionaries/collective zeitgeist construction of Title VII. To reiterate, the Court accepted a dictionary definition of "race" derived from and perpetuating an invented, antiquated, and debunked biological determinism "largely developed by Europeans seeking to justify colonization and enslavement of people they viewed as physically different—and inferior."[139] But "race" is not a biological truth; rather, it is a changeable and changing sociopolitical and historical concept. That social constructionism may be complicated and/or unfamiliar to judges is not a reason to foreclose consideration of that view on a motion to dismiss, especially where the EEOC has placed that issue and understanding of "race" front and center before the Court. At a minimum, the agency should have been allowed to support its argument

---

perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter." *Id.*

137. JEFF CHANG, WHO WE BE: THE COLORIZATION OF AMERICA 2 (2014).

138. Textualism need not be a static methodology as text can also be interpreted via a dynamic method that considers linguistic usages, changing contexts, and the "practical meaning of words." ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 367 (2017). For example, at one time the word "property" "included a man's right to his wife's exclusive domestic and sexual services . . . and to the labor of his children, apprentices, and (except in states that had emancipated them by statute or common law) slaves . . ." *Id.* "[N]o lawyer or lay interpreter of the word 'property' would take it to include any of those rights today." *Id.* (bracketed material added).

139. CRYSTAL MARIE FLEMING, RESURRECTING SLAVERY: RACIAL LEGACIES AND WHITE SUPREMACY 8 (2017); *see also* APPIAH, *supra* note 67, at 117 ("the increasingly negative view of the Negro through the later eighteenth century was the need to salve the consciences of those who trafficked in and exploited enslaved men and women"); COATES, *supra* note 101, at 7 ("Americans believe in the reality of race as a defined, indubitable feature of the natural world. Racism—the need to ascribe bone-deep features to people and then humiliate, reduce, and destroy them—inevitably follows from this inalterable condition."); YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND 140 (2015) ("But people don't like to say that they keep slaves of a certain race or origin simply because it's economically expedient. Like the Aryan conquerors of India, white Europeans in the Americas wanted to be seen not only as economically successful but also as pious, just and objective. Religious and scientific myths were pressed into service to justify this division."); Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race . . .,"* 11 STAN. J. C.R. & C.L. 45, 85 (2015) (discussing the use of race-as-biology to justify slavery); Lopez, *supra* note 121, at 13 (the "idea that there exists three races, and that these races are 'Caucasoid,' 'Negroid,' and 'Mongoloid,' is rooted in the European imagination of the Middle Ages . . . .").

with discovery and the analysis of expert witnesses[140] and the opportunity to persuade the court of the correctness of its position.

II. LOCS AND THE IMMUTABILITY ANALYTIC

Having accepted and embraced a biological definition of "race," the Eleventh Circuit determined that CMS did not discriminate against Chastity Jones on the basis of an immutable racial characteristic.[141] As discussed below, in doing so the Court joined the fatal invention and myth of biological "race" with the legal fiction of biological immutability.[142] The result: an impoverished interpretation and application of Title VII sanctioning CMS' mistreatment of Chastity Jones.

A. The Earlier Hair Cases

Did the EEOC's suit against CMS' no-locs policy involve an immutable racial characteristic? The Eleventh Circuit looked for answers in two earlier decisions by its predecessor, the United States Court of Appeals for the Fifth Circuit,[143] and in two additional cases considering the legality of employer policies specifically regulating Black hairstyles.

In *Willingham v. Macon Telegraph Co.*,[144] a sex discrimination case,[145] the Court addressed a male plaintiff's claim that an employer's grooming policy prohibiting the wearing of long hair by men but not by women working in public contact positions violated Title VII. This policy reflected the employer's determination that "the business community of Macon . . . was particularly sour on youthful long-haired males."[146] The Court held that the policy did not violate the statute, concluding that the statute's equal-employment-opportunity purpose is "secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and

---

140. *See* Greene, *Splitting Hairs*, *supra* note 14, at 1011 (noting the EEOC's brief to the district court opposing the employer's motion to dismiss stating that the agency would present expert witness testimony regarding locs).

141. *See supra* note 34 and accompanying text.

142. *See* Greene, *Splitting Hairs*, *supra* note 14, at 992, 996.

143. The Eleventh Circuit was created in 1981, covers three states (Alabama, Georgia, and Mississippi) formerly within the Fifth Circuit's jurisdiction, and has adopted as binding all Fifth Circuit decisions decided prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

144. 507 F.2d 1084 (5th Cir. 1975) (en banc).

145. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination because of "sex").

