ESSAY

Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism

CAMILLE GEAR RICH*

This Essay uses the current controversy over the racial self-identification decisions of former Harvard Law Professor Elizabeth Warren as an occasion to explore incipient cultural and legal anxieties about employers' ability to define race under affirmative action programs. The Essay characterizes Warren's racial self-identification decisions as proof of what I call "elective race," a contemporary cultural trend encouraging individuals to place great emphasis on their "right" to racial self-identification and a related desire for public recognition of their complex racial-identification claims. I argue that our failure to attend to the importance placed on racial self-identification by Americans today places persons with complex racial identity claims at special risk for racial commodification. The Essay further suggests that the Warren controversy gives us an opportunity to rethink the way we conceptualize racial diversity. I argue that we must shift away from the current model, which conflates race and cultural difference, toward a functionalist model that ensures that racial diversity programs are designed to sample for employees that can teach us about the diverse ways that race is actualized and experienced. Specifically, the Essay suggests that diversity initiatives should be based on a functionalist understanding that stresses race's use value as a source of insight into the social process of racialization. Programs structured in this fashion avoid the cultural commodification risks posed by current affirmative action programs, reorient employers away from thin concepts of diversity, and give employers a basis for making principled distinctions between employees' racial-identification claims. The Essay concludes by identifying and defending a three-part inquiry that can be used to identify proper beneficiaries of diversity-based affirmative action programs.

* Associate Professor of Law, University of Southern California, Gould School of Law. Special thanks to Mario Barnes, Kate Bartlett, Kim Buchanan, Zev Eigen, Ron Garet, D. "Wendy" Greene, Ariela Gross, Trina Jones, Nancy Leong, Melissa Murray, Stephen Rich, and the participants in the 2012 Labor and Employment Law Colloquium hosted by Northwestern Law School and Loyola Law School, and the Jerome Culp Research Colloquium, sponsored by Duke Law School.

INTRODUCTION

Over the past fifty years, despite periodic Supreme Court skirmishes, Americans have lived under a negotiated peace with affirmative action programs.[1] Meanwhile, employers have labored in the trenches, attempting to implement affirmative action programs in a principled fashion. Employers' primary chal-

1. For the most recent skirmishes involving affirmative action, see Grutter v. Bollinger, 539 U.S 306, 334–35 (2003) (permitting use of race as a plus factor in broader inquiry under affirmative action program), and Gratz v. Bollinger, 539 U.S. 244, 255 (2003) (rejecting mechanical point system for racial groups in affirmative action plan). These debates have begun again recently as the Supreme Court considered challenges to the current affirmative action program at the University of Texas involving racial "critical mass." *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

lenge in this process is balancing employees' dignity interests in racial self-identification and employers' countervailing interests in making so-called racial "authenticity" judgments to ensure the benefits of these programs are properly allocated.[2] Yet, in the contemporary era, employers charged with this responsibility also risk being seduced by the illicit temptation to try to shape employees' racial-identification decisions in ways that serve the employer's short-term diversity reporting goals. This normally invisible struggle was put on national display when we learned that Harvard Law School seemingly had manipulated the complex racial-identification claims of law professor Elizabeth Warren after Warren disclosed that she was part Native American, based on family lore indicating that she had a biracial Native American grandfather.[3] Given Harvard Law School's reported difficulty in finding minority faculty candidates, the school was quick to bracket Warren's primary claim of whiteness and categorize her as a Native American professor to improve the school's diversity record.[4] Years later, when Warren's Senate campaign led political muckrakers to uncover the tenuous basis for her claim of Native American identity, Warren was quick to point out that she was an innocent victim of Harvard's racial categorization decisions, as she neither sought nor received any affirmative action benefits based on her decision to identify as Native American.[5] However, Warren's caveats did little to assuage the concerns of race scholars about the harms threatened by her case, as they remained concerned about the potential under loosely run affirmative action programs for undeserving recipients to squander

2. Cases challenging affirmative action programs' definitions of race may be more common in the contemporary era than scholars currently believe. *See, e.g.*, United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130, 153 (E.D.N.Y. 2000) (reviewing plaintiff's challenge to allegedly over-inclusive employer definition of Latinos for affirmative action program that was based on racial self-identification); Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1551 (11th Cir. 1994) (same); *cf.* Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 200 (2d Cir. 2006) (reviewing plaintiff's challenge to allegedly overly restrictive definition of Latino used to qualify for minority-owned-business program). For earlier examples, see CATHERINE R. SQUIRES, DISPATCHES FROM THE COLOR LINE: THE PRESS AND MULTIRACIAL AMERICA 75–124 (2007) (discussing similar challenges brought by putative beneficiaries of affirmative action benefits in the 1980s and 1990s).

3. *See* Lucy Madison, *Warren Explains Minority Listing, Talks of Grandfather's "High Cheekbones,"* CBS NEWS (May 3, 2012), http://www.cbsnews.com/8301-503544_162-57427355-503544/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/. Subsequent reports indicate that Warren may not have Native American ancestry at all, as investigators have been unable to identify any documentary proof establishing that she has any Native American ancestor. *See* Kelefa Sanneh, *Elizabeth Warren's Family Ties*, NEW YORKER (June 4, 2012), http://www.newyorker.com/online/blogs/newsdesk/2012/06/elizabeth-warren-who-is-native-american.html (discussing general claim of Native American ancestry).

4. *See* Mary Carmichael & Stephanie Ebbert, *Warren Says She Told Schools of Heritage*, BOS. GLOBE (May 31, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/05/31/elizabeth_warren_acknowledges_telling_harvard_penn_of_native_american_status/?page=2.

5. *See id.* Harvard made much of her Native American background, reportedly touting her as the University's first woman-of-color hire. *See* Hillary Chabot, *Warren: I Used Minority Listing to Share Heritage*, BOS. HERALD (May 2, 2012), http://bostonherald.com/news/politics/view/20220502warren_i_used_minority_listing_to_make_friends.

affirmative action benefits.[6] More importantly, the Warren controversy revealed that there was no protective force that stood between Harvard's strategic diversity interests, its related desire to commodify Warren by race, and Warren's personal interest in racial self-identification. The Warren controversy warns about the ways in which an employee's complex racial self-identification decisions can be drafted to serve an employer's purposes.

Concerns about the Warren controversy intensify when her treatment is contrasted against that of the Malone brothers, two men who in 1977 self-identified as black in their employment applications for the Boston Fire Department and were hired under an affirmative action program.[7] Although the brothers previously had identified as white in their employment applications, they switched their racial identification to black after they failed the Department's standard entrance exam and learned of the more generous standards for blacks under the Department's court-ordered affirmative action program.[8] The brothers felt entitled to make the switch, as family lore suggested that they had a black great-grandmother.[9] In stark contrast to Warren, the Malone brothers were fired by their employer when the tenuous basis for their claims of blackness were discovered, and they were adjudged to have committed racial fraud.[10] The different results in the two scenarios, more than forty years apart, again raise complex questions about how to negotiate employees' interests in "elective" or voluntary self-identification by race, employers' discretionary power to define

6. Scholars' concerns about employers' (and other institutions') strategic use of individuals' racial-identity claims tend to focus on the risk that institutional decision makers engaged in such conduct will squander the benefits offered under their affirmative action programs, either by providing these benefits to undeserving individuals with tenuous racial-identity claims, or by extending benefits to a subpopulation within a racial minority group that is least in need of assistance. *See, e.g.*, Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367 (2006) (using the lens of fraud to discuss the conundrum faced by legal decision makers and administrators when an individual claims a racial identity that does not match how she is regarded in the community); Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html?pagewanted=all&src=pm (discussing symposium remarks from Lani Guinier raising concerns about affirmative action benefits for African Americans being disproportionately allocated to African immigrants and West Indians); *cf.* Taunya Lovell Banks, *Black Pluralism in a Post-*Loving *America*, *in* LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE 155, 162–166 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (narrating various constituencies' authenticity concerns in debate over whether Afro-Cuban law professor Maria Hylton should have been recognized by Northwestern as a black law professor for diversity-hiring purposes).

7. *See* Malone v. Haley, No. 88-339, slip op. (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989) (appeal from Civil Service Commission decision to single associate justice). After the brothers lost, they attempted to have the Civil Service Commission reconsider its decision; when this was unsuccessful, they filed suit, but ultimately their claims were dismissed. *See* Malone v. Civil Serv. Comm'n, 646 N.E.2d 150, 154 (Mass. App. Ct. 1995).

8. *Malone v. Haley*, *supra* note 7, at 2.

9. *Id.* at 2, 18–19.

10. *Id.* at 18–20; *see also* Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1191–92 (2001) (using the term "racial fraud").

racial categories, and authenticity contests under affirmative action.[11] For the fire department employer in *Malone*, just like Harvard in the Warren case, felt entitled to exercise its discretion to determine the character and content of racial categories; however, the fire department felt compelled to employ a stricter, more rigorous, authenticity-based standard that required further testing beyond the Malones' simple act of self-identification.

Students of race look at the two cases and are puzzled. Why is it that Warren's employer would embrace her tenuous claim of Native American ancestry today, but forty years ago the Malone brothers' similar claims about blackness were the basis for termination?[12] What happened in the four decades that separate the two cases to fundamentally change the employer's orientation from one invested in restrictive definitions of race that test the racial authenticity of employees to one prepared to accept the most tenuous act of self-identification as proof positive of racial status? Additionally, as a normative matter, what should we make of the extraordinary power we seem to have given employers to shape and mold an employee's racial-identity claims and draft these claims to their own purposes? Does an employer's strategic approach to racial-identity issues operate on a different moral or ethical plane than the strategic maneuvering of individuals? What role, if any, is there for law to play in negotiating these conflicts?

The cultural context we live in today demands an answer to these questions because we live in a vastly different cultural milieu than that occupied by the Malone brothers four decades ago. As this Essay shows, Americans' understanding of race has changed dramatically in the past forty years, shifting from an approach that places great weight on racial phenotype—the physical characteristics socially associated with a particular racial group—to a model that places primary emphasis on "elective race" or voluntary, racial self-identification decisions.[13] The law's failure to attend to this changed understand-

11. Questions about affirmative action program administrators' discretion to define racial categories have been raised obliquely in earlier Supreme Court cases. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting) (quoting a former dean of admissions at Michigan Law School as saying that "faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities").

12. Although many scholars have analyzed *Malone*, none have considered *Malone* in conjunction with the Elizabeth Warren controversy, namely, as an opportunity to reflect on employers' potentially commodifying maneuvers in defining racial categories. *Cf.* Banks, *supra* note 6, 162–66 (using *Malone* to understand the racial-identity claims of Barack Obama and Afro-Cuban law professor Maria Hylton); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1332–34 (1994) (using *Malone* as opportunity for cross-national comparison to identify ideal method of defining race in affirmative action programs); Kim Forde-Mazrui, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2196–97 (2003) (using *Malone* to explore risk of strategic deployment of race definitions by individuals); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1785 n.319 (1993) (discussing case as evidence of potential racial status interest in nonwhiteness); Kennedy, *supra* note 10, at 1191–93 (using *Malone* to explore risk of strategic deployment of race definitions by individuals).

13. The multiracial movement has successfully convinced government to be more respectful of individuals' racial self-identification decisions. *See* Revisions to the Standards for the Classification of

ing of race threatens new dangers. Without a clear understanding of how to accommodate individuals' interest in elective race, we risk potentially excluding from consideration elective race candidates who are proper beneficiaries of affirmative action or, conversely, deprioritizing the interests of candidates most marginalized by race—phenotypically raced subjects who have little agency in racial-identification matters. To address these dangers, this Essay introduces the concept of elective race as a challenge to the contemporary discourse of post-racialism.[14] Our analysis of elective race will allow us to consider the role voluntary racial affiliation can and should play in diversity-based affirmative action programs.[15]

Indeed, contrary to post-racialists' claim that Americans are being acculturated to ignore race, the sociological literature shows that individuals are actually being acculturated to demand that government and private employers respect and recognize their ever-more-complicated interests in racial self-identification.[16] To document this trend, this Essay explores changes in our views about racial identity over the past forty years and considers the consequences these changes have for the administration of affirmative action programs. After documenting the challenges our changed cultural views about racial-identity pose, the Essay also warns that we must be mindful of the changed incentives of employers or affirmative action administrators in the era of elective race. In prior decades, administrators might have opted for relatively strict definitions of race; however, diversity demands and other factors have caused administrators to prefer flexible, broad definitions for racial categories that can be strategically deployed. Thus far, these changes in the understanding

---

Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788–90 (Oct. 30, 1997) [hereinafter Revised Directive 15] (issuing Office of Management and Budget directive to federal agencies requiring future racial-data-collection efforts to rely on individual's racial self-identification decisions rather than third-party observation). For discussion of the multiracial movement's efforts, see Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 98 & nn.2 & 4, 99 n.7 (1998); Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1749–52 (2003).

