logical features that define the group, and characteristics referred to as "conduct," that is, practices, aesthetics, and other traits that occur as a secondary consequence of an "identity" developing around the stigmatized feature.[257] They have concluded that Title VII protects only against "status"-based discrimination and is not concerned with discrimination triggered by "conduct," associated with a protected class.[258] As the status/conduct distinction has been applied in various Title VII cases, it has taken on a variety of rhetorical constructions. Specifically, courts are conducting an inquiry into the status/conduct divide when they attempt to distinguish between the "involuntary" attributes of a group and those which are "voluntary,"[259] or, alternatively, when they distinguish between the "immutable" and "mutable" characteristics of a protected class identity.[260]

The status/conduct distinction is problematic on a number of levels, the most obvious being that the line between voluntary and involuntary attributes is neither bright nor clear. Indeed, many of the so-called voluntary or "conduct-based" aspects of identity are extremely difficult to unlearn because routine practice has caused physical changes in a person's body (e.g., accents caused by the shape of one's palate) or because cognitive barriers develop over time.[261] Additionally, the status/conduct divide fails to consider the personal dignity concerns that inform race/ethnicity performance behavior. Plaintiffs rightly might question whether it is fair or appropriate to ask a person to abandon race-associated or ethnically-marked conduct when it does not interfere with the person's ability to do her job. They would argue that these features of identity should not be summarily disregarded because, when a morphologically-marked, stigmatized group develops a positive conduct-based component of its identity, the conduct often serves a special psychological purpose and therefore should enjoy special protection.[262] Specifically, this conduct may provide a kind of dignitary armor that allows a person to tolerate subtle discriminatory slights that the law does not address or provide

[257] *See generally* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317 (1997) (comparing status/conduct divide in cases of race, sex, national origin, and religious discrimination). The sole exception is disability discrimination, which is defined in a manner that protects both status and conduct associated with being disabled. *See* 42 U.S.C. § 12101 (2000).

[258] *See* Garcia v. Gloor, 618 F.2d 264, 269–70 (5th Cir. 1980).

[259] *See id.* at 270–71.

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

[261] *See* Gaulding, *supra* note 90, at 685–87 (explaining that "most Black English speakers cannot simply choose to speak Standard English").

[262] *See id.* at 692.

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an independent basis for self-esteem that combats the negative stereotypes about the group in larger society.

Legal scholars also are critical of the status/conduct distinction, largely because of its conceptual instability. They explain that the status/conduct divide tends to be interpreted and rationalized differently, depending on the identity category at issue.[263] As applied to the Title VII context, it suggests that courts will articulate different rationales to explain why they exclude conduct or "voluntary" behavior from Title VII's protection for different protected classes.[264] Equally troubling, judges may borrow rhetorical constructions from one category of discrimination cases and inaccurately conceptualize the interests at issue in another category of discrimination cases,[265] often with disastrous effects for the parties involved.

The paradigmatic case on race performance is *Rogers v. American Airlines, Inc.*,[266] where the natural/artifice distinction was first articulated. In *Rogers*, an African American woman brought a disparate impact claim challenging her employer's policy of prohibiting women from wearing all-braided hairstyles.[267] Rogers argued that the policy constituted discrimination because it violated black women's dignitary interest in wearing the cultural hairstyle.[268] Recognizing that her claim of race discrimination was not premised on race-

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[263] *See* Halley, *supra* note 27, at 509–10 (critiquing immutability); Yoshino, *supra* note 27, 494–96 (arguing that "courts do not characterize all traits that are hard to change . . . as immutable," only those traits "perceived to be defined by nature rather than by culture").

[264] *See* Yoshino, *supra* note 27, at 495–96.

[265] While I am sensitive to the fact that there may be problems in drawing analogies between the discrimination suffered by racial and ethnic groups, I believe that the animus involved in these groups of cases is functionally identical. Indeed, many of the claims framed as "race discrimination" claims concern a plaintiff from an ethnic group that has been so marked by racial constructs and their accompanying stigmas that the reference to ethnic identity is treated as irrelevant and improper. *See, e.g.*, Rawlins-Roa v. United Way of Wyandotte County, Inc., 977 F. Supp. 1101, 1106–07 (D. Kan. 1997) (holding that Dominican national was required to show evidence of race discrimination to prevail on Title VII claim); Cuello Suarez v. Puerto Rico Elec. Power Auth., 798 F. Supp. 876, 891 (D.P.R. 1992) (holding same in case raising section 1981 claim). National origin claims, in contrast, are brought by plaintiffs who perceive that their ethnic group has retained its distinct identity, independent of racial constructs and that the discrimination suffered is triggered by that specific identity. In my view, the main distinction between national origin cases and race cases is that the plaintiff in the national origin case can offer evidence which shows a tighter fit between a stereotype and her ethnic identity. These distinctions between race and national origin discrimination prove irrelevant to our analysis, as it generally concerns negative animus triggered by voluntary behavior associated with disfavored groups. *See also* Perea, *supra* note 12, at 857 (analogizing between race and national origin discrimination and noting that they are "neither relevant nor detrimental in the performance of a job").

[266] 527 F. Supp. 229, 231–33 (S.D.N.Y. 1981).

[267] *Id.*

[268] *Id.* at 231.

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associated morphology, Rogers sought to establish that braids were a kind of race performance by explaining that black women in America perceived the hairstyle to be a means of expressing African American identity.[269] To support this view, Rogers noted that Cicely Tyson, a popular African American actress recently had worn braids to the Academy Awards as a sign of black pride and that this act had inspired her, and that the hairstyle historically had been worn by women in Africa.[270] The district court flatly rejected Rogers's claim, explaining that Title VII, like other antidiscrimination statutes, was designed only to protect against discrimination based on the immutable, biological characteristics that are constitutive of blackness.[271] The court explained that Title VII and section 1981 might prohibit discrimination based on the "Afro/bush" hairstyle because this hairstyle is a biological or immutable feature of blackness.[272] However, it

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[269] *Id.* at 231–32. Rogers is not the only plaintiff who attempted to raise this issue; indeed, although she lost her claim, *id.* at 234, black women plaintiffs have continued to litigate this issue as late as the 1990s. *See, e.g.*, Cooper v. Am. Airlines, Inc., No. 97-1901, 1998 U.S. App. LEXIS 10426 (4th Cir. May 26, 1998) (per curiam). Cooper challenged American Airlines' pre-1993 grooming code forbidding employees from wearing all-braided hairstyles. American Airlines revised its policy in 1993 to allow all "'braided hairstyles without beads or trim' so long as any loose braids were 'secured to the head or at the nape of the neck.'" *Id.* The court concluded that Cooper's claim was moot. *Id.* at *3.

[270] *Rogers*, 527 F. Supp. at 232.

[271] *Id.* at 232–33.

[272] *Id.* at 232; *see also* Kang, *supra* note 18, at 312–20 (analyzing *Rogers* decision). Kang explores the irony of the *Rogers* court's statement, noting that the insistence that black women's hairstyles be natural in order to be afforded protection ignores the fact that most white women's hairstyles are not natural. *Id.* at 315. This results in black women having fewer aesthetic choices than whites. *Id.* Of additional note, courts assume a variety of white hairstyles are natural because the whiteness is unmarked or invisible. Against this backdrop, any hairstyle a black woman adorns that is inconsistent with these styles is deemed deviant. *Id.* at 312–13.

Indeed, the only circumstance in which courts have recognized the validity of a race-associated practice was in this "Afro" scenario. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir. 1976) (en banc). In *Jenkins*, an African American employee claimed that she had an uneventful relationship with her supervisor until she appeared at work one day wearing an Afro. In her complaint to the EEOC, she stated, "I have worked for Blue Cross and Blue Shield approx. 3 years during which time I [had] no problem until May 1970 when I got my natural hair style." *Id.* at 167. Importantly, Jenkins' race-associated morphology had never offended her employer prior to the change in hairstyle. In order for the court to treat Jenkins' EEOC complaint concerning Afro-discrimination as race discrimination, it must have concluded that Afros are a genetic or immutable component of blackness. However, the facts of *Jenkins* refute this proposition. Jenkins indicated that she had suddenly changed her aesthetic and donned an Afro, clearly indicating that the hairstyle was not a function of biology. *Id.* In this case, her employer regarded her new aesthetic as a threat to the cultural hegemony of the workplace. The *Jenkins* case stands as a reminder that the aesthetic choices of minority employees can trigger race discrimination even when the discriminators profess to be resolutely indifferent to race-associated morphology. *See supra* notes 206–217 and accompanying text (discussing aversive racism). These cases decisively establish that, although there are

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explained that an "all-braided hairstyle" was not a protected racial trait because it was an "'easily changed characteristic'" and "even if socioculturally associated with a particular race or nationality, [it was] not an impermissible basis for distinctions in the application of employment practices by an employer."[273] Additionally, the court scoffed at Rogers's evidence proffered to show that braids were a part of African American identity. It noted that a popular white actress (Bo Derek) recently had worn braids in the movie "10," and therefore the practice was not particularly constitutive of African American identity.[274] Consequently, American Airlines's no-braids policy did not trigger Title VII concerns.[275]

The insights provided in the previous two Parts of this discussion explain the injustice of this view and lay the groundwork for a race/ethnicity performance analysis, which would produce a fundamentally different result. As a preliminary matter, I note that the disparate impact analysis theoretically should not have required such a strong showing about the immutable race-associated nature of Rogers's braids, as disparate impact analysis is designed to address policies that are neutral on their face, but tend for some reason to disproportionately compromise the interests of a protected group. However, assuming, arguendo, that the burden to establish a connection between race and a practice is relatively high in this analysis, the race/ethnicity performance analysis would allow that connection to be made without reference to immutability, and precisely because it is based on cultural practice. Indeed, the court would have avoided the woeful error it made in evaluating the evidence Rogers had offered to demonstrate the symbolic importance of the all-braided hairstyle. The court concluded that a single white actress's decision to wear a hairstyle in a film rebutted the more substantial historical evidence Rogers offered showing the long association between Africans and African Americans and braids.[276] While the transmission of cultural

employers who may have shed their antipathy towards the plain morphological characteristics associated with races, many remain deeply offended by practices associated with low-status racial "others."

[273] *Rogers*, 527 F. Supp. at 232 (quoting Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980)).

[274] *Id.* at 232.

[275] *Id.* at 233. The court summarily dismissed Rogers's claim as a mere matter of individual choice and personal expression. *See id.* at 231. ("[T]his type of regulation has at most a negligible effect on employment opportunity. It does not regulate on the basis of any immutable characteristic of the employees involved. It concerns a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment . . . .").

[276] *Id.* at 232. *See* Kang, *supra* note 18, at 316–17 (describing Judge Sofaer's analysis in *Rogers* as falling prey to this problem). Kang argues that Judge Sofaer reports on Bo

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or race/ethnicity-associated practices is to be celebrated, the race/ ethnicity performance framework teaches that courts should be wary of defendants' attempt to use a lone example of an outgroup member who engages in the race/ethnicity-associated practice as a means to invalidate a plaintiff's claims. If the court had applied a race/ethnicity performance analysis, it would have been required to treat Rogers's proffer of evidence in support of the race-associated nature of the practice more seriously and proceed to the second phase of the inquiry: an investigation of the employer's justifications and motivations.

The race/ethnicity performance framework would also have warned the *Rogers* court to be wary of American Airlines's seemingly "neutral" justification for its policy and to avoid allowing general palliatives about professionalism to improperly short circuit the court's analysis. In the *Rogers* case, American Airlines never was asked to define what they meant when they required employees to wear "conservative" or "business-like" hairstyles, or to explain why it believed that if her braids were visible Rogers could not convey a business-like image.[277] As a consequence, the company was able to use the value of professionalism[278] (an undefined, highly subjective value) as a cover for a policy which expressed the company's hostility towards blacks. Even if we assume that some hairstyles might interfere with job performance, American Airlines should have been required to explain why visible braids simply could not be viewed as professional. Under a race/ethnicity performance framework, unless American Airlines provided some clear, well-defined, and supported reasons for why the plaintiff's hairstyle interfered with the projection of its image, the plaintiff should have prevailed on her claim.

McGlothin v. Jackson Municipal Separate School District[279] presents another opportunity to explore the insights that the race/ ethnicity performance framework provides in these cases. McGlothin was an African American teacher's aide who brought a claim of religious discrimination under Title VII, alleging that her employer, a municipal school district, had subjected her to disparate treatment when it terminated her for wearing African head wraps and dreaded hairstyles as required by her Rastafarian and Hebrew-Israelite

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Derek's appropriation of the cornrow style to explain that the style was simply hot and faddish, offering this singular example as proof that the hairstyle was not communicative of black aesthetic pride or any racially associated political message. *See id.*

[277] *Rogers*, 527 F. Supp. at 233.

[278] *Id.*

[279] McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853 (S.D. Miss. 1992).

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beliefs.[280] The school alleged that her appearance violated its dress code and that she had never communicated the religious basis for her preferences, instead citing her reasons as being related to her normal "practice and heritage."[281] Although McGlothin submitted documentary evidence establishing that she had informed the district of the reasons she wore dreaded hairstyles, the court credited the testimony of her supervisor that McGlothin had never represented these activities as religious but rather as associated with race. The court therefore dismissed her claim, indicating that it did not raise Title VII concerns.[282]

Once the technical legal justifications for the court's decision are set aside, the case shows the hallmark traits of a race performance scenario. The facts of the case indicated that McGlothin repeatedly was warned that her unkempt hair set a bad example for her young charges and responded accordingly by changing her natural hairstyle and intermittently wearing headwraps. The evidence provided in the case and the testimony offered would have strongly supported a claim of race performance discrimination. However, recognizing that these kinds of protections were not available, McGlothin sought to recharacterize her claims as religious discrimination.

When McGlothin's actions are viewed under the race/ethnicity performance framework, several points become clear. First, the notice problems that plagued her case evaporate, for she provided clear evidence that she gave her employer specific notice that the hairstyles she had chosen were part of an expression of her heritage and nothing was presented to refute this claim.[283] Second, the race/ethnicity performance framework focuses our attention on the context in which the dispute occurred and the event that caused McGlothin to increase her race performance behavior. A review of the facts shows that the precipitating event that encouraged her to adopt a "natural" hairstyle was the school's Black History Month celebration and its announcement that it was adopting a diversity initiative.[284]

[280] *Id.* at 854–55. Though she alleged religious discrimination, most of the evidence that McGlothin submitted indicated that she represented her desire to wear headwraps or a "natural" hairstyle as part of her performance of African American identity. *Id.* at 857–58. Indeed, at the hearing convened after she was terminated, she repeatedly represented the headwraps and dreaded hairstyles as part of her African American culture, or her Hebrew-Israelite culture. *Id.* at 863.

[281] *Id.* at 860 (quoting testimony of Dr. Joseph Pete, Assistant Superintendent of the District) (internal quotation marks omitted).

[282] *Id.* at 865–66.

