Braids, Locs, and *Bostock*: Title VII's Elusive Protections for LGBTQ+ and Black Women Employees

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Abstract:

Whiteness and patriarchy frame our understanding of what it means to be and look "professional." Workplace grooming and dress standards, inherently rooted in gender and racial stereotypes, often result in policies that place Black women employees at a unique disadvantage, particularly when it comes to hair. Black women who do not conform to grooming policies often face an unfair choice: either change their look to appear more "professional" or face an adverse employment action. The problem is that looking "professional" by contemporary corporate standards usually means looking less Black. Courts in grooming policy discrimination cases like *Rogers v. American Airlines* have confronted the legal claims resulting from this discriminatory dilemma since the 1970s but have often refused to reassess their narrow understanding of racial discrimination or allow intersectional race and sex discrimination claims. This Note argues that this refusal represents a failure to achieve the goals of Title VII and renders Black women statutorily invisible.

Black women need better protections in the workplace. However, federal passage of the CROWN Act, which seeks to eliminate discrimination towards race-based natural and protective hairstyles, could take years, leaving Black women in most of the country unprotected from race discrimination based on hair. Until Black women achieve statutory protection, lawyers in grooming policy discrimination cases must push for judicial decisions that expand Title VII's protections. One Title VII case proves that such success is possible: *Bostock v. Clayton County* expanded Title VII's protections for LGBTQ+ employees after decades of gradual socio-political progress. Thus, this Note compares LGBTQ+ plaintiffs' obstacles and jurisprudential progress with that of Title VII race discrimination plaintiffs to determine whether Black women employees facing race-based hair discrimination will be able to achieve the same success—unfortunately, this Note ultimately determines that such success is unlikely.

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I. INTRODUCTION

Whiteness and patriarchy frame our understanding of what it means to be and look "professional."[1] Corporate America, which is overwhelmingly controlled by white males, has established workplace grooming and dress standards that are inherently rooted in gender and racial stereotypes.[2] Such standards result in policies that place Black[3] women at a unique disadvantage, particularly when it comes to hair. "Black women are 1.5 times more likely than white women to be sent home from the workplace because of their hair."[4] They are 80% more likely than white women to believe that they must change their hair from its natural state to fit in at the office.[5] Black women who do not conform to grooming policies often face a harsh and unfair choice: either change their look to appear more "professional" or face an

[1] Crystal Powell, *Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward*, 2018 BYU L. REV. 933, 943 (2019).

[2] Curtis Bunn, *Blacks in Corporate America Still Largely Invisible, Study Finds*, NBC NEWS (Dec. 11, 2019, 12:32 PM), https://www.nbcnews.com/news/nbcblk/blacks-corporate-america-still-largely-invisible-study-finds-n1098981 [https://perma.cc/BR8G-4844] ("Only 3.2 percent of executives and senior manager-level employees are African American."); Powell, *supra* note 1.

[3] I have chosen to capitalize Black throughout this Note when referring to people who are part of the African diaspora, the collective social identity of Black people, and Black shared cultures and experiences. However, I will not be capitalizing white. Because capitalizing Black is a personal stylistic choice that reflects one's understanding of the word's meaning, I will not be changing the capitalization of Black within quotations.

[4] *We're Ending Hair Discrimination*, THE CROWN ACT, https://www.thecrownact.com/ [https://perma.cc/RV2Y-RYFU].

[5] *See id.*

adverse employment action. The problem is that looking "professional" by contemporary corporate standards usually means looking less Black.

Courts have confronted the legal claims resulting from this discriminatory dilemma since the 1970s. In one seminal grooming policy discrimination case, *Rogers v. American Airlines*, the court upheld an employer's right to prohibit braided hairstyles in the workplace and distinguished between biological and sociocultural aspects of race, protecting only the former.[6] The court analyzed the race and sex discrimination claims separately, dismissing them both and refusing to assess the plaintiff's injury particularly as a Black woman who experiences racism and sexism simultaneously.[7] Indeed, "*Rogers* proceeds from the premise that, although racism and sexism share much in common, they are nonetheless fundamentally unrelated phenomena—a proposition proved false by history and contemporary reality."[8] This Note argues that courts' refusal to reassess their narrow understanding of racial discrimination, and refusal to allow intersectional claims in cases like *Rogers*, represents a failure to achieve the goals of Title VII. Such failures render Black women statutorily invisible, creating troubling precedent that courts still follow 40 years later.[9]

Black women need better protections in the workplace. Thankfully, a new piece of legislation promises to provide that much needed protection. In 2019, Dove and the Creating a Respectful and Open World for Natural Hair (CROWN) Coalition partnered with State Senator Holly J. Mitchell to introduce the CROWN Act in California.[10] The bill recognizes that hair has historically served as a basis for discrimination and racial classification due to "longstanding racial and national origin biases and stereotypes associated with hair texture and style."[11] These biases and stereotypes often result in school and workplace policies and practices that discriminate by prohibiting natural or protective hairstyles commonly worn by people of African

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[6] *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 234, 232 (S.D.N.Y. 1981).

[7] *Id.* at 231–33.

[8] Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365, 371 (1991).

[9] *See generally* Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (holding that employer's refusal to hire plaintiff when she would not cut off her dreadlocks based on its grooming policy did not violate Title VII), *cert. denied*, 138 S. Ct. 2015 (2018). Though the plaintiff only brought a race discrimination claim, the court dismissed the action by following the same "immutable characteristic" standard that the court set out in *Rogers*. *Id.* at 1021.

[10] *We're Ending Hair Discrimination*, *supra* note 4. The Act passed in California in January of 2019 and was signed into law for the first time on July 3, 2019. *Lawmakers Who Lead the CROWN Act*, THE CROWN ACT, https://www.thecrownact.com/about [https://perma.cc/NT77-B2D3].

[11] CROWN Act of 2021, S.888, 117th Cong. § 2(a)(3) (2021).

descent.[12] Therefore, the CROWN Act seeks to eliminate discrimination towards race-based natural and protective hairstyles by extending statutory protection to include hair textures and styles such as braids, locs, twists, cornrows, fades, afros, and knots in the workplace and public schools.[13] As of October 2022, 19 states have passed the CROWN Act: Alaska, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Virginia, and Washington.[14] At least 25 states have filed the Act or completed pre-filing, and 44 cities and counties have passed it in states where the Act has not yet passed.[15]

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[12] CROWN Act of 2021, S.888, 117th Cong. § 2(a) (2021). The bill's findings continue:

> (6) For example, as recently as 2018, the United States Armed Forces had grooming policies that barred natural or protective hairstyles that servicewomen of African descent commonly wear and that described these hairstyles as "unkempt".
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> (7) In 2018, the United States Armed Forces rescinded these policies and recognized that this description perpetuated derogatory racial stereotypes.
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> (8) The United States Armed Forces also recognized that prohibitions against natural or protective hairstyles that African-American servicewomen are commonly adorned with are racially discriminatory and bear no relationship to African-American servicewomen's occupational qualifications and their ability to serve and protect the Nation.
>
> (9) As a type of racial or national origin discrimination, discrimination on the basis of natural or protective hairstyles that people of African descent are commonly adorned with violates existing Federal law, including provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.), section 1977 of the Revised Statutes (42 U.S.C. 1981), and the Fair Housing Act (42 U.S.C. 3601 et seq.). However, some Federal courts have misinterpreted Federal civil rights law by narrowly interpreting the meaning of race or national origin, and thereby permitting, for example, employers to discriminate against people of African descent who wear natural or protective hairstyles even though the employment policies involved are not related to workers' ability to perform their jobs.
>
> (10) Applying this narrow interpretation of race or national origin has resulted in a lack of Federal civil rights protection for individuals who are discriminated against on the basis of characteristics that are commonly associated with race and national origin.
>
> (11) In 2019, State legislatures and municipal bodies throughout the United States have introduced and passed legislation that rejects certain Federal courts' restrictive interpretation of race and national origin, and expressly classifies race and national origin discrimination as inclusive of discrimination on the basis of natural or protective hairstyles commonly associated with race and national origin. *Id.*

[13] *We're Ending Hair Discrimination, supra* note 4.

[14] *19 States Down, 31 to Go*, THE CROWN ACT, https://www.thecrownact.com/about [https://perma.cc/NT77-B2D3].

[15] *Id.*

Though the Act spread through the states quickly in the last three years, its progress has slowed, especially in the country's most conservative states. And even despite the early momentum within state legislatures, Congress has yet to pass a federal version of the Act.[16] The House of Representatives initially passed the Act on September 21, 2020, but it stalled in the Senate.[17] Senator Cory Booker and Congresswoman Bonnie Watson Coleman then reintroduced the bill in March 2021 in the Senate and the House of Representatives.[18] Finally, on March 18, 2022, the House passed the CROWN Act, sending it to the Senate Judiciary Committee for consideration.[19] Still, despite the Democrats' narrow majority in the Senate and President Biden's support, federal passage could take years, leaving Black women in most of the country unprotected from race discrimination based on hair. Not held accountable by current federal anti-discrimination legislation,[20] employers will continue to legally deny Black women professional opportunities in the meantime.

By declining to adopt an intersectional approach and ignoring the sociocultural motivations behind racial discrimination in their analyses, courts in grooming policy discrimination cases like *Rogers v. American Airlines* have left a gaping hole in Title VII protections for Black women with traditionally Black hairstyles. Until Congress passes a federal CROWN Act to fill that gap, lawyers in grooming policy discrimination cases must push for judicial decisions that expand Title VII's protections. One Title VII case proves that such success is possible, even when unexpected: *Bostock v. Clayton County*.[21] Despite several legal obstacles, *Bostock* expanded Title VII's protections for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) employees after decades of gradual socio-political progress. The Court's "textualism plus" reasoning synthesized the language of key legal precedent to hold that LGBTQ+ discrimination violates Title VII's prohibition on sex

[16] *See* CROWN Act of 2021, S.888, 117th Cong. (2021); *Help Us End Hair Discrimination Nationwide*, THE CROWN ACT, https://www.thecrownact.com/about [https://perma.cc/NT77-B2D3].

[17] *See* CROWN Act of 2021, H.R. 5309, 116th Cong. (2020).

[18] *See* CROWN Act of 2021, S.888, 117th Cong. (2021); CROWN Act of 2021, H.R. 2116, 117th Cong. (2021).

[19] Jaclyn Diaz, *The House Passes the CROWN Act, A Bill Banning Discrimination on Race-Based Hairdos*, NPR (Mar. 18, 2022, 7:12 PM), https://www.npr.org/2022/03/18/1087661765/house-votes-crown-act-discrimination-hair-style [https://perma.cc/Q5HN-HAEG].

[20] S*ee 12 States Have Passed the Crown Act to Legalize Black Hair in 2021*, BOULEVARD (July 3, 2021), https://www.joinblvd.com/blog/crown-act-day-2021 [https://perma.cc/CEP2-JFAF] ("Although workplace discrimination on the basis of race is illegal in the United States, hair discrimination beyond afros did not have its own explicit law until the Crown Act.").

[21] *See generally* Bostock v. Clayton Cnty. 140 S. Ct. 1731 (2020) for Justice Gorsuch's reasoning, which I have labeled "textualist plus."

stereotypes, cementing LGBTQ+ individuals' right to be free from workplace discrimination nationwide.

This Note compares LGBTQ+ legal history and Title VII sex discrimination jurisprudence with the history of judicial and societal understandings of race and the Title VII race discrimination jurisprudence. It argues that social and cultural norms support judicial expansion of Title VII's protections to Black women employees facing race-based hair discrimination. However, although Title VII grooming policy plaintiffs face many of the same obstacles as *Bostock's* LGBTQ+ plaintiffs, it is unlikely that they will be able to achieve the same success. Title VII race discrimination precedent has failed to articulate the concepts necessary to expand protection to Black women facing race-based hair discrimination. Without (1) widespread judicial recognition of racial discrimination based on sociocultural considerations and (2) widespread judicial approval of race-sex intersectional claims, grooming policy discrimination plaintiffs may be left unprotected for the foreseeable future.

Part II of this Note will discuss intersectionality theory, Title VII race discrimination and employer grooming policies, grooming policy discrimination jurisprudence, and Title VII sex discrimination. Part III will analyze the "textualist plus" reasoning in *Bostock v. Clayton County* and examine whether Black women plaintiffs can recreate *Bostock*'s path to success. Part IV will conclude and suggest that academics should continue to develop scholarship in this area to find a creative solution to this problem.

II. BACKGROUND

Title VII grooming policy jurisprudence implicates many complex concepts. Part A will review Black women's existence at the intersection of race and gender. Part B will discuss Title VII race discrimination and Black women's particular vulnerability in the workplace. Part C will consider two seminal grooming policy discrimination cases. Lastly, Part D will address Title VII sex discrimination as it relates to LGBTQ+ rights and *Bostock*.

A. Intersectionality: "Multiplicative" Oppression

> Where else do the powerful influences of racism and sexism converge as they do in the lives of black women? Given both her color and her sex, she is presumed to have been twice victimized. For a black woman, the double oppression of race and gender complicates the problems of identity and choice because she must respond to the desires and expectations of black men and to white cultural values and norms. The messages given about what is attractive,

> acceptable, and necessary are often contradictory—and impossible to achieve.[22]

Black women are in a unique sociocultural position because they do not benefit from whiteness or maleness. Instead, Black women experience multidimensional oppression as targets of both patriarchy and white supremacy.[23] However, Critical Race Feminist scholar and professor Adrien Wing has argued that the experience of Black women "cannot be reduced to an addition problem: 'racism + sexism = straight black woman's experience.' I am not a 'white woman plus.' I am an *indivisible* black female with a *multiple* consciousness."[24] Thus, the reality of Black women's experiences is "multiplicative."[25] Racism and sexism are interlocking forces, mutually reinforcing components of the other, resulting in a system of dominance that is equally as rooted in patriarchy as it is in racism.[26] Existence at this intersection of race and gender "demands that black women negotiate these forces."[27] Race and civil rights expert and employment discrimination professor Paulette M. Caldwell has argued that combatting these forces necessarily depends on acknowledging the interdependency of racism and sexism.[28] Making progress against racism and sexism requires "not only an eradication of negative stereotypes about black womanhood and their associated behavioral consequences," but also the recognition that legal theories about the protection of Black women are central to theories about both race and gender.[29]

Unfortunately, the interaction between race and gender is generally not reflected in legal theory or public policy, leaving Black women grossly

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[22] Margo Okazawa-Rey et al., *Black Women and the Politics of Skin Color and Hair*, 14 WOMEN'S STUD. Q. 13, 14 (1986).