14. For further elaboration of the concept of elective race, including its repercussions for individual claimants' Title VII workplace discrimination claims and multiracial families' discrimination claims, see Camille Gear Rich, *Elective Race*, 102 GEO. L.J. (forthcoming June 2014) (discussing role of elective race in workplace disputes); Camille Gear Rich, *Making The Modern Family: Interracial Intimacy and the Production of Whiteness*, 127 HARV. L. REV. (forthcoming Jan. 2014) [hereinafter Rich, *Making The Modern Family*] (discussing role of elective race in interracial families).

15. For examples of the post-racial account, see generally DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995); JOSEPH L. GRAVES, JR., THE RACE MYTH: WHY WE PRETEND RACE EXISTS IN AMERICA (2004).

16. *See, e.g.*, J. Scott Brown et al., *The Greater Complexity of Lived Race: An Extension of Harris and Sim*, 87 SOC. SCI. Q. 411, 413 (2006) (explaining that "changing understandings of race in society have raised the legitimacy of multiracial identities"); Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 222 (2004) (noting that one in forty people describes themselves as multiracial today and that current trends suggest that one in five will describe themselves as multiracial by 2050).

and treatment of race and their implications for affirmative action have gone unexplored.

The primary goal of the Essay is to introduce the concept of elective race and explore its repercussions for the administration of affirmative action programs. After defining and describing the concept of elective race, the Essay offers employers a three-pronged "functionalist" inquiry to address the contemporary challenges posed by this new approach to racial identification. The Essay argues that in today's cultural environment, employers must turn to functionalist inquiries if they are to responsibly negotiate employees' complicated claims about race and ensure that diversity programs remain focused on the role race plays in social subordination. For race-based affirmative action programs are, at bottom, intended to provide equal opportunity to persons *disadvantaged* by race.[17] A properly structured functionalist inquiry that focuses on this question will allow employers to address the diverse and varied ways in which persons are subject to racialization.[18] When understood in this manner, affirmative action's promise is that it gives workers and employers greater insight into the social processes of racialization and requires inquiry into how seemingly facially neutral employment practices feed off of racialization dynamics. The Essay shows that the three-pronged functionalist inquiry offered here will give employers (and society more generally) greater clarity about the core purpose of

17. The first affirmative action programs were explicitly based on an antisubordination logic, and this antisubordination commitment continues to provide the strongest moral and ethical justification for the use of race-based affirmative action programs in the present day. *See* Exec. Order No. 10,925, 27 Fed. Reg. 1977 (Mar. 6, 1961) (creating the first government affirmative action program in order to "promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin"); *see also* President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), *available at* http://www.presidency.ucsb.edu/ws/?pid=27021#ax222h4nU38in. As President Johnson explained:

> You do not wipe away the scars of centuries by saying: Now, you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. . . This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Id. Importantly, in historical documents, the antisubordination logic tends to be represented as an attempt to counter the lingering effects of former de jure race discrimination, whereas the modern antisubordination commitment requires us to be aware of more subtle discrimination patterns such as aversive racism or implicit bias. These modern forms of prejudice, although less apparently virulent, still have significant material effects.

18. The various social processes of racialization are discussed in more detail in Part II. However, reduced to the most simple terms, my arguments are premised on the understanding that the experience of racialization is a product of involuntary racial assignment by third parties and voluntary choices made by the individual, either by publicly claiming a given racial identity or by engaging in certain behaviors (what I call race performance) that mobilize cultural signifiers and practices to signal that the individual is a member of a given racial group. For additional discussion, see Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145–49, 1158–66 (2004).

affirmative action programs, as well as alleviate the danger of race-based commodification and the tension between employees' and employers' interests regarding employees' racial self-identification decisions.

To be clear, this Essay is largely supportive of the current cultural trend encouraging greater respect for individuals' racial self-identification decisions. However, it also shows that there is a need to reclaim so-called authenticity judgments about race and properly name them for what they are: functionalist inquiries that structure and limit employer discretion to define racial categories. Functionalist inquiries about race in the employment context allow the law to consider with precision how race is being "commodified" or used by an employer in a given setting and to set fair terms for what Nancy Leong calls a "racial capital" exchange.[19] Additionally, by proposing substantive standards for this functionalist inquiry—ones that reject essentialist uses of race—the analysis charts a path that allows us to avoid the primary concerns Leong raises about racial commodification.[20] For despite Leong's concerns about the tendency of employers to racially commodify employees while administering diversity-based affirmative action programs, she also recognizes that it is unlikely we can fully extricate race from market pressures.[21] This Essay demonstrates that a properly tailored functionalist analysis will serve as the market control that ensures that diversity programs do not become unintended vehicles for racial stereotyping and subordination.

Antidiscrimination scholars will recognize my approach as a variant of the "sociological approach" to antidiscrimination law articulated by Robert Post, a method that recognizes government's unavoidable and necessary role in shaping racial categories, even as it attempts to blunt their negative social significance.[22] However, unlike Post, in this Essay I fully embrace the functionalist logic of employment discrimination law.[23] I show that functionalist inquiries that explore race's use value do not by definition create stereotyping dangers. Rather, a properly tailored functionalist inquiry that uses race to explore and understand employees' varied experiences of racialization gives us a unique opportunity to redefine diversity in a more effective manner. The processes of racialization—the ways in which individuals are socially categorized by third parties as

19. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156, 2169, 2174 (2013).

20. Leong's concerns, which are discussed in more detail in Part II, focus on three primary harms caused by racial commodification: (1) a dignity-based injury caused by reducing this key aspect of identity to its use value and subjecting it to market exchange; (2) an emotional injury, resulting in resentment by people of color who are alienated by the use of their identity for third-party ends; and (3) a racial-justice-based injury because it encourages institutions to adopt a superficial concept of diversity that is largely appearance driven and distracts from true social reform. *See id.* at 2158–69.

21. *Id.* at 2158.

22. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 32–36 (2000).

23. *See id.* at 16–17 (arguing that functionalism is part of the "dominant conception" of antidiscrimination law and prevents apprehension of the value of a sociological approach to antidiscrimination law).

members of a given racial group—are varied, complex, and independent in nature. I argue that by redesigning diversity initiatives to select for employees who are subject to these diverse experiences of racialization, we can both destabilize race and discourage employers from engaging in racial essentialism.

Part I of the Essay charts our path into the era of "elective race," identifying the demographic, political, and cultural changes that have encouraged Americans to regard the right to racial self-identification as a key dignity interest. This cultural and political shift has occurred during the same period that employers are being required to defend against employees' Title VII and Fourteenth Amendment affirmative action challenges that contest the employers' authority to define racial categories and the qualifications necessary to claim membership in a particular group.[24] Although there is a rich scholarship on affirmative action and voluntary racial identification,[25] no legal scholar has considered the impending conflict between employers' discretionary definitional power over racial categories and the racial-dignity interests of employees influenced by elective-race understandings. I argue that, if employer discretion is left unbounded, employers will exercise broad power to shape race in ways that should give all Americans pause.

Part II revisits the so-called racial-authenticity inquiry conducted in *Malone* to reveal its functionalist foundations and to retool this functionalist logic in ways appropriate for contemporary diversity-based affirmative action programs. I show that by mining the inchoate concepts of race articulated in *Malone*, we gain insight into the diverse range of racialization processes that are the proper focus of diversity initiatives. Part II then considers Leong's concerns about racial-capital exchanges that occur in diversity-based affirmative action programs.[26] I argue that the functionalist standard outlined here will clarify the proper terms on which racial status inquiries should be conducted and in this way ensure that we move away from thin conceptions of diversity that lead to the commodification of race in its worst form.

Part III turns to the most common concerns about the functionalist inquiry, namely that it involves government in the elaboration and policing of the definition of racial groups. Specifically, Richard Thompson Ford and Cristina Rodríguez have warned against involving courts in disputes over the definition of racial categories because they believe that in order to resolve these disputes, government is required to give legal imprimatur to racial stereotypes and create

---

24. *See, e.g.*, Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 199–200 (2d Cir. 2006) (discussing 14th Amendment challenge); Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1548 (11th Cir. 1994) (discussing Title VII challenge).

25. Most of the discussion of voluntary or "elective" racial affiliation and affirmative action explores concerns about individuals making strategic racial-identity claims. *See, e.g.*, Kennedy, *supra* note 10, at 1191. *See generally* John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49 (1995); Chris Ballentine, Note, *"Who Is a Negro?" Revisited: Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. FLA. L. REV. 683 (1983).

26. *See* Leong, *supra* note 19, at 2157, 2174.

"identity group subsidies" for putative racially linked cultural practices.[27] The revised functionalist analysis offered here is based on the understanding that we need greater demarcation between cultural-diversity initiatives and racial-diversity initiatives. I show that diversity initiatives that focus on diverse experiences of racialization largely avoid the stereotyping dangers that are the source of these scholars' concerns. However, I also show that the law must recognize the link between race, culture, and social subordination if it is to take account of the full range of racialization experiences that cause social subordination. Part III concludes by exploring Randall Kennedy's liberty-based arguments in support of relaxed approaches to racial identification[28] and the more contemporary manifestation of this argument made by Kenji Yoshino.[29] This liberty-based approach to racial self-identification again stresses the dignity injury employers and government inflict when they challenge employees' racial-identification decisions. This Essay explains that this dignity interest must bow to queries about one's experience of racialization when one claims, based on race, that one can advance an employer's diversity goals.

I. THE POLITICS OF RACIAL IDENTIFICATION IN THE ERA OF ELECTIVE RACE

Mark Twain famously quipped, "Reports of my death are greatly exaggerated," after hearing that his obituary had been published in the *New York Journal*.[30] Similarly, one senses the announcement of the death of race is premature, despite the extensive legal and political commentary announcing the advent of the post-racial era. Although there is a rich scholarship devoted to combating claims about post-racialism,[31] few have addressed what I consider to be the key contemporary challenge for legal scholars: to develop accounts of law that can negotiate individuals' complex racial-identity claims and the challenges they create for antidiscrimination law.[32] To address what I see as a disturbing silence in the literature on this topic, I have coined the term "elective

27. RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 91, 97–98 (2005) (arguing that "civil rights [laws] should focus on eliminating status hierarchies, while generally leaving questions of cultural difference to the more fluid institutions of popular politics and the market"); Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1406, 1412 (2008) (raising concerns about essentialism in affirmative action selection decisions).

28. Kennedy, *supra* note 10, at 1191–93 (arguing that government should respect self-identification decisions).

29. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 21–26 (2006) (arguing that civil rights law should protect against covering demands that require the individual to mute aspects of his or her authentic self).

30. SHELLEY FISHER FISHKIN, LIGHTING OUT FOR THE TERRITORY: REFLECTIONS ON MARK TWAIN AND AMERICAN CULTURE 134 (1996) (recording precise quote as: "the report of my death is an exaggeration").

31. *See, e.g.*, Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967 (2010) (discussing discursive and analytic limitations of the construct); Sumi Cho, *Post-racialism*, 94 IOWA L. REV. 1589 (2009) (same).

32. For a discussion of the problems multiracials' racial-identification decisions create for equal protection law, see Hernández, *supra* note 13, at 145–56.

race" to document our steady march down a path that encourages individuals to make more complex racial-identity claims and to demand that employers, government, and other social institutions recognize and respect these complex racial-identity interests.[33] Section A defines elective race. It shows that, although the contours of this racial self-identification interest are far from clear, Americans have come to invest more and more significance in their racial self-identification decisions. Section B explores employer discretion to define race in the context of affirmative action programs and racial data collection efforts. It then explores the tension created between employers and employees when employers' preoccupation with racial-diversity goals conflict with employees' interests in racial self-identification.