[283] *Id.* at 865 (concluding that "[t]he explanations which the District's witnesses credibly maintain she provided . . . were reflective of the African culture and Ms. McGlothin's African heritage").

[284] *Id.* at 856.

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McGlothin also began wearing headwraps to school more consistently and dreadlocking her hair after the district adopted a general program celebrating diversity.[285] Viewed in context, her behavior seems more logical; she felt safer in expressing ethnically marked aesthetic preferences because she believed that expressions of cultural or racial pride would be tolerated in line with the school's new policy.

Third, the race/ethnicity performance model suggests that McGlothin's behaviors must be viewed in the aggregate, rather than as single practices. Courts must understand that disparate aesthetic and behavioral choices may be part of a comprehensive effort to enact a racial/ethnic identity. Indeed, the facts of McGlothin's case suggest that she did not understand why her race-associated practices were offensive in light of the district's multiculturalism policy. Therefore, she vacillated between headwraps and dreaded hairstyles in an attempt to find some means of expressing her racial identity that did not offend her employer. Despite her efforts, she was chided for being unkempt and inappropriately dressed, and she was informed that her appearance violated the dress code.[286] Her attempts at accommodation and compromise were recast as willful recalcitrance.

Finally, the race/ethnicity performance framework suggests that the school district should have been required to explain why it perceived McGlothin's appearance to be in violation of the dress code, particularly in light of its newly adopted multiculturalism policy. It could not have prevailed based only on the assertion that dreadlocks are dirty, or that it perceived McGlothin's headwraps and cultural hairstyles to be unkempt, in part because these race-neutral justifications are disturbingly resonant with stereotypes about blacks, and it had no apparent basis for declaring McGlothin's hairstyles unsanitary or disruptive. Under the race/ethnicity performance framework, McGlothin presented sufficient evidence to establish a prima facie case of discrimination, and she should have been allowed to proceed to trial on her claims.

The framework proves equally helpful in addressing national origin or ethnic discrimination claims. For example, in *Jurado v. Eleven-Fifty Corp.*,[287] a bilingual Latino disc jockey brought a Title VII disparate treatment and disparate impact claim against his radio station employer, seeking wrongful termination damages based on his employer's decision to fire him for his refusal to abide by an English-only rule when hosting his radio program.[288] When Jurado began his

[285] *Id.* at 858.
[286] *Id.* at 855.
[287] 813 F.2d 1406 (9th Cir. 1987).
[288] *Id.* at 1408–09.

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tenure at the radio station, he hosted an English-only radio program and never expressed an interest in speaking Spanish on the air until his employer instructed him to do so. His employer hoped that by providing dual language programming, the radio station would attract more listeners.[289] Ultimately, the increase in listeners failed to materialize, and a consultant concluded that listeners were confused by the Spanish interludes and might lose interest in the radio station because of them.[290] Jurado, therefore, was ordered to resume using an English-only format.[291] When he refused to abide by the English-only rule, he was terminated.[292]

On review of Jurado's claims, the district court granted summary judgment to his employer.[293] On appeal, the Ninth Circuit affirmed the lower court's decision, explaining that since Jurado was bilingual, his language choice was a voluntary, mutable characteristic, and therefore it did not concern Title VII.[294] The court concluded that Jurado's rights under Title VII were not violated when the employer ordered him to stop speaking Spanish on the air.[295]

In *Jurado*, the race/ethnicity performance framework proves especially helpful, as the insights it provides again help explain the plaintiff's seemingly irrational behavior. The ethnic performance framework suggests that Jurado refused to stop speaking Spanish on the air because he perceived his employer's programming decision to be a status- based assault on the standing of his racial/ethnic group. Specifically, the model shows that Jurado likely believed that the radio station's abandonment of Spanish programming signaled either that his employer devalued Latinos or that he was pandering to racism.[296] As Jurado explained, the switch back to the English-only format felt like an attack on his identity: He argued that "it would have taken [his] character away."[297]

Despite Jurado's hurt feelings, a court applying the race/ethnicity performance framework likely would conclude that the employer should have prevailed. When viewed in toto, the radio station's

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289 *Id.* at 1408.

290 *Id.* at 1408, 1410.

291 *Id.*

292 *Id.*

293 Jurado v. Eleven-Fifty Corp., 630 F. Supp. 569 (C.D. Cal. 1985).

294 *Jurado*, 813 F.2d at 1411, 1412.

295 *Id.*

296 Jurado presented evidence on this point, as the consultant that recommended that the station switch to an English-only format indicated that the radio station was "preoccupied with ethniticity [sic] to a frightening degree," that Jurado's show was "too ethnic," and that the station did not "need the Mexicans or the blacks to win in L.A." *Id.* at 1410 (internal quotation marks omitted) (alternation in original).

297 *Id.* at 1409–10 (internal quotation marks omitted).

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actions do not suggest that its request for an English-only program was based on discriminatory intent. Rather, it was the radio station's program director's idea to add Spanish to Jurado's program, and the desire was motivated by an interest in making a *special appeal* to Spanish-speaking listeners. When the special appeal failed, the program director, logically, should have been permitted to require Jurado to return to an English-only format.[298] Also, unlike the scenario described in previous cases, in which employers attempted to justify discriminatory policies based on speculation about customer preferences or vague notions of "professionalism," in this case the programming director's actions were based on a study produced by a consultant who analyzed the relevant market demographics and came to a reasonable, well-supported decision.

The plaintiff's actions also must be considered. While it seems problematic to force ethnically marked workers to use these indicia to market products, this is not the issue presented here. Rather, in this case, Jurado voluntarily consented to allow his employer to use his Spanish-speaking capability in his radio program and, having agreed to use this performative behavior as a commodity, he could not cry foul when his employer decided that this commodity was not as valuable as it initially seemed. Jurado knowingly consented to allowing part of his identity to be used in a marketing strategy. Similarly, he should have known that his right to engage in this kind of ethnic display could be summarily terminated. In short, because the radio station's treatment of Jurado was not based on hostility to Latino culture, his claim of national origin discrimination was properly denied.

Although Jurado still loses on his claim under the race/ethnicity performance framework, the resulting decision produces an analysis that is much more responsive to the needs of the parties involved. The race/ethnicity performance analysis directly addresses Jurado's concerns about individual dignity and group status, as well as his employer's concerns about his marketing discretion. In contrast, in our current Title VII analysis, the decision turns on the irrelevant fact that Jurado is bilingual. The resolution of this claim under the race/ethnicity performance framework is not only more satisfying, but more logically defensible.

The *Jurado* case also provides an opportunity to consider some of the basic limiting propositions for the race/ethnicity performance framework, propositions which may comfort employers. The first lim-

[298] The case does, however, raise questions about when it is permissible for an employer to ask an employee to use some aspect of her racial or ethnic identity to market his product or business. This issue will be explored in a subsequent article.

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iting proposition is that an employer can defeat a race/ethnicity performance discrimination claim when she provides a valid, objective, documented explanation for why the behavior compromises her ability to market her product or impedes the employee's job performance. The second limiting factor is based on individual dignity concerns. Stated simply, the employer is free to prohibit any race/ethnicity performance when the behavior tramples upon civil rights of other employees.

A clear example of this second limitation is presented in circumstances when race/ethnicity performance claims conflict with Title VII's goal of gender equality. For example, one can imagine that Clarence Thomas, under a Title VII regime that protected race performance behavior, might attempt to explain his alleged sexual harassment of Anita Hill as a moment of race performance, namely "down home courting."[299] His employer's sanction of the harassing behavior, under this view, would provide grounds for a Title VII race discrimination claim. However, under a race/ethnicity performance regime, Thomas loses. His employer would have been well within his rights to tell Thomas that such behavior violated Title VII because of its effect on Hill, regardless of its independent cultural standing.

Some may argue that the above cases paint an overly optimistic view of courts' potential to resolve cases using the race/ethnicity performance framework, and rather than being branded racist, courts automatically will assume a practice is race/ethnicity-associated for fear of being accused of insensitivity. However, this admittedly politically loaded landscape is easier to navigate than it seems. As shown by many of the cases previously cited, plaintiffs typically come forward with clear, specific references for their race/ethnicity-associated beliefs. For example, in *McGlothin*, the plaintiff provided Bible references and cited the tenets of Rastafarianism as a basis for her race performance behavior.[300] Similarly, the plaintiff in *Rogers* cited

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[299] *See* Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 427–31 (Toni Morrison ed., 1992) (discussing claim that Clarence Thomas's behavior towards Anita Hill was example of "down home courting"). Although no one yet has explored possible cultural defenses to sexual harassment and other Title VII claims, there is a developing scholarship on cultural defenses to criminal behavior. *See* Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 110–16 (2000) (questioning whether cultural defenses are defensible interpretation of pluralist values); James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1867–69 (1999) (discussing provocation defense as form of cultural defense).

[300] McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853, 855 (S.D. Miss. 1992).

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examples from contemporary African American culture and the cultural practices of blacks living in Africa.[301] By requiring some evidentiary basis for the assertion that a performance is racially or ethnically marked, the inquiry becomes more analogous to religious discrimination cases under Title VII, which merely require that the employee identify the source of her belief and communicate the importance of the practice and belief to her employer. The employee must then demonstrate that she was terminated because she violated a policy that conflicted with or prohibited the practice in question, and was not provided with a reasonable accommodation.[302] It seems fair and reasonable to expect that those raising race/ethnicity performance claims would do the same.

B. *The Danger Posed By* Garcia v. Gloor: *Extrapolating from Sex-Plus Analysis in Race and National Origin Cases*

Given the limitations of the involuntary/voluntary framework in analyzing race/ethnicity performance claims, the question is: How did we become wedded to this paradigm? The Fifth Circuit was the first appellate court to apply the status/conduct distinction to a national origin claim in *Garcia v. Gloor*.[303] In *Gloor*, the Fifth Circuit affirmed a judgment in favor of an employer on a Mexican American employee's disparate treatment and disparate impact national origin discrimination claims.[304] The plaintiff alleged that speaking Spanish, although voluntary, was an essential part of Mexican American identity and, therefore, his employer's English-only rule constituted national origin discrimination. The *Gloor* court, in affirming the district court's decision, sanctioned the use of gender performance analogies to understand ethnic performance.

Specifically, the *Gloor* court began its analysis by noting that Title VII offers no definition of national origin and, therefore, no insight into the connection between voluntary behavior and national origin identity.[305] Additionally, it recognized that there was nothing

[301] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981).

[302] *See, e.g.*, Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984) (describing plaintiff's and employer's burdens in cases alleging religious discrimination); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 144 (5th Cir. 1982) (same).

[303] 618 F.2d 264 (5th Cir. 1980).

[304] Specifically, for the disparate impact claim, Garcia argued that the English-only rule denied native Spanish speakers the opportunity to speak to each other in the language they felt most comfortable speaking—a privilege already granted to primarily English-speaking employees. *Id.* at 268.

[305] *Id.* ("Neither the statute nor common understanding equates national origin with the language that one chooses to speak.").

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in the legislative history of the statute that defined national origin.[306] It then compared the case to *Willingham v. Macon Telegraph Publishing Co.*,[307] a recent en banc decision that concerned a challenge to an employer's ability to promulgate gender-specific grooming rules. The *Willingham* court held that, unless a Title VII claim concerned a fundamental right or an immutable characteristic, it did not state a claim.[308] Applying this framework, the *Gloor* court ruled that since the plaintiff did not raise a claim about an immutable feature associated with national origin or a legally established fundamental right, his claim must fail.[309] Importantly, the opinion never explicitly stated that it was applying a "national origin plus" analysis to analyze the plaintiff's claim. Structurally, however, it mirrors the sex-plus analysis offered in *Willingham*.

By relying uncritically on the *Willingham* decision, the court caused race/ethnicity performance analysis to be shaped by a doctrinal field that was preoccupied with a much different question; namely, to what degree was Title VII intended to transform gender categories? Before *Willingham*, sex-plus analysis simply provided that when an employer instituted a rule that used sex plus another neutral characteristic to discriminate against a subclass of women, this could constitute gender discrimination, particularly when it appeared to reinforce stereotypes about women.[310] Initially, the employer rules challenged under the sex-plus analysis concerned obvious stereotypes about women, such as rules preventing women of childbearing age from working in certain employment, or rules preventing women with children from qualifying for certain jobs.[311] However, litigants soon began using these claims to challenge grooming codes intended to maintain gender differences (i.e., rules that discriminated against effeminate men or masculine women). These litigants interpreted the standard in a manner that allowed them to bring a Title VII sex-plus claim based on any neutral employment rule that distinguished between subclasses of men or women and enforced a sex stereotype,

[306] *Id.* at 268 n.2 (noting that "legislative history concerning the meaning of 'national origin' is 'quite meager'" (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973)).

[307] 507 F.2d 1084 (5th Cir. 1975) (en banc).

[308] *Id.* at 1091–92.

[309] *Gloor*, 618 F.2d at 269–70.

[310] "Sex-plus"-based decisions are those that differentiate among employees of the same gender on the basis of an additional characteristic. In these cases, employers differentiate among subclasses of men or women. The concept first gained judicial recognition in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam).

[311] *See* Int'l Union v. Johnson Controls, Inc. 499 U.S. 187, 191–92 (1991) (challenging rule prohibiting women of childbearing age to work for company in lead processing); *Phillips,* 400 U.S. at 543 (challenging policy of refusing to hire women with preschool-age children).

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even an appearance-based one.[312] In these appearance cases, the plaintiff would attempt to show the invalid nature of the prohibition being applied to her group by showing the employer permitted the very same practice for women that it had prohibited for men. For example, a plaintiff might challenge a rule indicating that no men with earrings could be hired, by showing that the employer hired women with earrings. The *Willingham* plaintiff raised a claim based on this broader version of the sex-plus analysis. He argued that the telephone company he had applied to for employment had discriminated against him based on sex because it had declined to hire him under a sex-specific grooming code rule that prohibited the hiring of men with long hair.[313] He alleged that the rule discriminated based on sex plus a neutral characteristic (hair length) and enforced a stereotype about men. He noted that women were allowed to have long hair, and therefore the employer had no legitimate basis for prohibiting the practice for members of his gender.

From a legal realist perspective, the *Willingham* decision must be understood as a maneuver to limit the legal and social repercussions of the "sex-plus" analysis to ensure that it did not become a tool that required employers to participate in the fundamental dismantling of the aesthetics of gender. Although Willingham's claim comported with the general guidelines for a sex-plus challenge, the Fifth Circuit was unprepared to tell employers that they could not enforce grooming codes that preserved certain gender differences.[314] Therefore, the court's project in the *Willingham* case was to interpret the sex-plus analysis in a manner that afforded employers discretion to regulate the aesthetics associated with gender, but also ensured that the analysis still could be used for other sex-stereotyping challenges. In order to achieve this goal, the *Willingham* court held that unless a Title VII claim concerned a fundamental right or immutable characteristic, it must fail.[315] It recognized that some of the most odious discriminatory employment rules concerned stereotypes about procreation, or the *fundamental right* of childbirth; therefore, it concluded that as long as the sex-plus analysis prohibited discrimination based on a fundamental right or an immutable feature, it still would be able

[312] *See, e.g.*, Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977) (holding that grooming code, which limited manner in which men's hair could be cut, did not violate Title VII's prohibition on sex discrimination in employment); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (same).