[23] *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (discussing how the multidimensionality of Black women's experiences are ignored under a single-axis analysis used in antidiscrimination law). Professor Crenshaw, lawyer, civil rights advocate, Critical Race Theorist, and professor at Columbia Law School and UCLA School of Law first coined the term intersectionality in this 1989 paper.

[24] Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181, 191 (1990–91) (emphasis in original) (citing Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588–98 (1990)). Dean Wing is the Associate Dean for International and Comparative Law Programs at the University of Iowa College of Law and Director of the University of Iowa Center for Human Rights. She also teaches courses on Critical Race Theory and Sex-Based Discrimination, among others.

[25] *See id.* at 194 (emphasis omitted).

[26] Caldwell, *supra* note 8, at 372.

[27] Okazawa-Rey et al., *supra* note 22.

[28] Caldwell, *supra* note 8, at 372.

[29] *Id.*

unprotected.[30] There exists a powerful legal assumption of "race-sex independence or distinctiveness."[31] This assumption is deeply rooted in American political history, especially with women's suffrage and emancipation.[32] Separate political movements followed from this assumption, as well as the development of diverging legal approaches and social policy along distinct lines of gender *or* race.[33] Antidiscrimination law and theory were not designed with a multidimensional approach in mind.[34] Instead, the "dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis."[35] This "single-axis framework erases Black women in the conceptualization, identification, and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group."[36] Essentially, courts, academics, and theorists tend to view discrimination in terms of "sex- or class-privileged Black[ ]" people in race discrimination cases and in terms of "race- and class-privileged women" in sex discrimination cases.[37]

Professor Caldwell argues that the distinctiveness between race and gender is not itself a problem; however, damage occurs when this distinctiveness leads to an erasure of the potential for race and gender to intersect.[38] It is at this legally invisible intersection where Black women remain unprotected and overlooked—unfortunately, "the gender components of racism and the race components of sexism remain hidden."[39] Critical Race Theory scholar, professor, and civil rights advocate Kimberlé Crenshaw, argues that ignoring the intersection of race and gender and focusing on the most privileged members of each group effectively marginalizes those that are "multiply-burdened" and conceals their claims.[40] This in turn results in a distorted sense of racism and sexism, where the

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[30] *Id.*

[31] *Id.* at 373–74.

[32] *Id.* For more on racism in the women's suffrage movement, see Sharon Harley, *African American Women and the Nineteenth Amendment*, NAT'L PARK SERV. (Apr. 10, 2019), https://www.nps.gov/articles/african-american-women-and-the-nineteenth-amendment.htm [https://perma.cc/84VL-VM7Z]; Becky Little, *How Early Suffragists Left Black Women Out of Their Fight*, HIST. (Jan. 29, 2021), https://www.history.com/news/suffragists-vote-black-women [https://perma.cc/CB73-QJC3].

[33] Little*, supra* note 32.

[34] Crenshaw, *supra* note 23, at 140.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Caldwell, *supra* note 8, at 374.

[39] *Id.*

[40] Crenshaw, *supra* note 23, at 140.

"operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomena."[41] Because the intersectional experiences of Black women are more than just the sum of racism and sexism, any analysis that does not take intersectionality into account cannot adequately address "the particular manner in which Black women are subordinated."[42] Thus, intersectionality should be crucial in courts' analyses of Black women's race and sex discrimination claims.

Yet most courts have declined to adopt an intersectional approach in Title VII cases with Black women plaintiffs.[43] For example, in *DeGraffenreid v. General Motors*, five Black women sued General Motors alleging discrimination against the Black women employees.[44] General Motors had not hired any Black women prior to 1964, then it fired all of the Black women hired after 1970 when it conducted seniority-based layoffs.[45] Nonetheless, the district court granted summary judgment for General Motors, firmly rejecting the plaintiffs' efforts to bring suit as Black women, not just as women or Black people.[46] The court held that the plaintiffs, as Black women, were not a special class and were not entitled to a "'super-remedy' which would give them relief beyond what the drafters of the relevant statutes

[41] *Id.*

[42] *Id.* Professor Crenshaw argues that intersectionality is more than sexism added on top of racism. Rather, the forces of racism and sexism act as multiplications of oppression, interlocked and multi-faceted, and cannot be easily subtracted away. *Id.*

[43] Some lower courts have embraced intersectionality in their Title VII cases. *See, e.g.*, Jeffries v. Harris Cnty. Cmty. Action Assn., 615 F.2d 1025 (1980) (reversing district court decision to dismiss plaintiff's race and sex claim separately and holding that her claim should be evaluated on the basis of her status as a Black female). In *Jeffries*, the court stated, "We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women . . . . In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of black [people], we cannot condone a result which leaves black women without a viable Title VII remedy." *Id.* at 1032. *See also* Westmoreland v. Prince George's Cnty., 876 F. Supp. 2d 594, 604 (D. Md. 2012) ("The Court joins the evolving body of authority and concludes that intersectional claims based on sex and race are generally cognizable under Title VII."); Lam v. Univ. of Hawaii, 40 F.3d 1151, 1562 (9th Cir. 1994) (finding that the lower court erred by treating the sex and race claim of an Asian woman separately because "[l]ike other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.")

[44] DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 558 F.2d 480, 482 (8th Cir. 1977) (affirming the dismissal of the appellants' Title VII claims).

[45] *Id.*

[46] DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part*, *rev'd in part*, 558 F.2d 480 (8th Cir. 1977) (affirming dismissal of appellants' Title VII claims).

intended."[47] A cause of action can exist only for "race discrimination, sex discrimination, or alternatively either, but not a combination of both."[48]

The court dismissed the sex discrimination claim, finding that the seniority system did not perpetuate sex discrimination because General Motors had hired women before 1964, despite the fact that they were all white women.[49] It likewise dismissed the plaintiff's race discrimination claim by recommending the claim's consolidation with another case against General Motors that alleged broad-based racial discrimination against its mostly male employees.[50] Professor Crenshaw argues that the court's treatment of the Black women plaintiffs in *DeGraffenreid* made clear "that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences" and that Black women will be protected only when their experiences neatly coincide with those of either group's.[51]

In another case, *Moore v. Hughes Helicopters, Inc.*, the court refused to certify the plaintiff, a Black woman, as a class representative on behalf of all women employees at Hughes.[52] The court reasoned that Moore was incapable of representing white females in her sex discrimination claim because she had never claimed that Hughes discriminated against her as a woman generally, only that it discriminated against her as a Black woman.[53] Similarly, Moore could not represent Black male employees because the court determined from her deposition that she did not believe Black men were facing discrimination.[54] Because the court would not allow Moore to represent white women or Black men, she had to try to prove her claim using statistics on Black women alone, rather than statistics on race or sex disparity overall, and only statistics regarding those Black women qualified to be in upper-level positions.[55] With such a small statistical sample, it proved impossible for Moore to show discrimination under a disparate impact theory.[56] Professor

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[47] *Id.* at 143, 145 ("The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than . . . a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.")

[48] *Id.* at 143.

[49] *Id.* at 144.

[50] *Id.*

[51] Crenshaw, *supra* note 23, at 143.

[52] Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983).

[53] *Id.*

[54] *Id.*

[55] *Id.* at 484–86.

[56] *Id.*

Crenshaw argues that *Moore* exhibits the "centrality of white female experiences" within the concept of sex discrimination.[57]

Cases such as these exhibit how easily courts erase Black women's unique experiences.[58] The next section will detail how courts' current understanding of race discrimination perpetuates injustice and leaves grooming policy discrimination plaintiffs unprotected. The section will introduce Title VII and the immutability standard, then explain the "myth" of race and the importance of Black hair.

B. *Racial Discrimination & Employer Grooming Policies*

Title VII expressly prohibits discrimination in employment on the basis of race, national origin, sex, color, and religion.[59] Under Title VII, it is considered "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[60] Title VII's protections, however, are limited. Because courts have determined that Title VII's prohibitions refer only to "immutable characteristics,"[61] employees who face discrimination based on characteristics that fall outside of this classification are left largely unprotected. Biologically immutable characteristics are those that an individual cannot change, such as skin color.[62] Courts have generally rejected claims of race or national origin discrimination based on "mutable

[57] Crenshaw, *supra* note 23, at 144.

[58] *Id.* at 146; *see also* Payne v. Travenol, 416 F. Supp. 248 (N.D. Miss. 1976) (holding that Black female plaintiffs could not represent all Black employees because the sex disparities between Black women and men create undeniable conflicting interests preventing Black women from adequately representing Black men). Professor Crenshaw argues that cases like these show that, for white women, claiming sex discrimination "is simply a statement that but for gender, they would not have been disadvantaged." Crenshaw at 144–45. Their race privilege is taken as a given, and their race does not need to be specified because it "does not contribute to the disadvantage for which they seek redress." *Id.* As a result, claims that "diverge from this standard [of sex discrimination] appear to present some sort of hybrid claim." *Id.*

[59] 42 U.S.C. § 2000(e)–2(a)(1)(2000).

[60] *Id.*

[61] *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (first articulating the immutability principle).

[62] *See id.*

characteristics" such as hair style[63] and hair color,[64] language,[65] accent,[66] and dialect.[67] This Note focuses on hair, specifically Black women's hair, and how employer grooming policies discriminate against those Black women with traditionally Black hairstyles by relying on the court-made concept of biological immutability.

1. The "Myth" of Race

Race was initially thought of as a purely biological distinction by most scientists and other popular thinkers.[68] Various experts "promulgated hierarchical racial nomenclatures based upon discernible corporal traits," a process which gained in popularity and acceptance throughout the 17th and 18th centuries.[69] Society attached meanings to these racially indicative traits.[70] Physical markers such as skin color, hair texture, and the size or shape of

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[63] D. Wendy Greene, *Title VII: What's Hair (And Other Race-Based Characteristics) Got to Do With It?* 79 UNIV. OF COLORADO L. REV. 1355, 1361 (citing Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (holding that employer's policy requiring employees with "unconventional" hairstyles, including dreadlocks, to wear hats was not racially discriminatory).

[64] *Id.* (citing Santee v. Windsor Court Hotel Ltd. P'ship, No. Civ.A.99-3891, 2000 WL 1610775, at *3–4 (E.D. La. Oct. 26, 2000) (finding that a Black woman with blonde hair who was not hired due to the employer's policy banning "extreme" hairstyles did not establish a prima facie case of race discrimination under Title VII because hair color is not an immutable characteristic)).

[65] *Id.* (citing Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980) (holding that employer's policy prohibiting use of Spanish at work was not national origin discrimination under Title VII because language is not an immutable characteristic)). For further analysis of this case using LatCrit theory, see Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347 (1997).

[66] Greene, *supra* note 63 (citing Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989) (unpublished table decision), No. 88-1668, 1989 WL 61762, at *3 (9th Cir. June 2, 1989) (declining to decide whether a "Hawaiian Creole accent is a function of its speaker's race or national origin" under Title VII after plaintiffs were denied positions as weather broadcasters)). For further analysis of Title VII accent discrimination cases, see Gerrit B. Smith, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231 (2005); Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, 23 LANGUAGE SOC'Y 163 (2009); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991).

[67] Greene, *supra* note 63 (citing *Kahakua*, 1989 WL 61762, at *3); *see also* Greene *supra* note 63, n.23 (2008) (discussing Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English,* 31 U. MICH. J.L. REFORM 637 (1998) and arguing that speakers of "Black English" should be protected from racial discrimination under Title VII due to the "negative socio-cultural associations of the speech pattern denoted to 'Blackness.'")

[68] Greene, *supra* note 63, at 1365; *see* Ronald Turner, *On Locs, "Race," and Title VII*, 2019 WIS. L. REV. 873, 882 (2019) (discussing the biology-based notions of race described by scientists, anthropologists, and other thinkers as early as 1500).

[69] Greene, *supra* note 63, at 1365.

[70] *Id.* at 1366.

one's nose, eyes, and lips, were thought to depict an individual's "intellectual ability, morality, and humanity."[71] As a result, Professor Ronald Turner argues, "[t]he invention and myth of 'race' served as the pseudoscientific foundation for invented racial differences"[72] and a way to determine an "individual's participation and status in society socially, politically, legally, and economically."[73] "One-drop" rules and "traceable amount" laws, which categorized persons with any amount of "Black blood" as Black, demonstrate how essential the race-as-biology theory was to the enforcement of segregation and white supremacy.[74]

However, conceptions of biological race based on physical characteristics were destabilized in the 19th century. Dictionaries during this period usually defined race in terms of lineage and descendance from a common ancestor.[75] These definitions soon proved to be imprecise and unproductive. Where interracial relationships created children who did not fit neatly into racial categories, courts could not rely on biological or immutable characteristics to determine an individual's race.[76] As emancipation threatened the notion of Black inferiority, some courts scrambled to create more "'absolute' and 'consistent'" tests to determine race, largely abandoning a purely biological definition of race for one based on behavior or ability.[77] For example, in the 1835 case *State v. Cantey*, the court explicitly rejected a biological construction of race, holding that the amount of an individual's white or Black blood could not determine race.[78] Instead, the court determined that a person's race is indicated "by [his] reputation, by his reception into society, and his having commonly exercised the privileges of a white man."[79] The court specified that a man "of worth, honesty, industry and respectability, should have the rank of a white man, while a

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[71] *Id.*

[72] Turner, *supra* note 68, at 885. Professor Turner was an expert in labor, employment, and constitutional law before he passed away in 2021.

[73] Greene, *supra* note 63, at 1366.

[74] Turner, *supra* note 68, at 886. Dean Angela Onwuachi-Willig, Dean of the Boston University School of Law and Critical Race Theory scholar, notes that 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." ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 274 (2013).

[75] The Court in *St. Francis College v. Al-Khazraji* quoted a Webster's Dictionary from 1830 that referred to race as a "continued series of descendants from a parent who is called the *stock*" and another Webster's Dictionary from 1841 defining race as "the linage of a family" in determining that, for the purposes of 42 U.S.C. § 1981, Arabs, Englishmen, and Germans should not be considered a single race. 481 U.S. 604, 610–11 (1987).