A. THE RIGHT TO RACIAL SELF-IDENTIFICATION IN THE ERA OF ELECTIVE RACE

Most Americans identify by race;[34] however, the racial-identity claims that most characterize the modern era are those made by multiracial Americans: persons who make complex claims regarding their racial ancestry and who, in prior decades, would have been absorbed more willingly into monoracial categories.[35] Scholars such as Tanya Hernandez and Naomi Mezey have shown how, in the 1990s, multiracial advocacy groups shaped the national conversation on race as they petitioned for the addition of a new "multiracial" race category in the 2000 Census and 2010 Census.[36] Multiracial advocates' request for a separate multiracial category was ultimately rejected in favor of an option that allows multiracials to check off all racial categories with which they identify.[37] Despite this setback, the multiracial movement still profoundly shaped federal policy and national discourse about race.[38] Most significantly, the

33. For further discussion of this phenomenon, see Camille Gear Rich, *Elective Race*, 102 GEO. L.J. (forthcoming June 2014).

34. *See, e.g.*, Eric D. Knowles & Kaiping Peng, *White Selves: Conceptualizing and Measuring a Dominant-Group Identity*, 89 J. PERSONALITY & SOC. PSYCHOL. 223, 223 (2005) (discussing tendency for whites to focus more on white identity when interacting with persons of other races); Brian S. Lowery et al., *Concern for the In-Group and Opposition to Affirmative Action*, 90 J. PERSONALITY & SOC. PSYCHOL. 961 (2006).

35. Aliya Saperstein, *Double-Checking the Race Box: Examining Inconsistency Between Survey Measures of Observed and Self-Reported Race*, 85 SOC. FORCES 57, 58 (2006) (demonstrating that self-reported race and third-party classification often yield dissimilar results despite government policies that treat these methods as producing similar findings).

36. Hernández, *supra* note 13, at 98 & nn.2 & 4, 99 n.7; Mezey, *supra* note 13, at 1749–52.

37. For a discussion of the multiracial lobby and its constituents, see Mezey, *supra* note 13, at 1749–52.

38. For a discussion of the multiracial movement's effect on legal policy and national discourse, see Ann Morning, *Multiracial Classification on the United States Census: Myth, Reality, and Future Impact*, 21 REVUE EUROPÉENE DES MIGRATIONS INTERNATIONALES, no. 2, 2005, at 1, 2–19, *available at* http://remi.revues.org/index2495.html. Morning notes that once Directive 15 accommodated multiracials' needs, it led to a flurry of changes to *all* federal agencies' data-collection efforts to reflect this changed understanding. *Id.* at 3. Morning also explains that the growth of the multiracial movement is strongly linked to discursive claims about America's post-racial future, the permeability of racial boundaries, and the end of racism. *Id.* at 4.

movement's efforts caused the Office of Management and Budget to issue a revised Directive 15, the administrative guidance document that controls all federal racial-data-collection efforts. The new Directive 15 requires all federal agencies to respect an individual's interest in racial self-identification and allow the exercise of this right or interest whenever possible in government-sponsored or government-solicited data collection.[39]

The federal government's shift away from data-collection efforts that relied primarily on third-party observer reports to determine an individual's racial status in favor of approaches that stress the individual citizen's right to select her racial identity was a critical cultural sea change with profound institutional implications. As a result of this institutional shift, individuals that otherwise might not have reflected much on racial identity are now exposed to a regime that demands they make consciously chosen racial self-identification decisions periodically throughout their lives.[40] The Census tends to receive the most attention in literature on this subject,[41] but its effects are relatively limited because it only requires one to answer racial self-identification questions every ten years. However, employers are required to collect racial data on a yearly basis to facilitate the enforcement of Title VII,[42] and as a consequence, employees must answer racial-identification questions on a relatively frequent basis. In addition, educational institutions at all levels, from grade school through postgraduate education, are required to collect racial information for the enforcement of Title VI.[43] Parents are given primary responsibility for identifying a child's race until the child completes secondary education,[44] after which time the student's right to racially self-identify is triggered. Consequently, once a

---

39. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,782 (Oct. 30, 1997) ("Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible, recognizing that in some data collection systems observer identification is more practical.").

40. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 148, 177–84 (Alan Sheridan trans., Vintage Books ed. 1979) (1975). Foucault explains that when a person is subject to penal, bureaucratic, and administrative procedures, these procedures over time condition the individual to see herself in a particular way and to frame her interests in ways that are shaped by administrative and institutional norms. Applied to race, Foucault's insights suggest that the repeated government inquiries requiring individuals to make decisions about racial identity ultimately condition an individual to believe that racial-identification decisions are important, that she has a vested interest or right to determine her racial identity, and that the decisions made have institutional or social significance.

41. *See* Mezey, *supra* note 13, at 1719.

42. Joseph Z. Fleming, *I Believe There Is Something Out There Watching Us; Unfortunately, It's the Government: An Analysis of the EEOC's "EEO-1" and OFCCP Reporting Requirements*, *in* AMERICAN LAW INSTITUTE–AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION: ADVANCED EMPLOYMENT LAW AND LITIGATION 1209, 1240–41 (2006).

43. *See* 20 U.S.C. § 1094(a)(17) (2006) (discussing reporting requirements); *see also* Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,266, 59,277 (Oct. 19, 2007).

44. For discussion of the influence family-related factors play in the construction of racial identity for racially ambiguous and racially liminal subjects, see generally Rich, *Making The Modern Family*, *supra* note 14.

student reaches the age of majority, they will have been subject to numerous racial-identification regimes by different institutions as they move through the educational process and professional life.[45] These racial-information requests, taken together, encourage Americans' view that racial self-identification is an important part of one's identity construction.

Though Americans have been encouraged to see these moments of racial-identity selection as important, the values and understandings that guide their decisions are surprisingly unclear.[46] Some Americans may regard these inquiries as moments in which they are required to identify how they are racially perceived by others, regardless of whether their perceived race matches their personal racial-identity commitments. Others answer these questions based on how they believe they are expected to answer these questions, either because of their family's racial-identity commitments or those of their cultural group. Still others answer these questions based on their symbolic commitment to particular communities, regardless of whether they have had any social experiences in which they were recognized as members of a given racial category. The wide variation in how individuals make their racial self-identification decisions makes these decisions ripe for misunderstanding, exploitation, and abuse.

In addition to shaping federal racial-data-collection efforts, the multiracial movement also had a profound discursive impact on the language and constructs Americans use to articulate their relationship to race. For example, census data shows that after the multiracial movement, there was a surge in the number of persons who describe themselves as mixed race.[47] Relatedly, a new group of "white multiracials" has emerged.[48] These are persons who identify as white in certain circumstances but also are willing to shift to a minority or multiracial identity when they enter a particular cultural context that makes minority background relevant, in response to significant life events, or even to gain potential strategic advantages in social interactions.[49] Also, many more Americans are willing to challenge traditional, established racial categories and resist the default racial designation that would normally be assigned to them.[50]

---

45. *See* Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 539 n.1 (discussing Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, *supra* note 43).

46. Saperstein, *supra* note 35, at 59–60 (discussing various motivations that shape individuals' responses to racial self-identification decisions).

47. *See* J. Scott Brown et al., *supra* note 16, at 413 (explaining that "changing understandings of race in society have raised the legitimacy of multiracial identities").

48. Some believe the growth of white multiracials is in large part driven by interracial marriage rates. *See* Lee & Bean, *supra* note 16, at 228. The authors report that among persons age twenty-five to thirty-four, two-thirds of Asians who were born in the United States marry outside of their race, usually to someone white, and two-fifths of Latinos in this cohort marry outside of their race, typically to someone white. *Id.*

49. *See, e.g.*, Marie L. Miville et al., *Chameleon Changes: An Exploration of Racial Identity Themes of Multiracial People*, 52 J. COUNSELING PSYCHOL. 507, 511–13 (2005).

50. *See, e.g.*, Elizabeth Vaquera & Grace Kao, *The Implications of Choosing "No Race" on the Salience of Hispanic Identity: How Racial and Ethnic Backgrounds Intersect Among Hispanic Adoles-*

For example, although persons who identify as Latino may regard this identity as a racial identity, federal law treats being Latino as a kind of ethnic designation and requires Latinos to further racially identify as white, black, or another federally recognized racial category.[51] At present, large numbers of Latinos, particularly the young, resist this attempt to structure their racial-identification choices and choose "other race" rather than select a specific option.[52] Similarly, federal standards indicate that Middle Easterners should be categorized as white, but persons who identify as Middle Eastern may reject this proposition, citing their special experiences of discrimination as evidence that they are of a different race.[53]

Further complicating matters, sociologists have raised questions about the integrity of peoples' elective race decisions over time because multiracials may change their responses to inquiries about race depending on the kind of form that is used, the order of the questions, and the context in which these questions are asked.[54] In addition, although the law-review literature has devoted almost no attention to this issue, structural variables strongly influence racial-identification decisions. Issues such as class, history of imprisonment, and other experiences of social marginalization can trigger multiracials to "choose" to claim a minority identity. For example, one recent study showed that persons who identified as white and may have been socially perceived as white or mixed race were more likely to identify as black and be socially perceived as black after incarceration.[55] Other research suggests that persons of higher socioeconomic class are more likely to assert a biracial rather than monoracial minority identity.[56] These studies suggest that social stigmatization or economic marginalization plays a role in determining an individual's racial-identity choices. The insights these studies provide are important, because this research reveals that in many cases fluctuations in multiracials' self-

---

cents, 47 SOC. Q. 375, 389 (2006) (noting that two-thirds of Hispanic youth in their research sample refused to choose any of the established racial categories when told Latino would not be recognized as a racial category).

51. Wendy D. Roth, *Racial Mismatch: The Divergence Between Form and Function in Data for Monitoring Racial Discrimination of Hispanics*, 91 SOC. SCI. Q. 1288, 1289–91 (2010) (explaining that Latino or Hispanic is not a racial designation for federal data collection purposes and discussing problems with this rule); Vaquera & Kao, *supra* note 50, at 375–76 (same).

52. Lee & Bean, *supra* note 16, at 231–32 (reporting that in the 1990 Census and the 2000 Census, "slightly more than 97%" of those who chose "some other race" were Latino).

53. *See* John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 3–5 (2007).

54. *See, e.g.*, David R. Harris & Jeremiah Joseph Sim, *Who Is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC. REV. 614, 619 (2002). These authors found that that 8.6% of youths identified as multiracial at home or at school, but only 1.6% identified as multiracial in both contexts, and just 1.1% selected the *same* combination in both contexts. *Id.* They found further that 2.8% of youths switched between different single-race identities depending on context. *Id.*

55. *See* Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 92–93 (2010).

56. *See* Sarah S. M. Townsend et al., *Being Mixed: Who Claims a Biracial Identity?*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 91, 91 (2012).

identification decisions are not driven by thin, expressive interests or strategic considerations but may be profoundly linked to grounding experiences of alienation and marginalization.[57] Given the diverse array of influences that affect individuals' racial self-identification decisions, we must develop legal analyses that treat elective-race decisions in a manner that gives due weight to their complexity. In addition, government has an obligation to develop an intelligent, coherent response on how to manage and interpret individuals' shifting and sometimes conflicting racial-identification choices because in many cases, individuals fail to fully appreciate the legal significance attached to these decisions.

Given these cultural changes, antidiscrimination law may be on a collision course with the new "social default" emphasizing the importance of the right to racial self-identification because most individuals are unaware that, to the extent it exists, the right to racial self-identification is often defeasible. By "social default," I am referring to the assumption that individuals should be given the opportunity to choose the race with which they will be associated in administrative processes and social settings. The law, however, does not recognize this new identification interest as being an inviolate right that must be respected. Rather, census officials still rely on third-party observation or other categorization methods when it is impossible or inconvenient to get a person's racial self-identification information.[58] This rule may result in a census official racially categorizing an individual in a way that fundamentally contradicts the individual's own understanding of her race.[59] Similarly, employers also retain the ability to racially identify employees when an employee declines to state her race, conditions make racial data collection impossible or impracticable, or the employee appears to have engaged in racial fraud.[60] Education officials enjoy the same discretion.[61] Last, and perhaps most important for our discussion here, employers and public entities retain the ability to define racial categories and

57. *See* Saperstein, *supra* note 35, at 63–67 (discussing research showing working-class and poor, biracial whites were more likely to identify as black than middle-class ones); Saperstein & Penner, *supra* note 55, at 92–93 (showing incarcerated, biracial whites were more likely to identify as black upon release and were more likely to be seen as black, regardless of how they self-identified or were perceived prior to incarceration).