[313] *Willingham*, 507 F.2d at 1087–88.

[314] *Id.* at 1090.

[315] *Id.* at 1091–92.

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to address the problem of gender discrimination.[316] In analogizing the *Willingham* and *Gloor* plaintiffs' claims, the *Gloor* court failed to consider the practical purposes served by the *Willingham* decision.

Indeed, as the rest of this Part will explore, when the *Gloor* court sought guidance from the *Willingham* decision, it created a host of new problems because it unquestioningly borrowed the constructs and rhetoric of *Willingham* without considering whether they fully captured the political issues and values that inform race and national origin discrimination cases. First, the *Gloor* court failed to recognize that the *Willingham* sex-plus analysis was structured by social anxieties unique to the issue of gender performance. Second, the *Gloor* court adopted the *Willingham* court's understanding of the immutability construct. Instead of using immutability to identify groups in need of protection, it used the construct to identify traits held by protected classes that deserved protection. As a consequence, the court began using the immutability construct to shave off portions of protected class identities from statutory protection. The third error was that the *Gloor* court incorporated rhetoric from the *Willingham* decision equating performative behavior with the expression of "preferences," not recognizing that these comments in the gender cases were in response to specific autonomy and freedom claims raised with regard to grooming codes and their impact on gender diversity. Each of these errors is discussed in more detail in the sections that follow.

1. *Sex-Plus Analysis and the Dissolution of Gender*

The court of appeals in the *Willingham* case began its analysis with two foundational premises that, when laid bare, raise serious questions. Its first assumption was that there existed a social consensus about the need to preserve heterosexually informed gender categories.[317] The court's second assumption was that employers could be trusted to assist in maintaining heterosexually informed gender identity categories.[318] The district court, in its earlier review of the case, makes these concerns explicit and clear. The court explained that it feared a world in which "employers would be powerless to prevent extremes in dress and behavior totally unacceptable according to

[316] *Id.* at 1091.

[317] *See id.* at 1087 (noting that employer "believed that the entire business community it served—and depended upon for business success—associated long hair on men with the counter-culture types who [had] gained extensive unfavorable national and local exposure").

[318] *Id.* at 1091 (noting that hiring policy based on hair length is within employer's discretion as to "how to run his business").

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prevailing standards and customs recognized by society."[319] Moreover, the court warned that:

> if it [were] mandated that men must be allowed to wear shoulder length hair . . . because the employer allows women to wear hair that length, then it must logically follow that men, if they choose, could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses. . . . [I]t would not be at all illogical to include lipstick, eyeshadow, earrings, and other items of typical female attire among the items which an employer would be powerless to restrict to female attire and bedeckment. It would be patently ridiculous to presume that Congress ever intended such result . . . .[320]

The assumptions made above about the propriety of maintaining gender categories and employers' role in this process seem, on their face, immediately subject to dispute—that is, as soon as one considers the needs and interests of gay Americans or anyone with strong autonomy views about the performance of gender. Indeed, while the district court dismisses the idea of men in earrings and makeup as "ridiculous," many men (gay and straight) already may find pleasure in such adornments. Rather than presenting a ridiculous and tangential concern, a victory for the plaintiff in *Willingham* would have had substantial repercussions, giving individuals broad license to disrupt gender categories. I submit that the assumptions the court made about the maintenance of gender were only logical because the court rendered certain communities invisible and disregarded their interests. Also, I submit that these assumptions only seemed plausible because the subject matter being regulated was the aesthetic content of gender categories, and the court could not contemplate how regulation of this aspect of social life could have serious material repercussions or have any impact on financial realities.

Having laid bare the anxieties and concerns that surround gender performance cases, it is clear they have little or nothing to do with the anxieties triggered by the plaintiff in *Gloor* or, for that matter, any kind of race/ethnicity performance. Rather, the *Gloor* complaint was based on the concern that rules prohibiting ethnic performance in themselves inflicted a status-based harm on the plaintiff's minority group and would have serious social stratification repercussions. The concerns in *Willingham* are about exclusion as well, but are, in that case, pitched in the language of individual autonomy, self-determination, and freedom of expression.

[319] Willingham v. Macon Tel. Publ'g Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972).
[320] *Id.*

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Also, in a critical miscalculation, the *Gloor* court failed to realize that persons raising race/ethnicity performance discrimination claims find that the social attitudes about difference and employer discretion are exactly the *opposite* of those that hold for gender performance cases. Specifically, even if there is some consensus about the value and preservation of heterosexual gender categories, there is no such consensus about the value of racial or ethnic categories or whether they should be preserved. Also, assuming we do believe that race and ethnicity are worthy of preservation, there certainly is no consensus that *employers* should play a key role in regulating and maintaining these identity categories.

Indeed, one of the critical errors in the *Gloor* court's analysis is the assumption made about employers' attitude towards difference. Employers in gender cases are assumed to be enforcing rules that encourage and maintain a given set of established gender identity categories or differences and to prevent a blurring of those categories. In contrast, the rules employers enforce in race/ethnicity performance cases typically are designed to quash expressions of ethnic or racial difference in favor of maintaining an "unmarked" baseline culture of the workplace, which is typically Anglo or European. Stated more simply, one typically does not encounter employer rules that explicitly subsidize a given form of ethnic identity or rules designed to maintain differences between ethnic groups. One does, however, find workplaces that subsidize a certain kind of gender performance (e.g., rules that require women to wear skirts). Ironically, the discretionary authority that employers are granted in gender cases under the "plus" analysis to maintain a limited specific form of difference for each gender actually allows employers in the race/national origin cases to demand that racial and ethnic difference be wholly eradicated.[321] Of course, one could characterize employer rules about cultural difference in an alternative manner, and argue that they actually subsidize a certain kind of ethnic identity. For example, if an employer can create a policy that discourages blacks from wearing dreadlocks, she is arguably subsidizing some other presentation of black identity. How-

321 These concerns, however, do not abate when we consider a circumstance in which an employer wants to institute a rule that seeks to preserve ethnic difference. In these circumstances, most Americans still would be uncomfortable with employers manipulating race and national origin identities or creating special codes for these groups that distinguish them from other races or ethnicities. Indeed, it shocks the conscience to think that an employer could require an employee to "blacken" up and take on more African American affectations in order to sell her product, and we would not be comforted by the fact that she put the same pressure on white employees to display white ethnic traits in service of her goals. When viewed from this vantage point, it seems a terrible idea to give employers discretion to control the development of race and ethnic identities.

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ever, under the current regime, since she can do this for every visible voluntary identifier of a subgroup, the regime effectively allows her to prohibit cultural difference entirely.

Because the *Gloor* court failed to acknowledge the *Willingham* court's investment in heterosexually informed gender categories and the unique anxiety caused by the prospect of disrupting traditional gender aesthetic standards, it applied *Willingham*'s analytics to a race/ethnicity performance case with no modifications. In doing so, it created a world in which employers are granted broad authority to manipulate the performance of national origin and race, as long as these regulations are drafted in colorblind terms.

With these insights, the resolution of the *Gloor* case makes perfect sense. Applying the "plus" framework, the *Gloor* court ultimately grants the employer authority to regulate the performance of Latino identity because the regulation appears as a neutrally formulated English-only rule. While this was not the *Gloor* court's stated intention in the case, once it borrowed the sex-plus framework to analyze ethnic performance issues, this result was a foregone conclusion.[322]

2. *The Immutability Requirement*

The second mistake in *Gloor* is that the court adopts the proposition that only "immutable" features of protected class identity are entitled to Title VII protection. Again, citing *Willingham* as the basis for its decision, the *Gloor* court explains:

> Save for religion, the discriminations on which [Title VII] focuses its laser of prohibition are *those that are either beyond the victim's power to alter*, or that impose a burden on an employee on one of the prohibited bases. *No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics*.[323]

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[322] The *Gloor* court explains:

> As [we] said in *Willingham*, "Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity."

Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (quoting *Willingham*, 507 F.2d at 1091) (alteration in original).

[323] *Id.* at 269 (emphasis added) (citation omitted). Initially, the court appears to be making a distinction between immutable characteristics (those things beyond one's power to change), and the "prohibited bases" explicitly listed in Title VII as a basis for protection. However, in the next sentence, it reveals that it believes the two are exactly the same,

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Although neither *Gloor* nor *Willingham* cites a case in support of this proposition, the rhetoric and language used seems suspiciously similar to that employed in *Frontiero v. Richardson*,[324] an equal protection case that introduced "immutability" as a partial justification for extending special protection to women, first under the Fifth Amendment of the Due Process Clause, and later as its logic was extended and interpreted under the Fourteenth Amendment. Other scholars have commented on how the immutability construct has been given an unnecessary and unintended prominence in equal protection analysis and has become a substantial barrier to new groups finding protection under these amendments.[325] In the Title VII context, the immutability construct has a different, but equally restrictive and aggressive, role. It works to limit claims within protected classes, screening out certain aspects of protected class identity from statutory protection.

Indeed, the immutability construct's screening role is apparent in *Gloor*, as the court uses the construct to establish a distinction between the plaintiff's language abilities and his ethnic status, thereby denying his national origin discrimination claim.[326] Ironically, however, even as the *Gloor* court introduces the immutability construct into the discussion of ethnic performance, it is unprepared to accept its full repercussions. The court recognizes that once it severs language from ethnic identity, monolingual Spanish speakers who suffer discrimination on this basis are left without adequate discrimination protections.[327] To avoid this problem, the court distorts the immutability construct to address these concerns. The *Gloor* court explains:

> To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language of a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice.[328]

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listing the "prohibited bases" or identity variables named in the statute as examples of things that are beyond an individual's power to change. *Id.*

324 411 U.S. 677, 686 (1973) (plurality opinion).

325 *See* Halley, *supra* note 27, at 507–10 (noting theoretical and practical problems with immutability construct, including its poor "fit with the political realities of gay, lesbian, bisexual and queer life"); Yoshino, *supra* note 27, at 487, 490–91 (citing critiques of immutability doctrine and arguing that it encourages groups to assimilate by hiding or changing immutable characteristics).

326 *Gloor*, 618 F.2d at 268–69.

327 *Id.* at 270.

328 *Id.*

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As this excerpt shows, the *Gloor* court refuses to apply faithfully the *Frontiero* court's definition of "immutability," as describing those characteristics that are "determined solely by the accident of birth."[329] Instead, it treats language capacity as both mutable and immutable. For the bilingual plaintiff, it argues that language is mutable, because she can switch back and forth between languages and therefore cannot be injured by an English-only rule. For the monolingual speaker, however, it argues that language is immutable and therefore can be the basis for a Title VII claim. The *Gloor* court, however, should not be able to have it both ways. Language capacity either is immutable or not. In the alternative, the court should have confronted more directly the fact that the immutability construct was inappropriate for addressing the issues raised by the case.

The court's doublespeak about immutability is directly tied to the issue that should have dominated the court's discussion of the *Gloor* plaintiff's claim: the potential socially stratifying effects of rejecting race/ethnicity performance discrimination claims. The *Gloor* court was aware that if it announced a standard that did not protect monolingual workers from language-based discrimination, its decision likely would have severe stratifying effects; consequently, its goal was to preserve Title VII claims for these workers.[330] If the court had announced that language capacity, uniformly and in all cases, should be treated as a mutable characteristic, then employers could refuse to hire large numbers of monolingual, Spanish-speaking immigrants under an English-only rule, even if English language proficiency was not a requirement for the job at issue. This ruling would have catastrophic effects for many of the most marginalized and vulnerable workers—workers from ethnic enclaves where Spanish is the only language spoken or newly arrived immigrant workers. Because the *Gloor* court felt compelled to resolve this issue using an immutability analysis, it could not give voice to these social justice concerns in its discussion.

3. *Preference Rhetoric*

The last concern raised by *Gloor* stems from its adoption of a rhetorical formulation used in the *Willingham* decision—the distinction between rights and "preferences." In *Gloor*, once the court concluded that the plaintiff's claim did not concern a fundamental right or an immutable feature, it decided that his language claim was simply a

[329] *Frontiero*, 411 U.S. at 686.

[330] *Gloor*, 618 F.2d at 270 ("In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin . . . .").

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"preference," a "de minimis" issue beyond the scope of Title VII.[331] Commenting on Garcia's "language preference," the *Gloor* court explains:

> That this [English-only] rule prevents some employees, like Mr. Garcia, from exercising a preference to converse in Spanish does not convert it into discrimination based on national origin. Reduced to its simplest, the claim is "others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden."[332]

This discussion about language preference mirrors the discussion about appearance preferences in *Willingham*.[333]

Certainly, one could argue that this "preference" rhetoric was appropriate in *Willingham*, as the plaintiff's gender performance or "hair length" claim primarily rested on concerns about the freedom to transgress gender norms as a matter of individual expression or autonomy.[334] However, the *Gloor* plaintiff was making a different argument. He argued that Spanish was already a historically established constitutive aspect of his ethnic identity, the regulation of which had potentially social-stratifying repercussions.[335] He raised the concern that the prohibition of this highly common feature of Latino identity might function as a proxy for hostility against the group itself.[336] By dismissing his interest in speaking Spanish as a preference, the court rhetorically individuates his claim and avoids any

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[331] *Id.* at 271.

[332] *Id.* (quoting Mr. Garcia).

[333] Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (noting that employee may "choose to subordinate" appearance "preference").

[334] *See id.* at 1089. Summarizing its view of the *Willingham* claim, the Fifth Circuit explained, "Nothing that we say should be construed as disparagement of what many feel to be a highly laudable goal—*maximizing individual freedom by eliminating sexual stereotypes*. We hold simply that such an objective may not be read into the Civil Rights Act of 1964 without further Congressional action." *Id.* at 1092 (emphasis added).

[335] *Gloor*, 618 F.2d at 267, 270.

[336] Though it refused to offer plaintiffs protection from discrimination on this basis when they easily could conform with reasonably crafted English-only rules, the *Gloor* court did recognize that language was an important part of ethnic identity. The court explained, "We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification." *Id.* at 270. Moreover, the court seemed to recognize that its ruling missed a critical point—that language and other national origin-associated features may serve as a proxy for discriminating against status, warning that "[d]ifferences in language and other cultural attributes may not be used as a fulcrum for discrimination." *Id.* It likely hoped that its twist on the immutability paradigm would prevent this proxy type of discrimination from occurring. However, having concluded that the English-only rule that Garcia's employer had instituted was in fact moti-

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detailed treatment of the broad effects of the English-only rule on Mexican American workers as a group.

