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BOSTOCK, THE CROWN ACTS, AND A POSSIBLE RIGHT TO SELF-EXPRESSION IN THE WORKPLACE

BY HENRY L. CHAMBERS, JR. *

ABSTRACT

*Employment at-will is the default rule in American law. In the absence of an employment contract, employers are generally free to discharge workers for any reason not barred by statute or public policy. Typically, an employee can be fired when an employer dislikes an employee's self-expression that is not specifically protected by law. However, recent developments in employment discrimination law may provide the foundation for a burgeoning right to self-expression in the workplace. In its recent case *Bostock v. Clayton County*, the Supreme Court ruled sexual orientation discrimination and transgender discrimination necessarily involve sex discrimination under Title VII. The Court's focus on expanding Title VII sex discrimination to address all employer practices that consider an individual employee's sex, rather than limiting the statute's coverage to employer practices that more generally discriminate against women because they are women or against men because they are men, broadens Title VII. In addition, the proposed federal *Create a Respectful and Open World for Natural Hair (CROWN) Act of 2021* and various similar laws enacted in states bar discrimination based on racialized hairstyles and hair texture. The CROWN Acts arguably expand race discrimination to include discrimination because of traits associated with race. Taken together, *Bostock* and the CROWN Acts can be interpreted to broaden Title VII and other employment discrimination statutes to redress employer practices that bar employee self-expression related to protected characteristics under those statutes.*

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I. INTRODUCTION

Employees generally have little, if any, right to self-expression at work.¹ The default employment-at-will doctrine – which shapes the American workplace – typically allows employers to limit an employee's workplace self-expression.² The traditional summary of employment at-will suggests that, in the absence of an employment contract, a statute, or public policy limiting an employer, an employer may fire an employee for good reason, bad reason, or no reason at all.³ Barring a legal limitation, an employer can demand compliance with its workplace rules barring self-expression on pain of termination, whether or not the rules are relevant to the employee's performance or competence.

Employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, might appear to limit an employer's regulation of employee self-expression.⁴ Title VII bars an employer from discriminating against an employee because of the employee's race, sex, religion, color, or national origin.⁵ A bar on employee self-expression related to one of those protected characteristics might appear to violate Title VII. However, Title VII typically does not provide that protection.

Title VII tends to be interpreted narrowly. Employer rules barring self-expression related to a protected characteristic generally would not be considered discrimination because of the protected characteristic unless the rule was in place for the purpose of discriminating based on the protected characteristic. An employer who terminates female employees because of their self-expression but allows male employees to express themselves in similar ways discriminates because of the female employees' sex. The employer violates Title VII because the rule discriminates against women, not because the rule bans self-expression that is related to the employee's sex. A ban on self-expression related to an employee's sex unaccompanied by the intent to discriminate may not be actionable.

¹ See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) ("It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity."); Jessica A. Moldovan, *Authenticity at Work: Harmonizing Title VII with Free Speech Jurisprudence to Protect Employee Authenticity in the Workplace*, 42 N.Y.U. REV. L. & SOC. CHANGE 699, 729 (2019) ("Title VII fails to adequately protect authenticity in the workplace.").

² See Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 224.

³ See, e.g., *EEOC v. STME, LLC*, 938 F.3d 1305, 1320 (11th Cir. 2019) (noting employer can fire employee for good reason, bad reason, no reason, or unsubstantiated reason so long as the reason is not discriminatory).

⁴ 42 U.S.C. §§ 2000e to e-16.

⁵ *Id.* § 2000e-2.

A Title VII disparate impact claim based on unintentional discrimination is unlikely to apply to an employer's ban on self-expression related to a protected characteristic.⁶ In a typical disparate impact race discrimination case, an employer uses an employment practice that harms a disproportionately higher percentage of one race than another race.⁷ If no business necessity supports the rule or if an equally effective rule could be used with less discriminatory impact, the practice is an unlawful employment practice that may trigger Title VII liability.⁸ However, a ban on self-expression that triggers a disparate impact is unlikely to be actionable because self-expression is mutable.⁹ If the self-expression is easy to change or avoid, a ban on it is unlikely to trigger Title VII liability.¹⁰ The ban will be recognized as differential treatment because of self-expression but not discrimination because of race.

Courts and legislatures may be ready to define discrimination more broadly and in a manner that might protect some forms of employee self-expression in the workplace.¹¹ Title VII's ban on discrimination because of an employee's race, sex, color, religion, or national origin can be interpreted narrowly to primarily cover group discrimination that is visited on individual employees, such as when a rule against hiring women triggers the refusal to hire a specific female applicant.¹² It also can be interpreted more broadly to bar an employer from discriminating against a female employee for any reason related to her sex, even if such discrimination does not harm any other woman in the workplace. Whether Title VII should be interpreted to bar a discriminatory practice that is related to sex but is used to harm employees of every sex – consider an employer who sexually harasses men and women

⁶ See Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 68 (2006) ("The problem with bringing disparate impact claims of this sort under Title VII is that these claims tend to have no weight when the trait impacted by the regulation is not immutable, because the employee is not seen as experiencing a truly adverse effect."). *But see* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1024-25 (11th Cir. 2016) (suggesting EEOC should have brought case challenging ban on natural hairstyle as a disparate impact case).

⁷ See, e.g., *Lewis v. City of Chicago*, 560 U.S. 205 (2010).

⁸ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁹ See Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument about Assimilation*, 74 GEO. WASH. L. REV. 365, 374 (2006) (noting immutability requirement in disparate impact context).

¹⁰ For fuller discussion of disparate impact, see Henry L. Chambers, Jr. *Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U. L. REV. 781, 789-93 (2015).

¹¹ Various commentators have called for the protection of rights of self-expression in the workplace. See, e.g., Ramachandran, *supra* note 6; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1139-40 (2004) (arguing for protection for broad range of self-expression).

¹² See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam)(discussing workplace rule barring hiring women with school-age children).

– is not clear. If it should, Title VII's coverage may be broad enough to protect some forms of self-expression related Title VII's protected characteristics. Courts may be ready to clarify.

In *Bostock v. Clayton County*, the Supreme Court ruled sexual orientation discrimination and transgender discrimination necessarily involve discrimination because of an employee's sex.¹³ Sexual orientation discrimination treats a male employee who loves a man differently than a female employee who loves a man.¹⁴ Transgender status discrimination treats a man born as a woman differently than a man born as a man.¹⁵ The Court ruled an employment action based solely on sexual orientation or transgender discrimination necessarily treats individual employees differently than other similarly situated employees based on their sex, and therefore violates Title VII.¹⁶ That ruling negates the claim that sex discrimination under Title VII focuses on employment practices that treat women (or subgroups of women) differently than similarly situated men (or subgroups of men). Rather than focus on group discrimination, the *Bostock* Court appears to consider broadly whether an employer has linked an employee's employment to the employee's sex. If so, Title VII has been violated, even if employees of another sex have been similarly harmed by the same employer practice. The *Bostock* Court may significantly change how Title VII should be interpreted.

Create a Respectful and Open World for Natural Hair (CROWN) Acts, proposed at the federal level and enacted in several states, may broaden the scope of employment discrimination coverage to include protection for self-expression.¹⁷ The Acts prohibit discrimination regarding hairstyles associated with specific races. That challenges current doctrine that focuses Title VII discrimination on immutable or nearly unchangeable characteristics.¹⁸ If discrimination because of an individual's race includes

¹³ 140 S. Ct. 1731, 1737 (2020).

¹⁴ *Id.* at 1741.

¹⁵ *Id.*

¹⁶ *Id.* at 1737.

¹⁷ See CROWN Act of 2021, S. 888, 117th Cong.

¹⁸ For discussion of immutability doctrine in employment discrimination law, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015). Immutable characteristics need not be literally unchangeable. See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1512 (2011) ("In other words, a trait is immutable if 'changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.' Thus, according to this approach, an attribute need not be entirely fixed in order to be deemed immutable."). Indeed, the characteristic arguably need only be very important to be deemed immutable for employment discrimination purposes. See *id.* at 1545 ("Immutability, understood broadly to include traits that are so fundamental to personal identity that they are effectively unalterable for some individuals and should not have to be changed for employment purposes, is a unifying principle that accurately describes all of the antidiscrimination statutes' protected classifications.").

discrimination regarding mutable traits related to an individual's race, many aspects of a person's self-expression may be protected from employer infringement. If that approach is extended to other protected characteristics, Title VII's coverage may broaden significantly.

The result of the interaction of *Bostock* and the CROWN Acts may be substantial. If employers are limited by Title VII in barring self-expression related to race, sex, color, and national origin, employees may functionally gain a right to self-expression in the workplace. This essay proceeds as follows. Part II discusses *Bostock v. Clayton County* and how it arguably redefines discrimination under Title VII. Part III discusses the CROWN Acts and how they may expand the definition of discrimination. Part IV considers how interpretations of *Bostock* and the CROWN Acts may limit how employers can regulate self-expression in the workplace and provides a structure for protecting such self-expression, arguably resulting in a limited right to self-expression in the workplace and the curtailing of the effect of the employment-at-will doctrine.

II. *BOSTOCK V. CLAYTON COUNTY* AND REDEFINING DISCRIMINATION

In *Bostock v. Clayton County*, the Supreme Court ruled in a 6-3 decision written by Justice Neil Gorsuch that an employer who fires an employee solely based on the employee's sexual orientation or transgender status has discriminated because of the employee's sex under Title VII.¹⁹ Each plaintiff in the consolidated cases was terminated because of their sexual orientation or transgender status. Gerald Bostock was fired soon after his employee was informed that he had joined a gay softball league.²⁰ Donald Zarda was fired after mentioning at work that he was gay.²¹ Aimee Stephens, who presented as a man when she was hired, was fired after she informed her employer she planned to live and work as a woman.²² Having found both forms of discrimination necessarily involve discrimination because of an employee's sex,²³ the Court deemed each termination unlawful under Title VII.²⁴ The ruling is important and controversial both because the Supreme Court had not interpreted Title VII to encompass sexual orientation

¹⁹ 140 S. Ct. at 1737 ("Today, we must decide whether an employer can fire someone simply for being homosexual or transgender.").

²⁰ *Id.* at 1737-38 ("[H]e was fired for conduct 'unbecoming' a county employee.").

²¹ *Id.* at 1738.

²² *Id.*

²³ 42 U.S.C. § 2000e-2.

²⁴ *Bostock*, 140 S. Ct. at 1737.

discrimination or transgender status discrimination, and because it arguably alters how Title VII is to be interpreted more generally.²⁵

A. Majority Opinion

Title VII bars employment discrimination against an individual "because of such individual's . . . sex."²⁶ The clause outlaws employment discrimination against women (or men) as a group.²⁷ It also bans the differential treatment of subgroups of women and men when those groups are similarly situated.²⁸ Further, it bans discrimination against an employee because of her (or his) sex, even if others of the same sex have not been subject to discrimination.²⁹ Whether Title VII broadly bans employer practices that relate to an employee's sex but could be applied equally to women and men is not clear. The majority opinion appears to embrace the broadest scope for Title VII, which may require an employer completely delink an employee's employment from the employee's sex.

The majority analyzed whether discrimination based solely on sexual orientation or transgender status violates Title VII, ostensibly based on Title VII's original public meaning.³⁰ Given the Court's decision, that may be surprising. In 1964, neither sex discrimination nor discrimination because of an individual's sex would have seemed to include sexual orientation or transgender discrimination.³¹ However, Justice Gorsuch's analysis was not limited to determining whether Congress thought it banned such discrimination in 1964 or whether a typical person in 1964 would have

²⁵ See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340–41 (7th Cir. 2017) (en banc) (noting Title VII had historically been interpreted to exclude sexual orientation discrimination from its prohibition on sex discrimination).

²⁶ 42 U.S.C. § 2000e-2(a)(1).

²⁷ Some argue the *Bostock* majority did not sufficiently abandon a group-rights focus that has illuminated Title VII's interpretation. See Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 589 (2021).

²⁸ See generally *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam).

²⁹ This article discusses sex as though it is a binary because the primary cases discussed do so. How Title VII would apply to nonbinary employees is not clear. See Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 605 (2019) ("Although LGBT rights groups attained success in Title VII lawsuits by focusing on gender nonconformity, the doctrine has evolved only so far. Particularly because of Title VII jurisprudence on dress codes, nonbinary individuals may fall outside of Title VII protections.")

³⁰ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *id.* at 1767 (Alito, J., dissenting) ("[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment.")

³¹ In dissent, Justice Alito appears to suggest in-depth analysis is unnecessary. See *Bostock*, 140 S. Ct. at 1767–68 (Alito, J., dissenting) ("In 1964, the concept of prohibiting discrimination 'because of sex' was no novelty. It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.")

thought sex discrimination subsumed sexual orientation or transgender discrimination.³² Rather, the Court analyzed what "discrimination because of sex" means by defining what "discrimination," "because of," and "sex" meant in 1964.³³ "Sex" meant biological sex.³⁴ "Because of" meant but-for causation, which is met in the sex discrimination context when changing only the employee's sex would have yielded different treatment for the employee.³⁵ "Discrimination" meant to treat someone differently than a similarly situated person.³⁶ Discrimination because of an employee's sex occurs, and Title VII has been violated, if an employer treats two similarly situated employees of different biological sexes differently regarding their employment but would have treated them the same regarding their employment had they been of the same biological sex.³⁷

The *Bostock* majority found an employer's termination of an employee's employment based solely on the employee's sexual orientation or transgender status unlawful because such discrimination always involves discrimination because of the employee's sex.³⁸ Its proof is simple.³⁹ If a female employee loves a man and retains her job, but a male employee loves a man and is fired because of it, the male employee has been treated differently because of his sex.⁴⁰ If a male employee who was born male and

³² *Id.* at 1828 (Kavanaugh, J., dissenting) ("Statutory Interpretation 101 instructs courts . . . to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.").

³³ Justice Kavanaugh disagreed with that approach. See *id.* at 1827 ("Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does.").

³⁴ *Id.* at 1739 (majority opinion) ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

³⁵ *Id.* ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

³⁶ *Id.* at 1740 ("To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated.").