[76] Greene, *supra* note 63, at 1367.

[77] *Id.*

[78] State v. Cantey, 20 S.C.L. 614, 615 (1835).

[79] *Id.* at 616.

vagabond of the same degree of blood should be confined to the inferior caste."[80] Though this approach relies on behavioral racial stereotypes that may be equally as harmful, the court acknowledged that biological considerations alone were inadequate determinants of racial status.

In fact, the definition of race itself has varied throughout history "according to time and place," shifting in response to changes in ideology and sociohistorical conditions.[81] A social construction of race allows for such flexibility, recognizing that racial differences are created by people and "are not unchanging essential categories [or] naturally existing facts."[82] Leading up to the enactment of Title VII in 1964, many acknowledged this fact, that race is a social construct rather than a biological truth. For example, W.E.B. Du Bois argued in 1911 that "physical characteristics are . . . too indefinite and elusive to serve as a basis for any rigid classification or division of human groups."[83] The notion of socially constructed race continued to rise in popularity in the 1940s and 1950s.[84] Swedish economist and lawyer Gunnar Myrdal noted the "definition of the 'Negro race' is . . . a social and conventional, not a biological concept" and that "social definition and not the biological facts actually determines the status of an individual and his place in interracial relations."[85] In its 1950 statement on race, the United Nations Education, Scientific, and Cultural Organization distinguished the "biological fact of race and the myth of 'race'," stating: "The myth of 'race' has created an enormous amount of human and social damage." Such accounts illustrate that around the time Title VII was drafted, a strictly biological conception of race was not universally accepted.

Later, the Supreme Court alluded to the weakness of a strictly biological conception of race in the 1987 race discrimination case *Saint Francis College v. Al-Khazraji*.[86] There, a professor sued his university alleging that it denied him tenure because he was Arab and Muslim.[87] In answering whether a person of Arabian ancestry was protected from racial discrimination under Section 1981, the Court noted that many contemporary biologists and anthropologists "criticize racial classifications as arbitrary and of little use in

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[80] *Id.*

[81] Turner, *supra* note 68, at 890 (quoting MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 13 (3d ed. 2015)).

[82] *Id.*

[83] *Id.* at 891 (quoting W.E.B. DU BOIS, THE CRISIS 158 (1911)).

[84] *Id.*

[85] *Id.* (quoting GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 115 (1944)). Myrdal continued by saying that with the social definition "comes the whole stock of valuations, beliefs, and expectations . . . constituting the order of color caste in America." *Id.*

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

[87] *Id.* at 606.

understanding the variability of human beings."[88] The Court also indicated that clear-cut racial categories do not exist and that certain traits, which have been used "to characterize races[,] have been criticized as having little biological significance."[89] These observations, the Court stated, "have led some, but not all scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."[90]

Though the Court in *Al-Khazraji* did not explicitly determine whether race was indeed sociopolitical, the case indicates a potential for future judicial recognition of race as a social construct. However, many courts still reject social and cultural aspects of race in contemporary Title VII cases.[91] Courts' stubborn adherence to the concept of biological immutability, Professor D. Wendy Greene argues, "defies society's understanding of race historically and contemporarily."[92] As a result, courts that accept dictionary definitions of race that "derive[] from and perpetuat[e] an invented, antiquated, and debunked biological determinism" often developed by those seeking to justify colonization and brutality[93] may reach decisions that are impermissibly oblivious to the realities of racial discrimination and antithetical to the purported goals of Title VII.

2. More Than "Just Hair": The History and Culture of Black Hair

> Hair seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its

[88] *Id.* at 610 n.4.

[89] *Id.*

[90] *Id.*

[91] *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding a strict biological immutability standard for racial discrimination claims under Title VII). A number of professors have written articles criticizing how judges approach race in Title VII cases. *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2 (2015) (also discussing a new proposed immutability standard); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719–29 (2001); Greene, *supra* note 63, at 1369; 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 UNIV. OF MIAMI L. REV. 987 (2017); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1174 (1995); Camille Gear Rich, *Performing Racial and Ethnic Identity Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1166–71, 1194–99 (2004); Turner, *supra* note 68.

[92] Greene, *supra* note 63, at 1369. The Human Genome Project, finding that "all persons, without regard to racial ascription or identification, share 99.9 percent of the same genes" and cannot "be divided into coherent biological races," further disproves a race-as-biology approach. *See* Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 32 (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)).

[93] Turner, *supra* note 68, at 893 (citing CRYSTAL MARIE FLEMING, RESURRECTING SLAVERY: RACIAL LEGACIES AND WHITE SUPREMACY 8 (2017)).

grounding, and test its legitimacy.[94]

Historically, hair has held significant meaning to Black people. For some, hair supplies a cherished connection to African roots and history, as well as a welcomed tether to tradition and cultural heritage.[95] In the early 15th century, some Africans' hairstyles were used to convey information.[96] In fact, within many West African societies hair was "an integral part of a complex language system," used to indicate marital status, age, ethnic identity, rank, religion, and wealth.[97] Hair could show where an individual was from geographically or in what community they lived.[98] Some believed that hair, being the point of one's body that is "closest . . . to the heavens," could transmit communication from gods and spirits to one's soul.[99] With such importance tied to one's hair, it is unsurprising that these communities often held hairdressers in in the highest regard.[100] Hairstyling was, and often still is, a task that could take hours, sometimes days.[101]

Oftentimes, hair was central to African culture and personal identity. In fact, hair was so representative of communal ties and identification that when slave traders would kidnap Africans to sell into the slave trade, one of the first things they would do is shave their captives' heads.[102] This "unspeakable crime" brought the "highest indignity" to many Africans, severing them from an important piece of their personal identity.[103] All the culture, status, and meaning of hair was lost as slave traders effectively erased integral means by

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[94] Caldwell, *supra* note 8, at 370.

[95] AYANA D. BYRD & LORI L. THARPS, HAIR STORY, UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA, 2 (Griffin rev. ed. 2014).

[96] *Id.*

[97] *Id.*

[98] *Id.* at 3.

[99] *Id.* at 4.

[100] *Id.* at 6.

[101] BYRD & THARPS, *supra* note 95, at 6.

[102] *Id.* at 10. The shearing of enslaved Africans' hair was also allegedly due to hygienic reasons. *Id.* Slavers would frequently shave their victims' hair as a form of punishment as well. *See* Shane White & Graham White, *Slave Hair and African American Culture in the Eighteenth and Nineteenth Centuries,* 61 J. OF S. HIST. 45, 49 (1995). The shearing of another's hair for punishment has occurred throughout history. Immediately following World War II, the Froces Françaises de l'Intérieur (FFI), a French Resistance group, persecuted "horizontal collaborators": French women who had formed sexual and romantic relationships with German soldiers who had occupied France. *See* KEITH LOWE, SAVAGE CONTINENT: EUROPE IN THE AFTERMATH OF WORLD WAR II 166–69 (2012). The FFI, and many vigilante community members, performed retributive ceremonies, called *tontes*, which aimed to humiliate women by stripping them naked and shaving their hair in front of a crowd. *Id.* This form of dehumanization and sexualized punishment was seen as a way to reaffirm French virility that had been undermined by the war. *Id.*

[103] BYRD & THARPS, *supra* note 95, at 10.

which Africans communicated, expressed identity, and articulated culture.[104] "Without their signature hairstyles, Mandingos, Fulanis, Ibos, and Ashantis entered the New World, just as the Europeans intended, like anonymous chattel."[105] Once they reached their destination, the cruel and constant work of slavery left little time or energy for enslaved Africans to care for their hair.[106] The African combs that had been so useful back home were absent in America, leaving many without proper means to detangle their hair.[107] Some enslaved persons improvised by using sheep fleece carding tools; still, their hair and scalps suffered from lack of proper care.[108] Scalp diseases and other painful or uncomfortable afflictions were common.[109] Many women chose to cover their hair with scarves or pieces of fabric to cover scabs and protect their scalps from the sun.[110]

However, white slave owners villainized natural Black hair. Oftentimes, enslaved people's proximity to white people determined how they had to wear their hair in order to appear "neat and tidy."[111] Enslaved people working inside the house, for example, would often wear braids, plaits, cornrows, or even wigs at their master's order.[112] Whites pathologized African features such as "dark skin and kinky hair"[113] to intentionally demoralize their slaves and justify the atrocities they committed.[114] White people believed Africans were subhuman, accordingly referring to their hair as "wool."[115] As a result, Black people situated further from traditional notions of Blackness often fared better during slavery. Black women who had more tightly coiled hair styles and darker skin "were assigned to more grueling labor," with less access to education, clothes, and food than those whose physical traits more closely resembled white women's.[116] Moreover, "lighter skin and loosely curled hair" often indicated that an individual was free, since European features could

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[104] *Id.*

[105] *Id.*

[106] *Id.* at 12.

[107] *Id.*

[108] *Id.*

[109] BYRD & THARPS, *supra* note 95, at 13.

[110] *Id.*

[111] *Id.*

[112] *Id.* Often, those enslaved persons who worked in closer proximity to white people were mixed-race, of Black and white parentage, with more European features. Powell, *supra* note 1, at 941.

[113] BYRD & THARPS, *supra* note 95, at 14 ("Kinky" is a term that describes the texture of Black hair that is coiled in tight curls).

[114] *Id.*

[115] *Id.*

[116] Christy Zhou Koval & Ashleigh Shelby Rosette, *The Natural Hair Bias in Job Recruitment*, 12 SOC. PSYCH. AND PERSONALITY SCI. 741, 741 (2021).

indicate that one was what slavers called a "*mulatto*," a child of white and Black parentage.[117]

In the 19th century, Black people with more phenotypically European features were often perceived as superior to those with more phenotypically Black features.[118] They were more likely to be set free during slavery and had more successful businesses, more wealth, and better jobs;[119] features like "[s]traight hair translated to economic opportunity and social advantage."[120] Interestingly, hair was crucial to the determination of a person's racial status and was more telling than skin color.[121] If a Black person's hair showed "just a little bit of kinkiness," they would not pass as white, even if they had very light skin.[122] Therefore, hair often turned out to be "the true test of Blackness."[123] Because of the higher status mixed-race and lighter-skinned Black people held, Black women sometimes "sought to straighten and contort their hair" to imitate white women's hair.[124]

In many ways, straight hair, controversially referred to by some as "good hair,"[125] became a necessity if Black women were to survive within the

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[117] BYRD & THARPS, *supra* note 95, at 17. Today, that term is largely viewed as offensive and inappropriate to use to refer to people who are mixed-race. It is used here only to explain its historical relevancy.

[118] The terms "mixed-race" and "Black" are not mutually exclusive. Many mixed-race people *are* Black and identify as Black rather than mixed. Robert L. Reece, *Color Crit: Critical Race Theory and the History and Future of Colorism in the United States*, 50 J. BLACK STUD. 3, 8 (2019). Mixed-race people did not retain these benefits for long. After the Civil War, reinforcing the status hierarchy between Black and white people became critical due to the abolition of slavery. *Id.* at 9. When Black people gained some political power, the popularity of the "one-drop" rule increased throughout the country, particularly in the South. *Id.* The "one-drop" rule declared that anyone who had Black "blood" or racial ancestry was Black for the purposes of Jim Crow segregation, implicating lighter-skinned or mixed-race Black people. *Id.* The 1896 case *Plessy v. Ferguson* affirmed this approach, holding that Homer Plessy was not exempt from segregation laws despite being very light-skinned. *Id.* (citing 163 U.S. 537 (1896).

[119] Robert L. Reece, *Color Crit: Critical Race Theory and the History and Future of Colorism in the United States*, 50 J. BLACK STUD. 3, 8 (2019). In 1860, 41% of free southern Black people were mixed-race, while only 10% of slaves were mixed-race. *Id.* In the Deep South, only 9% of slaves were mixed-race, while 75% of free Black people were mixed-race. *Id.* In other places, there were no mixed-race slaves at all. *Id.*

[120] BYRD & THARPS, *supra* note 95, at 17.

[121] *Id.*

[122] *Id.*

[123] *Id.* Some mixed-race men would shave their heads to "get rid of the genetic evidence of their ancestry when attempting to escape to freedom." *Id.*

[124] Powell, *supra* note 1, at 941.

[125] Within the United States, "good hair" is generally considered to be "hair that is wavy or straight in texture, soft to the touch, has the ability to grow long, and requires minimal intervention by way of treatments or products to be considered beautiful." ALEXIS MCGILL JOHNSON ET AL., PERCEPTION INSTITUTE, THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT

American economy.[126] The search for "good hair" has since resulted in a multi-billion-dollar industry.[127] In the early years of the 20th century, Black hair products were marketed on a philosophy of "cleanliness and loveliness," hinting at the societal belief that that Black people were "unclean, unkempt, [and] uncivilized."[128] In 1905, Madame C.J. Walker created her hair softener, which is recognized as the first hair product developed by and for Black people.[129] During her life, Walker built a beauty empire that contributed to higher self-esteem among Black women, as they were able to more easily control and conform their hair to the white beauty standard.[130] Walker also popularized the hair-straightening comb at a time when straight hair signaled higher racial and economic status.[131]

A major shift occurred during the latter half of the 20th century. During the Civil Rights Movement of the 1960s, many Black people decided to wear their hair in a natural Afro "as a celebration of self-esteem, a rejection of the

ATTITUDES TOWARD BLACK WOMEN'S HAIR 2 (2017). For a survey question that asked, "what is 'good hair'?", one respondent answered that it is "hair that is easy to comb and style," often with texture that is either straight and smooth, or loosely curly, so that it "[d]oes not need a chemical or pressing to style." *Id.* However, another respondent noted the inherently racist context of the term, saying "[y]ou don't see women with afros or braids as 'good hair'" because "good hair" means straight hair that "flow[s] down your back." *Id.* Yet another refused to answer: "I hate the term." *Id.* The term falsely implies that only straight or wavy hair is desirable, beautiful, and professional. Today, more and more Black women are rejecting white beauty standards and embracing the beauty and power wearing their hair naturally. Still, white beauty standards suffocate the beauty industry. For more, see Ngozi Akinro, *Black Is Not Beautiful: Persistent Messages and the Globalization of "White" Beauty in African Women's Magazines*, 12 J. INT'L & INTERCULTURAL COMMC'N 308 (2019); Leah Donella, *Is Beauty in The Eyes of The Colonizer*?, NPR: CODE SW!TCH (Feb. 6, 2019), https://www.npr.org/sections/codeswitch/2019/02/06/685506578/is-beauty-in-the-eyes-of-the-colonizer [https://perma.cc/S7AK-FK6H]; Tracey Owens Patton, *Hey Girl, Am I More than My Hair?: African American Women and Their Struggles with Beauty, Body Image, and Hair*, 18 NWSA J. 24 (2006).