C. Second Order Cases: The Repercussions of Gloor

Although not all of the race/ethnicity performance cases explicitly acknowledge their debt to the *Gloor* court in charting the unknown waters in race/ethnicity performance analysis, one can see the problems inherent in the *Gloor* court decision reflected in numerous cases issued after the decision. In those that explicitly acknowledge these connections, the repercussions of its faulty logic are particularly clear.

1. Garcia v. Spun Steak Co.*: The Rhetoric of Choice*

Indeed, because *Gloor* was the first case to apply the status/conduct distinction to race and ethnic identity, it has played a seminal role in cases on this issue. For example, in *Garcia v. Spun Steak Co.*,[337] the Ninth Circuit deployed the *Gloor* court's "preference rhetoric" to defeat another Mexican American plaintiff's national origin challenge to an employer's application of an English-only rule. The *Spun Steak* court, however, elaborated on the *Gloor* analysis, worrying that the plaintiff's claim about language rights and "preferences" was the beginning of a wave of minority plaintiffs' claims seeking "special rights" in the workplace. The *Spun Steak* court explained:

> It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges. It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.[338]

In making this argument, the *Spun Steak* court refused to consider the cultural context in which the English-only rule operated. The plaintiff in *Spun Steak* specifically argued that he was seeking the vindication of a neutral right already afforded other workers—the

vated by legitimate business reasons, the court determined that this was not a problem in the instant case.

[337] 998 F.2d 1480 (9th Cir. 1993).

[338] *Id.* at 1487 (citations omitted). The plaintiff in *Gloor* also raised freedom of expression and autonomy arguments; however, they played a far smaller role in his case than in gender performance cases. *Gloor*, 618 F.2d at 270.

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right to speak in the language with which he was most comfortable. His goal was to address the interests of a class of Mexican American workers who were unfairly burdened by the English-only rule because they were forced to communicate in a language with which they were less familiar.[339] The court, however, reversed the district court's decision for the *Spun Steak* plaintiff. In doing so, it rejected the idea that rules drafted in "neutral" terms might provide certain workers (in this case, English-speaking workers) with substantive privileges and special rights. Indeed, in this case, the English-only rule was neutral only in the formal sense that it imposed the same requirements on all employees. However, the *Spun Steak* plaintiff could have used the court's own logic to argue that the English-only rule was an attempt to create a class of special rights for English-speaking Americans by prohibiting any worker in their presence from speaking a foreign language.[340]

Importantly, the preference rhetoric that the court pulled from the gender performance cases was a result of the kinds of arguments raised by gender performance litigants. Indeed, analysis of the gender performance cases shows that they frequently have featured arguments about autonomy and freedom of expression.[341] In these cases, plaintiffs allege that by regulating the practice of gender with sex-specific workplace rules, employers deny employees the opportunity to

339 *Spun Steak*, 998 F.2d at 1487.

340 Again, recognizing the concern that workers who speak only Spanish may be penalized unfairly under its analysis, the *Spun Steak* court offered the same caveats as the *Gloor* court, recognizing that, for monolingual speakers, speaking Spanish is not a preference. Consistent with *Gloor*, it argued that language is immutable for those who are able to speak only one language. *Id.* at 1488.

Ironically, prior to *Spun Steak*, a series of Ninth Circuit national origin "language" discrimination cases had cited approvingly to the EEOC's regulations on national origin discrimination, which indicated that language was part of national origin identity and rules regulating its use were presumptively violative of Title VII. *See, e.g.*, Gutierrez v. Mun. Court, 838 F.2d 1031, 1039–40 (9th Cir. 1988), *reh'g en banc denied*, 861 F.2d 1187 (1988), *vacated as moot by* 490 U.S. 1016 (1989) (rejecting employer's English-only rule as national origin discrimination based on EEOC guideline, which recognized that any language prohibitions should be presumed to have disparate impact in violation of Title VII unless justifiable by legitimate business necessity); *cf.* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987) (recognizing validity of EEOC rule but concluding that no discrimination occurred because employee was fluently bilingual and English-only rule was justified by business necessity). In *Spun Steak*, however, the court reversed course and definitively rejected the EEOC regulations, ruling that language regulations do not presumptively offend Title VII and that language is not an immutable part of national origin identity. *Spun Steak*, 998 F.2d at 1489–90 (rejecting EEOC rule creating presumption in favor of employee and refusing to adopt per se rule that English-only policies negatively impact workplace).

341 Bartlett, *supra* note 106, at 2558. Some equality arguments are made as well; however, because they offer even fewer parallels to the race and national origin discrimination context, they are not explored here.

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experiment with their gender identities. In order to explain why these expressive concerns are an insufficient basis for a Title VII claim, the court describes them as "preferences,"[342] a construction which both individuates these claims and suggests that they have limited symbolic import. The problem with using the preference rhetoric in race/ethnicity performance cases, however, is that it makes these claims seem like individual squabbles between employer and employee instead of symbolic cultural contests.[343] Indeed, the preference rhetoric, by focusing attention on the individual, masks the fact that these rules have broad repercussions for entire classes of workers, resulting in decreased opportunities for those who find it hard to abandon these behaviors and exacting a high dignitary cost on those who are compelled to give them up.

2. *The* Rogers *Decision: The Rhetoric of Immutability*

In contrast to the national origin cases, where the focus was on preferences, when the *Willingham* decision was applied to race performance claims, courts tended to focus on its discussion of immutability. *Rogers v. American Airlines, Inc.*,[344] a case earlier discussed in this Part, provides the clearest example. In *Rogers*, the court transforms the immutability construct into an analytical device called the "natural/artifice" distinction.[345] The court rejected the plaintiff's discrimination claim, in which she alleged that her employer discriminated against her because of her all-braided hair style.[346] In the course of rendering its decision, the court noted that Rogers's braids must be distinguished from some involuntary, immutable race-associated trait, such as the "Afro."[347] Given that Rogers could have chosen to style her hair in a manner that did not offend her employer but refused to do so, her race discrimination claim failed.[348]

Similar to the *Gloor* case, the distinction the *Rogers* court attempted to establish between the immutable and voluntary features of an identity broke down even as it was articulated. The court failed to account for the fact that there is a broad range of morphological

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342 *Spun Steak*, 998 F.2d at 1487 (quoting Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980)).

343 To the extent that the gender cases are about symbolic exchanges, they do share parallels with race/ethnicity performance cases, in that the behavior is taken up in order to communicate social belonging to a particular group. These behaviors also often have social and political meaning. *See supra* Part II.A.

344 527 F. Supp. 229 (S.D.N.Y. 1981).

345 *Id.* at 232; *see supra* notes 266–278 for additional discussion of *Rogers*.

346 *Rogers*, 527 F. Supp. at 233–34.

347 *Id.*; *see supra* note 272 & accompanying text.

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

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diversity within African American communities and that hair texture is not consistent across the group. Some persons who bear morphology that causes them to be categorized as black are born with Afros; some are not. The Afro is simply not a constitutive morphological marker of blackness. Additionally, the court failed to recognize that the Afro, at that time, was what I have referred to here as an "active race performance" feature. Many people voluntarily had attempted to create and cultivate the hairstyle for social and political reasons. Indeed, in the only case prior to *Rogers* that mentioned the specter of Afro discrimination, the plaintiff had voluntarily taken on the hairstyle after having worn her hair in another style for years.[349] The *Rogers* court, however, ignored this problem and endorsed the fiction that there are natural and artificial features of black identity. Other courts adopted a similar analysis and used variants of the natural/artifice distinction to reject minority employees' Title VII claims challenging the employer rules preventing them from wearing braids,[350] dreadlocks,[351] and headwraps.[352]

3. *Echoes of* Frontiero *in the Race/Ethnicity Performance Cases*

Rogers is helpful for this analysis because it is the most explicit about the fact that its discussion of immutability is derived from *Frontiero v. Richardson.*[353] Although the court never refers to *Frontiero* by name, the *Rogers* decision borrows from its language and logic, using *Frontiero*'s explanation of why certain groups are offered special protections to identify those traits persons in protected classes

349 Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir. 1976) (en banc) (ruling that plaintiff stated claim under Title VII for race discrimination when her EEOC charge concerned discriminatory treatment after she began wearing Afro). For a more detailed discussion of *Jenkins*, see *supra* note 272.

350 McPherson v. Shoney's Colonial, Inc., No. 95-0069-C, 1996 U.S. Dist. LEXIS 17627, at *9–*12 (W.D. Va. Nov. 21, 1996) (denying Title VII constructive discharge claim concerning plaintiff's desire to wear all-braided hairstyle); *see also* Carswell v. Peachford Hosp., No. C80-222A, 1981 U.S. Dist. LEXIS 14562, at *5 (N.D. Ga. May 26, 1981) (finding that "[p]laintiff's discharge was not based on an immutable characteristic," but on "her refusal to remove beads from her [braided] hair").

351 Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002) (rejecting discrimination claims concerning employer rule requiring covering of dreadlocks); Hines v. Hillside Children's Ctr., 73 F. Supp. 2d 308, 317 (W.D.N.Y. 1999) (rejecting discrimination claims concerning employer's claim that dreadlocks were unprofessional); Miller v. CCC Info. Sys., Inc., No. 95 C 6612, 1996 WL 480370, at *3 (N.D. Ill. Aug. 22, 1996) (rejecting discrimination claims concerning allegations based on discriminatory statements about dreadlocks).

352 McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853 (S.D. Miss. 1992) (rejecting disparate treatment claim concerning employer's reaction to employee's desire to wear "natural" hairstyles and headwraps).

353 Frontiero v. Richardson, 411 U.S. 677 (1973).

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have that are subject to protection. As this Section shows, with a better understanding of *Frontiero*, it becomes clear that the courts' application of the immutability requirement in Title VII jurisprudence rests on a fundamental error about the role of the concept in equal protection jurisprudence.

Although it was decided under the Fifth Amendment, *Frontiero* has proven to be a seminal Fourteenth Amendment equal protection case, as its antidiscrimination logic was applied to regulate the states. In the decision, the Court explains why women, like blacks and other protected classes, are entitled to the Constitution's equal protection guarantees.[354] Specifically, in *Frontiero*, the Court reviewed a servicewoman's challenge to a United States Army rule that provided that wives of servicemen were presumptively dependents and automatically provided with medical benefits, but husbands of servicewomen were not dependents unless it was established that they relied on their wives' salaries for more than fifty percent of their support.[355] The servicewoman plaintiff alleged that this benefits rule arbitrarily deprived her of property in violation of the Fifth Amendment's Due Process Clause because it discriminated based on sex.[356] Because a government agency typically need only show a rational relationship between its classification system and its purpose in order to withstand a Fifth Amendment challenge, the servicewoman was required to demonstrate that women were a special "protected class," and therefore regulations based on sex should be subject to more stringent scrutiny.[357]

In the course of its discussion, the *Frontiero* Court offered the definition of "immutability" that informs Title VII cases. The *Frontiero* Court explained that protected classes share one commonality: They are wedded by "immutable characteristic[s] determined solely by the accident of birth."[358] The *Frontiero* Court explained that the reason equal protection law shields these groups from societal discrimination is because of the moral view in America that one's opportunities should not be constrained by features that bear no

[354] *Id.* at 682–88.

[355] *Id.* at 678–79.

[356] *Id.* at 679–80.

[357] Yoshino discusses this issue as it relates to a Fourteenth Amendment analysis. The three criteria used to determine whether a group is a protected class under the Fourteenth Amendment are: 1) the group's history of disempowerment; 2) their current political powerlessness; and 3) the possession of an immutable physical characteristic that defines them as a group. *See* Yoshino, *supra* note 27, at 496–98.

[358] *Frontiero*, 411 U.S. at 686. Several scholars have noted that the discussion of immutability in *Frontiero* should not be understood as a claim that a group need only demonstrate that it is organized around an immutable characteristic in order to be recognized as a protected class under the Fourteenth Amendment. *See* Halley, *supra* note 27, at 507–08; Yoshino, *supra* note 27, at 504.

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relationship to ability and are beyond one's power to control.[359] Because sex, like race, is immutable, the Court concluded that classifications based upon sex deserved heightened scrutiny,[360] a classification later called "intermediate scrutiny."[361]

The *Rogers* court's reliance on this *Frontiero*-inspired logic was understandable because of Title VII's relationship to the Fourteenth Amendment, and *Frontiero* has been a guiding reference for Fourteenth Amendment jurisprudence. Again, although the court does not explicitly cite the case, it assumes that protected traits are only those that one possesses by accident of birth—and cannot change—making its focus immutability. However, by relying exclusively on this feature, the *Rogers* court obscures the fact that protected classes are defined by more than their immutability. Indeed, in addition to immutability, courts inquire into the political power of the concerned group;[362] whether they have a history of subordination;[363] whether the immutable trait is visible;[364] and whether the immutable trait validly may be treated as relevant in the assessment of inherent qualities.[365] Indeed, equal protection cases that turn on these other considerations

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[359] *Frontiero*, 411 U.S. at 686.

[360] *Id.* at 688.

[361] Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating standard of review for sex-based classifications later denominated "intermediate scrutiny").

[362] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443–45 (1985) (noting that mentally retarded cannot be considered politically powerless, and thus in need of judicial protection, because legislators have been responsive to their needs).

[363] Yoshino, *supra* note 27, at 496.

[364] *Id.* (explaining that immutability and visibility are required in order to be conferred suspect class status). Specifically, Yoshino points out that courts tend to conflate immutability with corporeal visibility, presuming that most corporeal, visible traits are an irrational basis for forming conclusions about a person's capabilities. *Id.* at 495–96.

[365] Halley, *supra* note 27, at 507–510 (explaining that Court uses immutability-plus test, with Court making subjective determination into whether immutable characteristics are relevant bases for discrimination). Indeed, the Supreme Court has refused to recognize the immutable characteristic of mental retardation as the basis for recognizing the developmentally disabled as a protected class deserving of heightened scrutiny under equal protection law. *Id.* at 510 (discussing *Cleburne*). The Court recognized that the developmentally disabled are burdened based on a characteristic that is merely an accident of birth but argued that this characteristic is sufficiently related to their abilities so as to provide a valid basis for treating them differently than other individuals. *Cleburne*, 473 U.S. at 442–48; *see* Halley, *supra* note 27, at 510. Janet Halley therefore concludes that the Court extends groups protected class status based on an immutability-plus test. The plus factor works as an inquiry to determine whether the immutable trait actually is related to the opportunity to which the group is being prohibited access. For example, intelligence and physical disability are considered to be valid bases for discrimination when these immutable differences are related directly to a person's ability to perform certain kinds of work. *Id.* at 507–08.