³⁷ *Id.* ("So, taken together, an employer who intentionally treats a person worse because of sex – such as by firing the person for actions or attributes it would tolerate in an individual of another sex – discriminates against that person in violation of Title VII.").

³⁸ *Id.* at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

³⁹ Treating the opinion as a logical proof is intriguing. See Doron M. Kalir, *The Inner Logic of Bostock*, 11 WAKE FOREST L. REV. ONLINE 42, 43 (2021) (noting the *Bostock* majority opinion was more of an exercise in formal logic than in statutory interpretation).

⁴⁰ *Bostock*, 140 S. Ct. at 1741 (providing the example). The majority's approach to but-for causation tracks Title VII's comparator doctrine. See Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 603 (2018) ("[T]o create an inference of discrimination to establish a prima facie case under Title VII, most courts require a plaintiff employee to provide evidence of a similarly-situated 'comparator' outside of their protected class (for example a male employee for a sex claim, a white employee for a race claim)."). Courts have suggested that in indirect evidence cases, an inference of race discrimination requires a comparator – a similarly-situated employee of a different race – who was treated differently than plaintiff. A comparator should not be required but often is. See *id.* ("As scholars have noted, many lower courts have consistently misinterpreted this dicta as requiring comparator proof."); Suzanne B. Goldberg,

presents as a man retains his job but a female employee who was born male presents as a woman and is fired for that reason, she has been treated differently because of her sex. The employer violates Title VII's ban on sex discrimination whenever the employer fires an employee based solely on the employee's sexual orientation or transgender status.⁴¹ When an employer considers an employee's sexual orientation or transgender status when terminating the employee's employment, it has not delinked the employee's employment from the employee's sex, in apparent violation of Title VII.

Justice Gorsuch used *Phillips v. Martin Marietta Corp.*,⁴² *Los Angeles Department of Water and Power v. Manhart*,⁴³ and *Oncale v. Sundowner Offshore Services, Inc.*⁴⁴ to support his reasoning and to rebut challenges. *Phillips* involved an employer who refused to hire women with school-age children.⁴⁵ *Martin Marietta's* practice could have been deemed not sex discrimination because the employer did not discriminate against all women. Indeed, with respect to the positions at issue, *Martin Marietta* arguably treated women better than men.⁴⁶ Nonetheless, the Court determined the employment practice constituted discrimination because of the employee's sex under Title VII. The Court compared similarly situated employees of different biological sexes – women with school-age children and men with school-age children – to prove the practice discriminated because of an employee's sex. The discrimination was deemed sex-plus discrimination because it involved sex discrimination plus another factor.⁴⁷ The *Phillips*

Discrimination by Comparison, 120 YALE L.J. 728, 744-45 (2011) ("Consequently, because of their utility in producing inferences of discrimination, comparators have emerged as the predominant methodological device for evaluating discrimination claims. Yet courts rely on them far beyond their evaluative function, to the point that comparators are treated not only as a useful heuristic for evaluating claims but also as an essential element of a discrimination claim."). The majority merely operationalized the but-for causation requirement in the same way courts that have required comparators have. *See* Lewis v. Union City, 918 F.3d 1213, 1221-22 (11th Cir. 2019) (en banc). *But see id.* at 1220 n.6 (noting that a comparator was only required as part of the *McDonnell Douglas* framework and that is not the only framework a plaintiff can use to prove discrimination).

⁴¹ *Bostock*, 140 S. Ct. at 1741-42 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. . . . [H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

⁴² 400 U.S. 542 (1971) (per curiam).

⁴³ 435 U.S. 702 (1978).

⁴⁴ 523 U.S. 75 (1998).

⁴⁵ *Phillips*, 400 U.S. at 543.

⁴⁶ *Id.* ("[A]t the time Mrs. Phillips applied, 70-75% of the applicants for the position she sought were women; 75-80% of those hired for the position, assembly trainee, were women."); *Bostock*, 140 S. Ct. at 1746.

⁴⁷ *See, e.g.*, *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1045-46 (10th Cir. 2020) ("Ample precedent holds that Title VII forbids 'sex-plus' discrimination in cases in which the 'plus-' characteristic is not itself protected under the statute."). For a recent discussion of sex-plus discrimination,

Court recognized an employment practice need not draw a neat line between men and women in the workplace to be actionable sex discrimination under Title VII. An employment practice can harm a subset of one sex and be deemed discrimination because of sex.

Manhart involved an employer's pension plan which required women make larger contributions into the plan than men. The employer argued women's longer life expectancy suggested women as a group would recoup more from the plan than men if both paid the same contribution.⁴⁸ The Court deemed the differential contribution requirement sex discrimination under Title VII. The requirement may have been rational and actuarially sound, but it was discriminatory.⁴⁹ Any specific woman who was required to pay more than any specific man for the same benefits under the plan was subject to discrimination because of her sex.⁵⁰ The Court compared similarly situated employees to determine if an employment practice constituted sex discrimination barred by Title VII. *Manhart* suggests an employer's practices should be analyzed at the individual employee level, not solely at the group level.⁵¹

Oncale involved a claim of same-sex sexual harassment.⁵² The case was somewhat controversial because the Court ruled a course of conduct that was not contemplated by Title VII in 1964 could be actionable under Title VII.⁵³ Plaintiff *Oncale* worked on an oil rig in the Gulf of Mexico. He alleged fellow employees physically assaulted him and threatened him with sexual assault.⁵⁴ The employer claimed the harassment was not cognizable under Title VII because it did not involve sexual attraction, which some courts and the Equal Employment Opportunity Commission (EEOC) had suggested might be a necessary component of same-sex sexual harassment.⁵⁵ Sexual

see Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469 (2019).

⁴⁸ 435 U.S. at 704-05.

⁴⁹ *Bostock*, 140 S. Ct. at 1743 ("An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables.").

⁵⁰ *Manhart*, 435 U.S. at 711.

⁵¹ *Bostock*, 140 S. Ct. at 1743 ("[A] rule that appears evenhanded at the group level can prove discriminatory at the level of individuals.").

⁵² *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

⁵³ *Id.* at 79 ("As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII."); see also *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (examining EEOC guidance on same-sex harassment).

⁵⁴ *Oncale*, 523 U.S. at 76-77.

⁵⁵ *Id.* at 80 ("Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.").

harassment typically involved sex-based attraction or sex-based animus, such as the desire to drive a woman from a male-dominated workplace.⁵⁶ In a same-sex sexual harassment case, sexual animus seemed an unlikely theory of harassment, leaving sexual attraction as the remaining basis to prove that a similarly situated person of a different sex would not have been subject to harassment the victim suffered.⁵⁷ However, the *Oncale* Court ruled same-sex sexual harassment claims not involving sexual attraction cognizable if the actionable conduct would not have occurred if the plaintiff had been a woman.⁵⁸ Differential treatment is sufficient to prove the harassment occurred because of the employee's sex.⁵⁹ Unfortunately, the Court did not clarify whether the plaintiff needed to prove a female employee would not have been harassed at all or merely that a female employee would not have been harassed in the way the plaintiff was harassed to prove the harassment was sex discrimination.⁶⁰

The *Bostock* Court divined three lessons from *Phillips*, *Manhart*, and *Oncale*. First, an employment practice that discriminates is actionable, even if an employer can characterize the policy as rational.⁶¹ Second, biological sex need only be a reason – not the sole reason – underlying an employment practice for the practice to be deemed discriminatory under Title VII.⁶² Third, an employment practice that treats women and men equally may constitute discrimination because of sex under Title VII if the practice harms a specific employee based on the employee's sex.⁶³ The third lesson is critical. Some had argued a practice that harmed both men and women could not be sex

⁵⁶ See, e.g., *Passananti v. Cook County*, 689 F.3d 655, 664 (7th Cir. 2012) ("[W]ords or conduct demonstrating 'anti-female animus' can support a sexual harassment claim based on a hostile work environment.").

⁵⁷ The *Oncale* Court suggested such assumptions were unwarranted. See 523 U.S. at 78.

⁵⁸ *Oncale*, 523 U.S. at 80 ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020) ("Because the plaintiff alleged that the harassment would not have taken place but for his sex – that is plaintiff would not have suffered similar treatment if he were female – a triable Title VII claim existed.").

⁵⁹ *Oncale*, 523 U.S. at 80-81 (noting a same-sex harassment plaintiff would need to show the harassment amounted to differential workplace conduct that treated members of opposite sexes differently).

⁶⁰ For a broader discussion of *Oncale*, sexual harassment, and sexual orientation discrimination, see Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 573-78 (2001).

⁶¹ *Bostock*, 140 S. Ct. at 1744.

⁶² *Id.*

⁶³ *Id.* ("[A]n employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.").

discrimination under Title VII.⁶⁴ The *Bostock* Court argued the opposite. If the same rule harms a male employee because of his sex and a female employee because of her sex, the rule involves sex discrimination under Title VII. The rule doubles the employer's liability rather than eliminates it.⁶⁵

The *Bostock* Court interpreted "discrimination because of an individual's sex" literally, even though that upset Congress' expected application of Title VII.⁶⁶ Whether Congress thought Title VII would bar same-sex harassment does not matter.⁶⁷ Similarly, whether Congress thought Title VII would deem sexual orientation or transgender discrimination to be sex discrimination does not matter.⁶⁸ By barring discrimination because of sex, Congress required employers to delink employment and an employee's sex. In doing so, Congress barred sexual orientation discrimination and transgender discrimination.⁶⁹ Justice Gorsuch's analysis is simple, but the decision is momentous.⁷⁰

B. Dissents

Two scathing dissents, penned by Justices Kavanaugh and Alito, rejected the majority's interpretation of Title VII, asserting the majority misinterpreted the statute so badly that it legislated from the bench.⁷¹ They argued sex discrimination under Title VII focuses on treating men and women differently. Consequently, sexual orientation and transgender status discrimination generally do not constitute sex discrimination under Title

⁶⁴ See Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1 (2020) (discussing how courts have attempted to subtract gay people from Title VII's sex discrimination coverage).

⁶⁵ *Bostock*, 140 S. Ct. at 1741 ("So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat women and men more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.").

⁶⁶ See *id.* at 1750 ("[T]he employers and dissents merely suggest that, because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text.").

⁶⁷ *Id.* at 1751.

⁶⁸ *Id.* at 1745 ("[T]he employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation.").

⁶⁹ *Id.* at 1746 ("By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.").

⁷⁰ The status of sexual orientation and transgender discrimination had been unclear for years. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345-46 (7th Cir. 2017) (en banc) (ruling sexual orientation discrimination is sex discrimination); *Etsity v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007) (ruling transgender status discrimination is not sex discrimination).

⁷¹ *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting); *id.* at 1822-23 (Kavanaugh, J., dissenting) (arguing Congress, not the Court, is tasked with adding sexual orientation to Title VII or not).

VII.⁷² Such discrimination can become actionable when used to treat one sex differently than another sex, such as when sexual orientation discrimination is used to terminate the employment of gay men but not gay women.⁷³

Justice Kavanaugh's dissent focused on the structure of the majority's statutory interpretation of Title VII, deeming it misguided. Rather than consider what "sex," "discriminate," and "because of" mean separately, the Court should have asked what sex discrimination included in 1964.⁷⁴ Traditional statutory interpretation would have led the Court to conclude sexual orientation discrimination is not sex discrimination under Title VII because virtually no one thought⁷⁵ sexual orientation discrimination constituted sex discrimination in 1964.⁷⁶ Justice Kavanaugh largely ignored transgender discrimination but claimed his analysis of it would track his analysis of sexual orientation discrimination.⁷⁷

Justice Kavanaugh may have overread the majority opinion. He claimed the majority treated sexual orientation discrimination as a form of sex discrimination,⁷⁸ while suggesting virtually everyone understands the ordinary meaning of sex discrimination does not include sexual orientation discrimination.⁷⁹ Indeed, he noted Congress treats sexual orientation discrimination and gender identity discrimination separate from sex discrimination when protecting them in statutes today.⁸⁰ However, the *Bostock* majority did not claim sexual orientation discrimination, transgender discrimination, and sex discrimination are synonymous. Rather, it asserted the more modest claim that sexual orientation and transgender discrimination necessarily involve discrimination because of the employee's sex.

Justice Alito's dissent, joined by Justice Thomas, offered a more granular refutation of the majority's opinion. He claimed the majority badly misinterpreted Title VII, arguing, like Justice Kavanaugh, no one in 1964

⁷² See *id.* at 1754-55 (Alito, J., dissenting); *id.* at 1822-23 (Kavanaugh, J., dissenting).

⁷³ Cf. *id.* at 1764 (Alito, J., dissenting) ("There may be cases where traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other.").

⁷⁴ *Id.* at 1828 (Kavanaugh, J., dissenting).

⁷⁵ *Id.* at 1829 (arguing the women's movement and gay rights movement were separate).

⁷⁶ *Id.* at 1829 (Kavanaugh, J., dissenting) (noting Congress has never defined sex discrimination to include sexual orientation discrimination in any statutes).

⁷⁷ *Id.* at 1823 n.1.

⁷⁸ See *id.* at 1829-34.

⁷⁹ *Id.* at 1833 ("In sum, all of the usual indicators of ordinary meaning – common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court – overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.").

⁸⁰ *Id.* at 1830 (noting Congress treats sexual orientation discrimination separate from sex discrimination in statutes).

believed sex discrimination encompassed sexual orientation discrimination or transgender discrimination.⁸¹ He suggested Congress' failed attempts to amend Title VII to include sexual orientation discrimination and transgender discrimination suggest those forms of discrimination do not necessarily involve sex discrimination under Title VII.⁸² He may have been mistaken. Attempts to amend Title VII to include sexual orientation discrimination and gender identity discrimination indicate Congress realizes courts have not treated those forms of discrimination as sex discrimination. It does not necessarily indicate members of Congress believe sexual orientation and transgender discrimination are unrelated to sex discrimination. The members supporting the amendment may believe courts have wrongly excluded such discrimination from sex discrimination coverage. Congress has amended employment statutes to fix the Supreme Court's perceived interpretive errors on multiple occasions.⁸³

Justice Alito addressed the majority's argument that sexual orientation discrimination and gender identity discrimination necessarily involve discrimination because of the employee's sex.⁸⁴ He argued discrimination because of sex differs from sexual orientation discrimination and gender identity discrimination because an employer can discriminate in these ways without knowing the sex of the person subject to discrimination. A refusal to hire based on sexual orientation can apply to gay women and gay men. Therefore, that form of discrimination cannot be sex discrimination.⁸⁵ If the employee's sex is irrelevant to the employer, he argued, there can be no sex discrimination.⁸⁶

Justice Alito questioned the but-for hypothetical on which the majority opinion rested. The majority noted discrimination because of sex occurs if a male employee who loves a woman is retained while a man who loves a man is fired based on his sexual orientation. Justice Alito argued the employees in the example differ with respect to both sex and sexual orientation, making them not similarly situated with respect to all relevant

⁸¹ *Id.* at 1755 (Alito, J., dissenting) ("If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation – not to mention gender identity, a concept that was essentially unknown at the time.").