[126] Powell, *supra* note 1, at 942–43.

[127] *Id.* at 943.

[128] *Id.* For a biography of famous entrepreneur and inventor of popular Black hair products Madam C.J. Walker, see *Madam C.J. Walker*, BIOGRAPHY (Apr. 2, 2014), https://www.biography.com/people/madam-cj-walker-9522174 [https://perma.cc/88UX-RWTC].

[129] Brenda A. Randle*, I Am Not My Hair; African American Women and Their Struggles with Embracing Natural Hair!*, 22 RACE, GENDER & CLASS, 114, 118 (2015).

[130] *Id.*; *see also* Chanté Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR DAILY (July 3, 2019), https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/ [https://perma.cc/QQ34-CZ9L].

[131] Griffin, *supra* note 130. Walker has been criticized, however, for perpetuating the idea that only straight hair could lead to economic and social advancement; others have praised her for allowing Black women to feel more accepted and beautiful, and for creating jobs for people who attended her beauty schools. *See* Randle*, supra* note 129. Walker was one of the first American women to become a self-made millionaire. *See Madam C.J. Walker*, *supra* note 128.

shackles of racist oppression, or a claim to cultural identity."[132] Afros became synonymous with Black power and rebellion, as well as a form of solidarity within the Black community.[133] However, many were opposed to the Afro. Black women who did wear it faced narrowing opportunities in white spaces and became associated with unpopular political beliefs, and rampant, dangerous sexuality.[134] Critics of the Afro claimed it was unusual, unclean, and unprofessional—most notably it was not as conservative as white beauty standards deemed appropriate[135] and not in line with whites' requirements for Blackness. To white people, the Afro was far too extreme, too militant, and too attention-grabbing to be acceptable.[136] White people expressed discomfort towards any expression of Blackness as resilient, powerful, and determined because such expressions threatened the prevailing racial order.

This history demonstrates that hair has never been "purely cosmetic" for Black women.[137] Rather, hair's "social, aesthetic, and spiritual significance has been intrinsic to [Black women's] sense of self for thousands of years."[138] Though hairstyle can be a powerful act of self-expression for Black women, it is an expression that has been met with bias and hostility.[139] The "Good Hair" Study by the Perception Institute examined attitudes towards Black women's hair, creating the first Hair Implicit Association Test.[140] The test measured implicit bias against textured hair in order to determine the risk of discrimination that Black women with natural hair face.[141] The study found

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[132] Caldwell, *supra* note 8, at 384. Activist Marcus Garvey encouraged Black women to wear their hair naturally in defiance of white Eurocentric beauty standards that, in his view, denigrated the beauty of Black women. Griffin, *supra* note 130. Garvey once said, "[d]on't remove the kinks from your hair! Remove them from your brain!" *Id.*

[133] Griffin, *supra* note 130. Activist Angela Davis was famous for her afro and powerful presence within the Black Panther Party, which was founded in Oakland, California in 1966 by Huey P. Newton and Bobby Seale. *The Black Panther Party*, NAT'L ARCHIVES (Mar. 22, 2021), https://www.archives.gov/research/african-americans/black-power/black-panthers [https://perma.cc/35G2-YFK6]. The Black Panthers were an organization founded on the ideologies of Black nationalism, socialism, and armed self-defense. *Id.* The Black Panther Party was a revolutionary group that separated from the nonviolent and integrationist policies of the Southern Christian Leadership Conference led by Dr. Martin Luther King, Jr. *Id.*

[134] Caldwell, *supra* note 8, at 384.

[135] *Id.*

[136] *Id.* at 385.

[137] BYRD & THARPS, *supra* note 95, at 7.

[138] *Id.*

[139] The authors of the "Good Hair" Study noted that "[b]ias has been shown to correlate with discriminatory behavior such as rejection, avoidance, and abuse." JOHNSON ET AL., *supra* note 125, at 1.

[140] *Id.*

[141] *Id.* According to the authors of the study, implicit bias "refers to embedded negative stereotypes our brains automatically associate with a particular group of people. Implicit biases

that on average, white women showed explicit bias towards Black women's textured hair, rating it as "less beautiful, less sexy/attractive, and less professional than smooth hair."[142] Furthermore, the study found that although nearly all women worry about their hair to some extent, Black women "experience high levels of anxiety more than white women."[143] Hair styling and maintenance is a much higher financial and social burden for Black women too, who spend more time and money on their hair than white women.[144] Interestingly, a majority of the participants showed implicit bias against textured hair, regardless of their race. However, white participants showed stronger levels of implicit bias against textured hair than Black participants.[145]

Hair bias has profound implications for Black women in the workplace. Because white people have "historically been the dominant social group in Western societies," there is an implicit assumption that professional appearance standards should be based on white physical characteristics—for women, this would suggest that straight, smooth hair is the professional standard.[146] It is unsurprising, then, that Black women participants of the "Good Hair" Study showed a preference for smooth hairstyles over textured styles in professional contexts.[147] The choice to wear smooth, straight hair is more than just a preference, however. One in five Black women stated that they felt "social pressure to straighten their hair for work," while only half as

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are often inconsistent with our conscious beliefs . . . . Implicit bias can affect our decisions and behavior toward people of other races and, therefore, lead to differential treatment." *Id.* The authors of the study also created an online survey to gauge explicit attitudes regarding the perception of natural hair. The comparison between data measuring implicit attitudes and explicit attitudes "helps explore the racial paradox: the coexistence of positive egalitarian racial values alongside strong implicit biases favoring whiteness." *Id.* at 3. The paradox shows the "durability of implicit bias despite conscious beliefs," which is important "because implicit bias is a greater predictor of our behavior than our conscious values." *Id.*

[142] JOHNSON ET AL., *supra* note 125, at 6.

[143] *Id.* at 11.

[144] *Id.* This burden Black women and girls face can have a profound effect on their daily choices. For example, a study by Susan K. Woolford et al. found that Black adolescent girls reported avoiding getting wet or sweating during exercise because of their straightened hair. Susan J. Woolford et al., *No Sweat: African American Adolescent Girls' Opinions of Hairstyle Choices and Physical Activity*, 3 BMC OBESITY 1, 6–7 (2016). Though the participants viewed braids or natural styles as better for exercise, they preferred straighter hair and viewed it as more attractive. *Id.* at 7. Some women and girls have chosen to go natural, especially since the start of the pandemic. Having natural hair, however, isn't necessarily easier or less costly. For more on the cost of wearing your hair natural, see Bianca Lambert, *How Much It Costs to Maintain Natural Black Hair: Ten Women Share Exactly How Much Time and Money They Spend on Their Hair Care Annually*, HUFFPOST (Feb. 28, 2020, 5:45 AM), https://www.huffpost.com/entry/costs-natural-black-hair_l_5e441e19c5b6d0ea3811b813 [https://perma.cc/M69M-AYE9].

[145] JOHNSON ET AL., *supra* note 125, at 13.

[146] Koval & Rosette, *supra* note 116, at 742.

[147] JOHNSON ET AL., *supra* note 125, at 12.

many white women felt the same.[148] Another study conducted in 2021 found that employers and coworkers perceived Black women with natural hairstyles as "less professional, less competent, and less likely to be recommended for a job interview than Black women with straightened hairstyles and White women with either curly or straight hairstyles."[149] Additionally, Black women with natural hairstyles received more negative evaluations when applying for jobs in industries with strong dress norms.[150]

Because professional requirements "such as 'appropriate business attire and *properly combed hair*' reflect norms that"[151] job recruiters generally expect, "dress or grooming choices that deviate from these expectations would signal a norm violation and negatively color perception of applicants' professionalism."[152] Therefore, choices about hair can carry heavy consequences. Professor Caldwell argues that these choices can represent a "search for a survival mechanism in a culture where social, political, and economic choices of racialized individuals and groups are conditioned by the extent to which their physical characteristics, both mutable and immutable, approximate those of the dominant racial group."[153] She also contends that hair can become "a proxy for legitimacy," which can determine whether individuals can escape the realm of segregation and colonization to "crossover" into mainstream culture.[154] Thus, a Black woman who does not bend to white professional beauty standards often finds herself at an impasse: does she sacrifice her culture, hair health, time, money, and energy to conform to professional expectations, or does she risk her job, reputation, and chances for advancement to wear her hair the way she wants? In answering why Black women braid their hair rather than straighten it, Professor Caldwell said this:

> Perhaps we do so out of concern for the health of our hair, which many of us risk losing permanently after years of chemical straighteners; or perhaps because we fear that the entry of chemical toxins into our bloodstreams through our scalps will damage our unborn or breastfeeding children. Some of us choose the positive expression of ethnic pride not only for ourselves, but also for our children, many of whom learn, despite all of our teachings to the contrary, to

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[148] *Id.*

[149] Koval & Rosette, *supra* note 116, at 741.

[150] *Id.*

[151] *Id.* at 742 (internal citation omitted) (quoting Murray R. Barrick et. al., *What You See May Not Be What You Get: Relationships Among Self-Presentation Tactics and Ratings of Interview and Job Performance*, 94 J. APPLIED PSYCH. 1394, 1397 (2009)).

[152] *Id.*

[153] Caldwell, *supra* note 8, at 383.

[154] *Id.*

> reject association with black people and black culture in search of a keener nose or bluer eye. Many of us wear braids in the exercise of private, personal prerogatives taken for granted by women who are not black.[155]

Furthermore, Black women and other women of color face the harshest consequences and intimidation from Western beauty standards.[156] This pressure plagues Black women as early as childhood and often continues throughout their lives.[157] Professor Caldwell argues that this "causes immeasurable psychological injury and dignitary harm," and is a "crucial instrument" used to limit the economic and social success of Black women.[158] Hair has "mutable and immutable characteristics," unlike other physical markers of race such as skin color.[159] Hair can be forcibly changed, cut, or covered, but often not without physical or emotional damage.[160] Indeed, what makes hair unique among other physical racial characteristics is "the ability of its true nature to be disguised [and] its susceptibility to external control."[161] Due to the current state of Title VII jurisprudence and legal theories on race, hair's mutable qualities have enabled employers to legally require that Black women change their hair as a condition of employment. Thus, one of hair's greatest strengths, its versatility, has been exploited to the point of becoming its weakness.

C. Title VII Grooming Policy Jurisprudence

Two seminal cases within Title VII grooming policy discrimination jurisprudence, *Rogers v. American Airlines* and *Equal Employment Opportunity Commission v. Catastrophe Management Solutions,* are key examples of courts' failure to remedy Black women plaintiffs' unique injuries.

In the 1981 *Rogers v. American Airlines* case, the District Court for the Southern District of New York dismissed the plaintiff's sex and race discrimination claims, upholding an employer's right to ban braided hairstyles

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[155] *Id.* at 369. Professor Caldwell's response highlights an important point: Black women, and the culture surrounding their hair, are not monolithic. Though many women may choose to wear traditional or protective styles, many others prefer to alter their natural hair texture with straighteners and relaxers for any number of reasons, from personal preference to societal pressure.

[156] *See id.* at 383. The authors of the Perception Institute's "Good Hair" Study note that women of other races and ethnicities who are not Black but have curly or textured hair may still experience pressure to conform to Eurocentric beauty standards—however, Black women are often pitted against those women. JOHNSON ET AL., *supra* note 125, at 2.

[157] Caldwell, *supra* note 8, at 383.

[158] *Id.*

[159] *Id.*

[160] *See id.*

[161] *Id.* at 384.

in the workplace.[162] The plaintiff, Renee Rogers, was a Black woman who worked for American Airlines for approximately 11 years.[163] She filed an action challenging American's rule that prohibited employees in certain employment categories from wearing an "all-braided hairstyle."[164] Because Rogers's duties involved extensive passenger contact, she fell into one of these categories.[165] Rogers claimed that the denial of her right to wear her hair in braids violated her rights under the Thirteenth Amendment and under Title VII because it discriminated against her as a Black woman.[166]

Dismissing her sex discrimination claim, the court first rejected Rogers's argument that the policy practically affected women only, emphasizing that the policy was "addressed to both men and women, black and white," and that anyone could choose to braid their hair.[167] The court held that "an even-handed policy that prohibits to both sexes a style more often adopted by members of one sex does not constitute prohibited sex discrimination" because such a policy had "at most a negligible effect on employment opportunity."[168] Second, the court highlighted that the policy did not regulate on the basis of an immutable characteristic.[169] Lastly, the court found that the policy did not involve a fundamental right; rather, the matter was of "relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII" and did not involve such fundamental rights as the right to have children or marry.[170]

The court addressed Rogers's race discrimination claim separately but dismissed it along the same lines.[171] Repeating that the grooming policy applied "equally to members of all races," the court also stated that Rogers had failed to allege that the hairstyle was exclusively or predominantly worn by Black people (though she had argued that it was a historically Black hairstyle "reflective of cultural, historical essence of the Black women in American society").[172] To support its contention that white people could also wear the braided style, the court insinuated that Rogers had only begun wearing her hair that way after it was popularized by the white actress, Bo

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[162] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 232 (citing Plaintiff's Memo. in Opposition to Motion to Dismiss, p.4).