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reveal that the immutability requirement, standing alone, is insufficient to establish that a group is entitled to special protection.[366]

Consequently, when the *Frontiero* decision is placed in its proper context, it is clear that the immutability construct should not serve as a barrier to race/ethnicity performance discrimination claims. Read broadly, the decision merely identifies one of several criteria necessary to demonstrate the right to special antidiscrimination protections. Read more narrowly, it identifies the minimum qualifying characteristics a group must possess in order to merit special protection. However, nothing in the *Frontiero* decision establishes that the immutability factor was intended to be used against already recognized protected classes as a means to sift out which features of their identity should be shielded from discrimination. Stated alternatively, nothing in the decision suggests that we should take one aspect of protected class status and assume that protected classes have no other dimension apart from that discussed in the articulation of their qualifying characteristics.[367]

The above discussion provides a detailed analysis of the repercussions that the gender performance constructs borrowed from *Willingham* had for the race/ethnicity performance cases. However, I emphasize that by understanding the basic principles that informed the *Willingham* case, the Court could have avoided these errors, and determined that this approach was not the proper framework for understanding race and national origin performance claims.[368] Stated simply, *Willingham* is based on the proposition that we have a fundamental commitment to the maintenance of gender categories, and,

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[366] *See supra* notes 364–365. Both Halley and Yoshino have indicated that the Supreme Court seems to recognize the immutability criterion's conceptual limitations, as it has been applied inconsistently in the Fourteenth Amendment context. Halley, *supra* note 27, at 507–08 (noting *Frontiero* court's admission that "many immutable characteristics . . . form the basis of discriminatory decisions that are widely regarded as unproblematic"); Yoshino, *supra* note 27, at 495 ("If a trait is perceived to be defined by nature rather than by culture, then the courts will be more likely to call it immutable."). This suggests that the Supreme Court is aware that immutability, standing alone, is not determinative of what affords a group the right to seek relief under equal protection.

[367] Indeed, this proposition is counterintuitive given the range of protections racial groups are afforded in other equal protection-based circumstances. For example, courts make efforts to protect ethnic communities' wishes in framing public debate through redistricting. *See* Shaw v. Hunt, 517 U.S. 899, 918 (1996) (explaining that districts drawn on basis of race to increase voting power of minority group must demonstrate compelling state interest for justification).

[368] Indeed, this perhaps explains why fundamental rights and *immutable* characteristics are the basis for protection. The immutability requirement has a tight fit with biological sex-based characteristics—the social identity the court wants to preserve. However, there is no biological underpinning for the race cases, and consequently, the immutability requirement ensures only that discrimination based on physicality is punished.

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moreover, that we are comfortable with employers exercising their discretion to manipulate these categories. The *Gloor* court, therefore, had an obligation to ask: Do we have the same understanding about race and ethnicity? Are we similarly committed to the maintenance of these social categories? If so, are we comfortable with or confident in the idea that employers can assist us in this goal? The *Gloor* court failed to ask these questions before it applied the sex-plus analysis to Garcia's language claim. If it had, it would have realized that the sex-plus framework assumes a different social orientation towards difference, and it should not have served as the template for understanding the social value of race/ethnicity performance.

IV
JUSTIFICATIONS

Part IV addresses the most likely concerns about race/ethnicity performance protections. Section A addresses arguments that these protections are contrary to the rules of statutory construction. Section B turns to concerns that the protections will compromise employers' ability to market their products or discipline their employees, as well as unnecessarily increase their potential for Title VII liability. Lastly, Section C considers the political question of whether these protections are contrary to America's goal of creating a unified, cohesive citizenry, one that transcends the dangers of identity politics.

A. *Legal Concerns*

Legal concerns about race/ethnicity performance protections form two groups. The first claims that the analysis goes too far and invites judges to transform an issue by judicial fiat that should be left to the legislature. The second group suggests that these protections do too much of the same, by further instantiating racial and ethnic categories, a dynamic which cannot advance us in the project to end discrimination. Each group of concerns is explored in the Section that follows.

1. *Statutory Construction Claims*

Critics may argue that whatever improvements the race/ethnicity performance regime might bring to our current antidiscrimination regime, the model simply cannot be used because there is no authorization for it in Title VII's language or legislative history.[369] According

[369] Title VII does not define race or identify where the status/conduct distinction should be drawn with regard to voluntary race-associated behavior. *See supra* note 9. Other sections of Title VII and similar workplace antidiscrimination statutes do outline where the

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to this view, when courts create doctrine to apply statutes, they are simply giving effect to congressional mandates; they are transforming abstract concepts into tests that can be applied to assess the array of particular problems within the statute's ambit.[370] In the case of Title VII and its provisions on race and national origin, the absence of any mention of voluntary race performance or ethnic-associated behavior bars courts from creating doctrine under Title VII to address these concerns.

When framed in this manner, the statutory construction argument seems impossible to overcome. Without question, Congress left no indication that it considered discrimination against race/ethnicity-associated behavior to be a legitimate source of governmental concern.[371] However, the import of Congress's silence seems less clear when one recognizes that it also nowhere indicated that courts should be concerned exclusively with discrimination based on morphologically associated racial and ethnic characteristics. Since Congress has not explicitly defined race, national origin, or the concept of discrimination in terms that distinguish between morphological markers of racial or ethnic status and voluntary and behavioral features, any prior judicial pronouncements on these issues are only rationalizations of "common sense" views about race and ethnicity during the period in which they were made.[372] Consistent with this view, Part III showed that the doctrine which establishes that Title VII is concerned only with morphological race/ethnicity-associated traits is actually a product of a misguided period of judicial activism in the 1980s, when courts were preoccupied by concerns about creating special protections for groups.[373] Therefore, when critics argue in favor of main-

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status/conduct distinction is to be drawn. Specifically, Title VII defines religious discrimination and discrimination "on the basis of sex" by defining these concepts to cover actual status as well as some practices associated with each particular status. *See* 42 U.S.C. § 2000e(j) (2000) ("The term 'religion' includes all aspects of religious observance and practice . . . ."); 42 U.S.C. § 2000e(k) (2000) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .").

[370] The prevailing understanding of the federal courts' role is that when federal courts interpret statutes, their primary goal is to give effect to congressional intent.

[371] Review of the 1964 House and Senate reports shows that three issues dominated congressional debates on the statute immediately prior to its passage: (1) concerns about the "eleventh hour" passage of the bill; (2) the related concern that earlier, more conservative versions of the bill had *sub silentio* been discarded in favor of the version set before the full House for a vote; and (3) concerns about the bill's potential to violate principles of federalism. *See generally* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 102, 106, 121 (1985).

[372] WINANT, *supra* note 72, at 24.

[373] The charge of judicial activism could be leveled easily at the Fifth and Ninth Circuit courts that, independent of textual support, summarily concluded that the statutory defini-

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taining the "original" definitions under Title VII for race, ethnicity, and discrimination, they are actually making an argument in favor of preserving the judicial interpretation of race or ethnicity during a particular historical moment. We cannot, however, flatly conclude that earlier judicial definitions capture these concepts adequately or disregard the understandings of the current period.

Indeed, Reva Siegel argues that we must maintain a critical perspective, one that recognizes the historical situatedness of our antidiscrimination efforts and their potential limitations when confronting new problems. She argues that antidiscrimination law must respond to changes in the nature of discrimination if we are to achieve our goal of equality.[374] Siegel explains:

> The body of equal protection law that sanctioned segregation was produced as the legal system endeavored to disestablish slavery; the body of equal protection law we inherit today was produced as the legal system endeavored to disestablish segregation. Are we confident that the body of equal protection law we inherit today is "true" equal protection, or might it stand in relation to segregation as *Plessy* and its progeny stood in relation to slavery?[375]

Siegel's observations are not intended to diminish the critical role that statutes like Title VII have played in disrupting workplace discrimination. Rather, her goal is to cultivate both a recognition of the historical context of any definition of race, ethnicity, and discrimination, and the willingness to question these definitions. Once one recognizes the distinctions in the way discrimination is defined over time, it seems appropriate—even necessary—to ask whether our current definition actually captures the phenomenon that is the subject of our current concerns, or if it was simply developed with an eye towards disrupting the most common, prevalent manifestation of discriminatory attitudes when the definition was crafted. The same must be asked of Title VII doctrine. The concept of discrimination that is addressed by today's Title VII was developed in a period when the most pressing issue was that people of color and ethnic minorities simply could not gain access to the workforce at all. Now, forty years later, having made partial inroads, Title VII should be concerned with

tion of race for Title VII referred solely to morphological, biological features, and severed race into its involuntary and voluntary elements. *See supra* Part III.B (discussing Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980)) and notes 287–298 and accompanying text (discussing Jurado v. Eleven-Fifty Corp., 630 F. Supp. 569 (C.D. Cal. 1985)).

[374] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1140–46 (1997) (explaining that antidiscrimination laws of all kinds must contend with forces that work to limit their disruptive effects, even as they transform society).

[375] *Id.* at 1114.

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assuring that these workers have equal dignitary rights and inquiring into other ways hostile employers might seek to discourage or thwart minority participation.

Armed with these insights, the statutory constructionists' reification of the current doctrine on discrimination seems less defensible, yet the consequences are enormous. When definitions of discrimination change due to shifts in American culture, concepts of race and ethnicity change as well.[376] Relatedly, as our understandings of assimilation and integration change, race and ethnicity definitions change as well. These cultural shifts are neither clean nor easy, and they develop over time.[377] However, as litigants have discovered, these shifts in cultural understanding typically outpace shifts in the law's understanding of these issues.[378] Part II of this Article provided some insight into how in the late nineteenth and early twentieth centuries, a variety of institutional actors, including biologists, social scientists, and judges, were called upon to justify cultural understandings codified by the legislature and proved quite useful in this role.[379] I suggest, however, that the problem is that non-judicial institutions are more responsive to changes than the judiciary, which on the whole tends to continue to build additional justifications on existing frameworks unless the legislature intervenes. The consequence is that the law quite often reflects an antidiscrimination orientation that is outdated and at odds with contemporary antidiscrimination logic.

Consider, for example, that even as the 1964 Civil Rights Act was being first introduced, several identity politics movements were gaining force that emphasized the importance of maintaining and celebrating difference.[380] However, as I read them, the Civil Rights statutes and the doctrine developed under them were still wedded to a concept of "assimilation" that was fundamentally at odds with the identity politics movements that had begun to mobilize. The understanding of discrimination held by judges, as illustrated in Part III, was that the statute was merely intended to be applied to address discrimination based on physical, immutable difference. Title VII then was interpreted and applied based on a "melting pot" orientation which encouraged assimilation, and was hostile to cultural difference. Under this model, race/ethnicity-associated behavior was an obstacle to be overcome. The intended message was that although racial and ethnic

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[376] Omi & Winant, *supra* note 31, at 62–68.

[377] *Id.*

[378] *See supra* notes 348–350.

[379] *See supra* notes 44–66 and accompanying text.

[380] *See* Bumiller, *supra* note 126, at 46–48 (discussing rise of black activist groups during civil rights movement).

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difference was real, the law was blind to these differences because they bore no relationship to any meaningful measure of worth.

The *Frontiero* Court gave full expression to this view when it explained that "race and national origin [are] . . . characteristic[s] determined solely by the accident of birth" and "the imposition of special disabilities upon the members of a particular [group] because of . . . [race or] sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .'"[381] Additionally, the Court explained that race- and sex-associated morphological traits "bear[ ] no relation to ability to perform or contribute to society" and antidiscrimination protections are designed to protect against those traits "hav[ing] the effect of invidiously relegating the entire class . . . to inferior legal status without regard to the actual capabilities of its individual members."[382]

Importantly, the melting pot model described above still treats race and sex as fundamental biological differences, assigned "solely by the accident of birth."[383] Therefore, the antidiscrimination laws as interpreted under this model provided that employers could discourage or penalize persons when racial or ethnic difference appeared to be a voluntary feature and was not biological. In fact, these workplace sanctions were treated as a necessary part of assimilating nonwhites into American culture. Minorities were, in essence, told that in exchange for antidiscrimination protections based on racial or ethnic status, they were required to shed voluntary or cultural markers of racial and ethnic identity and adopt the cultural demands required for public life, specifically those mandated by employers. Workers who refused to accept these terms were required to bear the cost of their recalcitrance, namely, social marginalization.[384]

By the mid 1990s, however, Americans had decisively shifted from the melting pot paradigm to the "salad bowl" or mosaic paradigm.[385] Scholars and politicians began to suggest that it was wrong to ask racially and ethnically marked persons to shed their distinctive-

[381] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

[382] *Id.* at 686–87.

[383] *Id.* at 686.

[384] *See* Peter D. Salins, *Assimilation, American Style: Universalist Ideals, Capitalism, a Plethora of Associations, and a Love of Progress are the Secret to Interethnic Identity*, 28 Reason 20, 20 (1997) (describing "up or out" model of assimilation in which immigrants must conform to majority culture or suffer marginalization).

[385] John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 Colum. J.L. Soc. Probs. 33, 37 (1999–2000).

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ness both because of dignitary concerns[386] and because this difference could be harnessed to make America a smarter and stronger economic force in the world community.[387] The mosaic paradigm was the logical outgrowth of a number of diversity initiatives that began after the Civil Rights movement and grew in prominence over time.[388] The new model's benefits for ethnic minorities were clear. The model required that cultural differences were not automatically treated as regressive and opened the possibility for accommodation of these differences.[389] The doctrine under Title VII, however, failed to change in conjunction with this shift, which I believe resulted in the dynamic observed in many of the cases discussed in Part III. Specifically, courts cracked down on employees who were acting based on an expectation that Title VII would be responsive to the values of diversity and multiculturalism and protect them from discrimination based on voluntary difference.[390] Importantly, even as this Article encourages judges to consider this diversity or multicultural model in their interpretations of antidiscrimination laws, I am also wary of the diversity model's limits, as it opens the door to a variety of new antidiscrimination problems that must be negotiated carefully. Several of these diversity-related problems are identified below.

First, the diversity paradigm tends to assume that behavioral- or practice-based differences associated with subgroups are "cultural" and have some substantive content. Some of these differences, however, are not actively mobilized as conscious symbolic gestures, but are "accidental" characteristics that develop as a consequence of segregation. Title VII at present does not indicate whether these "accidental" traits should be afforded the same kind of antidiscrimination protection as we would provide for cultural difference, or provide any guidance on whether they can and should be discouraged.

Second, the diversity paradigm turns race- and ethnic-associated difference into a commodity; it argues that these differences, once harnessed, will strengthen the community. Now Americans are told

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[386] *See* STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA 3–4 (1981); *see also* Salins, *supra* note 384, at 20–22 (discussing criticisms of melting pot model of assimilation). The melting pot theory also has foundered because some ethnic groups proved "unmeltable." *See generally* NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY (2d ed. 1970); MICHAEL NOVAK, THE RISE OF THE UNMELTABLE ETHNICS: POLITICS AND CULTURE IN THE SEVENTIES (1972).

[387] *See generally* Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85 (2000).

[388] *See* Rhee, *supra* note 385, at 37–46.

[389] *See id.*

[390] *See supra* Part III.A–B.