⁸² *Id.* at 1755.

⁸³ *See, e.g.*, The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁸⁴ *Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting) ("Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex.").

⁸⁵ *Id.* (noting the military's long-time, but since abandoned, policy of refusing to enlist gay and lesbian soldiers).

⁸⁶ *Id.* at 1759 (Alito, J., dissenting).

characteristics other than their biological sex.⁸⁷ Presumably, Justice Alito's preferred comparison would be between a male employee and a female employee with the same sexual orientation who both are fired because of their sexual orientation, proving they were not fired because of their sex but because of their sexual orientation.⁸⁸ His analysis merely restates the argument that sexual orientation discrimination is not precisely the same as sex discrimination – a claim the majority did not make.

Justice Alito's argument that an employment practice that limits both sexes equally cannot constitute sex discrimination triggered an interesting discussion regarding bans on interracial marriage. The statute in *Loving v. Virginia*,⁸⁹ the case that deemed anti-miscegenation laws unconstitutional, discriminated against Blacks and Whites by stopping Whites from marrying Blacks just as it stopped Blacks from marrying Whites.⁹⁰ Justice Alito's analysis suggests that statute and other bans on interracial relationships do not necessarily constitute or involve race discrimination. However, courts have ruled that firing an employee because the employee is in an interracial marriage or is associated with someone of a different race involves racial discrimination.⁹¹

Recognizing the implications of his argument, Justice Alito suggested bans on interracial relationships are grounded in race discrimination in a way that sexual orientation discrimination is not grounded in sex discrimination.⁹² He asserted bans on interracial marriage rest on White supremacy. He may be correct that improper racial motivation likely undergirds most interracial relationship bans, but various people have argued that race mixing is bad of itself, regardless of whether the races are deemed fundamentally equal or fundamentally unequal.⁹³ Nonetheless, his argument is not germane. A ban on same-sex relationships is related to sex in the same way a ban on

⁸⁷ As the majority notes, if the similarly situated test requires this, sex stereotyping also would not be considered to involve sex discrimination. *Id.* at 1748-49 (majority opinion).

⁸⁸ *Id.* at 1762 (Alito, J., dissenting) ("[I]f the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.").

⁸⁹ 388 U.S. 1 (1967).

⁹⁰ *Id.* at 4.

⁹¹ See *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008); *Parr v. Woodmen of World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986).

⁹² *Bostock*, 140 S. Ct. at 1765 (Alito, J., dissenting) ("Discrimination because of sexual orientation . . . cannot be regarded as a form of sex discrimination on the ground that it applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women.").

⁹³ For discussions recognizing the argument that some proponents of race mixing bans may claim the bans need not be grounded in White supremacy, see *Loving*, 388 U.S. at 11 n.11 (noting antimiscegenation statutes that may be intended to protect the racial integrity of all races would still violate the Fourteenth Amendment's bar on racial classifications); LINDA C. MCCLAIN, WHO'S THE BIGOT (2020) (discussing controversies in the same-sex marriage and interracial marriage conflicts in the last several decades).

interracial relationships is related to race. The key is what the ban does – discriminate based on race – regardless of the motivation of the entity that installed the ban.⁹⁴

Justice Alito also dismissed the argument that sexual orientation discrimination and gender identity discrimination are like sex stereotypes that can trigger sex discrimination liability. Sex stereotyping requires conformity to the employer's expectations of behavior and other characteristics of someone of the employee's sex. Justice Alito claimed sex stereotypes are not necessarily unlawful under Title VII.⁹⁵ He argued sex stereotyping is evidence of sex discrimination only when a trait that would be valued in employees of one sex would not be valued in employees of another sex, noting:

The [Price Waterhouse v. Hopkins] plurality observed that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but "can certainly be evidence that gender played a part." And the plurality made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision."⁹⁶

Justice Alito appears to have misread *Price Waterhouse*. *Price Waterhouse* was a mixed motives case in which the issue was how to analyze causation when both legitimate reasons and illegitimate reasons may have affected the ultimate employment decision.⁹⁷ The *Price Waterhouse* plurality appeared to believe sex stereotyping is a form of sex discrimination.⁹⁸ The issue was not whether sex stereotyping involves sex discrimination – it does – but whether sex stereotyping caused the ultimate employment decision.⁹⁹

⁹⁴ The *Loving* Court suggests the use of race to discriminate, not the motivation underlying the use, is the key issue. 388 U.S. at 11 ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.").

⁹⁵ *Bostock*, 140 S. Ct. at 1764 (Alito, J., dissenting) (arguing sex stereotypes and sex discrimination are distinct).

⁹⁶ *Id.*

⁹⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989) (plurality opinion) ("We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.").

⁹⁸ *Id.* at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

⁹⁹ If an employer could prove it would have made the same decision regardless of sex stereotyping, the employer would prevail. *Id.* at 252-53 ("The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.").

Justice Alito eventually discussed and dismissed the majority's reliance on *Oncale*, *Phillips*, and *Manhart*, suggesting the cases are unremarkable. He summarized *Oncale* as merely holding "that a male employee who alleged that he had been sexually harassed at work by other men states a claim under Title VII."¹⁰⁰ He asserted that *Phillips* and *Manhart* "held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex."¹⁰¹ Justice Alito's quick dismissal of these cases suggests it is unclear why the cases ever needed to be decided by the Supreme Court.

Justice Alito also noted Title VII sex discrimination refers to the biological male and female, not to sexual activity.¹⁰² That might suggest sexual orientation discrimination – which arguably relates to sexuality and potential sexual activity – is unrelated to sex discrimination. However, sexual activity and sex discrimination have been linked in Title VII doctrine. Much of sexual harassment law developed around the assumption of sexual attraction.¹⁰³ Early harassers claimed harassment based on sexual attraction was not sex discrimination.¹⁰⁴ Some courts agreed until other courts began to view sexual attraction to be intertwined with the victim's sex.¹⁰⁵ Nonetheless, *Bostock* is not based on how biological sex intertwines with sexual activity, but on an employer's refusal to delink an employee's sex from the employee's employment.

C. Implications

The *Bostock* majority and dissents agree that Title VII bars sex discrimination against women and men as groups,¹⁰⁶ bars sex-plus discrimination – discrimination against subgroups of women and men that encompasses sex plus other characteristics,¹⁰⁷ and bars discrimination against individual employees because of the employee's sex, even when no

¹⁰⁰ *Bostock*, 140 S. Ct. at 1774 (Alito, J., dissenting).

¹⁰¹ *Id.* at 1774-75.

¹⁰² *Id.* at 1765-66; see also *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) ("The clear meaning of 'sex' under Title VII is not 'intercourse,' but gender.").

¹⁰³ For a fuller discussion of the genesis of sexual harassment law, see Henry L. Chambers, Jr., *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 737-40 (2002).

¹⁰⁴ See *id.* at 739-40 (discussing genesis of sexual harassment claim).

¹⁰⁵ See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67-68 (1986). Of course, much harassment is not based on sexual activity or sexual desire, but rather the desire to remove women from a specific workplace.

¹⁰⁶ Discrimination against women or men as a group is only allowable under Title VII when sex is a bona fide occupational qualification. See *Int'l Union United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991).

¹⁰⁷ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam).

others of the same sex are subject to discrimination.¹⁰⁸ They disagree regarding sex-related employment practices that could harm both women and men. The majority suggests Title VII bars an employer from linking characteristics related to an employee's sex to the employee's employment, making whether both sexes can be harmed by the employment practice irrelevant to Title VII liability. The dissents deem Title VII to focus on whether the employer treats people of different sexes differently.¹⁰⁹ Briefly considering three issues relevant to sex discrimination – pregnancy discrimination, equal opportunity harassers, and transgender bathrooms – might help illuminate how differently the majority and dissents interpret Title VII.

1. Pregnancy discrimination

Since the Pregnancy Discrimination Act of 1978 (PDA)¹¹⁰ was passed, pregnancy discrimination has been defined as discrimination because of sex under Title VII.¹¹¹ In *General Electric Co. v. Gilbert*, prior to the PDA's passage, the Supreme Court decided pregnancy discrimination did not necessarily constitute sex discrimination.¹¹² Pregnancy discrimination was deemed actionable sex discrimination when it was used as a pretext to discriminate against women¹¹³ and potentially actionable when it triggered a disparate impact on women.¹¹⁴ Those two visions from the PDA and *Gilbert*, pregnancy discrimination as necessarily involving sex discrimination and pregnancy discrimination as potential sex discrimination, track the *Bostock* majority and dissents' visions of sex discrimination.

In the absence of the PDA, the *Bostock* majority and dissents could reach different conclusions regarding whether pregnancy discrimination necessarily involves sex discrimination. The *Bostock* majority's approach would suggest pregnancy discrimination necessarily involves sex

¹⁰⁸ See generally *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (involving harassment of one man in an all-male workplace).

¹⁰⁹ See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) ("[T]he question in this case boils down to the ordinary meaning of the phrase 'discriminate because of sex.'").

¹¹⁰ 42 U.S.C. § 2000e(k).

¹¹¹ What qualifies as pregnancy discrimination is still subject to interpretation. See generally *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015); Chambers, *supra* note 10.

¹¹² 429 U.S. 125, 134 (1976) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." (quoting *Geduldig v. Aiello*, 417 U.S. 484 (1974))). In that case, the employer's disability plan excluded payments for disabilities caused by pregnancy. See *id.* at 127.

¹¹³ *Id.* at 135 (pregnancy discrimination could constitute sex discrimination if it was used as pretext for sex discrimination).

¹¹⁴ For a fascinating pre-PDA discussion of pregnancy and disparate impact under Title VII, see *Women in City Gov't United v. City of New York*, 563 F.2d 537, 540-41 (2d Cir. 1977).

discrimination. Any rule specifically related to an employee's pregnancy would necessarily link employment or employment benefits to an employee's sex. The capacity to bear a child or act of carrying a child is fundamentally related to biological sex. Any differential treatment of an employee based on the pregnancy-related rule would appear to involve discrimination because of an employee's sex under Title VII.

However, pregnancy discrimination can be tricky. When the harm of a pregnancy-related rule falls on pregnant employees, the sex-based discrimination is easy to see because all victims are women. Similarly, before same-sex marriage was allowed, the harm of pregnancy discrimination that fell on employees with pregnant spouses fell exclusively on men.¹¹⁵ Today, treating pregnancy discrimination that affects an employee's pregnant spouse as discrimination because of the employee's sex is less obvious because that harm may fall on female or male employees.¹¹⁶ Nonetheless, if the pregnancy-related rule links employment and the employee's ability or inability to bear or carry a child, it is discrimination because of sex.

Conversely, the dissents' arguments suggest pregnancy discrimination does not constitute discrimination because of sex until it is used to discriminate against women or against men. Pregnancy discrimination that treats women poorly would constitute sex discrimination. Pregnancy discrimination that treats only men poorly would constitute sex discrimination. Pregnancy discrimination that treats non-pregnant people, which includes women and men, poorly would not constitute sex discrimination. That would suggest pregnancy discrimination is sex discrimination under Title VII only because it has been defined as such through the Pregnancy Discrimination Act.

2. The Equal Opportunity Harasser

The conundrum of the equal opportunity harasser has been extant for years.¹¹⁷ The question is whether an equal opportunity harasser should double an employer's harassment liability or eliminate it. The *Bostock* majority's position that sexual orientation discrimination doubles the employer's sex discrimination liability because it involves discrimination against both female and male employees suggests the equal opportunity

¹¹⁵ See *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983).

¹¹⁶ Giving extra benefits to pregnant employees does not invariably harm men and may not violate Title VII. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285-86 (1987). If extra benefits are to be considered harm, providing them harms all non-pregnant people, which includes men and women.

¹¹⁷ See *generally* *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000).

harasser doubles liability. The dissents' position that an employment practice that harms both female and male employees is not necessarily sex discrimination suggests the equal opportunity harasser may trigger no liability.¹¹⁸

Sexual harassment doctrine makes the issue tricky. Sexual harassment based on sexual attraction was not initially treated as sex discrimination under Title VII. Defendants claimed no sex discrimination occurred because only one woman in the workplace was harassed.¹¹⁹ Eventually, plaintiffs argued sexual harassment was the ultimate sex-plus claim in which the victim suffered discrimination because of her sex because the harasser (presumed to be heterosexual) would never have treated a man that way. Even though biological sex and sexual activity are separate, in the harassment context, the desire for sexual activity relates to the harassed employee's sex.

In a situation involving an equal opportunity harasser, the harasser sexually harasses men and women equally and in the same manner. If sexual harassment is deemed sex discrimination because the harasser presumably would not treat the harassed employee the same way if the harassed employer were of a different sex, the presumption breaks down in an equal opportunity harasser case. If the harasser treats members of all sexes in the same manner, the basis of the harassment is arguably not the employee's sex. That would suggest no harassment liability. The *Bostock* dissenters would likely agree.

The *Bostock* majority might consider a different question: Was the employee's employment linked to the employee's sex? Sexual harassment occurs when the harasser links employment to a willingness to be harassed sexually. From the harassed employee's perspective, his biological sex or sexuality has been linked to his employment whether or not employees of a different sex are subject to the same behavior. The *Bostock* majority might agree.