146. *Willingham*, 507 F.2d at 1087.

national origin."[147] The plaintiff's hair length was not immutable, the court determined, and the policy was "related more closely to the employer's choice of how to run his business than equality of employment opportunity."[148]

The second Fifth Circuit case, *Garcia v. Gloor*,[149] involved a Title VII challenge to the employer's English-only rule and the termination of an employee for speaking Spanish to a coworker while on the job. Rejecting the plaintiff's national-origin discrimination claim,[150] the Court held that neither Title VII nor common understanding equated national origin with the language a person chooses to speak. "National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage," for "[n]o one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics."[151] Citing *Willingham*, the Court emphasized that Title VII focuses on matters "beyond the victim's power to alter, or that impose a burden on an employee on one of the prohibited bases."[152]

The Eleventh Circuit also noted *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*[153] In that case, the plaintiff, who was Black and worked for the company for three years before she began to wear an Afro hairstyle, alleged that she was unlawfully denied a promotion because of her Afro hairstyle (according to the plaintiff, her supervisor told her that she "could never represent Blue Cross with my Afro").[154] The Court determined that the plaintiff's "description of racial discrimination could hardly be more explicit."[155] "The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[156]

The Eleventh Circuit then compared *Jenkins* to *Rogers v. American Airlines, Inc.*[157] Renee Rogers,[158] a Black woman who wore

147. *Id.* at 1091; *see also id.* ("Private employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights.").

148. *Id.* (citation omitted).

149. 618 F.2d 264 (1980).

150. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination because of national origin).

151. *Garcia*, 618 F.2d at 269.

152. *Id. See also Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (holding that English-only rule did not violate Title VII).

153. 538 F.2d 164 (7th Cir. 1976) (en banc).

154. *Id.* at 167–68.

155. *Id.*

156. *Id.*

157. 527 F. Supp. 229 (S.D.N.Y. 1981).

her hair in a cornrow hairstyle, worked for American Airlines as an airport operations agent, a position involving extensive contact with passengers. The company's grooming policy, "adopted in order to help American project a conservative and business-like image,"[159] prohibited employees from wearing an all-braided hairstyle. Rogers was not ordered to restyle her hair but was told that during working hours she could wear her hair in a bun wrapped in a hairpiece (which caused Rogers severe headaches).[160] Rogers contended that American's denial of her right to wear her hair in cornrows "discriminate[d] against her as a woman, and more specifically as a black woman,"[161] and that "the corn row has a special significance for Black women" and "has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[162]

American's motion to dismiss Rogers' complaint was granted by the district court.[163] Observing that Rogers did not allege that braided hairstyles were worn exclusively or predominantly by Black women, the Court concluded that the grooming policy applied equally to persons of all races and therefore did not violate Title VII.[164] In doing so, the Court problematically required Rogers to "put forth an essentialist claim that all, most, or only Black Americans wore braided

158. While the court's opinion refers to Renee Rogers her actual last name is "Rodgers." Paulette Caldwell, *Intersectional Bias and the Courts: The Story of* Rogers v. Am. Airlines, *in* RACE LAW STORIES 571, 575 n.12 (Devon Carbado & Rachel F. Moran eds., 2008). For ease of reference this essay will refer, as did the Court, to Rogers.

159. *Rogers*, 527 F. Supp. at 233.

160. *Id.*

161. *Id.* at 231. Rogers thus referred to intersectional discrimination against her as (1) a woman and (2) a Black woman, a claim judicially recognized in *Jefferies v. Harris Cty. Cmty. Ass'n*, 615 F.2d 1025 (5th Cir. 1980). For scholarly discussion of the intersection of race and gender and its impact on the employment experience of Black women, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139; *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

162. *Rogers*, 527 F. Supp. at 231–32 (citations omitted). Rogers informed the court that cornrows were "popularized" several years earlier when actress Cicely Tyson wore the hairstyle at the Academy Awards, and were analogous to a statement by Malcolm X regarding the Afro hairstyle. *Id.* at 232. In her view, a policy forbidding Black women and all women from wearing an "Afro/bush" hairstyle "would have very pointedly racial dynamics and consequences reflecting a vestige of slavery unwilling to die (that is, a master mandate that one wear hair divorced from ones historical and cultural perspective and otherwise consistent with the 'white master' dominated society and preference thereof)." *Id.* (citation omitted).

163. *Rogers*, 527 F. Supp at 233–34.

164. *Id.* at 231–32.

hairstyles,"[165] a peculiar requirement of proof shedding no interpretive light regarding the statutory question whether the individual before the Court, Renee Rogers, had been discriminated against because of *her* race. The Court then observed that Rogers appeared for work with a braided hairstyle soon after Bo Derek, a White actress, wore that style in the 1979 movie "10."[166] Having placed Rogers' hairstyle in a "not Black" category,[167] the Court's remark "looked to an isolated experience of a white woman to determine the legitimacy of [Rogers'] race discrimination claim"[168] and failed to recognize that Rogers' hairstyle "was an important expression of racial identity, whereas the same hairstyle on a white woman may connote something entirely different."[169]

The district court also assumed that Rogers was correct that a workplace policy prohibiting an "Afro/bush" hairstyle could violate Title VII.[170] "But if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics."[171] But "an all-braided hairstyle is a different matter. It is not the product of natural hair growth but of artifice" and is an "easily changed characteristic" subject to lawful employer regulation "even if socioculturally associated with a particular race or nationality . . . ."[172]

The Eleventh Circuit's takeaway from *Willingham*, *Gloor*, *Jenkins*, and *Rogers*: Title VII protects individuals against discrimination based on immutable characteristics and the court was "not free . . . to discard the immutable/mutable distinction," a distinction that "can sometimes be a fine (and difficult) one" to draw.[173] Title VII prohibits discrimination on the basis of "black hair texture (an immutable characteristic)" but not discrimination "on the basis of black

---

165. D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FLA. INT'L U. L. REV. 333, 348 (2013).

166. *Rogers*, 527 F. Supp. at 232. "Bo Braids" swept "the White hair-care industry" and the hairstyle was popular in New York City, Los Angeles, and other cities. BYRD & THARPS, *supra* note 35, at 100.