Dereck, in the film "10."[173] The court went further, rejecting Rogers's analogy between Afro/bush styles (prohibition of which might offend Title VII) and braids, because braids are "not the product of natural hair growth but of artifice."[174] Unlike the Afro, the court stated, a braided style was a characteristic that could be easily changed, even if it was "socioculturally associated with a particular race or nationality."[175] The court upheld the policy, finding that braided hairstyle was "not an impermissible basis for distinctions" in an employer's application of its employment practices.[176]

Nearly 40 years later in 2016, the Eleventh Circuit upheld *Rogers* in *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*.[177] The Equal Employment Opportunity Commission (EEOC) filed suit on behalf of Chastity C. Jones, alleging race discrimination under Title VII against her employer, Catastrophe Management Solutions (CMS).[178] Jones claimed that CMS violated Title VII by implementing a grooming policy that banned employees from wearing dreadlocks and rescinding a job offer when she refused to cut hers off.[179] The policy stated: "all personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image . . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable."[180]

The EEOC's complaint argued that race is a social construct with "no biological definition," and that "the concept of race is not limited to or defined by immutable physical characteristics."[181] The EEOC also argued that the concept of race "encompasses cultural characteristics related to race or ethnicity" including grooming practices.[182] Additionally, the EEOC stated that dreadlocks are a racial characteristic just like skin color, regardless of the fact that some non-Black people might be able to wear the style.[183] The EEOC argued that Black people who choose to wear their hair naturally to work are often stereotyped and viewed negatively as "radicals" or

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173 *Id.*

174 Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

175 *Id.*

176 *Id.*

177 *See* Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1031-32 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 2015 (2018).

178 *Id.* at 1020.

179 *Id.*

180 *Id.* at 1022.

181 *Id.*

182 *Id.*

183 Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1022 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 2015 (2018).

"troublemakers."[184] Because Black hair often grows in "tight coarse coils," unlike white hair, dreadlocks have traditionally been a method of styling that is culturally associated with Black people.[185] Therefore, the EEOC claimed, prohibition of dreadlocks in the workplace constitutes racial discrimination.[186]

The court recognized that it was being asked to consider what exactly race encompasses under Title VII, but decided that Title VII was not meant to protect "individual expression" tied to race.[187] Beginning its analysis in the 1960s, the court admitted that race was a complex concept without a single definition.[188] After examining the 1961 Webster's Dictionary definition of "race,"[189] the court stated that the definition of race at the time of Title VII's enactment usually included concepts of "physical characteristics or traits existing through ancestry, descent, or heredity."[190] The court cited Joseph Dunne's Dictionary of Political Science from 1964, which cautioned against believing that "cultural traits sufficiently differentiate races."[191] Though none of the definitions mentioned the word "immutable," the court stated that it

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[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.* at 1026–27.

[188] *Id.*

[189] Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1026–27 (11th Cir. 2016) *cert. denied*, 138 S. Ct. 2015 (2018) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1870 (unabridged ed. 1961)) ("In technical discriminations, all more or less controversial and often lending themselves to great popular misunderstanding or misuse, RACE is anthropological and ethnological in force, usu[ally] implying a physical type with certain underlying characteristics, as a particular color of skin or shape of skull . . . although sometimes, and most controversially, other presumed factors are chosen, such as place of origin . . . or common root language.").

[190] *Id.* at 1027. The court also cited other definitions of race. DICTIONARY OF THE SOCIAL SCIENCES 569 (Julius Gould & William Kolb eds. 1964) ("'[T]he descendants of a common ancestor: a family, tribe, people, or nation belonging to the same stock' or 'a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor,' or 'a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type (Caucasian ~) (Mongoloid ~)'"); A DICTIONARY OF SOCIO. 142 (G. Duncan Mitchell ed. 1968) ("'A *race* is 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 considerable degree of in-breeding among the ancestors of the group during a substantial part of their recent evolution'"); BLACK'S LAW DICTIONARY 1423 (4th ed. 1951) ("'Race. 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.'").

[191] *Equal Emp. Opportunity Comm'n*, 852 F.3d at 1027.

was not a "linguistic stretch to think that [racial] characteristics are a matter of birth, and not culture."[192]

The court conceded that many understand race today as a "social construct" with socio-political classifications rather than "an absolute biological truth"; however, it stated that the "possible current reality does not tell us what the country's collective zeitgeist was" when Title VII was enacted in 1964.[193] The court noted that however inconsistent the definition of race in the 1960s may be, leading Title VII precedent clearly holds that only immutable characteristics are protected from discrimination.[194] Though the court declined to create a new test for what constitutes racial discrimination and upheld the mutable/immutable characteristic distinction previously set out, it did acknowledge that the line between the two is sometimes hard to draw.[195] Citing *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, the court reiterated that discrimination on the basis of Black hair texture is prohibited by Title VII.[196] The court then cited *Rogers* to support its holding that dreadlocks, like braids, are not immutable and therefore, are not subject to protection.[197] In holding for CMS, the court suggested that Congress must determine what race means or should mean within the context of Title VII.[198]

Interestingly, in 2006, the EEOC issued a guidance document stating that it had not adopted a definition of "race" but that the Office of Management and Budget made clear that racial categories are "social-political constructs . . . and should not be interpreted as being genetic, biological, or anthropological in nature."[199] The EEOC also stated that Title VII prohibits employment discrimination based on cultural characteristics that are linked to race or ethnicity.[200] Furthermore, the EEOC supported the notion that intersectional discrimination based on two or more protected bases is also

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[192] *Id.*

[193] *Id.* at 1027–28.

[194] *Id.* at 1028–29 (citing Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980)).

[195] *Id.* at 1030.

[196] *Id.*; *see* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976) (holding that a plaintiff denied a promotion because she wore an Afro was racially discriminated against in violation of Title VII).

[197] Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 2015 (2018).

[198] *Id.* at 1035.

[199] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2006-1, SECTION 15 RACE AND COLOR DISCRIMINATION, PART II (2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIIB5 [https://perma.cc/9E9J-FL35] (citing OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, PROVISIONAL GUIDANCE ON THE IMPLEMENTATION OF THE 1997 STANDARDS FOR FEDERAL DATA ON RACE AND ETHNICITY 9–10 (2000)).

[200] *Id.*

protected under Title VII.[201] While agency guidance documents are useful in making the government's position on the issue clear, courts are not required to follow them—the court in *Catastrophe Management* certainly did not. The Supreme Court denied certiorari in 2018, solidifying grooming policy discrimination plaintiffs' invisibility under Title VII.

D. On the Basis of Sex

Society's understanding of race, gender, sexuality, and gender expression has changed significantly throughout the 20th and 21st centuries. Evolving understanding of these concepts, driven by intense advocacy, activism, and education, has been increasingly reflected in our jurisprudence, even if subtly. Part I of this section will discuss the history of LGBTQ+ rights and examine the progression of LGBTQ+ and Title VII sex discrimination case law. Part II will examine *Bostock v. Clayton County* and its reasoning.

1. LGBTQ+ Rights, History, and Case Law

The persecution and criminalization of homosexuality has a long and dismal history.[202] Many nations, including the United States, have only recently decriminalized homosexuality, while many others retain sodomy laws that make it illegal to engage in gay sex.[203] The penal codes of numerous states in the United States prohibited sodomy for over 100 years before they were discarded.[204] Sodomy laws in the 19th century targeted "crimes against nature, committed with mankind or with beast."[205] These laws derived from church law and originally aimed to prevent any non-procreative sex and sex outside of marriage.[206] In practice, they often applied in cases of sexual assault, sexual acts with children, public sex, or sexual acts with animals.[207] The laws sought to protect "public morals and decency," as sodomy was

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[201] *Id.* at PART IV.

[202] In the early 20th century, homosexuality was largely viewed as a psychological disorder or defect. GEOFFREY STONE, SEX AND THE CONSTITUTION 212 (2017). By 1938, 32 states had sterilization laws designed to prevent homosexuality and other undesirable traits. *Id.* at 219. For more on decriminalization of sodomy see Marie-Amelie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States,* 24 J. HIST. SEXUALITY 225, 227 (2015).

[203] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 584 (2003) (holding that criminal sanctions for private, consensual, adult homosexual intercourse violates the Due Process Clause).

[204] Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 AMA J. ETHICS 916, 916 (2014).

[205] *Id.* (quoting Brief for The Cato Institute as Amicus Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), http://object.cato.org/sites/cato.org/files/pubs/pdf/lawrencevtexas.pdf [https://perma.cc/V33F-5BDB]).

[206] *Id.*

[207] *Why Sodomy Laws Matter*, ACLU (2022), https://www.aclu.org/other/why-sodomy-laws-matter [https://perma.cc/A46L-VBLS].

categorized with adultery, bigamy, creation and dissemination of obscene materials, public indecency, and incest.[208]

However, a major shift in the use of sodomy laws occurred in the 20th century. In response to concern surrounding the crisis of masculinity at the end of World War II,[209] prosecutors, law enforcement, and social conservatives began to invoke sodomy laws against gay people.[210] At the start of the Cold War, McCarthyism and the "Lavender Scare" led to "nationwide witch hunts" of gay men whose consensual sex was conflated with child molestation.[211] In 1969, Kansas became the first state to rewrite its sodomy laws so that they applied only to gay people.[212] Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas soon followed.[213] In Alabama, Florida, Georgia, Mississippi, North Carolina, North Dakota, Pennsylvania, South Dakota, Utah, Virginia, and Washington, agencies and courts enforced sodomy laws, which applied to both heterosexual and homosexual activity, as if they only applied to the latter.[214]

The Gay Rights Movement of the 1960s and 1970s began with the goal of decriminalizing homosexuality.[215] The Stonewall Riots in 1969, which included six days of protests and violent confrontation with police, were a

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[208] Weinmeyer, *supra* note 204, at 916 (quoting *Ronald Hamowy, Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America, in* ASSESSING THE CRIMINAL 39 (Randy Barnett & John Hagel III eds., 1977)).

[209] *See Gender on the Home Front*, THE NAT'L WWII MUSEUM, NEW ORLEANS, https://www.nationalww2museum.org/war/articles/gender-home-front [https://perma.cc/Y7DU-3EYA] (explaining how wartime demands disrupted traditional gender roles and threatened notions of masculinity).

[210] *Why Sodomy Laws Matter*, *supra* note 207; STONE, *supra* note 202, at 241.

[211] Weinmeyer, *supra* note 204, at 216–17; STONE, *supra* note 202. Senator Joseph McCarthy and FBI Director J. Edgar Hoover set out to convince Americans that gay people were just as dangerous as Communists. *Id.*

[212] *Why Sodomy Laws Matter*, *supra* note 207.

[213] *Id.* Maryland and Oklahoma courts decided that sodomy laws did not apply to private heterosexual activity, resulting in law that practically applied to only homosexual activity. *Id.*

[214] *Why Sodomy Laws Matter*, *supra* note 207. In the 1960s and 70s, 18 states decriminalized consensual sodomy consistent with the Model Penal Code, which decriminalized consensual sodomy when the American Law Institute voted to do so in 1955. Weinmeyer, *supra* note 204, at 917. However, states that adopted reforms to follow the Model Penal Code faced protests from religious groups and right-wing political groups. *Id.* As a result, some states reinstated previous versions of their sodomy laws. *Id.* States such as Kansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas decriminalized opposite-sex consensual sodomy, leaving consensual same-sex sodomy a misdemeanor. *Id.* By 1978, 22 states had repealed their sodomy statutes. George, *supra* note 202, at 227.

[215] Mantas Grigorovicius, *Bostock and Contact Theory: How Will a Single U.S. Supreme Court Decision Reduce Prejudice Against LGBTQ People?* 97 IND. L.J. SUPPLEMENT 14, 16 (2022).

major galvanizing force for LGBTQ+ rights and political activism.[216] The movement met significant resistance, however, when a swell in religious conservative power and resurgence of traditional family values overtook the nation in the 1970s and early 1980s.[217] The movement was led by figures such as anti-feminist activist Phyllis Schlafly,[218] Senator Barry Goldwater,[219] and televangelist Jerry Falwell.[220] The Moral Majority, a conservative political action group with a staunch moral and religious agenda, presented some of the most intense opposition to LGBTQ+ rights.[221] In the 1980s and 1990s, the HIV/AIDS crisis did even more to hurt the gay rights movement. The disease led to widespread fear and heightened public hysteria about homosexuality, reinforcing existing anti-gay stigma and discrimination.[222] Often referred to as the "gay plague" at the time, AIDS effectively made gay sex seem synonymous with fatal illness.[223]

The LGBTQ+ community faced another major defeat in 1986 when the Supreme Court decided *Bowers v. Hardwick*.[224] Respondent Michael Hardwick was charged with violating a Georgia anti-sodomy statute after the police entered his home and found him engaged in consensual sex with a male

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[216] *Stonewall Riots*, HIST. (June 25, 2021), https://www.history.com/topics/gay-rights/the-stonewall-riots [https://perma.cc/G38C-5r6R]. Many gay rights organizations were formed in the wake of Stonewall, including the Gay Liberation Front, Human Rights Campaign, GLAAD (formerly Gay and Lesbian Alliance Against Defamation, and PFLAG (formerly Parents, Families and Friends of Lesbians and Gays). *Id.*

[217] George, *supra* note 202, at 259.

[218] For more on Phyllis Schlafly, see Douglas Martin, *Phyllis Schlafly, 'First Lady' of a Political March to the Right, Dies at 92*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html [https://perma.cc/LU4E-VM5B].

[219] For more on Barry Goldwater, see Suzanne McGee, *How Barry Goldwater Brought the Far Right to Center State in the 1964 Presidential Race*, HIST. (Oct. 20, 2020), https://www.history.com/news/barry-goldwater-1964-campaign-right-wing-republican [https://perma.cc/B6ZB-XVBW].

[220] For more on Jerry Falwell, see *God's Right Hand: How Jerry Falwell Made God a Republican and Baptized the American Right*, CAP (Mar. 12, 2012, 12:00 PM), https://www.americanprogress.org/events/gods-right-hand-how-jerry-falwell-made-god-a-republican-and-baptized-the-american-right [https://perma.cc/BQQ4-3TRY].

[221] STONE, *supra* note 202, at 258.

[222] *Id.* at 446.

[223] *Id.* An audio clip of a press conference held in 1982 reveals President Ronald Reagan's press secretary, Larry Speakes, and other media personnel joking about the AIDS epidemic, calling it "the gay plague." German Lopez, *The Reagan Administration's Unbelievable Response to the HIV/AIDS Epidemic*, VOX (Dec. 1, 2016, 11:20 AM), https://www.vox.com/2015/12/1/9828348/ronald-reagan-hiv-aids_[https://perma.cc/5R2Q-GZ7T]. President Reagan did not publicly acknowledge the AIDS crisis until 1985, when his friend Rock Hudson died from it. STONE, *supra* note 202, at 446.