The issue is tricky not only because it rests on how discrimination because of the individual's sex is interpreted, but because the definition of discrimination depends on what a court believes Title VII is supposed to do: eliminate employment practices aimed at one sex or eliminate workplace decision making based on an employee's sex. The issue is what makes sexual harassment unlawful. If sexual harassment is unlawful because the employer ties an employee's sex to employment, equal opportunity harassers should double the liability. If sexual harassment is unlawful because an employee is

¹¹⁸ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020); *Id.* at 1758-59 (Alito, J., dissenting).

¹¹⁹ For discussion of early sexual harassment cases, see Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 112-20 (2004).

treated differently than employees of another sex, equal opportunity harassers might eliminate liability.

3. Transgender Bathrooms

Justice Alito discussed transgender issues and bathrooms; the majority avoided the issue:

The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex.¹²⁰

Justice Alito's point is ironic because the trans person who is barred from using their bathroom of choice would surely appear subject to discrimination based on that person's biological sex. Compare two women, one transgender and one not, standing at the door to a women's bathroom. If the employer has a policy that requires an employee to use the bathroom consistent with the employee's assigned sex at birth, biological sex is the only reason the trans woman may be barred from walking through the door. The question is whether the discrimination is justified, not whether the trans woman is subject to discrimination because of her sex. The same is true regarding Justice Alito's concerns about trans women competing in women's sporting events.¹²¹ He would likely argue transgender discrimination may be related to sex but is not sex discrimination because it does not seek to treat women more poorly than men or vice-versa.

The majority would likely rest on the comparator example. Doctrinally, the majority would likely argue discrimination based on biological sex is the point of transgender discrimination. Not only does transgender discrimination not delink sex from employment, it fully links an employee's biological sex and the employee's employment.

The *Bostock* majority does not suggest sexual orientation discrimination, transgender discrimination, and sex discrimination are equivalent.¹²² It suggests sexual orientation discrimination or transgender discrimination necessarily entails discriminating against an employee because of the employee's sex. The question is whether an individual employee has been treated differently because of the employee's sex, not whether a differential treatment of the sexes – the dissent's definition of sex

¹²⁰ *Bostock*, 140 S. Ct. at 1778-79 (Alito, J., dissenting).

¹²¹ *Id.* at 1779-80.

¹²² *Id.* at 1746-47 (majority opinion) ("We agree that homosexuality and transgender status are distinct concepts from sex. But . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.").

discrimination – has visited harm on an individual employee. The question is answered by asking whether a similarly situated employee of a different sex would have been treated differently. If so, an employee has been subject to discrimination because of the employee's sex.

The majority and dissents have fundamentally different visions of what discrimination because of an employee's sex entails and what Title VII does. The majority views Title VII as requiring an employee's sex be delinked from the employee's employment. The dissenters view Title VII sex discrimination primarily as the differential treatment of the sexes. The dispute may look like a culture war, but it is an interpretive war.

III. THE CROWN ACT AND REDEFINING DISCRIMINATION

The CROWN Acts – proposed federal legislation and similar legislation enacted in some states – treat discrimination based on hair texture or racialized hairstyles as discrimination because of an employee's race or national origin.¹²³ Though the Acts may appear to address a niche issue, employment disputes about hair, hairstyles, and grooming are not new.¹²⁴ Cases involving general grooming and hair length,¹²⁵ hairstyles associated with Black people,¹²⁶ and facial hair associated with Black men¹²⁷ exist, with employees often losing. An employer's power to regulate how employees appear at work is broad but may narrow significantly if CROWN Acts are enacted at the federal level and in a significant number of states.¹²⁸

Courts interpret Title VII to provide employers significant latitude to structure grooming standards. Employers are given such latitude because grooming is thought to reflect employee choice rather than immutable

¹²³ The CROWN Act has passed in several states. See *Creating a Respectful and Open World for Natural Hair*, CROWN ACT, <<https://www.thecrownact.com/about>> (last visited Sept. 10, 2021).

¹²⁴ The workplace regulation of what is on one's head can cross non-obvious boundaries. Grooming codes can have similar effects on different groups. See D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 333-34 (2013) (discussing similar effects grooming codes can have on Black women's hairstyles and Muslim women's wearing of the hijab).

¹²⁵ See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975).

¹²⁶ See, e.g., *EEOC v. Catastrophe Mgmt. Sols.* 852 F.3d 1018 (11th Cir. 2016); *Rogers v. Am. Airlines, Inc.* 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

¹²⁷ See, e.g., *Bailey v. Metro Ambulance Serv., Inc.*, 992 F.3d 1265 (11th Cir. 2021); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).

¹²⁸ Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 770-71 (2014) (discussing employer prerogative and grooming codes); see also Ronald Turner, *On Locs, "Race," and Title VII*, 2019 WIS. L. REV. 873, 876 ("Unfortunately, and unsurprisingly, some employers . . . have conditioned the employment of Black workers on their compliance with workplace no-locs policies and practices.").

characteristics employees cannot change easily, if at all.¹²⁹ Grooming standards that explicitly treat employees differently based on sex may comply with Title VII. However, when those standards impose unequal burdens on women and men, they may be unlawful under Title VII. *Willingham v. Macon Telegraph Publishing Co.*¹³⁰ and *Jespersen vs. Harrah's Operating Co., Inc.*¹³¹ provide context for how Title VII applies to employer grooming standards.

Willingham focused on immutability when applying Title VII to grooming and hair length standards.¹³² The policy in that case required public-facing employees "be neatly dressed and groomed in accordance with the standards customarily accepted in the business community."¹³³ The employer interpreted the policy to bar long hair on men, with the plaintiff denied employment because his hair was too long.¹³⁴ The court argued equal employment opportunity bars discrimination based on factors an employee cannot change – immutable characteristics – rather than factors an employee can easily change.¹³⁵ In finding hair length not an immutable characteristic, the court ruled hair length could not be the basis of a sex-based Title VII claim unless Congress broadened and clarified Title VII's reach.¹³⁶ The employer's actions did not violate Title VII.¹³⁷ The court suggested the plaintiff should decide whether he was willing to cut his hair for the job rather than turn to employment discrimination laws.¹³⁸

The *Willingham* Court did not apply a standard but-for Title VII analysis to the employer's practice. The grooming code's interpretation involved clear sex discrimination. It denied employment to men with long

¹²⁹ See Hoffman, *supra* note 18, at 1489 (defining immutability to include characteristics that are accidents of birth or "so fundamental to personal identity that workers effectively cannot and should not be required to change it for employment purposes"); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014) ("[W]e can define immutability as a trait that is so central to our sense of self that it would be extremely difficult to change.").

¹³⁰ 507 F.2d 1084 (5th Cir. 1975).

¹³¹ 444 F.3d 1104 (9th Cir. 2006).

¹³² 507 F.2d at 1091 (suggesting discrimination on the basis of immutable characteristics is the core concern for equal employment opportunity); *id.* at 1092 ("Private employers are prohibited from using different hiring policies for men and women only when the distinction used relate to immutable characteristics or legally protected rights.").

¹³³ *Id.* at 1087.

¹³⁴ *Id.*

¹³⁵ The issue ostensibly relates to preferences – the employee's and the employer's. See *id.* at 1091 ("[A] hiring policy that distinguishes on . . . grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.").

¹³⁶ *Id.* at 1090-91.

¹³⁷ *Id.* at 1092.

¹³⁸ *Id.* at 1091 ("If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.").

hair while allowing employment for women with long hair. A mechanical application of a but-for causation test to the policy in *Willingham* demonstrates why the practice constitutes discrimination because of sex.¹³⁹ If a woman can have long hair and a similarly situated man cannot, the man has been discriminated against because of his sex. If the policy were interpreted to require men have short hair but barred women from wearing short hair, the policy would discriminate because of sex against women who wished to wear short hair.¹⁴⁰

The *Willingham* Court's approach to Title VII coverage, that discrimination that links a mutable characteristic with an immutable characteristic is not subject to Title VII scrutiny, is inconsistent with the Supreme Court's approach to sex stereotyping. In *Price Waterhouse v. Hopkins*, plaintiff Ann Hopkins claimed she was denied a partnership because she was a woman who acted in stereotypically male fashion.¹⁴¹ During her partnership evaluation process, she was advised to act more femininely to secure a partnership at Price Waterhouse.¹⁴² Hopkins could have altered her behavior – a mutable characteristic – but she was not required to do so. Under the *Willingham* Court's approach to Title VII, sex stereotyping would not necessarily be subject to scrutiny.¹⁴³ Yet, if sex stereotyping was the reason Hopkins did not make partner, Title VII was likely violated.¹⁴⁴ That is sensible. Employers could avoid Title VII scrutiny easily if adding a mutable characteristic to an immutable characteristic were sufficient to defeat a Title VII claim.

Rather than focus on immutability when analyzing a grooming policy, *Jespersen* considered the relative burdens on the sexes that may stem from a grooming policy.¹⁴⁵ The court ruled grooming standards violate Title VII

¹³⁹ Courts have not generally applied a simple but-for test in grooming cases. See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis under Title VII*, 98 GEO. L.J. 1079, 1081 (2010) ("Courts have repeatedly applied the undue burden test – a special hybrid, disparate treatment-disparate impact test used in sex-discrimination grooming cases – and upheld policies that allow women to wear their hair long but require men to wear their hair short. These courts reason that such hair-length policies impose different but essentially equal burdens on men and women.").

¹⁴⁰ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1742 (2020) (suggesting men and women can be subject to sex discrimination pursuant to a policy that sex stereotypes both groups).

¹⁴¹ See 490 U.S. 228, 234-35 (1989) (plurality opinion) (discussing opinions of partners that suggested sex stereotyping existed).

¹⁴² Assuming a change in behavior is all that was required, *Willingham* might suggest the sex stereotyping in *Price Waterhouse* was not discrimination because of sex.

¹⁴³ Justice Alito suggested that in *Bostock*. See *Bostock*, 140 S. Ct. at 1764 (Alito, J, dissenting) (arguing sex stereotyping does not always constitute sex discrimination).

¹⁴⁴ For a brief discussion of *Price Waterhouse*, see Chambers, *supra* note 10, at 783-85.

¹⁴⁵ *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) ("The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender.").

only if they "unreasonably burden one gender more than the other."¹⁴⁶ The comprehensive grooming policy in the case addressed appearance, jewelry, hairstyles, make-up, clothing, nail care, and dress.¹⁴⁷ It was sex neutral in some respects and explicitly sex specific in others.¹⁴⁸ The only portion of the policy the plaintiff challenged required female bartenders wear makeup while prohibiting male bartenders from doing so.¹⁴⁹ The court found that part of the policy did not constitute an unequal burden.¹⁵⁰

Though *Willingham* and *Jespersen* analyze grooming policies differently, they center on what an employer should be allowed to force an employee to do to get or keep a job. If the employee can easily do what the employer asks, the employment action resulting from the refusal is not deemed serious enough to violate Title VII, even if it explicitly relates to the employee's sex. That appears inconsistent with *Bostock's* core principles.¹⁵¹

The structure courts have used to analyze sex specific grooming standards is critical to understanding how courts analyze grooming standards that appear to discriminate because of race. How courts analyze grooming standards that bar or are interpreted to bar racialized hairstyles explains why the CROWN Acts are important. However, understanding the CROWN Acts' importance requires understanding how courts have applied Title VII to bans on hairstyles associated with Black people generally and Black women specifically. After discussing that issue, this Part considers the CROWN Acts and their possible implications.

A. Title VII and Black Hair

Title VII and Black hair have had an uneasy relationship. *Rogers v. American Airlines*¹⁵² and *EEOC v. Catastrophe Management Solutions*,¹⁵³ two cases decided thirty-five years apart, illustrate the difficulties. The cases conclude that policies barring hairstyles worn predominantly by Black people generally do not constitute race discrimination. They suggest employers must provide Black people an option regarding how to wear their

¹⁴⁶ *Id.* at 1110. Many circuits use the unequal burdens test. *Id.*

¹⁴⁷ *Id.* at 1107.

¹⁴⁸ *Id.* at 1109 ("[T]his case involves an appearance policy that applied to both male and female bartenders, and was aimed at creating a professional and very similar look for all of them. All bartenders wore the same uniform. The policy only differentiated as to grooming standards.").

¹⁴⁹ *Id.* at 1112 (noting that plaintiff's challenge to the makeup portion of the grooming policy did not trigger a claim of sex stereotyping).

¹⁵⁰ *Id.* at 1111 (noting the employer's "Personal Best" policies do not burden women more than men).

¹⁵¹ For a fuller discussion of the issue, see Justin Blount, *Sex-Differentiated Appearance Standards Post-Bostock*, 31 GEO. MASON U. CIV. RTS. L.J. 217 (2021).

¹⁵² 527 F. Supp. 229 (S.D.N.Y. 1981).

¹⁵³ 852 F.3d 1018 (11th Cir. 2016).

hair naturally and generally cannot restrict Afros – a natural, minimally styled hairstyle typically conducive to Black hair.¹⁵⁴ However, employers often can restrict other hairstyles predominantly worn by Black people without violating Title VII's race discrimination prohibition.

In *Rogers*, plaintiff Renee Rodgers challenged her employer's grooming policy barring all-braided hairstyles.¹⁵⁵ Rodgers's employer, American Airlines, deemed her cornrows to violate its policy.¹⁵⁶ Rodgers sought declaratory relief against the policy's application, claiming it violated Title VII and other laws.¹⁵⁷ The district court granted American Airlines' motion to dismiss.¹⁵⁸

The court decided the case as one involving a policy against all-braided hairstyles, not a policy banning cornrows. The policy was treated as generally applicable to all races and sexes equally, not as specifically barring hairstyles predominantly worn by Black people.¹⁵⁹ Ignoring (or ignorant of the fact) that cornrows had been donned by Black people for centuries,¹⁶⁰ the court indicated cornrows were popularized by Bo Derek, a White actress in the movie *10*.¹⁶¹ It then suggested the employer's policy might be lawful even

¹⁵⁴ See *Rogers*, 527 F. Supp. at 232 (suggesting bans on Afros, which ostensibly result merely from natural growth, "would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics"); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans against Black Women's Natural Hair* in EEOC v. Catastrophe Management Solutions, 71 U. MIAMI L. REV. 987, 991 (2017); 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 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 263, 267 (2020) ("The inherent difference between [Afros and other Black hairstyles], according to the courts, is that twists, braids, and locs can be changed to comply with an employer's policy. A Black person could opt to wear a wig, a hairpiece, relax their hair, or cut their hair off. Conversely, a Black person could wear an afro as it is 'the product of natural hair growth.'"). But see Onwuachi-Willig, *supra* note 139, at 1086 n. 33 (noting only short Afros may be fully protected).