167. *See* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1135 (2006).

168. Greene, *supra* note 165, at 348 (bracketed material added).

169. Fisk, *supra* note 167, at 1135–36.

170. *Rogers*, 527 F. Supp at 232.

171. *Id.*

172. *Id.*; *see also Pitts v. Wild Adventures. Inc.*, 2008 WL 1899306 at *6 (M.D. Ga. 2008) ("Dreadlocks and cornrows are not immutable characteristics. . . . The fact that the hairstyle might be predominantly worn by a particular group is not sufficient to bring the grooming policy within the scope" of antidiscrimination laws.).

173. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016).

hairstyle (a mutable choice) . . . ."[174] It was critical, the Court said, that the EEOC did not allege that dreadlocks are an immutable characteristic of Black persons; according to the agency, Black persons chose to wear locs "because that hairstyle is historically, physiologically, and culturally associated with their race."[175] "That dreadlocks are a 'natural outgrowth' of the texture of black hair does not make them an immutable characteristic," the Court stated, and the EEOC failed to state a plausible claim that CMS intentionally discriminated against Jones because of her race when the company asked her to cut her locs pursuant to its grooming policy.[176]

The cases discussed in the preceding pages of this section were decided before the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*.[177] In that important Title VII case, the Court considered Ann Hopkins' claim that her employer engaged in unlawful sex discrimination when it rejected her bid for partnership.[178] One partner considering her candidacy described Hopkins as "macho"; another partner stated that Hopkins "overcompensated for being a woman"; and a third partner advised Hopkins to take "a course at a charm school."[179] Hopkins was also criticized for using profanity ("it's a lady using foul language") and one of her supporters remarked that she "had matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate."[180] Another partner "delivered the *coup de grace*," advising Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[181] Justice William J. Brennan, Jr.'s plurality opinion reasoned that these comments showed that gender was a motivating factor in the decision not to elevate Hopkins into the partnership.[182] Requiring Hopkins to comply with "prescriptive stereotypes about women (*i.e.*, this is how women should be)"[183] constituted gender and therefore sex discrimination proscribed by Title VII:

---

174. *Id.* (citing *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168 (7th Cir. 1976) (en banc) and *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

175. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

176. *Id.*

177. 490 U.S. 228 (1989) (plurality opinion).

178. *Id.* at 228.

179. *Id.* at 235.

180. *Id.* (citation omitted).

181. *Id.* (citation omitted).

182. *Id.* at 251–53.

183. William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 369 (2017).

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[184]

Importantly, *Price Waterhouse's* construction of Title VII's sex discrimination ban was not restricted to or by dictionary definitions of the statutory term "sex" or by some notion of the country's zeitgeist when Congress enacted the statute in 1964.[185] The significant point, for present purposes, is that the Court's focus on "gender"—"the social and cultural differences attributed to males and females"—expanded the reach and scope of Title VII's sex discrimination prohibition beyond a dictionary-based sex-as-biology (male-female) concept.[186] The Court did so even though the gendered traits identified and weaponized by the employer in discriminating against Hopkins were not immutable sexual characteristics. Hopkins could have changed her behavior and "feminized" her walk, talk, dress, make-up, hairstyle, etc., in an effort to meet the employer's stereotypical expectations and demands. That she could have complied and conformed but did not wish to do so did not place her discrimination claim outside Title VII's protective umbrella. Furthermore, the Eleventh Circuit's resurrection of *Willingham*, a forty-four-year-old pre-*Price Waterhouse* decision,

---

184. *Price*, 490 U.S. at 251 (plurality opinion) (citation and quotation marks and brackets added and omitted).

185. Dictionary definitions of "sex" were relied on by Judge Diane S. Sykes in her dissenting opinion in *Hively v. Ivy Tech Comm. Coll. of Indiana*, 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc). Answering in the affirmative the question whether sexual-orientation discrimination constitutes sex discrimination prohibited by Title VII, the *Hively* majority opined that "[i]t is therefore neither here nor there that the Congress that enacted the Civil Rights Act of 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose." *Id*. at 345, 351–52. Judge Sykes, relying on dictionary definitions of "sex," argued that "in 1964—and now for that matter—the word 'sex' means biologically *male* or *female*; it does not refer to sexual orientation." *Id.* at 362 (Sykes, J., dissenting). While it is true that enactment-era dictionaries defined "sex" as biologically male or female that "simple understanding is incomplete, at best." Eskridge, *supra* note 183, at 338. Professor William Eskridge notes that the 1961 edition of *Webster's* dictionary defined "sex" as male or female *and* as gender ("the sphere of behavior dominated by the relations between male and female . . . man=masculine, woman=feminine). *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2296 (unabridged edition 1961)).