58. Ford, *supra* note 12, at 1243.

59. *See id.*

60. EEOC Final Notice of Submission to OMB of Employer Information Report (EEO-1), 70 Fed. Reg. 71,294, 71,294–71,303 (Nov. 28, 2005) (granting employer leave to identify employee when an employee has "declined to self identify or in other undefined situations in which it was 'unduly burdensome' or 'otherwise is not practical or feasible' to extend an invitation to self-identify"). The report also indicates that ordinarily an employer is only allowed to decide the employee's race if the employee declines to self-identify. *Id.*; *cf.* EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 632.3, VIOLATIONS INVOLVING ADVERTISING, RECORDKEEPING, OR POSTING OF NOTICE, CCH-EEOCCM P 5403, 2009 WL 3608161 (2012) ("[T]he person attempting to secure information regarding race, sex, or ethnic affiliation should not second guess or in any other way change a self declaration made by an applicant or employee as to race, sex, or ethnic background. An exception to this rule can be made where the declaration by the applicant or employee is patently false.").

61. *See* Rich, *supra* note 45, at 539 n.1 (discussing Department of Education standards).

the ultimate authority to determine whether an individual's racial-identity claims will be respected.[62] Indeed, *Malone*, though not cited for this proposition, stands for the principle that a public employer may define the content of a racial category and its membership.[63] Subsequent cases have made this point more explicitly, as employees have challenged the technical definitions of race used by employers or government agencies when these definitions would prevent employees from accessing benefits.[64]

B. EMPLOYER DISCRETION IN THE ERA OF ELECTIVE RACE

The powerful role employers can play in defining and maintaining racial categories need not raise alarm, but it gives many individuals pause. Much turns on the normative and practical considerations the employer brings to the inquiry—considerations that I argue have changed dramatically in recent years. For example, in the 1980s, many race scholars pointed to the racial-fraud cases—cases in which employers successfully challenged employees' suspect racial-identification claims—as good evidence that employers were taking seriously their responsibility to administer affirmative action programs in a principled manner. These scholars argued that the social-justice and equal-opportunity goals of affirmative action programs could only be realized if employers or other institutional decision makers were able to exempt those making strategic racial-identification decisions from the category of eligible program recipients.[65] For others, however, the racial-fraud cases seemed more properly characterized as dangerous racial-authenticity battles,[66] with courts being asked to apply a litmus test for race in a way disturbingly reminiscent of the racial-identification trials documented by Ariela Gross in the post-Civil War South and by Ian Haney López in his discussion of racial determination trials in early twentieth-century citizenship cases.[67] Discussion of the racial-fraud cases cycled between these two concerns for many years but dissipated over time.

When the question of racial fraud is raised today, scholars tend to argue that employer racial-authenticity inquiries are rare given the substantial financial cost of making such inquiries and the uncomfortable nature of applying so-called racial-authenticity tests. However, the truth is far more complicated. One still sees a fair number of authenticity contests in employment discrimination cases involving disputes between the employer and the employee over the

62. *See supra* notes 2 & 7.

63. *See* Malone v. Haley, No. 88-339, slip op. at 16 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989) (appeal from Civil Service Commission decision to single associate justice).

64. *See* cases cited *supra* note 2.

65. *See, e.g.*, Ford, *supra* note 58, at 1255, 1281–85 (discussing ethical and moral pitfalls associated with racial-determination decisions); Kennedy, *supra* note 10, at 1191–93 (discussing concerns articulated by scholars).

66. *See* SQUIRES, *supra* note 2, at 75–94.

67. *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

definition of the term "Latino" when used in affirmative action programs. Disputes may concern whether beneficiaries must speak Spanish, consistently identify as Latino, hail from a Spanish country, or have a Spanish surname. These challenges to employer race definitions have come from affected employees of other races or from applicants frustrated by what they perceive to be as overly generous or overly conservative definitions of the terms Hispanic or Latino.[68] Challenges to applicants petitioning to be recognized as African American were highlighted by the media in the 1980s and 1990s.[69] Certainly, there are not many contemporary reported cases, but it seems premature to argue that these conflicts are rare or have entirely disappeared.

Moreover, even if we assume that racial authenticity inquiries are largely a thing of the past, the Elizabeth Warren debacle shows that employers are using their discretionary power to define race in other disturbing ways that capitalize on elective-race norms. Specifically, employers and other entities charged with the administration of affirmative action now tend toward capacious definitions of race that are extremely accommodating of an individual's self-identification choices. Scholars such as Randall Kennedy have suggested this trend is evidence of a kind of cultural sophistication we have developed about race.[70] He believes that affirmative action programs must respect individuals' personal racial-identity decisions and understand the great range of diversity within ethnic and racial categories.[71] Lani Guinier, in contrast, raises red flags about the expansive definition of race used in some affirmative action programs, arguing that administrators have incentives to engage in cherry-picking within racial categories in ways that frustrate affirmative action's original social-justice goals.[72]

Others might regard administrators' use of capacious definitions of race as evidence of what I call "racial fatigue"[73]—an abstract commitment to racial equality, but impatience, anxiety, and ultimately disinterest in the quotidian struggles required to achieve this goal. For example, Angelina Castagno argues that employers and universities have consciously turned away from so-called authenticity inquiries about race because the process of policing race is politically fraught, expensive, and often results in outcomes that are counter to the

68. *See* cases cited *supra* note 2.

69. These challenges involved persons with racially ambiguous physical characteristics or weak social ties to minority communities, or, alternatively, persons shut out by technical definitions of race based on ancestry, but who physically appeared black and held themselves out as black persons. *See* SQUIRES, *supra* note 2, at 74–94.

70. *See* Kennedy, *supra* note 10, at 1191–93.

71. *See id.*

72. Rimer & Arenson, *supra* note 6 (discussing symposium remarks from Lani Guinier and Henry Louis Gates Jr. warning that the majority of blacks admitted to Harvard under affirmative action were African immigrants, West Indians, and children of biracial unions and noting that although these individuals add to institutional diversity, they are not the primary constituency initially targeted by affirmative action—children of former slaves). For further discussion, see SQUIRES, *supra* note 2, at 122.

73. Rich, *supra* note 45, at 550–51.

employers' own interests.[74] Indeed, employers and multiracials have arrived at a moment of what Derrick Bell calls "interest convergence."[75] Institutions invested in representing themselves as diverse to the public find that their incentives are aligned with employees who make tenuous identity claims to belong to historically disempowered racial groups.[76] The institution or employer is incentivized to accept even the most weak racial-identity claims as it will get the benefit of an employee it can categorize as a minority worker for diversity-reporting purposes without having to do the work necessary to reach out to more acutely subordinated workers from heavily racialized minority communities.

Employers consequently seem at risk for two types of behavior: overly restrictive authenticity judgments that are not sufficiently respectful of employees' dignity interests in racial self-identification, or conversely, overly capacious definitions of race that threaten to eviscerate the social-justice underpinnings of affirmative action programs. The danger of overly rigid definitions is that they may be experienced as a form of violence by employees, denying recognition for what these employees perceive to be one of their most important personal-identity characteristics. Additionally, rigid definitions born of convenience, political expediency, or detached administrative logic can function as racial litmus tests that shut out from affirmative action programs persons who have experienced racialization in culturally salient ways. In contrast, the danger posed by employers' use of capacious definitions for certain racial categories is that they end up conducting a superficial affirmative action program that grants benefits to anyone willing to claim minority status. The concern is that over time, affirmative action programs using these definitions will confer benefits not on culturally marginalized or socially subordinated individuals, but rather on sophisticated players attempting to gain a strategic advantage in competitive hiring, admission, or promotion processes.[77]

---

74. Angelina E. Castagno & Stacey J. Lee, *Native Mascots and Ethnic Fraud in Higher Education: Using Tribal Critical Race Theory and the Interest Convergence Principle as an Analytic Tool*, 40 EQUITY & EXCELLENCE EDUC. 3, 9–10 (2007) (discussing this phenomenon in the context of indigenous communities). Castagno explains that "[a] policy guarding against ethnic fraud would potentially facilitate greater equity in the distribution of funds, jobs, and resources. But, because the price is too high for the university to require proof [of racial or ethnic identity], self-identification policies remain intact." *Id.*

75. *See* Derrick A. Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523–28 (1980) (describing interest convergence as circumstances in which different interest groups find themselves united in pursuit of a single goal but for very different political reasons). Bell's primary goal in introducing this construct is to demonstrate how this phenomenon results in temporary unstable coalitions in the battle for racial equality. *Id.*

76. Castagno & Lee, *supra* note 74, at 7–10.

77. By sophisticated players, I am referring to those with experience negotiating racial-data-collection regimes and affirmative action programs in the workplace or other institutional settings. These individuals know that they can temporarily identify with a minority group in order to secure affirmative action benefits but later abandon this affiliation. *See, e.g.*, A. T. Panter et al., *It Matters When and How You Ask: Self-Reported Race/Ethnicity of Incoming Law Students*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 51, 58 (2009) (noting that majority of students identifying as

Additionally, employer discretion of this nature poses a unique threat to individuals, distinct from the aforementioned group-based and social-redistribution harms about which many race scholars worry. As Elizabeth Warren discovered, when employers are granted full discretion to define and police race, employers can coerce or cajole an employee into certain kinds of racial identification that the employee would otherwise avoid. That is, merely because an individual has a colorable phenotype-based, cultural, or familial link to a racial category does not mean that she is prepared to publicly embrace that identity, particularly if the racial identity in question does not match the lived experiences she has as a racialized person. Indeed, case law suggests that Warren may not be an isolated case, as there are a growing number of cases in which employers attempt to instrumentally use employees' self-identification decisions in the workplace, deploying their employees' racial-identification decisions in a sophisticated, strategic manner. For example, the employer may cite the employee's failure to racially identify with a particular racial group in employment registration documents as a basis for denying the employee affirmative action program benefits.[78] Yet this decision is clearly wrongheaded. The employee may have physical characteristics or engage in race-performance behaviors that would otherwise signal that he or she is a member of an eligible racial category and that cause her to experience workplace discrimination. Relatedly, an employer may use the employee's prior self-identification claims to defeat her discrimination claim, arguing that the employee has not previously identified as minority in workplace documents or in discussions with coworkers.[79] However, this approach is wrongheaded as well. The employee's prior self-identification decisions may be a surprise to those who encounter the employee in the workplace and recognize her phenotype (or her racially marked behaviors) to clearly place her in a vulnerable racial category. These cases suggest that when there are conflicts over race discrimination or affirmative action, antidiscrimination law may be more effective if it ensures that courts engage in a more searching inquiry that looks beyond an employee's bare racial self-identification decision in any one given context. The next section returns to *Malone* to consider the multiple ways in which racial self-identification decisions shape the experience of racialization. The discussion then assesses what relevance these voluntary racial-identification claims (or elective-race issues) have to our

"other" on the LSAT were multiracial white students who subsequently identified as white after the law school admissions process ended).

78. *E.g.* United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130, 153 (E.D.N.Y. 2000) (permitting employer to reject requests for benefits by putative Latino employees who failed to identify as Latino in employment forms).

79. *See, e.g.*, Lopez-Galvan v. Mens Wearhouse, No. 3:06CV537, 2008 WL 2705604, at *7 (W.D.N.C. July 10, 2008) (rejecting employee's claim of race discrimination because plaintiff solely alleged antiblack animus but self-identified as Latino and conceded his national origin was Dominican); Green v. Swain Cnty. P'ship for Health, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004) (employer challenging plaintiff's claim to be Native American because she did not identify as Native American on her employment application and was not an enrolled member of a tribe).

project—namely, the effort to develop a functionalist analysis of race appropriate for diversity-based affirmative action programs.