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that diversity is not a "problem" to be managed, but rather is a resource for communities and employers. The model, however, fails to consider that employers might demand that workers of color engage in certain kinds of race/ethnicity performance that workers find objectionable, while simultaneously refusing to compensate the employee for engaging in this performance, resulting in a kind of exploitation. Under the current Title VII regime, employers could theoretically encourage, and even require, an employee to engage in race/ethnicity performance at work, safe in the knowledge that the law's refusal to "protect" these aspects of identity gives them the discretion to crack down on these same behaviors as "disruptive" when they fail to provide an economic payoff.[391] The diversity paradigm on its face provides no basis for resolving these disputes.

Third, this paradigm may tend to increase cultural status contests in the workplace as each group, told that its culture and views are of equal worth, demands equal representation, resources, and time. Indeed, some of the cases discussed in this Article stem from the fact that employees felt slighted under diversity initiatives.[392] The diversity model, at present, is ill-equipped to handle these disputes.

Fourth, the diversity model does not consider how to resolve conflicts when the cultural imperatives of two groups are inconsistent, and one group's perspective must be regulated or limited in order to preserve the peace, promote efficiency, or protect the rights of an individual worker.[393] This area, again, promises to be an important antidiscrimination frontier.

In spite of its problems, the diversity model still holds substantial advantages over the assimilation model. Under the assimilation model, one cultural perspective dominates all others, and employers have enormous latitude to force employees to behave in ways that are consistent with this hegemonic cultural perspective. My hope is that the journey we have taken through the timeline of Americans' understandings about assimilation and discrimination suggests that any judicial decision based on the assimilation paradigm will not only seem disrespectful of subgroup difference, but, also, will fail to capture the

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[391] *See* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1408 (9th Cir. 1987) (noting that employer radio station requested that employee disc jockey speak Spanish on his radio program in order to attract Hispanic listeners, then told him to stop speaking Spanish due to concern about ratings).

[392] *See, e.g.*, McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853, 856 (S.D. Miss. 1992) (noting that employee felt that her attire should be acceptable under school's new "multi-cultural educational directive").

[393] *See, e.g.*, Webb v. R&B Holding Co., 992 F. Supp. 1382, 1388–89 (S.D. Fla. 1998) (alleging derogatory use of Spanish word "negra" and speaking of Spanish in workplace created hostile environment).

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concerns that should inform disputes about the management of diversity. If Title VII is interpreted using a diversity model, the primary question will be: How do we regulate the chorus of Lilliputian voices clamoring for recognition and respect? The race/ethnicity performance framework articulated here tries to provide some preliminary answers to that question.

The short response to the statutory constructionists is that the legitimacy of constructs which exempt voluntary aspects of race and national origin identities from protection are already questionable, as these constructs are not based on the plain language of Title VII or its legislative history. What is more, these judicial constructs no longer comport with our "common sense" understanding of the stakes in cases concerning voluntary race- and ethnic-associated behavior, further undermining their legitimacy. If statutory constructionists want the judiciary's interpretation of race and national origin to be based on clear legislative mandate, they can and should bring this question to the attention of Congress. They cannot, however, claim that the current definitions of race and ethnicity used in Title VII cases enjoy any special legitimacy, or that there is any statutory barrier to prevent the reformulation of antidiscrimination doctrine.

2. *Instantiating Racial Identity*

Another critical view is that race/ethnicity performance protections actually may prove worse than the current regime because they invite courts to build a behavioral portrait of each racial and ethnic group that inevitably will be based on, and therefore reify, stereotypical images of these groups.[394] When logically extended, this criticism suggests that courts could end up aggressively shaping individuals' discrimination cases to fit a range of standardized scenarios and, consequently, would leave the litigant in the equally disadvantageous position of being required to comply with some previously recognized static racial or ethnic portrait in order to garner protection. These concerns suggest that we should hold firm in our longstanding commitment to a colorblind America and the eradication of racial and ethnic categories. Under this view, the race/ethnicity performance framework takes us in the wrong direction because it further instantiates potentially regressive stereotypical racial and ethnic identities.[395]

[394] *See* K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149, 162–63 (Amy Gutmann ed., 1994).

[395] *See id.*

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The first step in addressing this argument is to recognize that even current antidiscrimination law is not committed to the eradication of racial and ethnic categories. Rather, antidiscrimination statutes can operate only by maintaining these categories, by creating "a vocabulary of [racial and ethnic] identities and sometimes even channel[ing] claims (and thus claimants) into recognized identity categories with conventional scripts for behavior."[396] Robert Post espouses this view, explaining that antidiscrimination law is designed to intervene selectively in the process of racial ascription. He explains that its goal is to limit the stigma associated with race groups by preventing this stigma from having an effect on an individual's political, social, and economic opportunities.[397] Also, as I explained in Part I, as a practical matter, it is impossible for antidiscrimination law actually to dismantle race or ethnicity because these constructs are believed to be a valid, reliable basis for gleaning information. Individuals will continue to rely on these constructs in private life, regardless of the nature of public sphere protections.[398]

The second concern—that judges may create stereotypical, regressive portraits of minority communities—deserves more serious consideration. American courts litigating the issue of racial identity in the eighteenth and nineteenth centuries were all too eager to associate regressive behavior with minority groups in racial determination cases concerning slave codes and citizenship statutes.[399] Not surprisingly, courts ruled that low-status groups possessed the negative traits from which whites hoped to disassociate themselves.[400]

Leti Volpp's work suggests that this predisposition continues at present, even more insidiously, as part of the professed project to respect and preserve ethnic difference.[401] Volpp's project is to analyze the destructive effect that the "cultural defense" used in criminal cases has for the project of equality generally. She argues that courts are more likely to recognize a cultural defense when it comports with negative stereotypical representations of an ethnic group.[402] These stere-

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396 Karst, *supra* note 10, at 295.

397 Post, *supra* note 16, at 20 (explaining that law is "seeking to alter the particular meanings of . . . [gender- and race-based] conventions as they are displayed in specific contexts").

398 *Id.* at 32 ("[W]e can expect judicial opinions to reach conclusions accepting social practices in implicit and indirect ways.").

399 *See supra* Part I.A; *see also* Gross, *supra* note 41, at 113 (noting that race determination cases implied that "'negro blood' . . . made a person act in certain ways").

400 *See supra* Part I.A.

401 Volpp, *supra* note 299, at 89–91.

402 *Id.* at 94–96 (explaining that American cultural common sense assumes third-world culture is static and monolithic and emphasizes events which represent these cultures as primitive and regressive).

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otype-based cultural defenses often seem reasonable to courts because they resonate with the "common sense" view that minority persons come from primitive, backward, or regressive cultures.[403] In contrast, when illegal acts are committed by whites, the behavior is characterized as aberrant, individualized behavior.[404] She explains that by recognizing minorities and minority culture as regressive, courts can "cast[ ] certain individuals outside the boundaries of our social body."[405]

Cultural protections of this order have two costs for minority Americans. First, these "protections" further instantiate the idea that minority culture is regressive and emphasize one strand of the ethnic or racial subgroup's experience at the expense of others.[406] Second, it allows the West to avoid interrogating its own troubling cultural practices that bear resemblance to those in immigrant cultures, including various manifestations of sexism and violence against women.[407] Volpp's analysis, however, is not complete until we consider that this cultural relativism is more likely to play a role when the victim is of the same ethnicity as her assailant. In this situation, her injury is likely to be represented as a minority community concern.[408] If cultural relativism is allowed to play a role in these circumstances, it affords people of color less protection under Title VII than it does their white or outgroup counterparts.

Applying these insights to the Title VII context, the concern is that courts only will recognize employees' race/ethnicity performance when the voluntary behavior at issue comports with stereotypical negative representations of minority communities. These insights also suggest that the need to engage in race/ethnicity performance is more likely to be recognized when the other workers burdened by the plaintiff's identity performance are from the plaintiff's minority community. Disturbingly, this analysis explains the credibility afforded Orlando Patterson's "down-home courting" argument offered to explain Clarence Thomas's sexual harassment of Anita Hill.[409] Patterson argued that Americans were wrong to use "American" values to judge Thomas's culturally specific flirtatious behavior with another member of his cultural community.[410] If Hill had taken

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403 *Id.* at 97–98.

404 *Id.* at 96.

405 *Id.* at 90.

406 *Id.* at 95.

407 *See id.* ("Many of the behaviors attributed to people of color are similarly ascribed to working-class whites, e.g., early marriage and excessive promiscuity.").

408 *Id.*

409 *But see* Crenshaw, *supra* note 299, at 421–29 (criticizing Patterson's argument).

410 *Id.* at 421–22.

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offense at this behavior, it was unfortunate, but she was being too sensitive. Thomas should not be punished for addressing her in this way, as, based on their shared cultural background, Thomas's actions toward her were reasonable and to be expected.[411] As Volpp explains, the corollary to this argument is the proposition that members of an ethnic or racial group that allegedly gave rise to a cultural practice must be offered less legal protection than their white counterparts from so called "cultural" behavior.[412]

While these concerns about judicial stereotyping are valid, I think they are often overstated. We have progressed in our understanding of diversity and continue to make progress. The courts' tendency to correlate negative behaviors with minority groups, while not entirely eliminated, is less prevalent and can be further regulated if they abide by the tenets discussed in Part I. Additionally, the race/ethnicity performance framework provides that behaviors which are truly disruptive to an employer's business or cause dissent between employees are prohibited.[413] An employee should not be able to secure race/ethnicity performance protections for any behavior that violates the civil rights of other employees, and the employer can and should cite the need to protect other employees' rights as the reason this behavior is being prohibited. These factors will encourage courts to deny protection for truly regressive behavior.[414] For example, in the Anita Hill case, Clarence Thomas's fictional supervisor could have prohibited "down-home courting" because it created a hostile environment for Hill as a woman, regardless of her cultural background.

3. *Group Identity Subsidies*

Jürgen Habermas's critique of group identity subsidies provides opportunity for a thought experiment about certain concerns about race/ethnicity performance protections.[415] Habermas argues that group subsidies may stunt an ethnic group's growth because they immunize the group from having to respond to social and economic

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[411] *Id.*

[412] Volpp, *supra* note 299 (discussing cultural defense in context of early marriage and forced marriage cases involving minorities and lack of such defense in cases involving whites).

[413] For the process courts should follow in recognizing an employer's defense in this circumstance, see *infra* Part IV.B.

[414] As explained above, Title VII's gender and religious discrimination protections can shield employers from liability in some circumstances when they need to police race/ethnicity performance that infringes on the equality rights of other workers.

[415] *See* Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 394, at 107, 130–31.

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pressures.[416] The analogous concern about the race/ethnicity performance framework would be that race/ethnicity-associated traits in fact may be dysfunctional and should face social pressures that will require the group to adapt its practices to contemporary circumstances.[417]

While this concern about race and ethnic identity subsidies is valid, the race/ethnicity performance framework outlined above is designed to ensure that groups' practices do remain reactive to social conditions. First, the model has built in protections to avoid the creation of a single, frozen, static portrait of a given group. Because it is reactive, and only "protects" a feature upon a showing that the trait was racialized or ethnically marked in the plaintiff's workplace, there will be variation across jurisdictions as to what traits are racially or ethnically coded. For example, an individual in the Northeast might be able to establish that she was discriminated against because she spoke Black English. The same claim could fail in the rural South where the accent might be harder to distinguish from a Southern dialect. Indeed, this requirement of contextual proof ensures that there will not be one unified "script" for any racial/ethnic group.

The race/ethnicity performance framework also requires that some race/ethnicity performance behaviors must be conceded when they unavoidably interfere with a legitimate business purpose, or when they trample on the rights of other employees. These are precisely the kinds of social pressures these practices would otherwise be subject to, but it raises the bar for challenging these practices to ensure that an employer offers some legitimate reason for discouraging employees from engaging in them.

As a separate concern, Anthony Appiah worries that racial scripts created by groups pose limitations for individual freedom; consequently, if groups are able to organize and encode these scripts in law, they may work as strong symbolic referents further spurring conformity.[418] He argues that even when there are multiple scripts for acting out an identity, an individual still experiences these scripts as limitations on her identity.[419] Gesturing towards Gayatri Spivak's

[416] *See id.* at 132 ("Cultures survive only if they draw the strength to transform themselves from criticism and secession.").

[417] *See id.*

[418] Appiah, *supra* note 394, at 159–63. This is distinguished from a classic assimilation model which demands that cultural differences must be surrendered.

[419] *See id.* at 163; David B. Wilkins, *Introduction: The Context of Race* to K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 3, 7 (1996). Relatedly, Wendy Brown also questions whether we should want to continue with these scripts based on racial (or ethnic) identity if they previously have been the basis for oppression because, whatever positive political movements have formed based on these

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work on "strategic essentialism," Appiah recognizes that racial categories are an important tool for social justice at present.[420] However, because of his initial concerns, it is likely Appiah would view the race/ethnicity performance framework with some apprehension, as a move to further instantiate a set of racial identities.

To this complaint, I can respond only that I do not believe there to be a clear relationship between the law and individual race/ethnicity performance. Many performative behaviors are never the subject of litigation, yet they remain vital and important parts of racial identity.[421] Others, like braided hairstyles, are litigated, fail to achieve protection, and still remain important features of identity. Moreover, those recognized under the law as being racially or ethnically marked, such as the Afro,[422] do not experience a surge in importance merely because they are recognized by courts.[423] The forces of identity construction are too varied and complicated to be defined completely by the features the law identifies as being worthy of protection.

4. *Special Rights Claims*

Finally, some will argue that race/ethnicity performance protections afford minority groups "special rights." When persons mobilize this kind of rhetoric, the careful scholar will recognize that this rather fuzzy term conflates two distinct types of claims.[424] The first claim is that the rights offered by an initiative are "special" because they are not extended to all groups and, therefore, constitute unfair preferential treatment.[425] The second argument posits that all antidiscrimination measures are "special rights" and although a national consensus has developed that these protections are available for race, sex,

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identities, they still were originally crafted based on an experience or condition of subordination. Wendy Brown, *Wounded Attachments: Late Modern Oppositional Political Formations*, *in* THE IDENTITY IN QUESTION 199, 220–22 (John Rajchman ed., 1995).

420 Appiah, *supra* note 394, at 160–63 (discussing role of group identity in black struggle to be treated with respect and dignity).

421 For example, certain hairstyles or clothing styles may be popular with an ethnic group in a particular period, yet they do not become the subject of litigation.

422 Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164 (7th Cir. 1976) (en banc).

423 *See* Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 654 (1996) (explaining that articulation of trait as "essential" to particular group identity tends to lead to debate within group, rather than unification).

424 Samuel A. Marcosson, *The 'Special Rights' Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 140 (1995). Marcosson's project is to show how these arguments are deployed in debates challenging gay antidiscrimination statutes. They are equally applicable in the context of race/ethnicity performance.

425 *Id.* at 140–44.