186. Erin E. Goodsell, *Toward Real Workplace Equality: Nonsubordination and Title VII Sex-Stereotyping Jurisprudence*, 23 WIS. J.L. GENDER & SOC'Y 41, 55 (2008).

provides no useful precedential or analytical support for the resolution of the EEOC's race discrimination suit against CMS.[187] *Willingham's* application of Title VII's sex discrimination provision to a policy regulating the hair length of men said nothing "about using immutability against a racial group to exclude certain features of racial identity from statutory protection."[188]

B. The Immutability Analytic

With the foregoing discussion in mind, we now turn to the specific question answered in the negative by the Eleventh Circuit: are locs an "immutable" racial characteristic?

The immutability analytic assumes that "certain traits, like race and sex," are accidents of birth that a person cannot change.[189] "The corollary is that traits for which an individual is accountable, in some sense, are appropriate bases for discrimination."[190] Professor Kenji Yoshino has argued that the assimilationist bias of this conception of immutability permits governments to make policies for persons who can "change or conceal their defining traits" in conformity with conventional views and expectations, thereby transforming the "descriptive claim that a group *can* assimilate . . . into the prescriptive claim that it *should* assimilate without much intervening investigation

187. Prior to its decision in *Catastrophe Management Solutions* and post-*Price Waterhouse*, the Eleventh Circuit had cited *Willingham* one time. In *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998), the Court stated that *Willingham* "squarely forecloses" a male employee's suit challenging his employer's hair-length grooming policy. The Court's opinion did not mention *Price Waterhouse*.

188. *EEOC v. Catastrophe Mgmt. Sols.*, 876 F.3d 1273, 1283 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing en banc).

189. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 9 (2015); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1511–12 (2011). This concept of immutability was initially articulated in Supreme Court decisions interpreting and applying the United States Constitution. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (applying the Fifth Amendment's Due Process Clause and concluding that "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility" (quotation marks and footnote omitted)); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (applying the Fourteenth Amendment's Equal Protection Clause and concluding that the denial of workers' compensation benefits to "illegitimate" children was unconstitutional; visiting "society's condemnation of irresponsible liaisons beyond the bonds of marriage . . . on the head of an infant is illogical and unjust" as "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent").

190. Clarke, *supra* note 189, at 9 (footnote omitted).

by the courts into the legitimacy of the legislation."[191] And, as noted by Professor Jessica Clarke, in addition to this "old version of immutability," which assumes and asks whether a trait is unchangeable, a "new immutability" asks "'not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon.'"[192] New immutability describes "those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically";[193] thus, a trait is immutable if "changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[194]

Grounding its analysis in the old version of immutability, the Eleventh Circuit defined an immutable characteristic as: a trait "beyond the victim's power to alter";[195] a "matter of birth, not culture";[196] a characteristic that is not "the product of artifice";[197] and characteristics "that an employee is born with and cannot change."[198] So defined, an applicant's or employee's changeable characteristics would not be deemed immutable and therefore protected by Title VII's prohibition of discrimination on the basis of race, color, sex, or national origin.[199] A strict and unyielding application of this definition and conception of immutability would problematically place outside the protection of Title VII an individual who could change a number of physical

191. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 490, 506 (1998).

192. Clark, *supra* note 189, at 4, 6 (quoting *Obergefell v. Wymyslo*, 962 F. Supp.2d 968, 990 (S.D. Ohio 2013), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

193. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring).

194. *Id.*

195. *EEOC v. Catastrophe Mgmt. Sols*, 852 F.3d 1018, 1029 (11th Cir. 2016).

196. *Id.* at 1027.

197. *Id.* at 1030.

198. *Id.* at 1029 n.4.

199. Title VII also prohibits discrimination on the basis of religion. "The obvious point to consider is that religion is mutable" and "is not a fixed identity like a race or sex." Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014); *see also* Matthew T. Bodie, *The Best Way Out is Always Through Changing the Employment-at-Will Default Rule*, 2017 U. ILL. L. REV. 223, 249 ("Instead of an immutable characteristic, one's religion is a personal choice (within a social context) . . ."). *But see* Hoffman, *supra* note 189, at 1513 (although the trait of religion "may appear objectively mutable to some" it is "immutable to others based on their world view and identity").

characteristics, for example, the shape of her nose and eyes and the color of her hair or skin.[200]

Suppose, for example, that an employer orders a Black woman employee to remove blonde streaks from her hair. Does the fact that the employee can make the mandated change place that matter beyond the reach of employment discrimination law? Recently, Farryn Johnson, a Hooters waitress, was fired from her job after a restaurant manager told her that she could not work with blonde streaks in her hair because the streaks did not look "natural" on African Americans.[201] Although Johnson could have made the requested change, she refused to do so and her employment was terminated. Johnson sued and an arbitrator ruled that Hooters had implemented its hair policy in a discriminatory manner adversely affecting Johnson's employment in violation of federal and state civil rights laws and awarded Johnson "$250,000 for lost wages and legal fees."[202]