[224] 478 U.S. 186 (1986).

partner.[225] The Eleventh Circuit relied on *Griswold v. Connecticut*[226] and *Roe v. Wade*[227] among other cases to determine that the Georgia statute was unconstitutional because it violated Hardwick's fundamental right to privacy.[228] The Supreme Court reversed.[229] The Court, led by Justice Byron White, did not frame its analysis by considering whether a fundamental privacy right was at stake—instead, the Court addressed "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . ." invalidating several states' laws that still criminalized such conduct.[230] The Court rejected Hardwick's appeal to privacy, stating that illegal conduct is not immune from prosecution simply because it is committed at home.[231] Distinguishing the case from precedent, the Court stated, "any claim that [*Griswold*, *Roe*, and *Loving*][232] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[233]

The Court went on to describe the "foundational" role of sodomy laws in United States since its founding,[234] saying that it was "at best, facetious" to claim that a right to private homosexual sex was "'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.'"[235] Lastly, the Court dismissed Hardwick's argument that there was no rational basis for the Georgia law because the only basis was in Georgia's belief that homosexual sex was immoral and unacceptable.[236] The Court countered that notions of morality are consistently cited as bases for law and outright refused to declare any sodomy law inadequate simply because it was based on the immorality of homosexuality.[237]

[225] *Id.* at 187–88.

[226] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding privacy rights for people using contraceptives).

[227] *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding abortion ban unconstitutional as a violation of a woman's privacy right).

[228] *Bowers*, 478 U.S. at 189.

[229] *Id.*

[230] *Id.* at 190.

[231] *Id.* at 195–96.

[232] *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (striking down a Virginia anti-miscegenation law that made it illegal for people of different races to marry); *Griswold*, 381 U.S. at 479; *Roe*, 410 U.S. at 113.

[233] Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986).

[234] *Id.* at 192–94.

[235] *Id.* at 194.

[236] *Id.* at 196.

[237] *Id.* at 195–96.

Seventeen years passed before the Supreme Court revisited the issue, this time in *Lawrence v. Texas*.[238] The case involved essentially the same question: whether a Texas statute criminalizing same-sex, private, consensual sexual conduct was unconstitutional.[239] This time, the Court struck down the law, overturning *Bowers*.[240] The case turned on whether the law violated the petitioners' liberty interest under the Due Process Clause of the Fourteenth Amendment and violated the Fourteenth Amendment's guarantee of equal protection.[241] The Court, led by Justice Anthony Kennedy, concluded that the Court in *Bowers* had failed to "appreciate the extent of the liberty at stake."[242] The Court acknowledged that adults may "still retain their dignity as free persons" when they choose to enter into a sexual relationship within their homes: "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice."[243]

More victories for the LGBTQ+ community followed. In 2012, the Obama administration promulgated a rule protecting LGBTQ+ people from discrimination in the sale, rental, and financing of housing under the Fair Housing Act.[244] In 2015, the landmark decision in *Obergefell v. Hodges* held that same-sex couples may not be deprived of the right to marry, which is a "fundamental right inherent in the liberty of the person."[245] The case held that the Fourteenth Amendment required states to license same-sex

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[238] 539 U.S. 558 (2003).

[239] *Id.* at 562. Just as in *Bowers*, the police entered the petitioner's private residence and found he and his partner engaged in a sexual act. *Id.* at 562–63. The two were arrested, charged, and convicted for the crime of "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." *Id.* at 563. The Texas "Homosexual Conduct" law did not criminalize identical behavior by different-sex couples. *Id.* at 564.

[240] *Id.* at 579.

[241] *Id.* at 564.

[242] *Id.* at 567. The Court stated, "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said marriage is just about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Id.*

[243] *Id.*

[244] Grigorovicius, *supra* note 215, at 21. The language of the Act has been generally approached by courts the same way that they have approached Title VII. *Id.* Though, the Trump administration proposed a rule limiting definition of sex to biological sex to eliminate Obama's protections, the Biden administration rescinded those measures shortly after taking office. *Id.*

[245] Obergefell v. Hodges, 576 U.S. 644, 675 (2015). The Court expanded upon the rights guaranteed by *Lawrence v. Texas*, stating: "[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Id.* at 667.

marriages and recognize those marriages when they were performed and licensed out of state.[246] The decision was not without its critics—Justices Roberts, Scalia, and Thomas joined in a dissent, arguing that the legislature, not the Court, should have the power of making such a decision.[247] Still, it represented a major win for the LGBTQ+ community.

In many ways, Title VII sex discrimination jurisprudence that did not involve LGBTQ+ rights indirectly bolstered the LGBTQ+ cause as well. Cases such as *Price Waterhouse v. Hopkins*[248] in 1989 and *Oncale v. Sundowner Offshore Services, Inc.*[249] in 1998 expanded the scope of Title VII. In *Price Waterhouse*, a female partnership candidate brought a sex discrimination claim when she was denied a partnership position at an accounting firm.[250] The firm had not promoted her because it found her "interpersonal skills" were lacking; partners labeled her as overly aggressive, harsh, difficult to work with, impatient with staff, and "consistently annoying and irritating."[251] However, the Court noted that the firm's negative reaction to her personality and many of the partners' comments were fueled by stereotypes about women and sex-based considerations.[252] Holding for the plaintiff, the Court stated that the words of Title VII meant that "gender must be irrelevant to employment decisions."[253] Thus, the sex-stereotyping that the firm engaged in in making its decision clearly violated Title VII.[254]

Later, in *Oncale*, the Court headed by Justice Antonin Scalia, held that in addition to male-to-female sexual harassment, same-sex sexual harassment also constituted discrimination on the basis of sex.[255] The Court stated that there was "no justification in the statutory language or [the Court's] precedents for a categorial rule excluding same-sex harassment . . . from the coverage of Title VII."[256] Noting the case's expansive effect, Justice Scalia admitted that:

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions

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[246] *Id.* at 644.

[247] *Id.* at 686 (Roberts J., dissenting).

[248] 490 U.S. 228 (1989).

[249] 523 U.S. 75 (1998).

[250] *Price Waterhouse*, 490 U.S. at 231–32.

[251] *Id.* at 235–36.

[252] *Id.* at 236–37.

[253] *Id.* at 240.

[254] *Id.* at 251.

[255] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

[256] *Id.* at 79.

> often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[257]

With this, Scalia unequivocally acknowledged the accommodating breadth of the Title VII.

Unfortunately, efforts to codify anti-discrimination prohibitions to explicitly protect LGBTQ+ individuals have failed. Most recently, the Equality Act passed the House in February 2021 but has not made it out of the Senate.[258] The Act would amend existing federal statutes to "prohibit discrimination on the basis of sex, gender identity, and sexual orientation" in employment, public accommodations and facilities, education, federal funding, housing, credit, and the jury system.[259] However, without this explicit statutory protection, LGBTQ+ workers who file discrimination claims remain at the mercy of the courts.

2. *Bostock v. Clayton County*

Finally, decided on June 15, 2020, *Bostock v. Clayton County* signaled a huge win for the LGBTQ+ community.[260] The Court, led by the conservative replacement for Justice Scalia, Justice Neil Gorsuch, held that an employer that fires an individual for being homosexual or transgender violates Title VII.[261] Three LGBTQ+ individuals brought suit for unlawful employment discrimination on the basis of sex, which resulted in a circuit split over the scope of Title VII's protection for transgender and homosexual employees.[262] The first action involved a gay county employee, Gerald Bostock who brought a sexual orientation discrimination claim against the county when he was fired from his job shortly after he began playing in a gay softball league.[263] A skydiving instructor, Donald Zarda brought the second case when he was fired just days after he mentioned that he was gay.[264] Aimee Stephens, a

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[257] *Id.* at 79–80.

[258] H.R. 5, 117th Cong. (2021–2022).

[259] *Id.*

[260] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1731 (2020).

[261] *Id.* at 1737.

[262] *Id.*

[263] Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F.App'x. 964 (11th Cir. 2018), *rev'd and remanded*, 140 S. Ct. 1731 (2020).

[264] Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 140 S. Ct. 1731.

transgender woman, who presented as male when she began working with a funeral home, brought the third case.[265] During her sixth year working, she wrote a letter to the company explaining her transition but was fired shortly thereafter.[266] The Supreme Court granted certiorari and consolidated these cases under one name.

The Court began by analyzing "the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of their employment, because of such individual's race, color, religion, sex, or national origin.'"[267] The Court emphasized its textualist approach by "orient[ing]" itself in the time of the statute's adoption in 1964 to examine its key terms and assess those terms' impact on the case.[268] The Court started by defining "sex."[269] The employers argued that the term "sex" in 1964 meant one's status as a biological male or female.[270] The employees rejected that meaning as overly simplistic, arguing that "sex" had a much broader scope, "capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation."[271] The Court proceeded, however, by assuming for the sake of argument (and declining to address the employee's definition) that "sex" only signified what the employers suggested: "biological distinctions between male and female."[272]

Next, the Court confirmed that the "ordinary meaning" of the phrase "because of" is "on account of" or "by reason of."[273] "Because of" indicates that the statute calls for a but-for causation standard, which is established when a certain outcome would not have occurred "but for" the certain cause.[274] The but-for causation standard does not mean that a defendant can avoid liability by citing some other factor that contributed to the adverse employment action; as long as the plaintiff's sex was one of the but-for

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[265] Equal Emp. Opportunity Comm'n v. R.G & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *rev'd and remanded*, 140 S. Ct. 1731.

[266] *R.G & G.R. Harris Funeral Homes*, 884 F.3d at 568–69.

[267] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) (quoting 42 U.S.C. § 2000e–2(a)(1) (2008)).

[268] *Id.* at 1738–39.

[269] *Id.* at 1739.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

[274] *Id.* A but-for test directs the Court to change one thing at a time to see if the outcome changes. *Id.*

causes, Title VII is triggered.[275] In Bostock's, Zarda's, and Stephens's cases, their sexuality or gender identity should not have been relevant to the adverse employment decisions "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[276]

Homosexuality and transgender status[277] are "inextricably bound up with sex."[278] To support this statement, the court gave two examples.[279] In the first, imagine that there are two individuals who are both attracted to men.[280] Each is identical to the other in every way except that one is a man and the other is a woman.[281] "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[282] Therefore, sex is a but-for cause of his discharge. The Court offered a second example to show that sex plays an "unmistakable and impermissible role" in such decisions[283]: if an employer fires a transgender person who was assigned male at birth but identifies as female, and the employer retains another employee who is identical except that she was assigned female at birth, that employer "intentionally penalizes" the first employee for traits or actions that it tolerates in the second.[284] When an employer treats one person differently for traits or actions that it would not have questioned in employees of a different sex, it has violated Title VII.[285]

The *Bostock* employers argued that, because few people in 1964 would have expected Title VII to apply to discrimination against LGBTQ+

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[275] *Id.*

[276] *Id.* at 1741.

[277] *Id.* at 1742. The Court uses the terms "homosexuality" and "transgender status" when referring to individuals within the LGBTQ+ community. I believe these terms reflect a more scientific or medical connotation rather than a colloquial connotation, which may dehumanize and generalize members of the LGBTQ+ community. For clarity, there are times where I must use these terms. Where I can do so without affecting meaning, I will use other terms such as "sexuality," "gay," "transgender," and "gender identity." The Court also uses the term "sex" when distinguishing between men and women. Though I believe that "gender" is the more appropriate term to use generally, I will use "sex" to stay consistent with the language of Title VII.

[278] *Id.* at 1742.

[279] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742 (2020).

[280] *Id.*

[281] *Id.*

[282] *Id.* at 1741.

[283] *Id.* at 1741–42.

[284] *Id.* at 1741.

[285] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

individuals, Title VII cannot do so now.[286] The court rejected their contention. First, when the meaning of a statute's terms are unambiguous, as Title VII's terms are, no analysis of the legislative history is necessary.[287] In some cases, the statute's application may reach "beyond the principal evil" that legislators may have expected or intended to address at the time of its creation.[288] However, that the statute has been applied in situations "not expressly anticipated by Congress" does not demonstrate ambiguity—it only demonstrates the breadth of the legislation.[289] Therefore, when a statute is unambiguous, "whether a specific application was anticipated by Congress 'is irrelevant.'"[290] The Court stated, "[t]he limits of the drafters' imagination supply no reason to ignore the law's demands . . . . Only the written word is the law, and all persons are entitled to its benefit."[291] It is the provisions of legislative commands and not "the principal concerns" of legislators that govern the Court.[292]

Furthermore, the Court pointed out that if it only applied Title VII to applications that were expected in 1964, it would "have more than a little law to overturn."[293] Because of the Act's broad language, "many, maybe most, applications of [its] sex provision were 'unanticipated'" when it was adopted.[294] Since its enactment, Title VII has been held to protect male employees from harassment by other men,[295] to protect women with children being treated differently from men with children,[296] and held that sexual harassment can amount to sex discrimination.[297] All of these examples were highly contested for years after Title VII was enacted.[298] Applying Title VII's protections to any politically unpopular groups would likely have been unexpected, but refusal by the Court to apply those protections to individuals who were unpopular in 1964 "would not only require [the Court] to abandon [its] role as interpreters of statutes; it would tilt the scales of justice in favor

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[286] *Id.* at 1749.

[287] *Id.*

[288] *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

[289] *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

[290] *Id.* at 1751 (quoting Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 208 (1998)).

[291] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020)

[292] *Id.* at 1749.

[293] *Id.* at 1751.

[294] *Id.* at 1752.

[295] *Id.* at 1751–52 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

[296] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1751–52 (2020) (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

[297] *Id.* (citing Barnes v. Costle, 561 F.2d 983, 990 (CADC 1977)).

[298] *Id.* at 1752.

of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."[299]

The majority's decision produced two dissents from three conservative justices. Justice Samuel Alito joined with Justice Clarence Thomas to criticize the Court for ignoring the Constitution's separation of powers principle by essentially engaging in legislating.[300] Citing the text of Title VII, Alito argued that sexual orientation and gender identity are not protected identities and noted that countless bills have been introduced in Congress to add them over the last 45 years, but none have passed.[301] Furthermore, Alito was adamant that the definition of "sex" in 1964 did not include sexual orientation or gender identity, and that even today the concepts of discrimination because of sex and discrimination because of gender identity or sexual orientation are starkly distinct.[302] Disparaging the majority's decision, he wrote: "The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."[303] Justice Kavanaugh's dissent scorned the majority along similar lines but added that the Court "update[d] the law" by utilizing the literal meaning, rather than the ordinary meaning of "because of sex."[304]

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[299] *Id.* at 1751.