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religion, and disability, there is no mandate for these protections to be extended beyond their initial formulation.[426]

The first special rights claim can be refuted by showing that the benefits of the race/ethnicity performance paradigm inure to the benefit of both minorities and whites. The paradigm is neutral in its formulation: It offers protection from discrimination triggered by ethnic behavior given stigmatic meaning because of racial/ethnic constructs, or similarly non-cultural behavior that, by accident or design, triggers stigmatic racial/ethnic associations. While ethnic minorities of color likely will be the first group to use the paradigm to establish their cases, whites will find it equally useful, particularly in cases involving intra-race ethnic discrimination. That is, the paradigm will prove useful in demonstrating that certain voluntary features associated with white ethnic subcategories are stigmatized as low-status "white" behaviors and provide the basis for discrimination against them. Additionally, those who experiment with racially marked practices will enjoy a safer context for exploration.

Still, some will insist that the race/ethnicity performance paradigm is a special tool designed to assist minority groups, based on their expectation that minority workers will be able to secure exemption from grooming and behavior rules of general application. The model, however, does little to alter facially neutral rules that are applied evenly. Instead, the model focuses on employer rules that prohibit specific race/ethnicity-associated practices, requiring the employer to demonstrate a legitimate business reason for its policies.[427] For example, it targets rules that prohibit braids and dreadlocks or Spanish speaking between employees. These are rules that have no bearing on groups with no interest in these practices. In this sense, the race/ethnicity performance cases help to level the playing field by treating rules that appear to target certain groups as suspect on their face.

In disparate treatment cases, the challenge is that a facially neutral rule is applied more aggressively to a minority employees' behavior. Here, the burden is on the employee to demonstrate that her conduct was comparable to outgroup members' conduct but was

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[426] *Id.* at 140, 144–45.

[427] The need for more aggressive inquiry into the business reasons asserted by an employer is explored in detail in Part IV.B. In the *Gloor* case, for example, the employer justified his English-only rule by explaining that he had received objections from English-speaking customers about the Spanish, and that he needed to cultivate workers' English skills so that they could better communicate with customers and understand trade literature (written in English). Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980). Also, he argued, the English-only rule allowed for better supervisory control by supervisors who spoke only English. *Id.*

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regarded less favorably because it was racialized. For example, if an employer routinely permits employees to wear ponytails at work, she should not be able to sanction a minority employee for wearing a similar ponytail composed of braids or dreads. As these cases show, the goal is not to provide special rules that benefit ethnic subgroups; instead, it is to require employers to relax their focus on subgroups' differences when these differences are irrelevant to the job at issue, and to apply neutral rules consistently across groups.

B. Preserving Employer Discretion

The second group of arguments against race/ethnicity performance protections stems from concerns that they will interfere with employers' ability to run their businesses.[428] This Section explores and responds to those arguments.

1. Respecting Employer Autonomy and Expressive Concerns

One group of arguments under this banner is based on the view that the law should not interfere unnecessarily with employers' expressive rights and interests. Proponents of this view argue that the employer, as a creator of business opportunity, is entitled to regulate workplace "culture," regardless of whether her preferences actually relate to the business's purpose. Under this view, the politics of culture are a zero-sum game, and while the employer must tolerate morphological difference, she is not required to tolerate cultural performances that disturb her sensibilities. The absolutist view of an employer's prerogative to control workplace culture is fundamentally libertarian in its orientation, and it treats the employer's right to operate a business as a space for her expression of individual freedom, with the employee's interests being subordinate to the employer's.

This libertarian orientation is reflected in common law employment rules, which provide that an employer may fire an employee "at will"[429] or "for cause" based on voluntary behavior and appearance.[430] The sole limitation is that these preferences may not be based

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[428] *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 24–28 (1992) (explaining that freedom of contract is basic social norm). Economists who hold this view also argue that because discrimination is irrational, employers who continue to engage in such behavior and ignore talent for invalid reasons will find that they are disadvantaged by the practice. *See id.* at 41–42.

[429] An employer may dismiss an "at will" employee whenever the whim strikes her, subject to a few judicially recognized policy-based exceptions that do not implicate cultural expression concerns. *See* HILL & WRIGHT, *supra* note 2, at 9–18.

[430] Reilly, *supra* note 15, at 262–63.

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on race/ethnicity-associated morphology.[431] However, this libertarian account fails to consider that wage-based work is an integral, unavoidable part of life for most Americans and that it consumes the vast majority of most people's waking hours. Indeed, these same libertarian principles could suggest that it would be fundamentally unfair to mandate that a person who is required to support herself financially by seeking work also should be forced, based on an employer's whim, to surrender features that are integral to her sense of personal dignity and identity.

Additionally, those that espouse a libertarian view of employers' rights rely on a naïve perception of the availability of employment opportunities for individual workers. They assume the availability of a large, accessible pool of jobs, suggesting that an employee who is particularly invested in race/ethnicity performance behavior is free to shop for an employer who will not prohibit these practices. Therefore, they argue, no individual employer should be required to tolerate a particular kind of race/ethnicity-associated behavior if she believes it is inconsistent with her business.[432] In reality, however, a single employer or group of employers may dominate the employment market in a particular venue, leaving the employee with few choices. Exit simply may not be an option. Additionally, this libertarian argument ignores the fact that employers with strict rules as to appearance and behavior tend to involve higher-status positions with greater economic advantages.[433] Under this analysis many ethnically and racially marked workers must "choose" to remain locked in marginal or low-

[431] Several scholars have commented on the limited protection from religious discrimination that Title VII offers, as the statutory test requires only that the employer show that she will suffer "undue hardship" if she adopts the proposed accommodation. Typically, courts only require a de minimis showing to establish that burden. *See, e.g.*, Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2518–20 (1996).

[432] This view is adopted in *Willingham* with regard to gender performance. Rejecting the employee's complaint that sex-specific grooming rules constituted an unfair burden to employment, the Fifth Circuit explained, "If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job." Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (1975).

[433] RUTH P. RUBINSTEIN, DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE 83–102 (2d ed. 2001) (discussing cultural meanings sent by executive attire). Ironically, the shift to casual dress in the workplace triggered even more anxiety in professional settings about maintaining hierarchies and projecting a professional look. Publishers are responding to the need to observe the now unwritten rules about projecting the appropriate authoritative image and "cope" with Casual Friday. *See generally* SUSAN BIXLER, THE NEW PROFESSIONAL IMAGE: FROM BUSINESS CASUAL TO THE ULTIMATE POWER LOOK (1997); MARK WEBER & THE VAN HEUSEN CREATIVE DESIGN GROUP, DRESSING CASUALLY FOR SUCCESS . . . FOR MEN (1997).

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status jobs, or make various compromises with regard to personal dignity.

Unfortunately, the judiciary has failed to problematize the common law or libertarian framework for the employment relationship, instead waxing on at length about the importance of preserving the employer's right to make judgments about how to run her business.[434] Fortunately, the common law's generous grant of employer autonomy is now fundamentally at odds with most Americans' understanding of the employer-employee relationship. Because most Americans' work experience has been during the era of federal and state employment protections for race and sex, as well as protections based on pregnancy, disability, and religion, they operate under the inaccurate perception that the employer-employee relationship provides them with some protection from random adverse treatment by employers. This break between workers' expectations and their actual protections is indicative, I believe, of a larger hegemonic shift in view about the proper rights balance in the employer-employee relationship.[435] Stated more simply, the common man no longer finds it natural, or "common sense," that employers should be permitted unilaterally to impose their will on workers when cultural interests are at stake. Rather, the new social expectation is that when an employer imposes a rule, she will justify her decision on some rational, cost-benefit analysis.[436] Consequently, employers' attempts to rebut race/ethnicity performance discrimination claims typically should identify some rational, economic, or practical reason for their actions, in contrast to the current regime which allows them to argue that no claim lies because the rule only targets voluntary behavior.[437] Of course, an employer's "rational calculations" can have discriminatory consequences as well, an issue discussed further below.

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[434] *See, e.g.*, *Willingham*, 507 F.2d at 1091 (rejecting grooming code challenge as improper attempt to "interfer[e] with the manner in which an employer exercises his judgment as to the way to operate a business").

[435] In a series of case studies, Kristin Bumiller documents that this is particularly true of minority workers who often are extremely wary of bringing suit because of the social repercussions that would flow from actively identifying and opposing oppressive practices in the workplace. *See* BUMILLER, *supra* note 126, at 26–29, 52–54.

[436] *See* Post, *supra* note 16, at 13–14 (explaining that "[f]unctional rationality . . . is . . . broadly regarded by American antidiscrimination law as a justification for employer decisions"). This expectation may develop because employers, wary of running afoul of employment discrimination law, may prophylatically justify policies which appear to have racial effects by way of some rational, business-related explanation. *See* Bisom-Rapp, *supra* note 227, at 14–31 (explaining that employer discretion has not decreased under antidiscrimination law but that lawyers have found ways to exercise that discretion in manner that comports with and may even rely on antidiscrimination doctrine).

[437] *See* Post, *supra* note 16, at 13 (explaining that logic of antidiscrimination law pushes employers to find functional justifications for their decisions).

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2. *Concerns about Employer Functionality*

The second group of arguments in support of preserving employer discretion consists of functionality claims. Specifically, employers argue that their discretion to control workplace culture is critical to their ability to: 1) control the marketing of their products;[438] and 2) maintain control over social dynamics in the workplace. With regard to the second factor, they may argue that they need to prohibit certain kinds of race/ethnicity performance in order to ensure worker harmony, and thereby increase workplace cooperation and efficiency.[439]

a. A Closer Look at Efficiency and Marketing Claims

Courts tend to treat functionality claims with substantial deference, most likely out of concern that judge-made rules can have unanticipated effects on a company's productivity and profitability, and therefore business administration and personnel decisions are best left to individual employers. As a separate matter, judges often are confounded by these seemingly rational efficiency- and marketing-based reasons for forbidding race/ethnicity performance because they remain trapped in the model proposed by the first wave of prejudice studies, which counseled that prejudice was an irrational, individual problem, an aberration from businessmen's otherwise accurate cost-benefit calculations.[440] Consequently, when an employer presents a rational, facially neutral reason for prohibiting racially/ethnically-marked behavior, judges conclude that the calculation itself was not discriminatory, and the rule cannot serve as the basis for Title VII liability.[441]

Many legal scholars, however, tell a different tale about the role of employer racial and ethnic discrimination in efficiency and marketing decisions, debunking the claim that discrimination is an irrational personal aberration and arguing instead that it may be a logical and powerful motivator in employer decisionmaking.[442] Scholars such

[438] Klare, *supra* note 94, at 1427 (recognizing that arbitrators regard employers' justifications based on "company image" as valid managerial interest).

[439] Balkin, *supra* note 221, at 2319.

[440] *See* Dovidio, *supra* note 185, at 830–31; *supra* notes 185–186 and accompanying text.

[441] *See infra* notes 453–456 and accompanying text.

[442] Brest, *supra* note 243, at 7. Brest explains:

> [I]f all race-dependent decisions were irrational, there would be no need for an antidiscrimination principle, for it would suffice to apply the widely held moral, constitutional, and practical principle that forbids treating persons irrationally. The antidiscrimination principle fills a special need because—as even a glance at history indicates—race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest

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as Cass Sunstein,[443] Robert Post,[444] and J.M. Balkin[445] have identified myriad ways in which patterns of racism form part of the cost-benefit analysis in employer decisionmaking. The simple truth is that employers historically have adopted marketing and workplace efficiency strategies that take account of and capitalize on historically sedimented and contemporary patterns of social discrimination and racial stratification. Prior to the passage of the 1964 Civil Rights Act, employers refused to hire minorities out of a fear of losing customers[446] and out of concern that these morphologically distinct new hires would disrupt and antagonize their majority white workforce.[447]

The remaining question is whether there is any relevant distinction between the aforementioned clearly illegal discriminatory behavior based on morphology and a situation in which employers forbid race/ethnicity-associated behavior because of concerns about a white customer base or to avert workplace conflict. This problem has been aggravated by hegemonic shifts in the ways in which Americans feel comfortable articulating discriminatory attitudes, as employers have learned to avoid explicitly stating their concerns about upsetting a white customer base or their employees and instead tend to articulate these same concerns in "neutral" terms.[448] However, as I demonstrate below, these ostensibly "neutral" reasons are intimately tied to their desire either to harness contemporary discriminatory attitudes or to avoid upsetting consumers who hold them.

b. Deconstructing Claims Regarding Customer Preferences

Employer rules prohibiting workplace race/ethnicity performance are commonly justified based on an employer's need to market her product effectively.[449] While employers rarely explicitly articulate the

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> on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.

Id.

443 Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 753–54 (1991) (arguing that employer may be motivated by economics instead of irrational prejudices in making discriminatory decisions).

444 Post, *supra* note 16, at 20 (identifying customer preference as employer justification for discrimination).

445 Balkin, *supra* note 221, at 2319 (arguing that employer may allow discriminatory behavior by "team player" if it promotes workplace cohesion and does not injure business).

446 *Cf.* Post, *supra* note 16, at 20 (discussing sexist customer preferences and their relationship to employer justifications for discriminatory hiring decisions).

447 Balkin, *supra* note 221, at 2319.

448 Indeed, in many cases, their own personal need to maintain a non-prejudiced self-image requires that they characterize their requests in race-neutral terms. *See supra* note 211 and accompanying text.

449 Klare, *supra* note 94, at 1427.

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reasons race/ethnicity-associated practices affect marketing strategy, the underlying premise of this claim is that the employer's goal is to deliver products and services that appeal to customers' tastes, and that cultural, racial, or ethnic signifiers are an important part of this process.[450] Race/ethnicity-associated practices common to low-status groups carry meaning and run the risk of becoming associated with the product. Consequently, the employer explains, she must have the power to prevent workers from engaging in this kind of behavior. As explained above,[451] because of shifts in social attitudes about discrimination and the rise of aversive racism, employers are unlikely to articulate these concerns about customer preference in such stark terms.[452] Instead, employers typically offer race-neutral justifications for prohibiting race/ethnicity-associated practices, characterizing these practices as "unprofessional," "dirty," "eyecatching," or some other seemingly uncontroversial but negative description.[453]

In *Fagan v. National Cash Register Co.*,[454] a Title VII sex-plus discrimination case involving grooming rules, the D.C. Circuit provides a cogent discussion of this view. The *Fagan* court explains:

> Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.[455]

Armed with this premise, the *Fagan* court concluded that Fagan's employer's policy, which prohibited him from wearing long hair, did not violate his rights under Title VII to be protected against sex discrimination because Fagan's appearance hampered the company's ability to market its services. The *Fagan* analysis, when extended to

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[450] Bartlett, *supra* note 106, at 2573–76.

[451] *See supra* Part I.B.

[452] *See id. But see* Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980) (justifying English-only policy on grounds of customer preference).

[453] Indeed, in *McGlothin*, an African American woman plaintiff who taught elementary school children was informed by her supervisor that she was concerned that the employee's all natural hairstyles were teaching the children bad hygiene and setting a bad example for them. McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853, 857 (S.D. Miss. 1992). For a more detailed discussion of this case, see *supra* notes 279–286 and accompanying text.