¹⁵⁵ The case is miscaptioned. See Greene, *supra* note 124, at 347 n.73 (noting the court misspelled Rodgers's name).

¹⁵⁶ *Rogers*, 527 F. Supp. at 231.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 234.

¹⁵⁹ *Id.* at 232 ("[T]he grooming policy applies equally to all members of all races and plaintiff does not allege that an all-braided hair style is worn exclusively or even predominantly by black people.").

¹⁶⁰ See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379 ("Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American – black American – as sweet potato pie.").

¹⁶¹ *Rogers*, 527 F. Supp. at 232 (noting plaintiff did not wear cornrows until "after the style had been popularized by a white actress in the film '10'"); Greene, *supra* note 154, at 998 ("Despite the long history of African descendant women wearing braids as a matter of course, the court implied that Bo Derrek [sic] popularized cornrows, thereby devaluing Ms. Rodgers' claim that for Black women, cornrows are imbued with deep cultural and personal meaning.").

if it explicitly banned cornrows,¹⁶² if the ban was not aimed at an employee's race.¹⁶³

The court found that banning a hairstyle does not generally constitute actionable racial discrimination because a hairstyle is not immutable.¹⁶⁴ Banning Afros might constitute racial discrimination because that could be interpreted as banning natural hair growth rather than banning a hairstyle.¹⁶⁵ However, the court treated Rodgers's cornrows as a chosen hairstyle unrelated to her race that could be altered fairly simply rather than a hairstyle dictated in part by her natural hair growth and texture.¹⁶⁶ *Rogers* tracks a narrow vision of race discrimination that asks if a policy constitutes racial discrimination in the abstract rather than whether a policy's application discriminates against an employee because of the employee's race.

EEOC v. Catastrophe Management Solutions (CMS),¹⁶⁷ tracks *Rogers*. In that case, the employer CMS rescinded a customer services representative job offer to plaintiff Chastity Jones when Ms. Jones refused to cut her short dreadlocks and restyle her hair to comply with the employer's interpretation of its grooming policy.¹⁶⁸ The grooming policy read: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]"¹⁶⁹ Why CMS interpreted its policy to exclude Jones's short dreadlocks is not clear.¹⁷⁰ Nonetheless, its human resources manager indicated the interpretation was not specific to Jones, noting Black male

¹⁶² *Rogers*, 527 F. Supp. at 232 ("In any event, an all-braided hairstyle . . . is not a product of natural hair growth but of artifice.").

¹⁶³ The court allowed *Rogers* to proceed on her claim that the policy had been enforced in a discriminatory manner. *Id.* at 234.

¹⁶⁴ *Id.* at 232.

¹⁶⁵ *Id.* (suggesting banning an Afro might be discriminatory "because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics"); Onwuachi-Willig, *supra* note 139, at 1131 ("Courts have rejected employer restrictions on Afro hairstyles as discriminatory, reasoning that such restrictions measure Blacks 'against a standard that assumes non-Negro hair characteristics.'").

¹⁶⁶ *Rogers*, 527 F. Supp. at 232 ("An all-braided hair style is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.").

¹⁶⁷ 852 F.3d 1018 (11th Cir. 2016).

¹⁶⁸ *Id.* at 1020-21.

¹⁶⁹ *Id.* at 1022.

¹⁷⁰ Defendant's human resources manager may have been concerned about how plaintiff's dreadlocks might look in the future. *See id.* at 1021 (suggesting dreadlocks "tend to get messy").

applicants had also been required to cut their dreadlocks to secure employment.¹⁷¹

The EEOC sued, arguing CMS intentionally discriminated based on race. It argued dreadlocks constitute a natural hairstyle for Black people, indicating the style is suited to Black hair and associated with Black people.¹⁷² The EEOC also appeared to argue CMS's decision to keep its interpretation of the policy constituted intentional discrimination once CMS was aware of the policy's disparate impact on Black employees.¹⁷³ The EEOC's argument appeared to confuse the court, which suggested the EEOC's case was better brought as a disparate impact case involving unintentional discrimination that disproportionately harms a minority group.¹⁷⁴

The *CMS* court opined that race discrimination focuses on the immutable characteristics of race, deeming dreadlocks a hairstyle that is not an immutable characteristic.¹⁷⁵ It noted: "Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices."¹⁷⁶ Though the EEOC's Compliance Manual deems discrimination based on cultural practices that track race to be racial discrimination, the court gave the EEOC's guidance virtually no deference.¹⁷⁷ The court affirmed the trial court's grant of defendant's motion to dismiss, though it did so while recognizing and sympathizing with the plaintiff's "intensely personal decision" to decline to cut her hair.¹⁷⁸

The *Rogers* and *CMS* courts found hairstyles do not involve an immutable characteristic. Given how the courts appear to define immutability, they are correct.¹⁷⁹ Hairstyles can be changed in a manner race

¹⁷¹ *Id.* at 1021-22; *see also* Turner, *supra* note 128, at 874 (discussing male high school wrestler who was required to cut his dreadlocks or forfeit his match).

¹⁷² *Catastrophe Mgmt. Sols.*, 852 F.3d at 1024 ("The [EEOC's] arguments . . . are that dreadlocks are a natural outgrowth of the immutable trait of black hair texture; that the dreadlocks hairstyle is directly associated with the immutable trait of race; that dreadlocks can be a symbolic expression of racial pride; and that targeting dreadlocks as a basis for employment can be a form of racial stereotyping.").

¹⁷³ *Id.* at 1024 (noting the EEOC argued the effects of the policy were discriminatory as part of disparate treatment claim).

¹⁷⁴ *Id.* at 1024-26. It is not clear that a disparate impact case would have survived the immutability doctrine.

¹⁷⁵ *Id.* at 1021.

¹⁷⁶ *Id.* at 1030.

¹⁷⁷ *Id.* at 1031 (noting *Skidmore* deference requires only as much deference to agency opinion as court believes the opinion deserves).

¹⁷⁸ *Id.* at 1035 ("Ms. Jones told CMS that she would not cut her dreadlocks in order to secure a job, and we respect that intensely personal decision and all it entails. But, for the reasons we have set out, the EEOC's original and proposed amended complaint did not state a plausible claim that CMS intentionally discriminated against Ms. Jones because of her race.").

¹⁷⁹ Courts may deviate from pure immutability analysis on occasion. *See* Robinson & Robinson, *supra* note 154, at 267 ("Courts have used the immutability standard to find that Black hairstyles like twists,

or sex cannot. However, hairstyles may not be simple to change, are intensely personal, and may reflect an individual's racial identity.¹⁸⁰ The issue arguably should not be immutability. It should be whether requiring an employee to cut their racialized hairstyle to conform to the employer's desires should be deemed discrimination because of the employee's race. Nonetheless, *Rogers* and *CMS* essentially update the court's advice in *Willingham* – change your hair or find another job – but without considering *Jespersen's* undue burdens doctrine.

Failing to consider the undue burdens issue matters. Courts could argue the unequal burdens doctrine should apply only to grooming standards that involve explicit discrimination. Grooming standards that bar everyone in a workplace from wearing certain hairstyles may not involve explicit discrimination. However, that limitation is inappropriate. If a policy interpretation banning racialized hairstyles functionally treats Black women and White women differently with respect to grooming, a racial discrimination analysis with respect to the burdens placed on Black women vs. White women (and Black men vs. White men) pursuant to the policy would appear appropriate.

In the absence of a required unequal burdens inquiry, courts may ignore the effects grooming policies have on Black women.¹⁸¹ Much of the scholarly analysis on *Rogers* and *CMS* focuses on intersectionality and harm to Black women.¹⁸² Intersectionality argues discrimination against Black women is different than race discrimination against Black people (which would include Black men) or sex discrimination against women (which would include White women).¹⁸³ However, in the wake of *Bostock*, race

braids, and locs are mutable. Curiously, these same courts have consistently found that afros, another traditionally Black hairstyle, are not.”).

¹⁸⁰ See Onwuachi-Willig, *supra* note 139, at 1130 (“[A]lthough hair does not represent a person's personality or dignity, it, along with skin color, is often a factor used to determine one's racial identity in this country.”).

¹⁸¹ Alesha Hamilton, *Untangling Discrimination: The Crown Act and Protecting Black Hair*, 89 U. CIN. L. REV. 483, 501 (2021) (“Most African Americans – especially African American women – must turn to chemical straighteners and other harsh processes to achieve similar hair texture and style as their white counterparts.”); Turner, *supra* note 128, at 904 (“The straightening of hair burdens Black women given the related financial costs, time expended on making and maintaining that change, and exposure to toxic chemicals.”). The policies may cause stigmatization which may trigger a change in behavior. See Greene, *supra* note 154, at 991 (“[I]n lieu of donning twists, locks, braids, or afros, many African descendant women don straightened hairstyles to avoid the stigmatization of their natural hair, which often engenders harassment, unfavorable performance evaluations, as well as loss or denial of employment.”).

¹⁸² See, e.g., Onwuachi-Willig, *supra* note 139, at 1087 (“[T]his Essay argues that courts should extend the application of the special ‘undue burden’ test from gender discrimination cases to race discrimination cases and apply the test intersectionally in hairstyle-related grooming code cases brought by black women.”).

¹⁸³ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (“[T]he intersection of racism and sexism

discrimination should be the frame through which to view racialized hairstyle discrimination. Comparing Black women to White women through an unequal burden lens should be the way an employee can prove she has been subject to discrimination because of her race.

Functionally, Black women may be substantially limited in how they may style their natural hair. The allowable limits on Black hairstyles in *Rogers* and *CMS* would appear to permit employers to restrict many Black women with long natural hair to a long Afro hairstyle. Grooming codes that ban employees from wearing many hairstyles typically associated with Black people may not impose equivalent limitations on Black and White employees. That triggers an unequal, race-based burden on Black women that should face Title VII scrutiny.¹⁸⁴

Employers may claim to want their workers to look professional. That desire should not provide a free pass to interpret "professionalism" in a manner that has significant negative effects on Black women.¹⁸⁵ Claims of a lack of professionalism leveled at Black hairstyles are problematic.¹⁸⁶ "Professional" hair has little substantive meaning and is essentially an open invitation to critique a Black employee's hair. When grooming standards embed White beauty standards and are interpreted to exclude Black hairstyles, the employer is functionally suggesting Black women who style their hair consistent with their race and sex are not professional.¹⁸⁷ Without more detailed rules on professionalism, claims of lack of professionalism become veiled commands to Black women to wear their hair short or to attempt to mimic White women's hair. Grooming standards are typically framed for White women who will generally have little problem meeting

factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately."); Greene, *supra* note 154, at 995 ("Black women have contended employers' regulation of their natural hair constitutes a form of race discrimination or discrimination at the intersection of race and gender in violation of Section 1981 and/or Title VII.").

¹⁸⁴ See Onwuachi-Willig, *supra* note 139, at 1082 ("Many courts (and many people) in our society would find the notion of forcing white women to abide by a grooming policy that does not acknowledge or recognize the structure and texture of their hair ludicrous. Yet, antidiscrimination case law imposes just such a requirement on black women by upholding implicit demands that they straighten their hair and then maintain that hairstyle through various processes.").

¹⁸⁵ See Robinson & Robinson, *supra* note 154, at 265 ("Black women have suffered damage to their financial stability and their health and well-being due to being forced to kowtow to Eurocentric norms about professionalism and beauty.").

¹⁸⁶ However, they may not be uncommon. See Greene, *supra* note 154, at 990-91 ("African descendant women have endured a barrage of offensive, stereotypical perceptions, denigrating their naturally textured hair as 'messy,' 'unkempt,' 'dirty,' and 'unprofessional,' not only during the hiring process, but also during the course of their employment.").

¹⁸⁷ See Robinson & Robinson, *supra* note 154, at 265 ("[O]ur current legal framework, indeed our entire society, operates to consistently perpetuate whiteness, including white people, white beauty, and white standards, as the norm. We see this reproduced across institutions and coded as 'professional' or 'businesslike,' especially in the workplace.").

them.¹⁸⁸ Conversely, forcing Black women and Black hair to conform to an employer's image of a White female professional hairstyle can impose serious financial, emotional, physical, and discriminatory burdens on Black women.¹⁸⁹

A comparison of Black male employees to White male employees may trigger similar issues, though Black men as a group may not shoulder the same burden as Black women as a group.¹⁹⁰ Grooming standards tend to allow Black men to cut their hair short or grow their hair into a short Afro, yielding less concern about making one's hairstyle appear generally acceptable.¹⁹¹ However, any individual Black male employee who wants to wear his hair as long as his White male colleague may be allowed to wear his hair will have concerns regarding limitations on hairstyles. Restrictions on dreads, braids, twists, and similar hairstyles are functional restrictions on long hair for Black men or can be restrictions on moderate-length hair styled in a manner appropriate for such hair.¹⁹²

Grooming codes tend to police Black people's hair in a manner White people's hair is not policed.¹⁹³ Policing Black hairstyles is policing self-expression, which current doctrine allows an employer to do because self-expression – the hairstyle – is not immutable. However, policing Black hairstyles arguably is race discrimination, either because the policing relates directly to race or the policing necessarily limits Black employees in how they can style their hair more significantly than it limits White employees in how they can style their hair. Limits on Black hairstyles should be less about

¹⁸⁸ See DEBORAH L. RHODE, *THE BEAUTY BIAS* 69 (2010) ("Minorities are held to idealized norms that favor Anglo-American features and to grooming requirements that are unevenly applied."). Dean Onwuachi-Willig suggests that if White women were required to wear their hair in Black hairstyles, courts would quickly decide such a policy constituted race discrimination. See Onwuachi-Willig, *supra* note 139, at 1081-83.