II. REVISITING *MALONE* IN THE ERA OF ELECTIVE RACE

Part II of the Essay revisits *Malone v. Hayley*, the most famous racial-fraud case in the employment-discrimination literature. The discussion teases out the lessons the case teaches about the various ways in which individuals are racialized. The case also provides an opportunity to understand and explore the most common concerns raised about giving an employer the discretion to define race and to challenge employees' racial self-identification decisions. Section A outlines the distinction between so-called authenticity inquiries about race and the functionalist inquiry proposed; it explains that a functionalist inquiry would not give an employer the authority to define race writ large, but merely would empower the employer to create a definition of race to be used for specific employment purposes. Section B demonstrates that the functionalist inquiry does not require an employer to commodify race in the troubling ways currently outlined in the employment-discrimination literature. Rather, the functionalist inquiry proposed here allows an employer to set aside race's connection to culture and to explore race's use value in terms of what it teaches us about the dynamics of racial subordination. Section C closely explores the analysis in *Malone* to identify the three ways racialization is effected in the workplace, and it explains why individuals subject to these discrete processes can give an employer different insights about race discrimination.

A. AUTHENTICITY TESTS VERSUS FUNCTIONALIST INQUIRIES ABOUT RACE

Though the racial-authenticity examination conducted in *Malone* attracted some criticism in its time, it would be deeply worrisome in today's cultural climate. Some might see it as a "racial truth" inquiry, an idea deeply concerning to scholars like Cristina Rodríguez and Richard Thompson Ford, both of whom warn about the dangers of government-driven authenticity inquiries about race.[80] Close review of *Malone* tends to only heighten concerns. The dispute in *Malone* concerned the Boston Fire Department's court-ordered affirmative action program, a program created after litigation established that the Department had engaged in a pattern of discrimination against blacks. The hearing officer who reviewed the case began her analysis by acknowledging that there were no written guidelines regarding who could identify as black prior to the *Malone* dispute, but she concluded that her approach was sufficiently comprehensive to avoid any notice or unfairness concerns.[81] She then conducted a three-part

80. FORD, *supra* note 27, at 91–97; Rodríguez, *supra* note 27, at 1406.

81. Although the Essay is based on the hearing officer's decision, it cites to a judicial decision that summarizes and reviews the officer's findings. The Essay cites to the judicial decision, as opposed to the unpublished hearing officer's decision, because the judicial decision is more readily available to interested readers.

inquiry to determine whether the Malones could be counted as "black" by Department officials. The hearing officer considered: (1) the documentary proof the brothers could provide to establish their race; (2) the brothers' phenotype or racially-marked physical characteristics; and (3) whether the brothers had identified as black socially by holding themselves out to the community they lived in as black persons.[82] After laying out the three-part test, the hearing officer further indicated that, even if the Malones failed to establish that they were black under the three-part rule, she would rule in their favor if they held the "honest belief" that they were black. With this proviso, we see one of the earliest examples of an affirmative action administrator's accommodation of "elective race": the dignity interest an individual has in public recognition of his racial self-identification decisions.[83]

Fairly viewed, the *Malone* decision is riddled with problems. As an initial matter, it should raise due process concerns. The brothers were held accountable under a racial-definition standard that had not been established, much less circulated, prior to the dispute about their racial identities. Second, the criteria the hearing officer used to assess the brothers' racial-status claims were based on what Reva Siegel calls "group-salient" characteristics: traits that are statistically correlated with a given race but are not actually possessed by all members of that racial group.[84] Consequently, the variables the hearing officer relied on could be challenged as being under- or over-inclusive in identifying members of a given racial category. Third, and perhaps most important, although the hearing officer claims that she engaged in a functionalist inquiry, she did not explicitly outline how her definition of race was informed by and reflective of the purposes of the affirmative action program in that case. As a consequence, the hearing officer appeared to be defining more generally what it means to be black, rather than identifying what was required to be recognized as black for the remedial purposes of the Boston Fire Department's affirmative action program. However, close examination of the *Malone* decision shows that the list of considerations the hearing officer offered were designed to ensure that opportunity was extended to those persons who were most likely to be socially recognized as black, and therefore most likely to have been excluded from the Boston Fire Department's pool of eligible hires during the relevant period.

Our interest in *Malone* stems from the recognition that the decision is a basic blueprint for understanding the multiple ways in which persons are racialized in society. Put differently, *Malone* charts dynamics that I have elsewhere described as the various forms of voluntary and involuntary racial ascription.[85] *Malone* allows us to identify the three most common methods of racial ascrip-

82. *See* Malone v. Haley, No. 88-339, slip op. at 16 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989).

83. *See id.*

84. Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 91 (2000).

85. *See* Rich, *supra* note 18, at 1145–46.

tion or "racialization" one might experience: ascription based on physical characteristics, documentary decisions, and symbolic social practices or "race performance."[86] The hearing officer rightly concluded that persons who had been subject to any of these forms of racialization were proper beneficiaries of the Department's remedially focused affirmative action program.

Although it reserves space for further arguments about the brothers' "honestly held belief" about their racial status, *Malone*'s primary inquiry stops at this juncture because the hearing officer had exhausted what she perceived to be the primary bases for the Malones to claim that they had been racialized in social life and therefore deserved the benefits of an affirmative action program. However, administrators of contemporary affirmative action programs would require a more searching inquiry because these programs typically are premised on increasing diversity rather than the explicitly remedial purposes that informed the Boston Fire Department's program. Moreover, contemporary racial-diversity initiatives have been articulated in ways that stress cultural diversity,[87] an interest that has little apparent relationship to the various processes of voluntary and involuntary racialization explored in *Malone*.[88] Today, employers argue that they are interested in racial diversity because it makes workplace teams smarter by allowing teams to make decisions that are enriched by minority workers' cultural experiences.[89] Employers also argue that racial diversity assists with marketing because employers can more easily reach out to minority customers if they have employees that understand minority groups' cultural predispositions.[90] Thus far, scholars have done little to consider the consequences of this discursive and analytic shift or the commitments we have made by privileging culture in discussions of racial diversity. However, as scholars such as Richard Ford have shown, the conflation of race and culture in discussions of racial diversity is essentialist and misleading.[91] Moreover, privileging culture in racial-diversity discussions does little to transform social arrangements in ways that ensure fair and equal opportunity to persons of all races. My project is to show that by reconsidering this discursive shift we can chart a path towards a more defensible, analytically sound approach to race that clarifies the proper use of race in affirmative action programs. The next section

86. *See id.* For a more expansive discussion of the ways in which documentary race can trigger discrimination, see generally Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (discussing studies showing race discrimination was triggered in written application process because of applicants' racially marked first names).

87. *Cf.* Carol T. Kulik & Loriann Roberson, *Diversity Initiative Effectiveness: What Organizations Can (and Cannot) Expect from Diversity Recruiting, Diversity Training, and Formal Mentoring Programs*, *in* DIVERSITY AT WORK 265, 265 (Arthur P. Brief ed., 2008) (discussing the business case for diversity).

88. *See id.* at 265–69.

89. *Id.* at 265.

90. *Id.*

91. FORD, *supra* note 27, at 70–73 (noting that cultural practices may be associated with a given racial group but not all of these cultural practices are engaged in by all group members).

more specifically explores the problems that arise when employers treat race as a proxy for culture.

B. FUNCTIONALIST INQUIRIES ABOUT RACE AND THE RISK OF RACIAL COMMODIFICATION

Robert Post's analysis of the normative underpinnings of antidiscrimination law helps one understand why our conflation of racial diversity and cultural diversity causes serious problems. Post explains that employment discrimination law is based on an instrumental or functionalist logic that reduces employees to a set of skills or traits that are valued by the employer.[92] Race, according to this functionalist logic, should be irrelevant to an employer's evaluation of an employee because it does not have any bearing on the employee's actual skills.[93] Consequently, employers can be prohibited from using race in making employment decisions. In my view, however, contemporary diversity-based affirmative action programs do violence to this distinction. Contemporary diversity arguments invite employers to abandon this traditional bright-line rule because these arguments suggest that racial minorities' *racially-inflected cultural differences* are relevant skill sets that should be put to use in the workplace. The problem is that once race is brought into dialogue with the functionalist logic of the workplace, many employers assume they have a "green light" to engage more broadly in the racial and ethnic commodification of their employees.[94] This is ironic because the functionalist logic was initially articulated to explain why racial differences should be *ignored.*

Despite these issues, one need not assume that employers' functionalist inquiries about race necessarily create racial commodification problems. Functionalist inquiries about race can be bounded in ways that serve our interest in racial diversity but avoid cultural essentialism. The first step is to ensure that employers recognize that race and culture are not synonymous, although each is indelibly shaped by the other. The second point follows from the first: arguments in favor of cultural diversity should be weighed separately from arguments in favor of racial diversity. Cultural diversity may improve workplace decision making, but the justification for racial diversity is an entirely separate matter. Third, employers interested in understanding the justification for racial diversity must understand that recruiting and promoting racial minorities provides the employer with opportunities to explore diverse experiences of racialization (by phenotype, by social performance, or by documentary decisions, among other considerations). Racial-diversity initiatives, therefore, should focus on the

92. Post, *supra* note 22, at 13–16.

93. *See id.*

94. I have previously raised concerns about the ways in which the employer's functionalist logic makes use of race in ways that can aggravate racial-subordination dynamics. *See* Rich, *supra* note 18, at 1250–51. Rather than denying that this functionalist logic makes use of race, or prohibiting the use of race in the manner, scholars should identify prohibited functionalist uses and find ways to tailor the functionalist inquiry so that it does not make use of or aggravate existing racial stereotypes. *See id.*

ways in which racial minorities have had disparate experiences of racialization to better understand how these various processes of racialization result in subordination. Employers should be interested in these experiences because their goal is to ensure that the workplace is refashioned to avoid the subordination effects caused by all of these different forms of racialization.

The abovementioned shift in the way we articulate the justification for racial diversity would allow us to move beyond the current glut of incoherent responses employers provide to explain why they value racial-diversity initiatives. For employers' rush to achieve cultural diversity by reference to racial diversity makes little sense unless we have reasons to specially value the cultural diversity provided by groups that have been racially subordinated. Moreover, as Devon Carbado and Mitu Gulati explain, employers show little interest in allowing minority culture to transform the workplace, preferring instead to hire employees who conform with the established workplace cultural baseline.[95] That is, although much of the literature generated to guide human resources professionals discusses the insights that a diverse workforce can produce by virtue of the mix of cultural perspectives, at bottom, employers remain focused on the economic value they can derive from their employees. As the many Title VII cases on grooming codes and "disruptive" cultural behavior make clear, the employer who manages an employee pool with significant cultural diversity often finds that diversity has *negative* rather than positive economic consequences.[96] Diverse cultural practices often become a basis for distraction in the workplace, or worse, a basis for dissent and conflict among employees.[97] Indeed, employers find that, rather than producing economic benefits, racial and culture difference in the workplace threatens to compromise the bottom line, so employers make efforts to suppress these differences. Given the number of

95. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1293–97 (2000).

96. Indeed, employers managing a group of culturally diverse employees find that one of the unexpected costs of diversity is greater risk of Title VII hostile work environment liability. Employees from the majority racial or ethnic group in the workplace may make efforts to ensure that their cultural practices become the cultural baseline for the workplace, triggering claims of discrimination from minority employees. Conversely, employees from the majority or dominant racial or ethnic group may point to the cultural practices of minority groups as attempts to change the cultural baseline and create a hostile atmosphere. Importantly, majority-group employees may act based on more clear concerns about the relative status of their racial group in a given workplace, or based on an amorphous unconscious form of bias, because of anxiety about minority difference. For further discussion and representative cases, see Rich, *supra* note 18, at 1253–60 (discussing Title VII conflicts over clothing styles, music, language choices, and other cultural practices); *cf.* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2319 (1999) (explaining that as a general rule, "[employers] will even tolerate employee behavior that is racist, sexist, unjust, or anti-social, as long as it promotes workplace cohesion and morale and is not bad for business").

97. *See* Rich, *supra* note 18, at 1253–60. These conflicts range from the more clearly offensive cultural practices to seemingly mundane practices. *See id.* at 1258–60 (discussing Title VII hostile-environment suit regarding white employee's refusal to cover Klu Klux Klan tattoo in presence of black employees); *cf. id.* (discussing black employee's Title VII claim regarding discrimination triggered by his choice to play rap music and wear a gold chain—a practice associated with hip-hop culture in the 1980s and 1990s).