[300] *Id.* at 1754 (Alito, J., dissenting).

[301] *Id.* "Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation." *Id.* at 1755. Numerous bills have been introduced that suggested adding "sexual orientation" to the list of Title VII's protections: H.R. 166, 94th Cong., 1st Sess., § 6 (1975); H. R. 451, 95th Cong., 1st Sess., § 6 (1977); S. 2081, 96th Cong., 1st Sess. (1979); S. 1708, 97th Cong., 1st Sess. (1981); S. 430, 98th Cong., 1st Sess. (1983); S. 1432, 99th Cong., 1st Sess., § 5 (1985); S. 464, 100th Cong., 1st Sess., § 5 (1987); H. R. 655, 101st Cong., 1st Sess., § 2 (1989); S. 574, 102d Cong., 1st Sess., § 5 (1991); H. R. 423, 103d Cong., 1st Sess., § 2 (1993); S. 932, 104th Cong., 1st Sess. (1995); H. R. 365, 105th Cong., 1st Sess., § 2 (1997); H. R. 311, 106th Cong., 1st Sess., § 2 (1999); H. R. 217, 107th Cong., 1st Sess., § 2 (2001); S. 16, 108th Cong., 1st Sess., §§ 701–704 (2003); H. R. 288, 109th Cong., 1st Sess., § 2 (2005). *Id.* at 1755 n.1.

[302] Bostock v. Clayton Cnty., 140 S. Ct 1731, 1754–55 (2020) (Alito, J., dissenting).

[303] *Id.* at 1755–56. Justice Alito's dissent was lengthy, totaling 107 pages including 52 pages of appendices.

[304] *Id.* at 1821–22 (Kavanaugh, J., dissenting). For more discussion of *Bostock*'s dissents and textualist interpretation, *see generally* Sam Capparelli, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of Bostock v. Clayton County?*, 88 U. CHI. L. REV. 1419 (2021) (analyzing the linguistic difference between Gorsuch's semantics approach and Kavanaugh's pragmatics approach); Steven Semeraro, *We're All Originalists Now . . . Or Are We?:* Bostock*'s Misperceived Quest to Distinguish Title VII's Meaning From the Public's Expectations*, 49 HOFSTRA L. REV. 377 (2021) (discussing originalist/textualist interpretation and original public meaning versus subjective expected applications); Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021) (arguing that *Bostock* is a textualist decision that also uses the rule-of-law norm of legal justice).

III. ANALYSIS

The right to employment free from discrimination based on racial characteristics such as hair should be a fundamental right. Hair has held incredible importance to Black women for centuries because it can represent one's history and identity. Hairstyles such as locs, braids, twists, and knots are inexplicably tied to Black culture. However, hair's ability to be changed and covered has enabled employers to enforce policies that routinely discriminate against Black women who wear their hair in natural or protective styles. As shown by *Rogers v. American Airlines*,[305] Title VII does not adequately protect Black women when employers can legally rescind or deny employment opportunities to Black women because of their hair.

Title VII jurisprudence has relied far too long on the dubious distinction between mutable and immutable racial characteristics, ignoring a truth that sits plainly in front of our courts: "race" encompasses more than biology. Furthermore, courts have specifically failed Black women by refusing to consider the intersectionality of their claims. The only way for Black women to gain the protection they need and deserve in Title VII grooming policy discrimination cases is for courts to re-examine their understandings of discrimination based on race and recognize the particular positionality of Black women. One case proves that such an expansion of Title VII's application is possible: *Bostock v. Clayton County*.

Part A of this section will argue that the reasoning *Bostock v. Clayton County* can be more accurately described as "textualist plus": an ordinary reading of the text and calculated use of precedent influenced by socio-political progress. Part B will compare the obstacles facing Black women plaintiffs in grooming policy discrimination cases with those that faced *Bostock*'s plaintiffs and assess whether grooming policy discrimination plaintiffs can recreate the success of *Bostock*.

A. Bostock and "Textualism Plus"

Few expected that Justice Gorsuch would lead the majority in *Bostock v. Clayton County*, writing a textualist[306] opinion extending Title VII protections to LGBTQ+ employees on the basis of sex.[307] *Bostock* succeeded in broadening the scope of Title VII without changing the strictly biological

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[305] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

[306] Textualism is "a legal philosophy that laws and legal documents (such as the U.S. Constitution) should be interpreted by considering only the words used in the law or document as they are commonly understood." *Textualism*, MERRIAM-WEBSTER (2022); *cf. Originalism*, MERRIAM- WEBSTER (2022) ("a legal philosophy that the words in documents and especially the U.S. Constitution should be interpreted as they were understood at the time they were written"). The late Justice Scalia championed textualism as well as originalism; he believed that courts' decisions should be limited to the text of the statute itself.

[307] *See* Bostock, 140 S. Ct. at 1737.

definition of sex that the defendant employers presented.[308] Justice Gorsuch accepted, "for argument's sake," that the meaning of "sex" in 1964 only referred to the biological distinction between men and women rather than any cultural or sociological definition that would include sexuality or gender identity.[309] This commitment to the ordinary meaning of statutory terms is a hallmark of textualist thought.[310] Gorsuch found that the plain meaning of the statute's language necessarily extended protection to gay and transgender employees because it prohibits discrimination based on sex stereotypes.[311]

Still, this decision amplifying LGBTQ+ rights arguably would not have happened without the long history of LGBTQ+ civil rights advocacy and activism. The rights of members of the LGBTQ+ community have been steadily built and fortified throughout the 20th and 21st centuries to become what they are now.[312] *Bostock* supplements a collection of hard-fought civil rights battles, but the case was won in a way few would have thought possible. After all, conservative textualists have not often been the authors behind our greatest civil rights cases.[313] In fact, many, including Justices Alito and Kavanaugh, have criticized the *Bostock* decision as very un-textualist.[314] Though the decision of Justice Gorsuch in *Bostock* stands on firm ground, this Note argues that the decision reflects a reasoning more accurately labeled as "textualism plus." "Textualism plus" reasoning retains a textualist base supplemented by two additional necessities, which combine to create the "plus": a history of socio-political progress and foundational legal precedent. Years of socio-political progress has led to an increased societal understanding of LGBTQ+ issues. And during the last century, key precedent has incrementally made space for Title VII sex discrimination jurisprudence to further develop and expand.[315] Together, these were necessary conditions for the *Bostock* decision.

Progressive social and cultural norms likely influenced Justice Gorsuch, despite his commitment to the ordinary meaning of Title VII's terms. Though judges are meant to be impartial decisionmakers, they are necessarily

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[308] *See generally id.* (finding that discriminating against employees on the basis of gender expression or sexual orientation was sex discrimination because persons of a different sex wouldn't be penalized for similar expressions or orientations).

[309] *Id.* at 1739.

[310] *Supra* note 306.

[311] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742–43 (2020).

[312] *See supra* Section D.1.

[313] See, for example Brown v. Bd. of Educ., 347 U.S. 483 (1954), Griswold v. Connecticut, 381 U.S. 479 (1965), Miranda v. Arizona, 384 U.S. 436 (1966), and Loving v. Virginia, 503 U.S. 946 (1967) all written by Justice Earl Warren; and Roe v. Wade, 410 U.S. 113 (1973), written by Justice Harry Blackmun.

[314] *See supra* notes 300–04 and accompanying text.

[315] *See infra* notes 323–38 and accompanying text.

influenced by many different factors, such as their background, their identity, their lived experience, their education, and their personal and political beliefs.[316] Such influences can transform a judge: from a proverbial safe harbor that supports civil rights progress, to stormy open water that leaves progress stranded. For example, the socio-political environment in 1986 likely influenced the Court's decision in *Bowers v. Hardwick*.[317] The AIDS crisis magnified existing intolerance of homosexuality and spurred deep indifference or malevolence towards those afflicted with the disease (and gay men in general).[318] In this context of mass hysteria and prejudice, it is no surprise that the Court upheld the Georgia sodomy law and held that the Constitution did not protect homosexuality as a fundamental right, ignoring the plaintiff's liberty and privacy interests at stake.[319] Though the *Bowers* case exemplifies how socio-political context can stymie progress, the socio-political context surrounding civil rights issues can produce more positive results. The steady legal advancement and affirmation of LGBTQ+ rights and increased acceptance of LBGTQ+ persons over the last two decades[320] created a far more welcoming backdrop for a case like *Bostock* in 2020, and a far more favorable outcome followed.

On the other hand, numerous Title VII sex discrimination cases set the stage for *Bostock*. The Title VII sex discrimination case, *Oncale v. Sundowner*[321] presents an example of the kind of "expansion" that bolstered the *Bostock* court's broad holding. There, the Court held that Title VII protected

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[316] *See* Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 UNIV. OF BALT. L. F. 5, 6–7 (1998) (citing Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of the Judge*, 17 ILL. L. REV. 102 (1992) (discussing a judge's view of public policy and personality affecting their judicial decision)). "[S]ocial, political, economic and cultural movements, coupled with the judge's individual temperament, personal impulses, and lifelong experiences, create a predisposition whereby certain judges are inclined to arrive at certain decisions." *Id.* (citing Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of the Judge*, 17 ILL. L. REV. 102 (1922)). Haines identified several factors that are "most likely to influence judicial decisions": (1) "direct influences," including "legal and political experiences[,] . . . political affiliations and opinions[,] and . . . intellectual and temperamental traits; and . . . indirect and remote influences," including "legal and general education[,] and . . . family and personal associations, including wealth and social status." *Id.* (citing Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of the Judge*, 17 ILL. L. REV. 102 (1922)). Theodore Schroeder has hypothesized that "every judicial opinion necessarily is the justification of every personal impulse of the judge in relation to the situation before [them], and the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration in emotional tone." *Id.* at 7 (quoting Theodore Schroeder, *The Psychologic Study of Judicial Opinion*, 6 CAL. L. REV. 89, 93 (1918)).

[317] 478 U.S. 186 (1986).

[318] *See supra* notes 222–23 and accompanying text.

[319] *See supra* notes 224–37 and accompanying text.

[320] *See supra* Section D.1.

[321] 523 U.S. 75 (1998).

employees from same-sex harassment, as long as "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[322] This statement thus supports the integral conclusion that gay and transgender employees could still bring sex discrimination claims even if they are harassed by individuals of the same gender.[323] That Title VII protects women and men from workplace harassment does not seem surprising today; however, lower courts took many different stances on the issue at first.[324] The Court's decision in *Oncale*, led by staunch textualist and originalist, Justice Scalia, rejected a rule that would exclude same-sex harassment from protection simply because it was "not the principal evil Congress was concerned with when it enacted Title VII."[325] Justice Gorsuch eventually quoted Scalia's statement that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"[326] in *Bostock*, arguing that statutes

[322] *Id.* at 80 (quoting Harris v. Forklift Sys, Inc. 510 U.S. 17, 25 (1993)). The male plaintiff in *Oncale* was being harassed by other male supervisors and co-workers. *See id.* at 76–77.

[323] This could be particularly important for gay men (and perhaps transgender women, who were assigned male at birth); studies have shown that men are more likely to be both the targets and perpetrators of sexual prejudice. A study conducted in 2019, which explored attitudes towards LGBTQ+ people in 23 countries, found that lesbian women are accepted far more than gay men. Tim Fitzsimons, *Lesbians More Accepted Than Gay Men Around the World, Study Finds*, NBC NEWS (Jan. 28, 2020, 4:28 PM), https://www.nbcnews.com/feature/nbc-out/lesbians-more-accepted-gay-men-around-world-study-finds-n1118121 [https://perma.cc/Q4BA-TVAW]; *see generally* Maria Laura Bettinsoli et al., *Predictors of Attitudes Toward Gay Men and Lesbian Women in 23 Countries*, 11 SOC. PSYCH. AND PERSONALITY SCI. 697 (2019) (the study in question, which found that there was more dislike of gay men than women across all 23 countries surveyed). This is largely because attitudes towards gay individuals are deeply related to beliefs about gender and gender norms. *Id* at 697. The study found that men made up the majority of negative attitudes towards gay men, *id.* at 698–99, leading the study's authors to conclude that being prejudicial towards sexual minorities "is part of the social construction of what it means to 'be a man." *Id.* at 698. *See also* Tim Fitzsimons, *American Psychological Association Links 'Masculinity Ideology' to Homophobia, Misogyny*, NBC NEWS (Jan. 8, 2019, 5:28 PM), https://www.nbcnews.com/feature/nbc-out/american-psychological-association-links-masculinity-ideology-homophobia-misogyny-n956416 [https://perma.cc/2WYC-5QSJ] (discussing APA guidelines that, for the first time, link toxic masculinity to homophobia and misogyny).

[324] *See Oncale*, 523 U.S. at 79; *see generally* Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988) (holding that same-sex sexual harassment claims are never cognizable), *abrogated by* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998); McWilliams v. Fairfax Cnty. Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (holding that claims of same-sex harassment where the harassers and victim are heterosexual are not cognizable, without answering whether homosexuality of victim or harasser might affect whether the claim is cognizable), *abrogated by* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996) (holding that perpetrators of sexual harassment need not be of a different sex than the victim for the claim to be cognizable and that a heterosexual plaintiff's claim against his homosexual supervisor and co-workers was cognizable); Doe v. City of Belleville, 119 F.3d 563 (7th Cir.1997) (holding that workplace sexual harassment is always actionable, regardless of the harasser's sex, sexual orientation, or motivations.)

[325] *Oncale*, 523 U.S. at 79.