A change in hair color is one thing; lightening one's skin color or changing the shape of one's eyes is quite another.[203] An employer's

---

200. *See Catastrophe Mgmt Sols.*, 876 F.3d at 1284 (Martin, J., dissenting from denial of rehearing en banc):

> Is the color of an employee's hair an immutable trait? What about the shape of an employee's nose? It seems to me that employers could use the panel's rule to argue that any case in which the employer hasn't overtly discriminated on the basis of skin color falls outside Title VII's protections. And even that may be questionable, because with modern medicine skin color can be changed too.

Cf. Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) ("Racial discrimination . . . would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment."). On changing skin color, see Jason Buckland & Ben Reiter, *Exiled by the Cubs, Sammy Sosa Is Enjoying the Life He Wants You to See*, SPORTS ILLUSTRATED (June 27, 2018) (discussing Sosa's daily use of skin cream to lighten his skin color), https://www.si.com/mlb/2018/06/27/sammy-sosa-cubs-dubai-steroids-mark-mcgwire [https://perma.cc/5TAK-46SE].

201. Elizabeth Chuck, *Former Hooters Waitress Awarded $250,000 in Racial Discrimination Case*, NBC NEWS (Apr. 7, 2015, 3:16 PM) https://www.nbcnews.com/news/us-news/former-hooters-waitress-awarded-250,000-racial-discrimination-case-n337396 [https://perma.cc/RV53-YNHC].

202. *See id.*

203. Julie Chen, former host of the CBS show The Talk, recently revealed that when she was twenty-five an agent and news director suggested that she have cosmetic surgery on her eyes because the monolid shape of her eyes made her look "disinterested." The director told Chen, "You'll never make it on this anchor desk because you're Chinese. . . . Our audience can't relate to you because you're not like them." Chen, who does not regret having the surgery, said that she had the procedure "not to look better, but to look more interested and engaged when I'm interviewing someone on TV. The benefit was that I *did* look better, at least by societal standards." Julie Chen, *Exclusive:* The Talk's *Julie Chen Has No Regrets About Her Cosmetic Surgery*, GLAMOUR (Sept. 20, 2016), https://www.glamour.com/story/julie-chen-the-talk-eyelid-surgery?verso=true [https://perma.cc/4XGG-Y2DG].

requirement that applicants or employees comply with a skin-lightening or eye-shape-changing conformity command would involve technically doable and therefore mutable changes and alterations in their physical appearance. Under the Eleventh Circuit's old and strict cannot-be-changed definition of immutability, a worker who refused to comply with the command would not have a viable Title VII claim. This would be an absurd construction of the statute, one which reveals that the Eleventh Circuit's definition of immutability sweeps too broadly as it cannot be the case that any and all changeable physical characteristics are not immutable. Assuming arguendo that a court should adopt an immutability analytic model,[204] the new immutability approach asks not whether an at-issue characteristic can be changed, but whether the characteristic, although changeable, is one that an individual should not be required to change.[205] Should Title VII allow an employer to require employees to lighten their skin or change their hair color or their natural hair or the shape of their nose in furtherance of the employer's desire for conformity and an assimilationist work force? No, an emphatic no.

Now consider the immutability analytic as applied to a Black worker's locs and the Eleventh Circuit's distinction between immutable "black hair texture" and a mutable "black hairstyle."[206] Recall that the Court relied on a Seventh Circuit decision stating that the plaintiff's "description of racial discrimination could hardly be more explicit" given the employer's reference to her Afro hairstyle,[207] and the Southern District of New York's conclusion that a workplace policy prohibiting an immutable "Afro/bush" hairstyle could offend Title VII but banning a mutable braided hairstyle, the product of "artifice," would not violate the statute.[208]

The fundamental flaw in this immutability analysis is apparent. Locs, "'formed in a black person's hair naturally, without any manipulation'"[209] are the "black-female equivalents" of an Afro.[210] As

---

204. *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1418 (2014) (defending the view that "Title VII prohibits discrimination only on the basis of immutable characteristics"); Yoshino, *supra* note 191, at 518 (noting scholarly commentary calling for the retirement of immutability as a factor in antidiscrimination law).

205. *See supra* note 192 and accompanying text; *see* Brief for NAACP et al. as Amicus Curiae Supporting Appellants, *EEOC v. Catastrophe Mgmt. Sols.*, 876 F.3d 1273 (11th Cir. 2017) (No. 14-13482), 2016 WL 7733072 at *14, discussed in Greene, *Splitting Hairs*, *supra* note 14, at 1034.

206. *See supra* note 174 and accompanying text.

207. *Jenkins v. Blue Cross Mut. Hosp. Ins.*, 538 F.3d 164, 168 (7th Cir. 1976).

208. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

209. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022 (quoting EEOC's proposed amended complaint); see also ASHE, *supra* note 35, at 87, 92 (locs are the product of

both Afros and locs are the product of the growth of natural Black hair and "are distinctly African-American racial traits," an employer's adverse action against an employee based on either one of those traits "is an action based on the employee's race" and should therefore be prohibited.[211] On that view, a posited immutability or mutability of such a racialized aspect of the employee's appearance "is beside the point."[212]

Furthermore, and accepting arguendo the Eleventh Circuit's definition of an immutable characteristic as a trait "beyond the victim's power to alter,"[213] the Court's bright-line distinction between an Afro ("black hair texture" and therefore a protected "immutable characteristic")[214] and locs (a "black hairstyle" and therefore an unprotected "mutable characteristic")[215] "is nonsense. If an immutable trait is something that is 'beyond the [plaintiff]'s power to alter' . . . then neither dreadlocks nor Afros are immutable traits of black people. Like any hair style, both can be altered."[216] Given the undeniable fact that the "appearance of a person's hair is always capable of change—hair can be cut, straightened, curled, or covered"—the "question is whether Title VII protects a black employee's choice to wear her hair in its natural state."[217]

With regard to hair straightening, a Black worker who could comply with a demand that she change her natural hair, including her locs, should not be required to do so as a condition of obtaining or retaining employment. The straightening of hair burdens Black women given the related financial costs, time expended on making and maintaining that change, and exposure to toxic chemicals.[218] Black women "are more likely to use a greater number and variety of hair

---

natural hair growth); BYRD & THARPS, *supra* note 35, at 133 ("Dredlocs—What happens when nappy hair is left to its own devices.").

210. Onwuachi-Willig, *supra* note 2, at 1086.

211. *EEOC v. Catastrophe Mgmt. Sols*, 876 F.3d 1273, 1285 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing en banc).

212. *Id.* (Martin, J., dissenting from denial of rehearing en banc).

213. *Id.* at 1029.

214. *Id.* at 1030.

215. *Id.*

216. *Id.* at 1284 (Martin, J., dissenting from denial of rehearing en banc).

217. *Id.* at 1289 (Martin, J., dissenting from denial of rehearing en banc).

218. *See* Onwuachi-Willig, *supra* note 2, at 1104, 1114–20 (discussing the costs of hair straightening and maintenance, including the costs of hair relaxers for permanents and touch-ups and time spent in the home or in the beauty shop on hair care; the damage to the health of Black women's hair and scalp caused by relaxers and chemical scalp burns; the adverse effects on Black women's physical health linked to the avoidance of exercise and sweating; and negative psychological consequences for Black women forced to conform to a norm of White female beauty); *see also* Greene, *Splitting Hairs*, *supra* note 14, at 1012–14 (same).

products and to have their hair chemically or professionally treated."[219] Exposure to certain chemicals contained in those products has been linked to higher rates of uterine fibroids in Black women, endocrine disruption, and asthma, and has been identified as a risk factor for excessive premenstrual breast cancer.[220] A Black woman compelled to change her natural hair as a condition of obtaining or keeping a job should not be required to expose herself to such serious health issues and consequences. That compulsion places upon Black women a work-related burden not borne by other women.[221]

An additional and significant point concerning CMS' mistreatment of Chastity Jones: recall that CMS' human resources manager stated to Jones that locs "tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[222] The company's grooming policy, while not specifically mentioning or referring to locs, mandated hairstyles projecting "a professional and businesslike image" and prohibited "excessive" hairstyles and "unusual colors."[223] While the manager's statement was not as derogatory as those made in other cases,[224] her comment reveals that she distinguished and could tell the difference between "messy" and "non-messy" locs.[225] The manager's

---

219. Ami R. Zota, *The Environmental Injustice of Beauty: Framing Chemical Exposures from Beauty Products as a Health Disparities Concern*, 417 AM. J. OBSTETRICS & GYNECOLOGY 418, 419 (2017).

220. *See* Jessica S. Helm et al., *Measurement of Endocrine Disrupting and Asthma-Associated Chemicals in Hair Products Used by Black Women*, 165 ENVTL. RES. 448 (2018); *see also* Black Women for Wellness, *supra* note 2, at 11–16.

221. The burden imposed by an employer's no-locs grooming policy raises the question whether Black women subject to the policy are or can be unequally burdened in the workplace. In *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106, 1109 (9th Cir. 2006) (en banc), the court held that an employer's must-wear-makeup mandate did not create an unequal burden for women. In so holding, the court refused to take judicial notice "that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short." *Id.* at 1110. The dissenting judges, relying on the Supreme Court's *Price Waterhouse* decision, argued that "gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave." *Id.* at 1115 (Pregerson, J., dissenting). A Black woman forced to incur the time and expense of wearing her hair not as she wants but as the employer demands should be allowed to allege and attempt to prove that she has been subjected to an unequal workplace policy violating Title VII's ban on discrimination in terms, conditions, and privileges of employment.

222. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021 (11th Cir. 2016).

223. *Id.* at 1022; *see supra* note 29 and accompanying text.