Title VII cases involving employers exercising their prerogative to suppress cultural differences, there is little reason to believe that employers' claims about the value of cultural diversity are anything more than hortatory or that the rhetoric on cultural diversity is supported by an authentic desire to make the workplace more racially and culturally inclusive.

In contrast, when we assume that diversity initiatives instead should focus on ensuring that an employer has access to a pool of employees with diverse experiences of racialization, we better understand how affirmative action can transform the workplace in ways that make affirmative action less necessary. Employees with different experiences of racialization will be more adept at identifying and disrupting what Susan Sturm calls "second generation" discrimination, structural issues, and other discriminatory workplace dynamics that prevent minorities from advancing within a company.[98] Specifically, Sturm explains that colorblind rules may mask cultural defaults or structural arrangements that tend to channel opportunities to nonminority groups.[99] Racially biased employees may subject minority employees to these discriminatory processes because of the minority employees' appearance or cultural performances or because they become aware of the employees' race through documentary evidence. The employer benefits from charting these dynamics because he is given insight into the various ways discrimination is triggered in the workplace and the different, seemingly colorblind rules that may be used to effect disadvantageous treatment. In short, by employing workers with diverse experiences of racialization, the employer gains the ability to continually audit its workplace for the specter of discrimination.

Employers are likely to be strongly incentivized to adopt this approach to racial diversity precisely because it allows them to avoid Title VII liability by heading off many legally actionable discriminatory practices in the workplace. Additionally, those truly committed to fair and equal opportunity will want to know about workplace practices that are unwittingly frustrating their attempts to create a level playing field for all workers.[100] My goal in emphasizing the

98. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2–3, 10 (2006) (criticizing Susan Sturm, Tristin Green, and others for structural turn).

99. Sturm, *supra* note 98, at 460–63.

100. Some may regard my proposed approach to diversity as a bit naïve because, if employers are not interested in learning about minority workers' cultural insights in these diversity programs, why would they be interested in listening to these same workers' insights about workplace racialization and subordination? The difference is that my revised approach is based on a rational self-interest model. Economic interest will motivate a larger number of employers to be attentive to their employees' insights about racialization and race-based subordination in the workplace. Employers will be less sure that an employee's "cultural" insights will increase profits or efficiency in a workplace. They are far more likely to believe that previously unnoticed racialization dynamics in a given workplace could ripen into costly Title VII litigation. Of course, we should acknowledge that some other employers will be interested in these insights about racialization for purely benevolent reasons, namely a strong desire to discharge their antidiscrimination obligations.

practical value we can gain from understanding racialization in the workplace is not intended to devalue the benefits an employer might enjoy by mining the cultural insights of employees shaped by particular racially associated cultural influences. Instead, my goal is simply to point out that *culture* has been overemphasized in conversations about *racial* diversity.

Moreover, the shift to a diversity analysis that inquires into specific kinds of racialization would avoid many of the commodification risks Nancy Leong associates with the administration of affirmative action programs. In her article *Racial Capitalism*, Leong explains that she is primarily concerned about diversity initiatives that are focused on "thin" conceptions of diversity, ones that reduce race to mere presence, or the inclusion of brown bodies in the workplace, rather than trying to effect substantive change.[101] This "thin" conception of diversity makes racial minorities prized commodities and reduces race to yet another "thing . . . bought and sold."[102] Leong rightly has concerns about our current thin definition of diversity and the way it makes us use race; this Essay is offered to help re-theorize our understanding of diversity to avoid the commodification risks she describes. Simply put, my model posits that employers' inquiries about race in affirmative action programs should be narrowly focused on identifying candidates that have experienced racialization in ways that give these employees insights about social subordination. In this way, the model pushes employers to see racial diversity as something more than merely increasing the number of minority workers in a given workplace. Rather, my diversity model is premised on the idea that employers will want to make use of the substantive insights racialized employees have about race-discrimination dynamics that could potentially surface in the workplace. In this way, my analysis is distinguishable from Leong's because she believes that we should discourage the commodification of race.[103] I argue that, instead, we should work to control the terms on which race is commodified. We must use the law to set terms that ensure that race's use value in the affirmative action context is limited to the insights it provides about the process and experience of racial subordination. In this way, my functionalist inquiry serves as a much-needed market control over employers' use of race, *and* it ensures that the employees hired under affirmative action programs have the experience base necessary to effect change in the workplace. By redefining diversity, by redefining race's use value, the functionalist inquiry reorients the employer to be receptive to understand his employees' experiences of racialization as well as the exercise of their skills in identifying race discrimination.

In order to have a more nuanced conversation about individuals' experiences of racialization, the next section revisits the *Malone* analysis to consider the ways in which today's elective-race climate would complicate a court's inqui-

101. Leong, *supra* note 19, at 2157–58, 2169–70.
102. *Id.* at 2152, 2188–89, 2205.
103. *See id.* at 2158.

ries into the various processes of voluntary and involuntary racialization. As the next section shows, although there are complex sociological considerations that should be weighed in understanding the racialization process, it is possible to use inquiries about an individual's racialization experiences to achieve racial diversity while destabilizing the concept of race itself. Additionally, the *Malone* analysis provided below allows us to revisit how the hearing officer and the court made use of the "honest belief" standard in its analysis and the proper role honest belief claims should play in the era of elective race. I suggest that honest belief arguments, to the extent they rely on an understanding of racial self-identification that focuses on individual liberty, should have little role in affirmative action inquiries. An individual's freedom to express his "authentic desire" to identify with a given race must yield to more concrete functionalist concerns.

C. REWRITING *MALONE*: THE SOCIAL PROCESSES OF RACIALIZATION IN THE ERA OF ELECTIVE RACE

1. Physical Race or Phenotype-Based Race

The hearing officer in *Malone* began her inquiry with the brothers' physical characteristics, or what I call a phenotype-based or physical race. The hearing officer concluded that both brothers had "fair skin, fair hair coloring, and Caucasian facial features" and therefore "[did] not appear to be Black."[104] She also noted that the brothers conceded as much about their appearance when questioned.[105] Though the hearing officer's claim about identifiable black features triggered some controversy when *Malone* was decided, it would elicit far more controversy today. Americans are far more sophisticated about the wide range of physical characteristics that might cause a person to be socially categorized as a member of a given racial group. Moreover, contemporary disputes today are less focused on African Americans (who arguably have a clearer phenotypic profile) and more on persons in racial minority groups with much less clearly established physical profiles.[106] Many of these groups, including Native Americans, Middle Easterners, and Latinos, are not understood to have clearly distinguishable sets of physical characteristics. Persons who presume to "know" what members of these racial groups look like tend to privilege the features of the subset ethnic group with which they are most familiar in a given racial category.[107] Additionally, recent sociological studies suggest that racial-phenotype determinations are strongly influenced by one's perceived class. In one study, viewers were shown a racially ambiguous person and asked

104. Malone v. Haley, No. 88-339, slip op. at 17 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989).

105. *Id.* Philip Malone stated at the hearing, "Somebody might question and say, 'he doesn't look Black' whatever." *Id.*

106. *See* GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE 37–44 (2003) (noting that the growth of Asian and Latino populations in the United States has moved discussions of race away from the black–white paradigm).

107. *See* Vaquera & Kao, *supra* note 50, at 376 (explaining that Mexicans, as the largest Latino ethnicity, are the primary referent for assumptions about Latinos' culture and appearance).

to determine his race.[108] When the racially ambiguous model was dressed as a janitor he tended to be identified as black; when dressed in a business suit, the model was more likely to be characterized as white.[109] This insight suggests that poor or working-class multiracials are more likely to be assumed to be members of socially subordinated racial groups.

Recognition of the difficulties associated with identifying racial phenotype or "physical race" does not require the conclusion that phenotype-based inquiries are inappropriate when identifying individuals eligible for affirmative action programs. Rather, physical race remains the most common way in which persons are racialized in our society and should be recognized as an important trigger for socially disadvantageous treatment. However, any phenotype-based inquiry conducted today must acknowledge that determinations about physical features are always determined by the specific "racial lexicon" of the viewer, or the social experiences a viewer has had with persons in other racial groups.[110] Additionally, phenotype-based inquiries should always be an exercise in exploring the social meaning of race in a particular context. The phenotype inquiry, at bottom, is nothing more than an attempt to understand how an individual's features are most likely to be interpreted in a particular community or by a particular group of persons. By conceptualizing the inquiry into physical race as a cultural and interpretive project, the employer insulates the inquiry from claims of racial essentialism and from over- or under-inclusiveness challenges.

2. Documentary Race

The hearing officer in *Malone* next inquired into whether the Malones could provide documentary proof of their claimed racial status, apart from their self-identification decisions in their second set of employment applications.[111] The administrator concluded that the brothers had no persuasive evidence to establish that they were black because the sole documentary proof they could offer was a sepia-colored photograph of a woman they claimed to be their great-grandmother.[112] The hearing officer noted, however, that the brothers could not prove the race of the morphologically ambiguous woman in the picture.[113] In contrast, the hearing officer pointed to the brothers' birth certificates, which listed not only each brother's racial identity but the racial identity of all of their ancestors for three generations.[114] Because the brothers and all of

108. Jonathan B. Freeman et al., *Looking the Part: Social Status Cues Shape Race Perception*, 6 PLoS ONE 1, 2 (2011), *available at* http://www.plosone.org/article/info%3Adoi/10.1371/journal.pone.0025107.

109. *Id.* at 2–3.

110. *See* Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL'Y & L. 36, 48, 72–73 (2001) (noting that greater exposure to different racial groups leads to greater accuracy in categorizing faces into racial groups).

111. Malone v. Haley, No. 88-339, slip op. at 18 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989).

112. *Id.* at 18–19.

113. *Id.* at 19.

114. *Id.* at 18.

their family members accounted for in the birth certificates identified as white, the hearing officer concluded that, for documentary purposes, the brothers were racially white.[115]

Though not part of the formal documentary race inquiry, the hearing officer also seemed swayed by other documentary evidence showing that the brothers were inconsistent about their racial-identification decisions in ways that appeared strategically motivated. These issues are discussed as part of her inquiry into whether the Malone brothers' racial-identification claims were genuine, but they are surveyed here to help us understand the range of documentary sources courts today would consider as part of the documentary race inquiry. Specifically, the hearing officer noted that the first time the brothers took the Fire Department test in 1975 they identified as white, and they only decided to identify as black in 1977, after they failed to meet the general entrance-exam standard and sought to qualify under the more relaxed standard for blacks.[116] Additionally, she noted that one brother failed to respond to questions about his racial status in the employment form he filled out the day of his hire, and that another claimed his father was black—which she deemed to be a misrepresentation.[117] Lastly, the hearing officer noted that one Malone brother did not list his status as black when he applied for a promotion to lieutenant, which she intimated was due to the fact that there was no affirmative action program for the lieutenant position. On this application form, the brother declined to state race at all.[118]

Although the hearing officer seems confident in her skeptical reading of the Malone brothers' documentary proof, sociologists' work on race reveals that today her concerns about racial fraud would be understood to stand on shaky ground. For example, researchers have discovered that the birth certificates of racial minorities with an indeterminate physical profile are notoriously unreliable.[119] After studying the racial-identification data for babies who died in the first year of life, researchers determined that babies from such groups are often reported as one race on their birth certificates, but their identified race is reported differently on the death certificate issued less than one year later.[120] Some of this discrepancy may be caused by parents who may avoid identifying a mixed-race child as minority to protect the child from discrimination.[121] With

115. *Id.* at 18, 20.

116. *Id.* at 21.

117. *Id.* at 21–22.

118. *Id.* at 19 n.9.