¹⁸⁹ For a recent discussion of pressures exerted on Black women to straighten their hair to secure employment, see Shannon Cumberbatch, *When Your Identity Is Inherently "Unprofessional": Navigating Rules of Professional Appearance Rooted in Cisheteronormative Whiteness as Black Women and Gender Non-Conforming Professionals*, 34 J. CIV. RTS. & ECON. DEV. 81 (2021).

¹⁹⁰ Black men do have a burden regarding facial hair, with many Black men unable to be clean shaven without risking a medical condition. See, e.g., *Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).

¹⁹¹ Some argue Black men are already protected. See Onwuachi-Willig, *supra* note 139, at 1086 ("[T]his Essay argues that antidiscrimination law fails to address intersectional race and gender discrimination against black women through hair-based grooming restrictions because it does not recognize braided, twisted, and locked hairstyles as black-female equivalents of Afros, which are protected as racial characteristics under existing law.").

¹⁹² That can be problematic for men who wear their hair in that manner. See BERT ASHE: *MY DREADLOCK CHRONICLES* (2015).

¹⁹³ See Greene, *supra* note 154, at 992 (noting *Catastrophe Management Solutions* "sanctions the 'hyper-regulation' of Black women's bodies via their hair in contemporary American workplaces."); Onwuachi-Willig, *supra* note 139, at 1086 (on hair: "Even in our 'post-racial' society, where race has purportedly become meaningless, significant phenotypical differences between Blacks and Whites are ignored in ways that reify the subordinate status of black women in the workplace").

how hard changing a hairstyle is and more about whether Black employees should be required to conform to the employer's desires that are related to an employee's race but are unrelated to the employee's performance.¹⁹⁴ The CROWN Acts address that issue.

B. The CROWN Acts

The various CROWN Acts treat discrimination based on racialized hairstyles somewhat differently. The proposed federal CROWN Act of 2021 adds racialized hairstyles to Title VII's list of protected characteristics. Other CROWN Acts, including Virginia's enacted version, redefine race discrimination to include discrimination based on racialized hairstyles.¹⁹⁵ Those differences may be small or may be significant.

1. Federal CROWN Act of 2021

The proposed federal CROWN Act deems discrimination based on hair texture or hairstyle unlawful when that hair texture or hairstyle is commonly associated with a particular race or national origin:

It shall be an unlawful employment practice for an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual, based on the individual's hair texture or hairstyle, if that hair texture or that hairstyle 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).¹⁹⁶

The federal Act simply adds hair texture and racialized hairstyles to the list of bases on which an employer cannot discriminate.¹⁹⁷ That is a limited expansion of Title VII.

¹⁹⁴ See Greene, *supra* note 154, at 990 ("Countless employers have instructed African descendant women to cut off, cover, or alter their naturally textured hair in order to obtain and maintain employment for which they are qualified."); Turner, *supra* note 128, at 904 ("With regard to hair straightening, a Black worker who could comply with a demand that she change her natural hair, including her locs, should not be required to do so as a condition of obtaining or retaining employment.").

¹⁹⁵ The legislation amended the Virginia Human Rights Act and is codified at VA. CODE ANN. § 2.2-3901.D.

¹⁹⁶ CROWN Act of 2021, S. 888, 117th Cong. § 6.

¹⁹⁷ The Congress may believe this discrimination is already covered under race and national origin discrimination but wants to make clear it is covered. This negates the claim that Congress is adding these provisions because it does not believe it is already addressed in Title VII. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755-56 (2020) (Alito, J., dissenting) (suggesting Congress' attempts to add sexual orientation discrimination to Title VII suggests that it views sexual orientation as fully distinct from sex discrimination).

The findings portion of the Act indicates those supporting the Act believe discrimination because of racialized hairstyles is already covered by Title VII but that courts have misinterpreted Title VII, leaving such hairstyles uncovered by Title VII.¹⁹⁸ The bill also notes an employee's hairstyle does not affect an employee's ability to do a job.¹⁹⁹ That suggests a disparate impact claim based on discrimination based on racialized hairstyles discrimination²⁰⁰ may not afford a business necessity defense typically necessary to justify a disparate impact.²⁰¹

The suggestion in the CROWN Act that Title VII already bars discrimination based on racialized hairstyles could have important implications if the federal CROWN Act passes. That belief could inform how courts define race discrimination under Title VII. The CROWN Act's passage would suggest Congress believes Title VII already protects mutable characteristics that are intertwined with immutable characteristics. Given that, the immutability doctrine could be reinterpreted and minimized. That would be sensible because the immutability doctrine is court made and does not appear in Title VII.²⁰²

¹⁹⁸ S. 888 §2(a)(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.) 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.").

¹⁹⁹ *Id.*

²⁰⁰ *Id.*; see also H.R. REP. NO. 116-525, at 2 (2020) (suggesting that policies barring natural or protective hairstyles constitute race or national origin discrimination and impact African Americans as a group).

²⁰¹ 42 U.S.C. § 2000e-2(k); see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (initially describing the disparate impact theory); see also *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 781 (2015) (Thomas, J., concurring in part, dissenting in part) (noting that "disparate impact claims . . . involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity" (citation omitted)).

²⁰² That might allow Title VII to fully serve its purpose. See Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 772 (1987) ("This Article asserts that decisions predicated on the distinctions between mutable and immutable characteristics misconstrue Title VII's plain language and purposes."); Greene, *supra* note 154, at 1036 (noting the immutability doctrine limits challenges to discrimination regarding mutable characteristics that are related to race); Turner, *supra* note 128, at 901 (suggesting immutability analysis limits protection against race discrimination).

2. Virginia Act

Virginia's version of the CROWN Act deems discrimination related to traits associated with race, including hair discrimination, to be race discrimination.²⁰³

The terms "because of race" or "on the basis of race" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists.²⁰⁴

The law redefines a type of discrimination (race discrimination) to include a related form of discrimination (trait discrimination). Some may argue the amendment merely adds hair texture, hair type, and some racialized hairstyles to the list of prohibited forms of discrimination, but the statute may do more than that.

Virginia's CROWN Act arguably alters how race discrimination should be defined. By defining race discrimination to include trait discrimination, the statute invites courts to identify other traits historically associated with race. Hair texture, hair type, and protective hairstyles are merely examples of protected traits under the statute. Hair texture and hair type are immutable; protective hairstyles arguably are not.²⁰⁵ The General Assembly may intend to treat protective hairstyles as nearly immutable. If so, and if "trait" is defined narrowly, the statute is a small tweak regarding immutability. If "trait" is defined broadly to include many mutable characteristics that are associated with race, immutability may be deemed inconsistent with Virginia race discrimination law.²⁰⁶

That raises the possibility that immutability should be deemed eliminated with respect to the other forms of discrimination under the

²⁰³ Virginia law does not treat hairstyle discrimination as national origin discrimination, though national origin discrimination is addressed in the statute. VA. CODE ANN. § 2.2-3902 (making national origin discrimination unlawful in some circumstances).

²⁰⁴ *Id.* § 2.2-3901.D.

²⁰⁵ See Hoffman, *supra* note 18; see also Greene, *supra* note 154, at 999 (discussing courts' claim that hairstyles are mutable); Vanessa Simpson, Note, *What's Going On Hair? Untangling Societal Misconceptions that Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection*, 47 SW. L. REV. 265, 269-74 (2017) (discussing differences between natural texture and protective styles for immutability analysis).

²⁰⁶ Whether Virginia has imported the immutability doctrine into its employment discrimination jurisprudence is not clear. Some commentators argue the immutability requirement should be abandoned. See Robinson & Robinson, *supra* note 154, at 287 ("Courts should retire the immutability requirement and replace it with a new standard – that Title VII protects Black people who were terminated because of racial stereotypes about their hair, including whether or not their hair is professional, or racial stereotypes rooted in what constitutes professional or business-like hair.").

Virginia Human Rights Act. If race discrimination includes discrimination because of traits associated with race, sex discrimination could be thought to include discrimination because of traits associated with sex. That would be a significant change.

C. Implications of CROWN Acts

The CROWN Acts' effects could be modest or substantial. If the Acts are interpreted narrowly, they may merely ensure employers cannot discriminate against employees donning racialized hairstyles. If so, the Acts' effects would be important but modest. That approach would expand coverage for Title VII but would not significantly change how Title VII and state statutes are interpreted. Conversely, if the Acts are interpreted broadly, their effects could alter fundamentally how discrimination is defined.

1. Narrow reading

The CROWN Acts could be read narrowly merely to add racialized hairstyles to the list of protected characteristics under relevant statutes. The reading might be appropriate if the approving legislatures believe racialized hairstyle discrimination is a special style of discrimination. The legislatures that pass CROWN Acts may believe racialized hairstyles that are connected to hair texture are functionally immutable because they are closely tied to race, an immutable characteristic.²⁰⁷ They may also believe discrimination based on racialized hairstyles is close enough to racial discrimination to be treated as racial discrimination. If so, adding racialized hairstyles to the list of protected characteristics, and going no farther, is a sensible and modest expansion of Title VII coverage.²⁰⁸

The expansion of coverage is important, even if modest. At its narrowest, the CROWN Acts limit employers from requiring Black people to forgo hairstyles conducive to and protective of their hair to get a job. That matters substantively because a hairstyle can be mutable self-expression intimately related to race.²⁰⁹ An employer may believe a hairstyle is mutable

²⁰⁷ Commentators have long noted hairstyles have mutable and immutable characteristics. *See, e.g.*, Caldwell, *supra* note 160, at 83 ("Unlike skin color and other physical manifestations of race, hair has both mutable and immutable characteristics.").

²⁰⁸ This would be similar to Congress adding pregnancy discrimination to sex discrimination under the Pregnancy Discrimination Act of 1978. *See* 42 U.S.C. § 2000e(k) (defining sex discrimination to include pregnancy discrimination).

²⁰⁹ *See* RHODE, *supra* note 188, at 100 ("Prohibitions on grooming styles associated with particular groups, such as Afros, cornrows, or dreadlocks pose special concerns; at issue may be core values of cultural identity.").

and subject to employer regulation; an employee may suggest a hairstyle is sufficiently tied to immutability that it should not be subject to employer regulation. Allowing the employee freedom to choose a hairstyle from among hairstyles amenable to Black hair is important. The broader the choice Black employees have in styling their hair, the less unequal the burdens Black employees would shoulder under most grooming policies.

The expansion of coverage matters procedurally. An employee would need only prove the employer has discriminated based on a racialized hairstyle. The employee need not prove the employer banned racialized hairstyles as its intended method to discriminate because of race. The latter requires significantly more evidence. The change the CROWN Acts may bring may reflect the belief that discrimination against racialized haircuts necessarily involves discrimination because of race or constitutes disparate impact because of race.²¹⁰

2. Broad reading

A broad interpretation of the CROWN Acts would also be reasonable. The Acts can be interpreted broadly to bar discrimination regarding traits related to race regardless of immutability. Racialized hairstyles are a combination of the mutable and immutable.²¹¹ Natural hair texture and structure are immutable. However, given the range of hairstyles a person can have, the choice of a specific hairstyle is mutable. The legislatures that pass the CROWN Acts may believe hairstyles are mutable but are important enough that employees should not be required to change them to get or keep a job.

If the legislatures that pass the CROWN Acts believe hairstyles are a mutable trait that should be protected under employment discrimination statutes nonetheless, the statutes could be interpreted to significantly relax or eliminate the immutability doctrine. That would require a reevaluation of immutability's role in the interpretation of discrimination.²¹² Doing so would

²¹⁰ That would track the EEOC's position in *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018 (2016). See *id.* at 1024-25 (discussing EEOC's litigation position and noting aspects of both disparate treatment and disparate impact claims embedded in the argument that the grooming policy barring racialized hairstyles violated Title VII).

²¹¹ See Turner, *supra* note 128, at 903 (noting distinction courts have made between "immutable 'black hair texture' and a mutable 'black hairstyle'").

²¹² For a discussion of the genesis of the immutability doctrine, its lack of inevitability, and possible reasons to discard it, see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 408-15 (1997).

be reasonable because the immutability doctrine is problematic.²¹³ Immutability is tied to employer primacy. An employer can require an employee change any easily changeable or mutable factor regarding the employee's appearance to gain or retain employment, even if that factor is important to the employee and irrelevant to performance.²¹⁴ Under current law, such a demand is deemed to reflect employer prerogative rather than discrimination.²¹⁵

Eliminating immutability would allow courts to consider a key question: What should an employer be allowed to force an employee to do to get or keep a job? The CROWN Acts can be interpreted to mean an employer should not be allowed to force an employee to give up race-linked traits to get or keep a job. That is significant. Over time, courts would need to determine which traits are sufficiently linked to race to be protected by the statutes; the CROWN Acts could be the first step in the process.

3. Open issues

The CROWN Acts leave multiple open questions that might help determine how broadly or narrowly the Acts will be or should be interpreted. For example, the CROWN Acts discuss hairstyles but do not appear to address facial hair. Black facial hair often has the same texture as hair from the head and can affect the appearance of a person's beard.²¹⁶ Beards, even when long and uncut, are not invariably associated with a specific race or national origin. Nonetheless, a hairstyle coupled with facial hair could be associated with a specific race or national origin.²¹⁷ Whether the CROWN Acts would apply under those circumstances is not clear.

The CROWN Acts appear to focus on ensuring employees can style their hair in a manner consistent with natural hair growth. Whether an

²¹³ Immutability may not mean what courts think it means. See Robinson & Robinson, *supra* note 154, at 267 ("The immutability standard is premised on the idea that race is a biological, fixed characteristic. However, research indicates that it is not.").

²¹⁴ See Robinson & Robinson, *supra* note 154, at 267 ("Under this immutability standard, Title VII only protects characteristics an employee cannot change."); Turner, *supra* note 128, at 894-97 (noting courts often consider immutability and whether a plaintiff can change an attribute the employer wants the plaintiff to change).

²¹⁵ For defense of immutability doctrine and employer prerogative, see Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1418-19 (2014).