224. *See, e.g.*, *Eatman v. UPS*, 194 F. Supp. 2d 256, 264–65 (S.D.N.Y. 2002) (manager told employees with locs that he "looked like an alien and like Stevie Wonder," compared his hair to "shit," and equated the employee's hair to extracurricular drug use).

225. *See Catastrophe Mgmt. Sols.*, 876 F.3d at 1287 (Martin, J., dissenting from denial of rehearing en banc).

statement thus makes clear that her objection to Jones' locs was an objection to locs *per se*, natural hair that, in the eyes of the conformity commander, could not "*possibly* fit within the category of neat, clean, and well-groomed."[226]

The manager's reaction to Jones' locs is "disturbingly resonant with stereotypes" about purportedly unkempt locs,[227] a weaponized stereotype that was not overridden by Jones' actual and stereotyping-refuting locs. The manager told Jones that her locs were not "messy" ("I'm not saying yours are") but still viewed Jones' locs—and consequently the person wearing them who had already been hired—as unprofessional and not businesslike and not suitable for employment with CMS.[228] And it could certainly be argued that the manager's statement to Jones, "you know what I'm talking about," assumes and cruelly seeks to enlist Jones' agreement with and cooperation in the very racial stereotyping that resulted in the loss of her job.[229] Regrettably, what the manager intended—a matter that would have been a focus of the adversarial process of litigation—was foreclosed by the Eleventh Circuit's affirmance of the district court's grant of CMS' motion to dismiss.[230]

CONCLUSION: A WAY FORWARD

Chastity Jones sought employment with and was initially hired by CMS before that job was taken away from her because she wore her hair in locs. (Notably, persons wearing locs may serve in the United States armed forces,[231] work as a flight attendant for many airlines,[232]

---

226. Dawn D. Bennett-Alexander & Linda F. Harrison, *My Hair is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 CARDOZO J.L. & GENDER 437, 452 (2016) (footnote omitted).

227. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination By Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1209 (2004); *see also* Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 18 J. GENDER RACE & JUST. 389, 398 (2016) (noting the stereotype that locs worn by Black women "are dirty, disheveled, or strange").

228. *Catastrophe Mgmt. Sols.*, 876 F.3d at 1279 (citing *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021); *id.* at 1286 (Martin, J., dissenting from the denial of a rehearing en banc).

229. *Id.* at 1279 (citing *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021–22).

230. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1020–21.

231. In his dissenting opinion in *Goldman v. Weinberger*, 475 U.S. 503, 519 (1986), Justice Brennan opined that the military could prohibit locs in furtherance of "the goal of a polished, professional appearance." The armed forces have now determined that military personnel can wear locs and other braided hairstyles. *See* James Bollinger, *Air Force OKs New Hairstyles for Women, Off-Duty Earrings for Men*, STARS AND STRIPES (July 17, 2018), https://www.stripes.com/news/air-force-oks-new-hairstyles-for-women-off-duty-earrings-for-men-1.538036

and successfully pursue careers as executives in corporations and excel in other professional endeavors.)[233] The EEOC's suit alleging that CMS' action violated Title VII's proscription of discrimination on the basis of race faced an uphill battle given the wide latitude and deference courts have granted employer grooming and appearance codes reflecting dominant social norms and White standards of beauty and aesthetics.[234] That battle was made all the more difficult given the Eleventh Circuit's acceptance of the invention and myth of biological "race" and the Court's determination that locs are not an immutable racial characteristic subject to Title VII protection.[235] Future court decisions should not rely on and replicate the Eleventh Circuit's impoverished interpretation of Title VII. "Race" must be untethered from biology and the flawed immutability analytic must be interred and no longer applied in Title VII cases involving employers' refusal to employ Black women because of their natural hair or locs, braids, twists, and other hairstyles. Employers should not and must not be allowed to continue to deny employment to Black persons on the basis of their natural hair.

Important exemplars of legislative prohibition of workplace racial discrimination on the basis of an employee's natural hair are found in recent local and state initiatives addressing that issue. In February 2019, the New York City Commission on Human Rights issued a legal enforcement guidance announcing that grooming or appearance policies

---

[https://perma.cc/7PVM-J33W]; Caitlin Doornbos, *Navy to Allow Ponytails, Dreadlocks and Other Hairstyles for Female Sailors*, STARS AND STRIPES (July 11, 2018), https://www.stripes.com/news/us/navy-to-allow-ponytails-dreadlocks-and-other-hairstyles-for-female-sailors-1.537026 [https://perma.cc/BE4L-NM4M]; Christopher Mele, *Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice*, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/army-ban-on-dreadlocks-black-servicewomen.html [https://perma.cc/ZCJ6-MVJU]; Meghann Myers, *New Army Regulations OK Dreadlocks for Female Soldiers*, ARMY TIMES (Jan. 5, 2017), https://www.armytimes.com/news/your-army/2017/01/05/new-army-regulations-ok-dreadlocks-for-female-soldiers/ [https://perma.cc/N75Q-B4L9]; Jennifer H. Svan, *Female Marines Can Now Wear Locks and Twists in Their Hair*, STARS AND STRIPES (Dec. 15, 2015), https://www.stripes.com/news/female-marines-in-uniform-can-now-wear-locks-and-twists-in-their-hair-1.384225 [https://perma.cc/C4XW-YFNM].