119. *See generally* Robert A. Hahn et al., *Inconsistencies in Coding of Race and Ethnicity Between Birth and Death in U.S. Infants: A New Look at Infant Mortality, 1983 Through 1985*, 267 JAMA 259, 259 (1992) (explaining that Asian and Latino babies have the highest rates of inconsistent reports of race between the two events). In both groups, over 40% of deceased babies were recategorized. Racially ambiguous babies in both racial categories tended to be recategorized as white. *Id.*

120. *Id.*

121. *See* Lee & Bean, *supra* note 16, at 230 (reporting on a study that found that 50% of biracial white/Asian and biracial white/Native American children were reported to be white by their parents).

this understanding, one can see why the Malone brothers and their relatives were identified in birth records for three generations as white persons, even if the brothers had a black great-grandmother. Inconsistencies in the racial designations for the infants in the mixed-race baby study also may have been developed because people with ambiguous physical characteristics may be racially categorized differently by different observers. Consequently, we should expect to see some inconsistencies when we look at the racial-identification documents associated with a racially ambiguous adult, particularly if third parties are involved in some of the racial-categorization decisions in his records. Importantly, none of the third-party racial-categorization decisions in a mixed race person's records may properly reflect that individual's personal views about his or her racial identity. Therefore, affirmative action administrators and courts reviewing affirmative action disputes must distinguish between the different kinds of documentary evidence attributed to a litigant-employee to identify which materials actually reflect the employee's decisions about racial self-presentation. In addition, they should be attuned to the fact that a person with a record of inconsistent racial designations may have a particularly insightful and interesting perspective on racialization that would be relevant in conversations about diversity.

Moreover, when we focus on the question of personal agency in making decisions about documentary race, we face new and interesting questions. For the Malones' seemingly inconsistent and ambivalent racial-identification decisions are readily explained by current research on multiracials' attitudes about racial identity. For example, it is now well-known and accepted that many multiracial individuals shift between racial identities, and they may invoke a minority identity when it provides strategic advantage, either in a casual social situation or when applying to an educational institution.[122] Today, this behavior tends to elicit little controversy among multiracials themselves, although the practice has clear moral, ethical, and political significance. However, unlike the treatment the Malone brothers received, my view is that "race-switching" should not necessarily disqualify an individual from benefitting from affirmative action. Instead, affirmative action administrators and courts need a better understanding of the broad array of documentary-race evidence that may be presented, the limited responsibility individuals may have for many of these documentary-race decisions, and the various reasons a person might switch between different racial identities when given a chance to do so.

3. Public Race

The hearing officer's last inquiry was into whether the Malones "[held] themselves out to be Black" or were regarded as black in the local community.[123] The hearing officer concluded that since the Malones had no social ties

122. *See* Miville, *supra* note 49, at 512.

123. Malone v. Haley, No. 88-339, slip op. at 16 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989).

in the black community and they had not joined the Society of the Vulcans—the African-American firefighters group in the area—they had not held themselves out as black.[124] The conclusions produced in this inquiry are arguably the most troubling part of the hearing officer's decision. Any inquiry today that would require a person to prove social ties with the black community to prove he is black would raise serious concerns. At worst, the public-race inquiry the hearing officer performed could be characterized as a demand for proof of a certain set of social affiliations and practices to establish racial identity. Rigid public-race inquiries of this kind would most harshly affect those who do not have physical characteristics stereotypically identified with a particular group and would potentially constrain an individual's expressive and associational choices. Additionally, a rigid public-race inquiry of this kind could cause problems for persons whose physical features would easily cause them to be categorized as "black" but under the inquiry would be deemed suspect because they fail to socialize with blacks or lack clear ties to black communities. The hearing officer's decision is also troubling because it focuses on whether the brothers were socially recognized by other blacks as black, rather than on whether the brothers were recognized as black by whites—the group that was most likely to discriminate against them during that time period. In fact, the Malones did show that many of their white coworkers knew that they had identified as black on their employment forms and that they had not tried to hide their racial self-identification decisions.

Two changes are required to reform the public-race inquiry. First, we must establish that inquiries into public race must not be racial litmus tests that demand particular kinds of "race performance" to establish one's right to claim a given racial identity. There are no social practices that are required or constitutive of a given racial group. Rather, administrators should look for evidence of social activity that communicates a willingness to be racialized in a particular fashion. Second, we must recognize that the inquiry into an individual's social practices should primarily be directed to determining whether the person in question has engaged in social performances that would signal to out-group members (or potential discriminators) that he is affiliated with a particular group. Evidence regarding these social practices can be important in identifying racialized persons who, because of phenotype and inconsistent documentary-race evidence, might have difficulty establishing that they have significant experiences of racialization. Simply put, in the public-race inquiry, an administrator should look to evidence of a person's social practices to assess whether the individual has voluntarily taken on the risk and reward of racialization in public life. These risks and rewards are an essential part of the diversity conversation.

124. *Id.* at 19–20.

In summary, a multiprong inquiry that would allow an individual to establish in three different ways that he was, voluntarily or involuntarily, systematically characterized as a racialized subject has many advantages. Programs structured in this way ensure that persons included in a racial category in a given diversity program have a wide range of racialization experiences. Indeed, we might be particularly interested in understanding the stigma suffered by people whose phenotype establishes their racial identity, as distinct from those who are racialized primarily by documentary evidence or social practices. Even persons who are solely racialized by documentary processes have relevant things to contribute to conversations about diversity because they have likely experienced adverse shifts in their treatment once they are "outed" as persons of color. Similarly, a person who does not have physical characteristics associated with a given racial group may be able to speak about changes in his treatment once people learn about his adoption of certain racially inflected social practices that would cause him to be recognized as a minority person. Even people who are recognized as minority because of their physical characteristics, but do not identify as such, have something unique to contribute to conversations about race. By ensuring that the pool of minority applicants includes people with a range of racialization experiences, an affirmative action program will tend to destabilize race rather than fix its meaning.

III. DEFENDING FUNCTIONALIST INQUIRIES ABOUT RACE

Part III explores arguments from the antidiscrimination literature on the socially constructed nature of racial identity that suggest dangers in the functionalist approach to race proposed here. Section A addresses the claim that race is such a fraught and socially charged domain, critically important to self-definition, that we should allow private parties to negotiate their competing understandings about racial identity without government intervention. This section shows that leaving race to private decision making and the market may allow the state to avoid potentially rigid authenticity-based definitions of race, but it creates another danger—an employer-sponsored definition of race that is irrationally hostile to racially marked cultural difference. Section B addresses the view that, because race is a key part of self-definition, the government should recognize a person's individual liberty interest in racial identity, and this interest should prevent employers from challenging any employee's racial-identification decisions. I argue that the emphasis on liberty in this argument threatens to give short shrift to the concerns that have properly dominated discussions of racial bias—namely, understanding the role race plays in social subordination. Section C applies the functionalist inquiry introduced in Part II to demonstrate its value in the employment context. It demonstrates that the functionalist inquiry offers the most promise for remedying the social-subordination problems that originally motivated the creation of workplace affirmative action programs.

A. THE DANGERS OF LAISSEZ FAIRE DEFINITIONS OF RACE

The multiprong functionalist inquiry outlined here may still bring a cold shiver to some scholars' hearts. Richard Thompson Ford would likely raise concerns about the analysis because, in his view, government should not be in the business of creating racial definitions beyond what is minimally required to disrupt social subordination.[125] His primary concern would be with the third part of the analysis—the inquiry into public race. Specifically, Ford believes that cultural practices associated with racial groups should not be protected by government under antidiscrimination protections.[126] In the context of affirmative action, he would likely worry that the public-race inquiry proposed here continues a fundamental confusion that conflates race with cultural practice or race performance.[127] Ford also notes that cultural practices privileged in affirmative action discussions are merely group-salient—they are not practices engaged in by all persons in a given racial category.[128] Consequently, racial-diversity discussions that emphasize culture promote racial essentialism. Finally, Ford fears that any regime that provides preferences or protects racially inflected cultural practices will create incentives for racialized subjects to conform their behavior to the racial identity recognized under the controlling legal standard.[129] Cristina Rodríguez similarly worries that, in the affirmative action context, individuals will be incentivized to perform race in legally recognized ways to ensure that they receive institutional benefits.[130] She argues that the public-race inquiry creates identity group subsidies for the social practices associated with particular racial groups.[131] Further, she contends that, to avoid racially essentializing inquiries that reward people for conforming to stereotype, administrators should simply accept the racial-identity claims of all comers without further inquiry.[132]

Unlike Ford and Rodríguez, I am less concerned about antidiscrimination models that recognize the link between race and culture and thus extend individuals credit or consideration when they engage in cultural practices associated with marginalized racial groups. Each cultural practice is indelibly marked by the race of its community of origin, and therefore can function as a trigger for race discrimination. As I have elsewhere observed, the racial stigma attached to a given set of cultural practices often is so strong that the practices are still stigmatized even when they are adopted by racial out-group members.[133]

---

125. FORD, *supra* note 27, at 91–98.
126. *See id.* at 91.
127. *See id.* at 93.
128. *See id.* at 71–73.
129. *See id.*
130. *See* Rodríguez, *supra* note 27, at 1406.
131. *See id.*
132. *Id.*
133. *See* Rich, *supra* note 18, 1159–60. The paradigmatic example is the white man who wears dreadlocks. Although dreadlocks are increasingly being embraced as an attractive style by persons who

Because race marks cultural practices, legal analyses must account for the stigma employees experience when they engage in these practices. Because cultural practice often signals race in the absence of other markers, it is critical to our understanding of social subordination based on race.

Certainly, the arguments offered by Ford and Rodríguez are understandable. Ford in particular wants to ensure that members of cultural communities can make decisions about the value of their cultural practices in an atmosphere that accurately informs them about these practices' current social utility.[134] However, in reality, Ford's hands-off approach quickly devolves into a laissez faire or market-driven approach that is overly sanguine about whether cultural practices associated with minority communities can be fairly evaluated in the open market. An employee who engages in cultural practices associated with a racially marginalized group has no reasonable expectation (in the absence of antidiscrimination law) that the employer will analyze his practices based on pure functionalist logic or the efficiency norms of the marketplace. Rather, as scholars such as Angela Onwuachi-Willig and Mario Barnes have shown, employers (like other Americans) are still fairly hostile to the cultural performances of subordinated groups when assessing workers' compliance with professionalism norms.[135] If we leave disputes about racially inflected cultural practices to the market, we should fully expect to see the market consolidate performances of race that tend to mute or cover ethnic difference. However, this market development tells us nothing about whether minority-associated cultural practices have any important economic or social value.

Rodríguez's concerns would focus more on the potentially problematic incentives created by the public race inquiry. She would argue that legal recognition of racialized cultural practices will make those who otherwise would not engage in these cultural practices more likely to do so.[136] But, at bottom, Rodriquez's argument is really about the exploitative use of these so-called "identity subsidies": she seeks to protect sophisticated players in the affirmative action market who would be tempted to try to "game the system" by inauthentically claiming and engaging in certain cultural behaviors. However, to be clear, an affirmative action program that recognizes the importance of racially-inflected cultural performance does not compel conformity; minority applicants will only feel compelled to inquire about these practices if they realize that they do not have other bases for showing they have had adequate experiences of racialization.

---

are not socially recognized as black, the practice still remains linked to the racial community perceived to have originated the practice. Additionally, as I observe in my other work in this area, persons who engage in cultural practices associated with racially subordinate groups may be sanctioned for engaging in such behavior. The motivations for this sanction stem from frustration and concerns about the loss of status threatened when members of socially powerful groups abandon their own cultural practices in favor of socially subordinate communities.

134. *See* FORD, *supra* note 27, at 71–73.

135. *See* Onwuachi-Willig & Barnes, *supra* note 86, at 1315–19.

136. Rodríguez, *supra* note 27, at 1406.

Simply put, public race or cultural practice is merely one way of establishing that an employee has relevant experiences of racialization. People offended by the public race inquiry can avoid this inquiry altogether by providing other evidence of relevant racialization experiences. Last, the risk of gamesmanship should not prevent use of this productive approach. Administrators of affirmative action programs know that they cannot create a system that prevents gamesmanship entirely. Moreover, an affirmative action regime that spurs a putative minority to inquire about the practices of his or her alleged cultural/political group might not be such a bad thing in the long term.