²¹⁶ Facial hair may be worn for race-based reasons, religious reasons, or both. See Bailey v. Metro Ambulance Serv., Inc., 992 F.3d 1265, 1269 (11th Cir. 2021) (conflict between religious-based need to wear a goatee and grooming policy that prohibited facial hair other than a moustache); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1114 (11th Cir. 1993) (skin condition associated with race).

²¹⁷ Cf. Goodman v. Money, 180 F. Supp. 2d 946, 947 (N.D. Ohio 2001) (discussing application of prison grooming policy to a Jewish inmate's beard and sidelocks); Lovell v. McAuliffe, No. 9:18-CV-0685 (TJM/CFH), 2020 WL 4938165, at *4-5 (N.D. N.Y. July 14, 2020) (same for practicing Rastafarian).

employer that requires its employees to keep their hair in a natural state has violated the CROWN Act by functionally requiring Black women who have straightened their hair to let it go natural is unclear. If the CROWN Act bars such a restriction, the CROWN Act may serve to minimize an employer's ability to regulate its employees' standard hair choices. That may be sensible, but it limits employer discretion at the heart of employment at-will.

Some CROWN Acts explicitly deem discrimination regarding hairstyles commonly associated with a particular race to be race discrimination. Hairstyle discrimination against a Black person wearing a hairstyle commonly associated with Black people is covered by the CROWN Act. How the statute would address the specifics of the hair of biracial or multiracial people is not clear. Hair texture can vary widely for people who identify as Black.²¹⁸ The hair of some biracial people may be barely more amenable to Black racialized hairstyles than prototypically White hair. Of course, the cultural significance of a wearing a Black racialized hairstyle may be a substantial part of the cultural identity of a Black biracial person.²¹⁹

The CROWN Acts are unclear on whether hairstyle discrimination against a White person wearing a hairstyle commonly associated with Black people is covered.²²⁰ Consider the example from *Rogers v. American Airlines*²²¹ of Bo Derek, a White woman, wearing cornrows. The CROWN Act could be limited to discrimination against hair style or texture when the hairstyle or texture is commonly associated with the individual's race or national origin, not merely associated with a specific race. Whether that is the proper interpretation of the CROWN Acts is not clear.

The CROWN Acts may carry multiple intertwined messages. The Acts may mean that employers can regulate hairstyles, but the regulation must be race-neutral and cannot functionally link an employee's race to an employee's employment. They could mean employers must allow employees to choose among a reasonable range of hairstyles based on an employee's race and hair texture. When an employer limits the options inside of that range, the employer may believe it is merely exercising its discretion to run its business as it sees fit and has not trespassed on an immutable

²¹⁸ See Cumberbatch, *supra* note 189, at 105 ("Black people's hair comes in a vast variety of textures, lengths, thicknesses, colors and styles.").

²¹⁹ When a hairstyle may be commonly associated with multiple minority races, how the CROWN Act would apply is unclear.

²²⁰ See Robinson & Robinson, *supra* note 154, at 286 (noting that courts have suggested that a race-based challenge to a grooming policy banning traditionally Black hairstyles could lead to White women who wear such hairstyles to challenge the policy based on race).

²²¹ 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

characteristic.²²² The employee may believe those limitations restrict the employee's choices based on an immutable characteristic – race. Since Title VII was enacted, the courts have largely sided with the employer. The CROWN Act may be the beginning of a trend of legislatures and eventually courts siding with the employee.

More broadly, the Acts may suggest that employers should regulate their employees' hair as little as possible because hairstyle is often related to race and is usually related to identity.²²³ Hair choices that are unrelated to race or immutable hair texture, including coloring choices, may be subject to regulation but should be part of employer hair regulation that is as narrow as possible.²²⁴ The more broadly the CROWN Acts are interpreted, the larger the clash over employer discretion in the workplace will be.

IV. A BURGEONING RIGHT TO SELF-EXPRESSION AT WORK?

Bostock v. Clayton County and the CROWN Acts provide a path toward a right to self-expression in the workplace. Both broaden the definition of discrimination by focusing on whether an employee has been subject to discrimination as an individual rather than as a member of a group. *Bostock* analyzes Title VII discrimination from the perspective of the individual employee. If the employee's sex is used in part to affect the employee's employment, even if members of all sexes can be similarly affected, the employer has discriminated against the employee because of the employee's sex. The CROWN Acts add racialized hairstyles to the list of protected characteristics under relevant employment statutes. The Acts clarify that an employer may discriminate against an individual employee because of race by discriminating against the employee because the employee chooses to wear a racialized hairstyle, a mutable trait linked to immutable aspects of race. That allows or encourages courts to rethink whether the immutability doctrine should be abandoned, possibly leading to

²²² See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (finding that the employer's standard grooming policy which applied to both male and female bartenders focused upon company uniformity and professionalism, even though the policy prohibited men from wearing long hair or makeup and required women to apply makeup and wear their hair down and styled, teased, or curled).

²²³ See Cumberbatch, *supra* note 189, at 105 ("[T]he hair type most phenotypically associated in closest proximity with visible Blackness is thick, tightly coiled, gravity defying, afro-like tresses when worn loosely, as well as braided, twisted and loc'd Afrocentric styles."); Greene, *supra* note 154, at 350 ("Grooming policies . . . which bar Black women from wearing braided hairstyles or forces their covering, divest Black women of complete autonomy over deeply personal, political, as well as pragmatic grooming choices and bespeak a unique sense of identity informed by broader race and sex dynamics.").

²²⁴ Hair coloring decisions, whether to cover gray hair or to dye hair blonde or green, are choices. Indeed, the grooming policy in *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018, 1022 (11th Cir. 2016), barred "excessive hairstyles or unusual colors."

the protection of self-expression related to traits linked to protected characteristics under Title VII and similar employment discrimination statutes.²²⁵

A narrow interpretation of *Bostock* and the CROWN Acts may lead to modest change. *Bostock* could be limited by its approach, which rests on finding similarly situated pairs of employee comparators to identify discrimination. If so, future interpretations of that case may revolve around the proper comparators to use to prove discrimination. The CROWN Acts could be interpreted narrowly to merely add racialized hairstyles to the list of prohibited bases for discrimination. If so, Title VII's coverage expands only modestly.

A broad interpretation of *Bostock* and the CROWN Acts may lead to significant change. *Bostock* can be read to suggest Title VII discrimination generally requires employers to delink an employee's employment from all protected characteristics under Title VII. Given how *Bostock* analyzed sexual orientation discrimination, the new approach could result in employment practices that appear race neutral being interpreted to constitute discrimination because of an employee's race. The CROWN Acts broaden the definition of discrimination to include forms of discrimination based on characteristics related to but different from race. That may result in courts deeming discrimination related to traits associated with any protected characteristic under Title VII to violate the prohibition on discriminating because of the protected characteristic.

When combined, *Bostock* and the CROWN Acts encourage courts to consider requiring employers to delink an employee's employment from any traits associated with the employee's protected characteristics. Title VII protection of those traits would result in a functional right to self-expression related to traits associated with protected characteristics, and could encourage courts to protect self-expression related to an employee's identity. That would significantly broaden Title VII's coverage and could be especially important to workers who have been required to conform in various ways inconsistent with their self-identity to survive and thrive in their workplaces.²²⁶ It also would significantly limit employer discretion to

²²⁵ Many would support its abandonment. See, e.g., Robinson & Robinson, *supra* note 154 (arguing to eliminate the immutability doctrine); Turner, *supra* note 128, at 907 ("[T]he flawed immutability analytic must be interred and no longer applied in Title VII cases involving employers' refusal to employ Black women because of their natural hair or locs, braids, twists, and other hairstyles. Employers should not and must not be allowed to continue to deny employment to Black persons on the basis of their natural hair.").

²²⁶ See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 131-39 (2007) (discussing Title VII and workplace assimilation); Turner, *supra* note 128, at 909 (noting "Black women . . . are eighty percent more likely than other women to change their natural hair to meet workplace

structure its workplace, and chip away at the employment-at-will doctrine. The remaining discussion revolves around what self-expression to protect and how to protect it.

A. Expanding Protection to Self-Expression Generally

Expanding Title VII to protect traits that are related to protected characteristics is not a novel idea. The EEOC tries to protect some of those traits in its definition of some forms of unlawful discrimination.²²⁷ In addition, academics and commentators have suggested Title VII should include protection for such traits.²²⁸ However, how far courts should go in defining and protecting those traits and whether courts should go farther to protect self-expression more generally are open questions.²²⁹

Courts should protect two different but related types of self-expression. First, the expression of traits that are directly linked to immutable aspects of protected characteristics should be protected. For example, the CROWN Act protects an employee's decision to wear a racialized hairstyle. It does so because such hairstyles are mutable in that they can be changed, but are linked directly to hair texture, an immutable aspect of a protected characteristic. Hair texture affects which hairstyles an individual can easily wear. Which hairstyle an employee chooses to wear among reasonable hairstyles is the employee's choice.

Second, courts should interpret Title VII to protect self-expression linked to the employee's identity when it relates to protected characteristics under Title VII.²³⁰ Protection for this type of self-expression is broader than protection for racialized hairstyles and similar traits shaped by an employee's immutable characteristics. However, an employee's choices regarding

expectations and social norms, and fifty percent more likely to be sent home from the workplace because of adverse employer judgments about their hair texture and hairstyles"); see also Bayer, *supra* note 202, at 772 (arguing that forced assimilation of any kind should trigger a justiciable Title VII case).

²²⁷ 29 C.F.R. 1606.7 (2020) ("Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin.").

²²⁸ See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); see generally Yuracko, *supra* note 9 (noting how antidiscrimination law may address trait discrimination).

²²⁹ See Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395, 409 (2018) (noting we should rethink whether discrimination based on traits highly correlated with protected characteristic should be actionable).

²³⁰ Some argue the protection should be rights based rather than equality based. See Moldovan, *supra* note 1, at 730 (arguing "one's sense of self" should be protected because "it is an authentic expression of his identity" not because it is tied to a protected characteristic); Ramachandran, *supra* note 6, at 20 ("Finally, I conclude the Article with a plea to start treating the freedom of dress seriously, not just because of its race, sex, gender, and religious saliency and not just because it is a kind of speech or art. Instead, it is time to start taking it seriously in its own right.").

identity are important.²³¹ They are intensely personal and are guided by the employee's sense of self.²³²

Deciding what self-expression should be protected in this area may be tricky. For example, racial and cultural self-expression may be similar but not identical. Racial expression relates directly to a protected characteristic; cultural expression arguably relates indirectly to a protected characteristic. Nonetheless, an employer's limitation on cultural self-expression may implicate racial self-expression. Self-expression is not currently protected by courts, but such protection is consistent with the principles that animate the CROWN Act. Protected self-expression could include self-expression regarding dress, appearance, adornment, language,²³³ or more.²³⁴ Limiting how an employer can restrict these manifestations of self-expression would be a significant step forward.²³⁵

The key question is: What aspects of an employee's identity should the employee be forced to give up to secure or retain employment given Title VII's bar on certain forms of discrimination? An employee should not be required to avoid self-expression that is directly related to immutable characteristics the employee cannot change. An employee also should not be required to avoid completely mutable self-expression related to the employee's identity when that identity relates to protected characteristics under Title VII, even though the employee's expression may resemble choice more than compunction.²³⁶ Of course, protecting the employee's choice clashes with employer prerogative.

²³¹ See *RHODE*, *supra* note 188, at 99 ("The way individuals present themselves to the world often implicates core values and cultural identity.").

²³² See generally Ramachandran, *supra* note 6.

²³³ See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) ("The employees argue that denying them the ability to speak Spanish on the job denies them the right to cultural expression. It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges."); *Lopez v. Flight Servs. & Sys., Inc.*, 881 F. Supp. 2d 431, 439-40 (W.D.N.Y. 2012).

²³⁴ See Ramachandran, *supra* note 6, at 13 ("Freedom of dress is the right to choose the hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry, and other adornments that make up the public image of our sometimes private persons."); Rich, *supra* note 11, at 1139-40 ("[T]his Article argues that courts should abandon the current definitions of race and ethnicity under Title VII that exempt from protection 'voluntary' aspects of racial and ethnic identities – what I call 'race/ethnicity performance.' Race/ethnicity performance is defined as any behavior or voluntarily displayed attribute which, by accident or design, communicates racial or ethnic identity or status. It covers racially and ethnically coded indicia such as hairstyles and other aesthetic choices, as well as dialect, language choice, and accent.").

²³⁵ See *Garcia*, 998 F.2d at 1487 (noting Title VII allows employers to restrict self-expression).

²³⁶ See Ramachandran, *supra* note 6, at 61 ("One might counter my argument with the claim that whether or not we feel choices about our appearance are important or meaningful, we should live with the consequences of those choices in the private realm.").

B. Reasonably Protecting Self-Expression

Courts should extend Title VII protection to self-expression stemming directly from immutable traits and mutable self-expression related to identity. However, the different types of self-expression may call for different levels of protection. Self-expression related to immutable traits probably should be protected more comprehensively than mutable self-expression related to identity. The protection given to each style of self-expression should relate to how much discretion in running a workplace the employer should be required to forgo.

Traits and self-expression linked to immutability should be fully protected by Title VII just as typical discrimination aimed directly at an employee's protected characteristics is protected. Such self-expression is protected because it is similar to the core discrimination the statute is meant to prohibit. As such, it should be protected just as core discrimination in the statute is protected. A court should bar an employer from regulating such self-expression unless the expression interferes with the employee's job or is subject to a bona fide occupational qualification.²³⁷

Self-expression that is related solely to the employee's identity arguably can reasonably be protected less fully than self-expression that dovetails with immutable characteristics. That does not suggest fully mutable, identity-based self-expression is unimportant. Any protection for it belies that. However, such self-expression focuses more on how the employee wants to live life rather than how immutable aspects of the employee's being forces the employee to live. Protection for that type of self-expression could be based on the reasonable accommodation structure that protects religious practices and beliefs under Title VII.²³⁸

The reasonable accommodation structure may be as well-suited to protect self-expression regarding non-religious identity as it is to protect expression regarding religious identity. Multiple commentators have

²³⁷ The bona fide occupational qualification (BFOQ) serves as a defense under Title VII for sex, religion, and national origin claims; race cannot serve as a BFOQ. 42 U.S.C. § 2000e-2(e)(1); 29 C.F.R. §1604.2 (2020) (sex); 29 C.F.R. §1606.4 (2020) (national origin); see Russell K. Robinson, *Casting and Re-Casting: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1 (2007); Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. 2010) (discussing BFOQ and stating "Title VII forbids employers from using race as a BFOQ").