[326] *Id.*

can be, and often are, applied in situations that were not anticipated by their drafters.[327] In fact, it is unlikely that Scalia, a longtime and outspoken opponent of gay rights, anticipated that his words would eventually be used to expand Title VII protections to LGBTQ+ employees.[328]

Another key sex discrimination case, *Price Waterhouse* held that decisions based on sex stereotypes constitute sex discrimination under Title VII.[329] Many members of the firm that denied the plaintiff partnership status, despite previously praising her character, her high level of achievement, and her productivity,[330] used explicitly gendered language in their assessment of her.[331] One partner described her as "macho," another said she was "overcompensated for being a woman," while another stated that they opposed the language she used only "because it's a lady using foul language."[332] The partner who explained the reasons for the firm's decision to Hopkins advised her that her chances would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[333] *Bostock* relied on and quoted from *Price Waterhouse* when it reinforced the notion that an individual employee's sex cannot be "relevant to the selection, evaluation, or compensation of employees."[334] According to Gorsuch, the message for *Bostock* was just as simple as the one laid out in *Price Waterhouse*—because it is impossible to discriminate against a gay or transgender employee without discriminating based on sex stereotypes, an individual's homosexuality and transgender status cannot be relevant to employment decisions.[335]

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[327] *Id.*; Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020).

[328] Scalia seemed to support employers' rights to discriminate against LGBTQ+ individuals in his dissent in *Lawrence v. Texas*:

> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter.

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting).

[329] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

[330] *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112–13 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989). At trial, Judge Gesell found that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." *Id.* at 1112.

[331] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

[332] *Id.*

[333] *Id.*

[334] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)).

[335] *Id.*

One of the Court's hypotheticals in *Bostock* illustrates just how critical *Price Waterhouse*'s denunciation of sex stereotypes was for Title VII jurisprudence. In the example, two individuals are both dating men, but one is a woman, and the other is a man—if the man is fired for being attracted to men, "the employer discriminates against him for traits or actions it tolerates in his female colleague."[336] Here, the Court emphasized the *behavior* of the two employees. The woman employee's behavior is consistent with societal expectations: women should be attracted to men. On the other hand, the male employee's behavior completely contradicts those expectations. Thus, when an employer fires a male employee for this reason, it fires him because he has failed to conform to the gender expectations and sex stereotypes the employer deems acceptable—exactly what occurred in *Price Waterhouse*.

Oncale and *Price Waterhouse* inadvertently opened the door to the *Bostock* decision, not only by providing the precedential language that Gorsuch used, but by expanding the scope of Title VII and making necessary space for more progressive interpretations to take place in the future. In determining that sex stereotyping and same-sex sex discrimination violated Title VII, these cases created necessary steppingstones that made it possible to expand the protections of Title VII beyond what it was intended to cover without changing the definition of the word "sex."

B. *A Solution for Grooming Policy Discrimination Plaintiffs?*

Bostock exhibits how Title VII litigation can lead to progress for groups who have previously been vulnerable to employment discrimination. Using "textualism plus," the Court managed to expand protections for LGBTQ+ individuals despite two substantial legal obstacles. First, Congress has not passed legislation amending Title VII to explicitly include sexual orientation and gender identity as protected identities distinct from sex.[337] Second, a five to four conservative majority existed at the time of *Bostock*'s decision, a fact that could have easily spoiled the plaintiffs' chances, but because Justice Roberts and Justice Gorsuch sided with the majority, it did not.[338] *Bostock*'s plaintiffs won, finally capturing the elusive protections of Title VII for LGBTQ+ workers, nearly 60 years after the act's enactment.

Bostock evokes timid hope in those who have not yet secured Title VII protections. Though it appears that Black women facing grooming policy discrimination may be in a similar position to capture these elusive

[336] *Id.*

[337] *See supra* notes 258–59 and accompanying text. As of the writing of this Note, the Equality Act has passed in the House but has not yet made it through the Senate. H.R. 5, 117th Cong. (2021–2022).

[338] Andrew Koppelman, *Bostock: What Two Conservatives Realized and Three Dissenters Missed*, AM. PROSPECT (June 15, 2020), https://prospect.org/justice/bostock-what-two-conservatives-realized-and-three-dissenters-missed [https://perma.cc/FEA3-ZVZ8] (noting that Justice Roberts and Justice Gorsuch had never voted to support a gay rights claim until *Bostock*).

protections for themselves, it is unlikely the conditions are right for them to succeed. Still, they share many similarities to the *Bostock* plaintiffs. First, like the Equality Act,[339] Congress has not yet passed the CROWN Act, legislation that would protect Black women employees with natural or traditional hairstyles. Federal passage of the CROWN Act would offer Black women in grooming policy discrimination cases sufficient protection[340] by modifying Title VII.[341] However, with the current makeup of Congress, the chances that the bill passes both the House and Senate in its present form are low; a bill that did pass may be a "watered-down" version of the Act with qualified protections.[342] Furthermore, the Supreme Court has not held that Title VII allows Black women to have standing based on their existence at the intersection of race and gender.[343] In most circuits, they may not combine

[339] H.R. 5, 117th Cong. (2021–2022); *see* notes 258–59 and accompanying text.

[340] *See supra*, notes 10–20 and accompanying text.

[341] Overall, the Act would be enforced "in the same manner and by the same means, including the same jurisdiction, as if such subsection was incorporated" within Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a et seq.), Title VI (42 U.S.C. § 2000d et seq.), Title VII (42 U.S.C. § 2000e et seq.), Section 1977 of the Revised Statutes (42 U.S.C. § 1981), and the Fair Housing Act (42 U.S.C. § 3601). The act prohibits discrimination by failing or refusing to hire or discharge any individual based on their hair texture or style if it is "commonly associated with a particular race or national origin (including a hairstyle in which hair is tightly coiled or tightly curled, locs, cornrows, twists, braids, Bantu knots, and Afros)." CROWN Act of 2021, S.888, 117th Cong. § 6 (2021).

[342] One possibility is that Congress modifies the Act so that it only confirms the tenuous protection that EEOC guidelines suggest, and the *Rogers* court theorized: protection for traditionally Black hair texture, such as Afros, but not hairstyles. *See* Title VII, 29 CFR Parts 1600, 1607, 1608; § 15 Race and Color Discrimination, 4/19/2006, EEOC-CVG-2006-1, https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIIB5 [https://perma.cc/2H3X-UDH3]; Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) ("Plaintiff may be correct that an employer's policy prohibiting the "Afro/bush" style might offend Title VII and section 1981. 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 . . . . In any event, an all-braided hairstyle is a different matter.")

[343] Dean Wing has called for the United States to reinvent our Constitution's equality clause so that it mirrors that of South Africa. *See* Adrien Katherine Wing, *The South African Constitution as a Role Model for the United States*, 24 HARV. BLACKLETTER L.J. 73, 79 (2008). Dean Wing served as an advisor to the African National Congress Constitutional Committee for years prior to the adoption of South Africa's constitution. *Id.* The South African Constitution permits an intersectional approach to discrimination, allowing plaintiffs to bring claims on intersecting grounds. *Id.* South African justices "are particularly attuned to the plight of people who have faced multiple forms of discrimination, such as black women." *Id.* The possibility to bring claims with grounds that intersect is integral for plaintiffs who suffer from discrimination whose "impact could not be evaluated on one ground only." *Id.* South Africa's constitution was created in 1996 and designed to create "a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights." *Id.* at 74 (quoting Penelope E. Andrews, *Perspectives on Brown: The South African Experience*, 49 N.Y.L. SCH. L. REV. 1155, 1163 (2004–05)). From that purpose "emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination." *Id.* (quoting Andrews). Unlike the U.S. Constitution, South Africa's includes gender, pregnancy, marital

their claims in order to have standing as Black women, rather than severally as women or as Black people.[344] As a result, their claims are often systematically dismissed, as exhibited in *Rogers* and *Catastrophe Management*.[345]

Second, Black women employees with natural or protective styles face the same challenge the *Bostock* plaintiffs did: a conservative Supreme Court. In fact, the Court currently includes only three left-leaning justices, Justice Sotomayor, Justice Breyer, and Justice Kagan, while right-leaning justices fill the remaining six slots: Justice Roberts, Justice Kavanaugh, Justice Barrett, Justice Gorsuch, Justice Alito, and Justice Thomas. Though, at the time of writing this Note, Justice Breyer has announced his retirement and will be replaced with liberal Justice Ketanji Brown Jackson, a Black woman who may add helpful perspective, the Court will still be packed with an ominous company of conservative justices for the foreseeable future.

It has been 40 years since *Rogers*, with very little forward movement. But the right conditions could generate a *Bostock*-like success in the courts. For Black women facing grooming policy discrimination, success under the *Bostock* "textualism plus" formula requires sufficient bedrock of socio-political progress and a foundation of legal precedent that courts can use to expand protections. The socio-political progress element plainly exists. Anthropologists, philosophers, biologists, and other experts have scrutinized how society and the law treat race,[346] and for decades, it has been clear that a strictly biological conception of race is not workable.[347] Moreover, since *Rogers v. American Airlines,* many Black feminist scholars, Critical Race Theory scholars, and employment discrimination experts have argued that courts must take an intersectional approach in Title VII cases with Black women plaintiffs.[348] These scholars have addressed the "multiplicative" identities of Black women and the necessity of considering the cultural aspect of race

status, sexual orientation, age, disability, conscience, belief, culture, language, and birth as protected identities in its equality clause. *See* S. AFR. CONST., § 9 1996. It is also the first constitution to include sexual orientation in its protections. Wing, *supra,* at 75.

[344] See *supra* note 43 and accompanying text for circuit courts that do allow intersectional claims.

[345] *See supra* Section C.

[346] *See supra* Section B.1.

[347] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987); State v. Cantey, 20 S.C.L. 614, 615 (S.C. App. L. & Eq. 1835); *supra* notes 75–93 and accompanying text.

[348] *See, e.g.*, Clarke, *supra* note 91 (also discussing a new proposed immutability standard); Carbado & Mitu, *supra* note 91, at 719–29; Greene, *supra* note 63, at 1369; Greene, *supra* note 91, at 925–1005; Krieger, *supra* note 91, at 1174; Rich, *supra* note 91, at 1166–71, 1194–99; Turner, *supra* note 68; Dena Elizabeth Robinson & Tyra Robinson, *Between a Loc And a Hard Place: a Socio-Historical, Legal, and Intersectional Analysis of Hair Discrimination and Title VII*, 20 UNIV. OF MARYLAND J. OF RACE, RELIGION, GENDER, AND CLASS 263, 288 (2020); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Judy Scales-Trent, *Black Women and the Constitution: Finding our Place, Asserting Our Rights*, 24 HARV. C.R.-L.L. REV. 9 (1989); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L. J. 16 (1995).

discrimination in employment discrimination analysis.[349] The Equal Employment Opportunity Commission has released guidance documents supporting these ideas.[350] Politicians and lobbyists have indicated their awareness and understanding of the issue by creating the CROWN Act and pushing for its passage on a federal level.[351]

Yet courts in Title VII grooming policy discrimination cases have failed to protect these women, denying their racial discrimination claims by contending that the law only prohibits race discrimination based on immutable characteristics and denying their sex discrimination claims due to their inability to represent all women.[352] Black women plaintiffs in future cases lack essential steppingstones of precedent like *Oncale* and *Price Waterhouse*, which expanded Title VII and led *Bostock*'s plaintiffs to win. No Supreme Court precedent has yet articulated the need for an intersectional approach in discrimination cases with Black women plaintiffs, nor has any explicitly held that cultural conceptions of race ought to be protected. Though *Al-Khazraji* hinted nearly 40 years ago that Title VII jurisprudence could move forward by casting away the notion that biological racial categories and characteristics are dependable and pragmatic tools in discrimination cases,[353] we have yet to see that displacement solidified in our grooming policy discrimination case law.

The court had the opportunity to take this integral step in *Equal Employment Opportunity Commission v. Catastrophe Management* but refused.[354] The Eleventh Circuit should have embraced intersectionality theory, overruled *Rogers*, explicitly recognized that race's ordinary meaning includes both biological and sociocultural considerations, discarded the immutability standard, and held that discrimination against traditionally Black hairstyles thus constitutes unlawful employment discrimination under Title VII. Instead, the court denied EEOC the chance to support its argument with expert testimony and further discovery, declining to add nuance to issues that had not been touched for almost 40 years.[355] The Supreme Court then denied

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[349] *See generally* Wing, *supra* note 24 (discussing the "multiplicative" identities of Black women); Kimberlé Crenshaw, *supra* note 23 (coining the term "intersectionality").

[350] *See supra* notes 199–201 and accompanying text; Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1031-1032 (11th Cir. 2016), *cert. denied* 138 S. Ct. 2015 (2018).

[351] *See supra* Section C.

[352] *See, e.g.*, Rogers v. Am. Airlines, Inc. 527 F. Supp. 229 (S.D.N.Y. 1981) (dismissing the case because American Airlines' policy "does not regulate on the basis of any immutable characteristic of the employees involved.").

[353] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n. 4 (1987); *supra* notes 86–90 and accompanying text.

[354] *See* Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016), *cert. denied* 138 S. Ct. 2015 (2018); *supra* notes 177–201 and accompanying text.

[355] *Id.*

certiorari, dodging its responsibility to take on this crucial question. For Black women facing race-based hair discrimination to have a chance to repeat *Bostock*'s success, the Supreme Court must expressly recognize the cultural aspects of racial discrimination and articulate the requirement of intersectional analysis in discrimination cases with Black women plaintiffs. Without such precedent, current legal obstacles may deny Black women employees protection indefinitely.

IV. CONCLUSION

Because of their existence at the intersection of race and gender, Black women are particularly vulnerable when it comes to employment discrimination. Grooming policy discrimination cases demonstrate this vulnerability—Black women who choose to wear their hair in natural, protective, or traditionally Black styles are not protected from racial discrimination based on opposition to those styles. Existing Title VII grooming policy jurisprudence has refused to acknowledge that racial characteristics can be based on more than biological or immutable physical characteristics. After decades of similar failures, the LGBTQ+ plaintiffs in *Bostock v. Clayton County* finally succeeded in expanded their rights under Title VII, providing hope for other marginalized and under-protected groups. Unfortunately, Black women plaintiffs will not be able to recreate *Bostock*'s success until the Court reassess its understanding of racial discrimination and recognizes intersectional claims. Experts must continue researching this important gap in Title VII jurisprudence so that we may find a solution that finally succeeds in protecting Black women plaintiffs in grooming policy discrimination cases. With luck, Congress will pass the CROWN Act and finally write that protection into law.