Ford's and Rodríguez's arguments might also be characterized as raising concerns about regimes that incentivize an employer to racially commodify an employee based on stereotypes about the employee's racial group. Unfortunately, these scholars' suggestion that we abstain from protecting racialized cultural practices does not escape the commodification problem; rather, it merely creates other commodification dangers. When employers know that they can, with impunity, "prefer" performances of race that do not disrupt the baseline cultural default in a given workplace, they will naturally prefer minorities who engage in this more conservative version of race performance.[137] Devon Carbado's and Mitu Gulati's work supports this claim because they show that employers have a preference for employees whose "working identit[ies]" signal conformity to established workplace culture, rather than challenging workplace cultural norms.[138] In their latest book, *Acting White*, Carbado and Gulati expand on this claim, explaining that employers may prefer certain performances of race (or ways of expressing racial identity) that are consistent with white middle-class professionalism norms.[139] Employers adopt this approach because they believe that less strongly racially marked minority employees are less likely to experience cultural marginalization and exclusion and are less likely to challenge the cultural norms of the workplace.[140] Carbado and Gulati's work helps us to understand that there is already a market for racialized employees that commodifies employees based on how they perform race, and this market prefers subgroups of minority employees who do not engage in behavior that is culturally inconsistent with white middle-class professionalism norms. I argue that this racial commodification dynamic threatens minorities' dignity and self-identification interests far more than analyses that provide credit for socially stigmatized, culturally marked performances of racial identity. Again, in most workplaces, the default cultural norm is something produced by socially privileged whites, and this norm is hostile to, if not actively discouraging of, expression of the kind of minority-associated cultural difference

137. *See* Carbado & Gulati, *supra* note 95, at 1293–98; Onwuachi-Willig & Barnes, *supra* note 86, at 1302–05; Rich, *supra* note 18, 1200–02.

138. *See* Carbado & Gulati, *supra* note 95, at 1293–98.

139. *See* DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA 25–33 (2013).

140. *Id.*

common in working-class communities. To be clear, minorities currently do not have the freedom to choose the ways in which they will perform racial or ethnic identity. Rather, the current employment market economically coerces the rational minority worker into choosing an approach that is least disruptive to middle-class professionalism norms.

The public-race aspect of my proposal is bound to trigger controversy. However, I believe that in the affirmative action context, one can acknowledge the way cultural performances trigger discrimination without believing that this acknowledgement must lead to cultural conformity by all who seek to identify with a particular racial group. Moreover, the risk associated with ignoring racially inflected cultural practices outweighs any potential concern about the law's role in standardizing minority culture. If we do not make public race a part of the affirmative action inquiry, administrators may overlook affirmative action candidates who may primarily be raced because of the cultural practices in which they engage. Lastly, the refusal to recognize public race would fall most heavily on minority-identified morphologically ambiguous persons because cultural practice is one of the key factors or triggers that cause them to be subject to racial bias in daily life. An affirmative action inquiry that gives credit for having suffered stigma based on these practices does much to disrupt dynamics of racial subordination.

B. THE DANGERS OF LIBERTY-BASED APPROACHES TO RACE (OR THE RETURN OF THE HONESTLY HELD BELIEF STANDARD)

Randall Kennedy argues that the strength of *Malone* rests in part on its respect for the honestly held belief standard, an idea key to our understanding of elective race.[141] Specifically, Kennedy argues that "no plausible aim of the affirmative action plan [in *Malone*] would have been worth the cost of excluding individuals from racial identifications that they honestly embraced."[142] The virtue of the court's decision, he explains, is that it accommodates "people who might conventionally be described as white [but] could nonetheless be classified as black so long as they *honestly considered* themselves to be black."[143] In Kennedy's opinion this approach pays "appropriate deference to the healthy intuition that a free society ought to permit people to exit and enter racial categories, even for purposes of gaining access to public entitlement programs, fettered only by the bounds of good faith."[144] To rule otherwise, he explains, would return us to a time when we abided by the "baleful notion that state power should be used to confine every person to a given racial place regardless of individual preferences."[145] In Kennedy's view, "[i]t would be

141. Kennedy, *supra* note 10, at 1191–93.
142. *Id.* at 1191.
143. *Id.* (emphasis added).
144. *Id.* at 1191–92.
145. *Id.* at 1192.

better to tolerate some or even considerable racial fraud under a regime of racial self-identification than to police affirmative action programs by subjecting individuals to racial-identity tests."[146] Indeed, he explains, abolishing these programs would be preferable to maintaining them if intrusive racial policing became part of their price.[147]

Kenji Yoshino's work might also be cited in support of liberty-based approaches to racial identification because he calls on us to adopt a broader antidiscrimination logic that takes seriously the interest in the presentation and recognition of one's authentic self.[148] In his book, *Covering: The Hidden Assault on Our Civil Rights*, Yoshino explains that we all face "covering" demands with regard to various socially disfavored parts of our identities. What antidiscrimination law requires, in his view, is a way to more broadly recognize the dignity injury inflicted when we are asked to mute difference and deny our authentic selves in order to conform with the norms of the workplace or broader society.[149] Although he does not specifically discuss the issue of racial self-identification, Yoshino's claim that covering demands are kind of discrimination would likely resonate with multiracials as they have argued that data-collection regimes or social frameworks that do not account for racial complexity force them to "cover" and pass as monoracial. They could make similar claims about affirmative action programs that refuse to grant applicants recognition or credit for all aspects of their racial identities.

Scholars who privilege individual autonomy and liberty in their accounts of individuals' antidiscrimination interests provide multiracials and racially ambiguous people with precisely the normative justification they need to demand recognition of, and affirmative action benefits based on their complex claims of racial self-identification. However, once an individual's racial self-identification interest is represented as being part of her interest in authentic self-presentation, there is little negotiating room left to argue for employer functionalist inquiries into the basis for her racial-identity claims. The key consideration in establishing dialogue with persons who adopt a liberty-based position is to differentiate between the individual's interest in authentic self-presentation and the employer's or government institution's interest in tapping into certain insights produced by specific kinds of racialization. They must be reminded that the employers' interest is in spurring dialogue about the ways that negative forms of racialization may be shaping workplace culture, and this end trumps their liberty interests. To allow the employer to achieve her end, she needs a way to recruit employees that have something more than a mere amorphous symbolic interest in asserting a connection to a given minority group. Importantly, an employee subject to a racial-identity inquiry based on proper functionalist concerns will

146. *Id.*
147. *Id.*
148. YOSHINO, *supra* note 29, at 21–25.
149. *Id.* at 23.

not be significantly burdened, Rather he may merely be required to answer a focused set of questions about the degree to which he has been racialized as a member of particular group. The public-race inquiry does not, however, deny employees the freedom to pursue their expressive interests in claiming whatever racial identities they choose in contexts other than the workplace. The functionalist inquiry simply establishes that, without more, an aspirational or purely symbolic connection to a racial group is insufficient to establish that an individual can address the employer's interest in learning more about racial subordination.

C. APPLYING THE FUNCTIONALIST INQUIRY TO WARREN AND *MALONE*

Armed with our new understanding of the central role racialization experiences should play in understanding affirmative action and diversity, the Elizabeth Warren controversy becomes a much simpler case. First, the analysis allows us to set aside Warren's claim that her Native American identity "is an authentic and important part of who she is"[150] because, although we understand that this statement is an expression of her personal interest in her Native American background, it does not necessarily establish that she has relevant experiences of racialization. After performing the three-part functionalist inquiry into her prior racial-ascription experiences, it becomes clear that she can provide only a thin basis for understanding the experiences of racially subordinated Native Americans. Specifically, Warren made no claim that her phenotype had caused her to be recognized as Native American. Her documentary race evidence, though mixed, reveals a tendency to recede back into whiteness. Her best evidence of a desire to be socially recognized as Native American was her identification as Native American in the AALS Directory of American Law Teachers for close to ten years.[151] However, Warren explained that she made this disclosure in order to meet other Native Americans and learn about their lives and that she retreated back into identifying as white when this attempt failed. The strongest proof that this documentary attempt to establish race failed is that the hiring committee at Harvard was entirely unaware that Warren identified as Native American until after she was hired. Warren's evidence of public race was also limited. Her best evidence on this score was her contribution to an out-of-print 1984 cookbook called *Pow Wow Chow: A Collection of Recipes From Families of the Five Civilized Tribes: Cherokee, Chickasaw, Choctaw, Creek, and Seminole.*[152] Even if we assume, again, that this act reflects Warren's earnest desire to express her interest in Native American identity, there is no evidence that this act caused her to be regarded in daily life as a Native American. As a whole, the evidence in Warren's case reveals that her understanding of discrimination against Native Americans in the workplace

150. Sanneh, *supra* note 3.
151. *See* Chabot, *supra* note 5.
152. Sanneh, *supra* note 3.

or in other social settings would be quite limited. Consequently, Warren was correct to conclude that she should not be a beneficiary of a diversity-focused affirmative action program.

My determination that Warren should not have been eligible for benefits under a diversity-based affirmative action program does not invalidate her claim that her Native American background is *important to her personally.* To the contrary, in my view, Warren should have a legal basis for suing her employer for exploitatively using her identity claims for diversity-reporting purposes if this administrative move was made without her permission.[153] That is, Warren's sympathetic connection to Native Americans might make her particularly offended by the abusive use of her identity claims, particularly if they compromised opportunities for more clearly racially marked Native Americans. Antidiscrimination scholars rightly worry about employers' exploitative use of an employee's cultural and racial heritage when the employee is asked to market to, recruit, or network with other minority employees.[154] We should not overlook, however, the dignity injury employees may feel when their racial identities are exploited for mere statistical purposes. Indeed, employer pressure of this kind can make an employee feel vulnerable and defensive and can quickly devolve into the kind of hostile environment with which Title VII is concerned. Legal protections would help to forestall this kind of strategic employer behavior.

Though the functionalist analysis makes Warren's a simpler case, it makes *Malone* more difficult. There is evidence to suggest that the Malones' racial-identity claims were strategic, but times have changed in ways that make this strategic action more ethically ambiguous and potentially more acceptable to some readers—certainly more acceptable than it was at the time the case was decided. Moreover, the case becomes more interesting when we consider that the Malone Brothers worked in the Boston Fire Department for ten years while their racial identities were officially recorded as black. During that period, they may have been racialized in some limited way for the brothers explained that they told their coworkers that they identified as black. We cannot know if the Malone brothers' strategic gambit caused them to experience discrimination, if they were regarded differently by their coworkers after the disclosure, or if this identity decision caused them to relate differently when they were confronted with race discrimination. An administrator might still reasonably conclude that

153. This issue is discussed in further detail in my forthcoming article. *See* Rich, *supra* note 33. This claim could be constructed as a standard disparate treatment claim under Title VII, which allows a worker to bring a Title VII action to challenge disadvantageous treatment because of race. The employee who is racially commodified for diversity-reporting purposes could argue that, but for her perceived racial identity, she would not have been reassigned to another racial category instead of the one she recognizes as the accurate understanding of her racial status. Alternatively, she could bring a standard Title VII "hostile environment" claim alleging that the employer's use of her racial identity in a particular manner over time amounted to severe and pervasive racial harassment.

154. *See* Leong, *supra* note 19, at 2174.

the Malones did not have sufficient experiences with race discrimination and marginalization to be granted benefits under the Department's remedial affirmative action program. However, if we focus on racial diversity, the Malones' experiences of racialization in the Department might be relevant and might dovetail with the more sympathetic case of persons who phenotypically tend to be categorized as white but who socially identify as black. Indeed, Elizabeth Warren may have had her first real experiences with racialization after Harvard began characterizing her in public documents as their first minority female hire. She certainly had relevant experiences of racialization when media analysts began questioning her qualifications after they learned she was Native American.

CONCLUSION

Our current cultural moment calls on us to reevaluate *Malone* and the Warren controversy for political, moral, and ethical reasons. We have long known that employers have broad power to define race for affirmative action programs. Yet this power raises new concerns in the era of elective race, as employees place more emphasis on their racial self-identification decisions and face a new, unique risk of racial exploitation. For a time, scholars abandoned questions about how to define race for the purposes of affirmative action, because it appeared our only recourse was to return to the politically fraught authenticity-based inquiries about racial identity from the early years of affirmative action, or to simply honor the racial membership claims of all applicants. This Essay shows that, armed with a more nuanced understanding of "elective race," employers, policymakers, and judges can approach affirmative action programs with proper respect for a person's racial self-identification decisions, but also with an eye towards the functionalist goals of diversity programs. The functionalist approach outlined here allows employers a range of discretion to ask questions about the substance or basis for a racial status claim, but it remains dynamic enough to account for the multiple ways in which race is lived and experienced. The analysis promises to allow employers to discuss race in ways that tend to destabilize racial constructs and, equally important, responsibly administer affirmative action programs in the era of elective race.