²³⁸ See 42 U.S.C. § 2000e-(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"); see Loren F. Selznick, *Managers and Turbans: Nonverbal Religious Expression in a Diverse Workplace*, 49 U. BALT. L. REV. 183 (2020) (discussing how Title VII protects religious expression); see also EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772 (2015) (noting religious expression is considered a practice when the employee sincerely believes, or her religion requires the expression).

suggested using Title VII's religious accommodation structure to evaluate various discrimination claims.²³⁹ Using a reasonable accommodation structure can be helpful when discrimination is analyzed at the individual level rather than the group level.²⁴⁰ Determining whether an employee has been subjected to discrimination based on the employee's identity or self-expression can be similar to considering whether an employee has been subject to discrimination based on the employee's religious beliefs and practices.²⁴¹

Title VII requires employers accommodate an employee's religious beliefs or practices if doing so is costless to the employer.²⁴² Given how important freedom of religion is in our society, the refusal to accommodate a religious practice when doing so is costless is unjustifiable. Indeed, Title VII suggests the refusal to accommodate religious beliefs and practices should be treated as discrimination because of religion.²⁴³ The employer's traditional discretion to refuse to accommodate almost any employee behavior is less important than the need to accommodate religious practices. The same principle could require an employer to accommodate self-expression based on an employee's identity when it is costless for the employer to do so.

As is the case with race, religion can be core to an employee's sense of self.²⁴⁴ Consider how to analyze a workplace rule barring the wearing of

²³⁹ See, e.g., Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 386 (2008) ("I propose in this Article that employees should be provided space to signal membership in groups protected by Title VII of the Civil Rights Act through employer accommodation of appearance."); Kramer, *supra* note 129, at 897 ("The second major doctrinal change is that sex discrimination law should supplement disparate treatment analysis with a reasonable accommodation protection."); Ramachandran, *supra* note 6, at 63 (positing a right to freedom of dress in the workplace protected through a reasonable accommodation structure).

²⁴⁰ See Kramer, *supra* note 129, at 895 ("Sex discrimination has become highly individualized. Modern sex discrimination does not target all men or all women, nor does it target subgroups of men or women – such as women who are aggressive and men who are effeminate. The victims of modern sex discrimination are particular men and women who face discrimination because they do not or cannot conform to the norms of the workplace.").

²⁴¹ 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

²⁴² See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (requiring employer bear more than "de minimis cost" triggers an "undue burden" that obviates the need to accommodate); Chambers, *supra* note 10, at 793-98 (discussing reasonable accommodation); Kramer, *supra* note 129, at 941 ("A surprisingly low standard, the undue-hardship test is far more favorable to an employer's interests than an employee's.").

²⁴³ See 42 U.S.C. § 2000e(j) (defining religion); *id.* § 2000e-2(a) (prohibiting discrimination because of religion).

²⁴⁴ See Hoffman, *supra* note 18, at 1508 ("Although individuals can theoretically convert to a different religion, many feel that religion is central to their personal identity and that adherence to their religious beliefs and practices is required by higher powers, so that conversion is out of the question.").

jewelry that has been interpreted to ban wearing Christian crosses as necklaces. On its face, the jewelry ban does not entail religious discrimination. However, as interpreted, the rule limits a religious practice that might need to be accommodated. If an employee says she must wear the cross as a religious practice, the wearing of the cross must be reasonably accommodated, and the rule must fall, unless wearing the cross triggers "undue hardship to the conduct of the employer's business."²⁴⁵ If the rule is necessary because necklaces can get caught in machinery and cause harm, the wearing of the cross need not be accommodated. Conversely, if allowing the employee to wear the cross is costless, the employer must accommodate the religious practice.²⁴⁶ Workplace disruption is a cost that may be considered in determining if a reasonable accommodation triggers an undue burden.²⁴⁷

Crosses may be worn by religious people for at least three reasons. First, a person may wear a cross because he believes doing so in a manner that is seen by others is required by his religious commitments.²⁴⁸ The employee may refuse to remove the cross even if that triggers termination. Such devotion arguably is as much about obedience as self-expression. That adherence to the practice should trigger an accommodation process.²⁴⁹ Second, a person may wear a cross because it reminds her of her religion and life's purpose. Wearing the cross is a religious practice that is self-expression related to religious devotion. The person may prefer not to remove the cross but might be willing to do so if an employer so requests. The employer may act lawfully in requesting removal if the employee does not request an accommodation.²⁵⁰ Third, a person may wear a cross because he is a Christian who likes wearing it but does not feel he must wear it. That person might be willing to remove the cross at work if a policy against wearing the cross exists. That practice arguably need not be accommodated if it is not

²⁴⁵ 42 U.S.C. § 2000e-(j); *see also* case cited *supra* note 242.

²⁴⁶ *See* *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) (noting the reasonable accommodation inquiry and undue burden analysis ultimately revolve around whether the employer has acted reasonably).

²⁴⁷ *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (defining cost to employer to include decreased efficiency).

²⁴⁸ *See* *Wilson v. U.S. West Commc'ns*, 58 F.3d 1337, 1339 (8th Cir. 1995) (involving employee wearing anti-abortion button to be a "living witness" against the practice).

²⁴⁹ *Id.* (noting plaintiff's commitment to wearing a button displaying the image of an aborted fetus to constitute religious expression entitled to accommodations process).

²⁵⁰ *See* *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774-75 (2015) (noting a request for accommodation may not be required but may be helpful in proving discrimination if the employer's rule is not aimed at discriminating because of religion). An accommodation request is valuable in the workplace. *See* *Kramer*, *supra* note 129, at 942 ("[T]he real value of reasonable accommodation is that it facilitates a conversation between employers and employees about difference.").

deemed a religious practice.²⁵¹ A good employer should accommodate if doing so is costless, but that is not necessarily required.²⁵²

A distinction between the protection provided to self-expression tied to immutable characteristics and the protection provided to self-expression based on identity is reasonable. The CROWN Acts do not appear to allow the employer to ask an employee why the employee styles his hair as he does or whether the employee is willing to conform to the employer's limitation on hairstyles. A male employee who wears dreadlocks rather than a close-cropped hairstyle may do so for racial, political, stylistic, or other reasons. He may feel compelled to do so because of his race or he may view his hairstyle to be a political statement regarding his desire to wear a natural hairstyle or he may like how dreadlocks look or some combination of the reasons.²⁵³ The Acts suggest an employer policy that bans such a hairstyle is discriminatory whether or not the employee wears his hair for an explicitly race-based reason. The employee appears to be protected whether he wears his hairstyle as a form of racial self-expression or for another reason.²⁵⁴ If the employee's reason is not relevant to the protection for his actions, the employee's desire to make a political statement may trump the employer's desire for all its male employees to have short hair.

Conversely, an employee who seeks to dress in traditional African clothing to reflect his racial identity or national origin would be subject to a reasonable accommodation analysis.²⁵⁵ Some might suggest that such an employer-friendly analysis is inappropriate for important self-expression. However, the same structure applies to important religious identity self-expression. Forcing an employer to consider whether racial identity self-

²⁵¹ *Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 772 (noting religious expression is considered a practice when the employee sincerely believes, or her religion requires the expression).

²⁵² Employers may defend failure to accommodate claims by demonstrating that they are unable to accommodate without suffering an undue hardship. *Id.*; see also cases cited *supra* note 242.

²⁵³ See ASHE, *supra* note 192, at 61 ("[B]lack hair is, indeed, political, meaning the wearing of a particular hairstyle is an implicit – sometimes explicit – political act. . . . White countercultural boomers did the same with the length of their hair."); Caldwell, *supra* note 160, at 384 ("Because the appearance of hair and some of its characteristics are capable of change, the choice by blacks either to make no change or to do so in ways that do not reflect the characteristics and appearance of the hair of whites, represents an assertion of the self that is in direct conflict with the assumptions that underlie the existing social order.").

²⁵⁴ The human resources manager in *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018, 1021-22 (11th Cir. 2016), relayed to the plaintiff in that case a story of male employee required to cut his dreadlocks to get a job at CMS. It is not clear he would have cut them had he not been so required by CMS.

²⁵⁵ See Ramachandran, *supra* note 6, at 62 ("Providing workers with more responsibility and agency over the self-image they bring to the workplace improves the opportunities for meaningful cultural exposure and confrontation. But we must also recognize that the business an employer owns or controls may be the site of other forms of important communication and expression."); see also Kramer, *supra* note 129, at 940 ("The new sex discrimination is all about sex as a practice, capturing the performative side of a person's identity.").

expression can be fairly accommodated without undue hardship is hardly troubling.²⁵⁶ Ultimately, courts would be able to correct the accommodationist structure if it is insufficient or problematic.

C. Implications

Extending protection to workplace self-expression could improve a workplace. Protecting self-expression could encourage employees to be their authentic selves at the workplace.²⁵⁷ Minority and outgroup employees would likely benefit from the protection of identity-based self-expression in the workplace. Those employees have often needed to adopt different persona and attitudes to fit in at work.²⁵⁸ Tolerance and respect for racial and cultural difference borne of the acceptance of self-expression might, over time, eliminate the need to hide one's true self in the workplace. Attempts to assimilate into the dominant culture may persist, especially if promotions continue to be given based on employer preference. However, a workplace that accepts people for who they are and the work they do might become a workplace in which employer preference does not track manifestations of racial, sexual, or other identities. If the workplace atmosphere changes, metrics that value what an employee does rather than who the employee is might lead to more equitable results regarding workplace advancement.²⁵⁹ That could benefit everyone in the workplace. The employer would lose some discretion to regulate the workplace but likely would not lose much discretion that would affect the workplace's productivity.

²⁵⁶ See Moldovan, *supra* note 1, at 731 ("Rather, it advocates for a legal scheme that balances an employer's interest in efficiency and an employee's interest in authentic self-expression, recognizing that Title VII's protected-group scheme does not cover all forms of self-expression that merit protection. Moreover, in striking this balance, it errs on the side of protecting employee authenticity by placing the burden on employers to justify their actions to courts in the face of increased scrutiny.").

²⁵⁷ See RHODE, *supra* note 188, at 99 ("[M]any of these individuals see such self-expression as central to their personal beliefs and religious, racial, or ethnic affiliations.").

²⁵⁸ See Green, *supra* note 239; Moldovan, *supra* note 1, at 709 ("In the context of the workplace, authenticity often runs up against organizational demands to assimilate – to downplay or hide one's true self for the sake of the job."); Yuracko, *supra* note 9, at 366 ("An employer may be perfectly willing, perhaps even eager, to hire blacks who dress, talk, and act in a particular way, but unwilling to hire blacks who deviate from the employer's cultural norm."). Indeed, the need to conform or perform identity in the workplace may not be explicit or policy-based. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (discussing need to perform identity in the workplace to maintain or secure employment status); Cumberbatch, *supra* note 189, at 107 ("Research shows that in corporate environments, Black women who wear their hair in Afrocentric styles are penalized economically, even if not actually in violation of any written policy.").

²⁵⁹ See Kramer, *supra* note 129, at 936 (arguing that accepting self-expression "would bring us closer to the ideal of a workplace culture in which employers make decisions on the basis of merit rather than identity").

Some might argue a movement toward treating characteristics that comport with race as race discrimination could trigger backlash. If dominant groups are allowed to use their position to engage in troubling self-expression, tension may ensue. For example, if racial self-expression allows White employees to express themselves as White people, workplace strife may increase.²⁶⁰ Similarly, if sexual self-expression allows male employees to express toxic masculinity, workplace strife may increase. However, given the American workplace is generally structured around whiteness and maleness, White male self-expression is already largely respected. In such workplaces, acting out in the name of whiteness or maleness may be little more than bad behavior masquerading as self-expression. An employer will need to address that as bad behavior, not as self-expression or the manifestation of identity. Ironically, the reasonable accommodation structure's consideration of and intolerance for workplace disruption might be helpful.

V. CONCLUSION

Bostock v. Clayton County and the CROWN Acts could trigger a burgeoning right to self-expression in the workplace. They provide a doctrinal basis for a shift in Title VII doctrine that allows the protection of an employee's workplace self-expression that relates to an employee's protected characteristics. Though *Bostock* and the CROWN Acts could be considered standard interpretations of sex discrimination and race discrimination that trigger little movement toward allowing people to be their authentic selves at the office, they conversely could be considered redefinitions of Title VII that expand the scope of race, sex, and national origin discrimination broadly enough to require protection for an employee's workplace self-expression that relates to the employee's identity.²⁶¹ If so, employers would be limited in the reasons they could use to restrict such self-expression. That strikes at the heart of the discretion employment at-will

²⁶⁰ See Moldovan, *supra* note 1, at 730-31 ("Protecting behaviors as well as appearances would, at first impression, present a risk of being overbroad. Would such a scheme protect the employee who feels her most authentic when she is cursing profusely or the white supremacist who brings his whole self to work by wearing a shirt with a racist message?").

²⁶¹ This article's structure would not protect employees whose self-expression of identity does not track their protected characteristics. See Green, *supra* note 239, at 398 ("[A] growing number of scholars have gone so far as to argue that an individual's interest in being free from assimilation demands should be recognized as a right to autonomy, liberty, or privacy rather than as an equality concern."); Moldovan, *supra* note 1, at 729 ("The law also ignores authentic expressions of identity that are unrelated to protected group membership – or to any group membership – yet fundamental to an individual's self-image.").

gives employers to fire employees for good reason, bad reason, or no reason at all.

Whether a movement toward allowing workers to be their authentic selves at work has started is unclear. American law might not be ready for substantial change, but it should get ready for a middle ground that allows employees to express themselves in ways directly related to immutable aspects of their protected characteristics, particularly race and sex, that are covered under Title VII. In this era of Black Lives Matter and #MeToo, it is the least American law can do.