232. *See* Laura Morgan Roberts & Darryl L. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 405 (2007).

233. *See id.*

234. *See* RUTHAN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES 82–83 (2013); Onwuachi-Willig, *supra* note 2, at 1083; Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 129–30 (2001).

235. *See EEOC v. Catastrophe Mgmt. Solutions*, 876 F.3d 1273, 1279, 1289–90 (11th Cir. 2017) (Martin, J., dissenting from the denial of rehearing en banc).

banning, limiting, or otherwise restricting natural hair[236] or hairstyles associated with Black people[237] violate the antidiscrimination provisions of the New York City Human Rights Law (NYCHRL).[238] With respect to employment discrimination,[239] the guidance provides that "Black hairstyles are protected racial characteristics . . . because they are an inherent part of Black identity," and recognizes the "strong, commonly-known racial association between Black people and hair styled into twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs, and employers are assumed to know of this association."[240] Employer grooming policies prohibiting the foregoing and non-exhaustive list of hairstyles (including "protective hairstyles" intended to maintain the hair health), or requiring employees to straighten or relax their hair by the use of chemicals or heat in order to conform to an employer's appearance standards, or banning hair extending a certain number of inches from the scalp (such as Afros) violate the NYCHRL.[241] And an employer may not ban, limit, or restrict natural hair or hairstyles associated with Black communities in promoting a particular corporate image or because of customer preference or speculative health and safety concerns.[242]

California recently became the first state to prohibit discrimination against persons on the basis of their natural hair. Senate Bill No. 188, the "Creating a Respectful and Open World for Natural Hair Act" (CROWN Act), was signed into law by Governor Gavin Newsom on July 3, 2019 and goes into effect on January 1, 2020.[243] The law amends existing California law and prohibits employers and

---

236. Defined as "hair that is untreated by chemicals or heat and can be styled with or without extensions." *NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair* (Feb. 2019), at 1 n.3, https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf [https://perma.cc/DV38-TL3S] [hereinafter *Hair Guidance*].

237. Including "those who identify as African, African American, Afro-Caribbean, Afro-Latin-x/a/o or otherwise having African or Black ancestry." *Id.* at 1 n.1.

238. N.Y.C., N.Y. ADMIN. CODE § 8-107 (1991).

239. The Guidance also applies to and prohibits discrimination in public accommodations and in public, private, and charter schools. *See Hair Guidance*, *supra* note 236, at 8–9.

240. *See id.* at 3–4, 6–7.

241. *Id.* at 3–4, 7–8.

242. *See id.* at 8. In cases involving legitimate health and safety concerns an employer must consider alternative ways to address those issues before banning or restricting employees' hairstyles, including the use of hair nets, hair ties, head coverings, and alternative safety equipment accommodating different hair textures and hairstyles. *See id.*

243. S. B. No. 188, § 2 (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB188 [https://perma.cc/A5VD-J2CE].

schools from discriminating on the basis of race or ethnicity, with "race . . . inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles" including "braids, locks, and twists."[244] Nine days later, New York Governor Andrew Cuomo signed into law a bill prohibiting racial discrimination based on natural hair or hairstyles, with "race" defined as including but not limited to ancestry, color, ethnic group identification, and ethnic background.[245] This law, effective immediately, defines "race" as including traits historically associated with race, including but not limited to hair texture and protective hairstyles, with the latter defined as including, but not limited to, braids, locks, and twists.[246]

The just-described state and local laws do what federal law, to date, does not: target and formally provide legal protection against racial discrimination against, not the invented biological and immutable conception of "race" recognized in and driving the Eleventh Circuit's *Catastrophe Management* decision, but "race" as a fundamental part of Black identity inclusive of traits historically associated with Black persons' hair texture and hairstyles and with respectful recognition of the personal costs and harms they endure in complying with an employer's hair-related conformity commands. Other state and local governments and Congress following California and New York's lead would be a significant and welcome development for Black women who are eighty percent more likely than other women to change their natural hair to meet workplace expectations and social norms, and fifty percent more likely to be sent home from the workplace because of adverse employer judgments about their hair texture and hairstyles.[247]

---

244. *Id.*

245. *Governor Cuomo Signs S6209A/A7797A to Make Clear Civil Rights Laws Ban Discrimination Against Hair Styles or Textures Associated with Race*, (July 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-s6209aa7797a-make-clear-civil-rights-laws-ban-discrimination-against-hair [https://perma.cc/J4FB-DKV7].

246. *See* Assemb. B. AO7797, 2019–20 Reg. Sess. (N.Y. 2019), https://assembly.state.ny.us/leg/?default_fld=&bn=AO7797&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y [https://perma.cc/62UQ-8455].

247. *See Ending Discrimination Against Black Hair with The CROWN Coalition*, https://www.dove.com/us/en/stories/campaigns/the-crown-act.html [https://perma.cc/4K93-7RWV].