[454] 481 F.2d 1115 (D.C. Cir. 1973) (rejecting male plaintiff's challenge to his employer's rule prohibiting long hair).

[455] *Id.* at 1124–25.

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race or national origin discrimination, thus provides that any time an employer identifies a rational reason to argue that a voluntary race/ethnicity-associated behavior compromises her ability to provide a service or sell her product, she has presented sufficient justification to police employees' behavior.[456] The quote could just as easily have been used to justify the *Rogers v. American Airlines* decision.

Although it appears uncontroversial in the abstract, this rule has disturbing repercussions when applied in cases of race/ethnicity performance. Consider, for example, a hypothetical in which an employer such as Federal Express which, in the wake of September 11th, issued a directive to midwestern field offices not to use persons with accents on any delivery run in a federal building because these couriers were more likely to be stopped by security, which would compromise the company's ability to ensure the timely delivery that is the hallmark of its business. The company imposes this rule knowing that the majority of workers impacted by the decision are Middle Eastern based on the demographics of the region. Consider another directive, which prohibited the hire of any person wearing dreadlocks on similar grounds: Couriers wearing the hairstyle were likely to be stopped on delivery runs, compromising fast delivery. Under the existing Title VII framework, these cases would not trigger antidiscrimination concerns, as both are facially neutral and involve voluntary, changeable behavior. Moreover, both meet the highest standard for employers' business purpose: They are directly linked to the core task that is the nature of the employers' business. Yet despite these features, these rules do have discriminatory implications.

These kinds of employer functionality decisions are worrisome because they conflict with one of the basic tenets of antidiscrimination law: the view that the instrumental value or overall functionality of an employee is entirely independent from her race or ethnicity.[457] However, this is simply untrue. Assuming for a moment that morphology no longer plays any role in an employee's decisionmaking, an employee's value to her employer is determined by the degree and kinds of racial/ethnic markers she bears, independent of her possession of the baseline physical or cognitive abilities necessary to perform her job. These voluntary racial/ethnic markers play a role because the employer is aware of outgroup members' reaction to the employer's racial/ethnic group, and the employer must assess whether or not he is willing to bear the risk that these marks of distinctiveness will compro-

[456] Klare, *supra* note 94, at 1138–42, 1433–34 (offering economic arguments for why employer's business necessity justifications for maintaining control over employee appearance should fail).

[457] Post, *supra* note 16, at 12–16.

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mise the employee's ability to effectively perform her job. As the Federal Express hypotheticals show, these calculations need not be tied to bare prejudice; instead, they may concern indisputable realities about an employee's ease or difficulty in moving through society, her ability to trigger immediate liking or aversion, as well as a host of other subconscious aversive reactions. Also, these hypotheticals demonstrate that an employer who is aware of discriminatory trends in its customer pool can translate the realities posed by social prejudice into myriad race-neutral and rational justifications for treating racially and ethnically marked employees unequally.

Given these realities, how should courts presented with marketing or customer preference claims respond in cases concerning discrimination based on race/ethnicity performance? As an initial matter, they should acknowledge that we live in a world that still harbors lingering effects of historically sedimented patterns of discrimination, one that engenders new forms of cultural bias with new national conflicts, and one in which voluntary behavior, as much as physical difference, plays a role in triggering discrimination.[458] Moreover, they should be mindful that employers know that customers, who may be neutral with regard to race/ethnicity-associated morphology, still may be adverse to voluntary markers associated with certain groups and may pay a premium to avoid these behaviors. Lastly, they should recognize that employers who want to appeal to this animus may attempt to institute rules that prohibit distinctiveness associated with a particular low-status group or invoke ostensibly neutral reasons to crack down on a race/ethnicity-associated practice.

Additionally, judges must take cues from the lessons learned in the sex discrimination cases concerning customer preference, which counsel that these claims should be vigorously challenged and interrogated before being accepted. In the 1970s and 1980s, there were a number of suits in which employers were challenged for hiring only one gender, in which employers justified their rules based on customer preference.[459] As in the racial/ethnic performance cases, the concern in these cases was the socially stratifying effects of the employers'

[458] As Cass Sunstein explains, "[A] social or legal system that has produced preferences, and has done so by limiting opportunities unjustly, can hardly justify itself by reference to existing preferences." Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2420 (1994).

[459] *See, e.g.*, Wilson v. S.W. Airlines, 517 F. Supp. 292, 302 (N.D. Tex. 1981) (rejecting claim that airline's love-themed image required female workers, on grounds that image concerns were too tangential to service provided); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387–89 (5th Cir. 1971) (rejecting claim that airline passengers' preference for female employees was sufficient to justify exclusion of male workers from flight attendant position).

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decision. Indeed, the concern in the gender/customer preference cases was that, in satisfying customer preferences, the court would have to endorse certain gender stereotypes, lock women out of high paying jobs and ensure a certain amount of social stratification.[460] Indeed, in the 1960s and 1970s, courts struck down a number of employer policies forbidding the hiring of women based on customer preferences and the claim that women would not be accepted in certain positions.[461] These customer preference cases show that courts are able to deconstruct "common sense" claims about customer preference and must work hard to recognize those which rest on propositions that have become naturalized.[462] Similarly, when neutral justifications for policies appear to comport with the social stereotypes associated with low-status races and ethnic groups, courts are less likely to recognize their offensive basis.[463] For example, an

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Additionally, an employer's belief that a practice will result in loss of customers, in the absence of any proof, cannot be used to establish sex as a bona fide occupational qualification (BFOQ). Moreover, sex does not become a BFOQ simply because an employer wants to market female sexuality. Guardian Capital Corp. v. N.Y. State Div. of Human Rights, 46 A.D.2d 832, 833 (1974) (rejecting employer's claim that he needed to fire waiters to hire sexually attractive waitresses and boost sales).

460 Several of these cases concerned wait staff positions in high status restaurants which only employed male waiters. Univ. Parking, Inc. v. Hotel & Rest. Employees & Bartenders Int'l Union, 71-2 ARB. ¶ 8622 (1971) (Peck, Arb.) (rejecting claim that waitresses must be fired to hire waiters as part of classier image); *see also* EEOC v. Joe's Stone Crab, Inc., 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (holding restaurant chain responsible for policy of only hiring male waiters).

461 *See supra* note 459 and accompanying text.

462 Post, *supra* note 16, at 27–28.

463 Courts have recognized that in some narrow circumstances when an independent and objective justification explains the preference, gender is sufficiently related to job function to justify the exclusion of one sex. To test for these circumstances, courts have interpreted the legal exception in a manner that is designed to ensure that customer preference claims are narrowly tailored to meet specific, clearly delineated and reasonable needs. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 333–40 (1977) (interpreting 42 U.S.C. § 2000e-2(e) narrowly, but allowing exception in case of prison guard height and weight requirements which excluded some women).

Some would argue that race never may be marketed in a manner that does not offend Title VII's goal of eradicating a belief in essentialized racial difference. However, while it is not well known, the legislative history of Title VII indicates that there is some limited legal ground for making a case for BFOQ based on "national origin" or ethnicity in certain circumstances. *See* 110 CONG. REC. 2548–49 (1964), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3179–81 (1968) (noting that Title VII should not be interpreted to prevent employer from imposing BFOQ requiring Italian national in enterprise making pizzas, or someone of French national origin for waiter position in French restaurant). *But see* Ray v. Univ. of Arkansas, 868 F. Supp. 1104, 1126 (E.D. Ark. 1994) (arguing that plain language of BFOQ exception prohibits race-based BFOQ). Given current marketing trends, it seems clear that race-based marketing might force broader consideration of this doctrinal issue. If the BFOQ distinction in Title VII ultimately is interpreted to cover race-based claims, employees would fare far better under this test than under the more amorphous customer preference inquiry

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employer's claim that braided hairstyles are prohibited because they are dirty or unprofessional comports with the low-status stereotypes associated with blacks and, consequently, normally might not be subject to the scrutiny it requires.

In summary, there are some circumstances in which an employer can make a valid claim that race/ethnicity-associated behavior may interfere with workplace performance, but they usually will be cases concerning more concrete functionality claims.[464] For example, Title VII is not implicated when a rule requiring the wearing of a safety helmet leads to the termination of an employee whose dreadlocks will not fit under the helmet and the employee refuses to alter her hairstyle. Rather, the concern is when employers frame business concerns as neutral justifications for workplace rules when they really are, in effect, trying to capitalize on prejudice. When courts allow such justifications to stand unchallenged, they unwittingly permit employers to make discrimination part of their marketing strategies.

c. Deconstructing Efficiency Claims

Employers also rely on racial and ethnic status hierarchies as a tool in promoting workplace harmony, hoping to improve worker efficiency. A culturally homogenous workforce typically is more congenial; therefore, employers can forestall dissent among workers by avoiding the hire of persons with strong racial and ethnic markers or by hiring workers of predominately one race or ethnic group.[465] Alternatively, having hired a strongly racially/ethnically marked worker, the employer may adopt a laissez-faire attitude towards harassment when workers from the majority ethnic/racial group target the minority worker; the employer's decision is based on the assess-

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currently conducted. These questions will be discussed in further detail in my next article on this issue, regarding the permissive marketing of race. Stated simply, antidiscrimination scholars simply cannot have it both ways: Either racial difference has no place in an employer's economic calculus about the value of workers, or it does have value and its absence or presence can be controlled, shaped, and marketed.

[464] In some instances, the practice may be forbidden, but this should not occur before an inquiry as to whether accommodation is possible and necessary. *Cf.* Matsuda, *supra* note 91, at 1353–57 (arguing for analysis in accent discrimination cases that separate out practices that are necessary and related to job performance from practices that simply give advantage to whites).

[465] Sunstein, *supra* note 443, at 754. Indeed, Balkin and Sunstein also indicate that an employer may retain workers who engage in discriminatory behavior simply because, in every other respect, they are good employees, and they are reluctant to lose valued workers. Balkin, *supra* note 221, at 2319; Sunstein, *supra* note 443, at 754; *see, e.g.*, Saucedo v. Bros. Well Serv., 464 F. Supp. 919, 920 (S.D. Tex. 1979) ("The court believes that Mr. Nohavistza [the employer] tolerated the [discriminatory] supervisory conduct described herein because good tool pushers are undoubtedly hard to find.").

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ment that this dynamic will enforce cultural conformity over time and eventually lead to less conflict. Alternatively, the employer may permit the harassment to continue because the majority employees' hazing of a minority employee fosters a sense of camaraderie between these otherwise valuable employees. After assessing the potential difficulty of finding replacement, nondiscriminatory workers or the costs of training new hires, the employer may make the rational decision to ignore the discrimination triggered by racial or ethnic practice, for it does not violate current Title VII standards. In the employer's view, it is cheaper to replace the target of the harassment than the perpetrators. J.M. Balkin nicely summarizes this view, explaining that "[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."[466]

The role that racial animus and ethnic bias play in employers' workplace harmony strategies is far easier to discern than it is in their marketing and customer preference claims. Stated simply, the employer not only tolerates, but capitalizes on her employees' belief in racial and ethnic status hierarchies, relying heavily on their feelings of ingroup racial and ethnic solidarity to facilitate workplace cooperation,[467] instead of taking on the harder task of independently cultivating a company identity that encourages cooperation. In the more extreme cases, the employer relies on racial/ethnic harassment to further galvanize ingroup cooperation and a sense of belonging among nonminority workers, while requiring her minority or outgroup workers to bear the costs of this community-building strategy or to find other employment.

Strangely, courts seem unaware of the discriminatory premises that inform the view that race/ethnicity performance must be forbidden in order to promote workplace harmony. This confusion stems from two sources. For one, many of the cases in which this claim is raised concern one group of minority employees complaining about another minority employee's behavior.[468] The court fails to consider that an employer may hire employees predominately from one minority group—a group that claims cultural hegemony in the workplace—and then that group may attempt to stamp out the markers of

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[466] Balkin, *supra* note 221, at 2319.

[467] *Id.*

[468] *See, e.g.*, Webb v. R&B Holding Co., 992 F. Supp. 1382, 1388 (S.D. Fla. 1998) (denying African American woman's hostile environment claim based on Spanish-speaking co-worker's use of word "negra"). Plaintiff also had complained previously about her Latino co-workers' use of Spanish in the workplace, which led to a reprimand of those co-workers by a supervisor, but no permanent halt to their Spanish speaking. *Id.* at 1384.

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other racial or ethnic groups in an attempt to protect the high status position of their group. Disputes about group position are particularly acute when they occur between racial groups with low social status as compared to whites, for "[t]he more that members of a racial group feel that they are alienated and oppressed, the more likely they are to regard other racial groups as competitive threats to their own group's social position."[469]

A second reason for confusion is that many of the cases up for review involve hazing by non-homogenous groups of employees with different racial and ethnic backgrounds who, united by an "American" identity, attempt to quash racial or ethnic difference. That is, a racially diverse group of employees grows concerned that the traits associated with an American identity are under attack by the behavior of newly arrived immigrant groups, and unite across racial lines to quash this difference. The courts' confusion in these cases is unwarranted, for it seems relatively obvious that members of various ethnic or racial groups will and often do cross racial and ethnic lines for the purpose of terrorizing others: White and Latino workers join to mistreat African Americans, or African Americans and whites join in an effort to prevent Spanish from being spoken by Latino employees.

A few examples help make these points clear. In *Garcia v. Spun Steak*,[470] the Ninth Circuit granted summary judgment to an employer on a Latino employee's discriminatory discharge claim when the employee was discharged for violating an English-only rule instituted in the interest of workplace harmony. The employer presented evidence showing that it had instituted the rule because it had received complaints alleging that Latino employees had made racist remarks in Spanish about two other employees, one African American and one Chinese American.[471] The court concluded that the English-only rule did not overly burden the fluently bilingual Spanish employees; therefore, it held that the employer had a right to enforce the English-only rule.[472] The case illustrates how workers who occupy a low-status position in America's racial/ethnic hierarchy are often the first to complain about race/ethnicity performance and find Title VII a useful tool in this endeavor. That is, these employees may claim that the

[469] Bobo, *supra* note 20, at 460 ("[I]n a multiracial context, one may find some of the highest levels of perceived threat from other groups among members of the most disadvantaged racial minority group, not among dominant racial group members.").

[470] 998 F.2d 1480 (9th Cir. 1993). For a more detailed discussion of this case, see *supra* Part III.C.1.

[471] *Spun Steak*, 998 F.2d at 1483.

[472] *Id.* at 1487–88, 1490.

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race/ethnicity performance of other low-status groups creates a hostile environment and request that their employers crack down on these displays. The *Spun Steak* case may be correctly decided; however, the reader is left without a clear sense of what it was about the speaking of Spanish that constituted evidence of hostile environment.

This issue is revisited in *Webb v. R&B Holding Co.*,[473] where an African American plaintiff filed a discriminatory discharge, hostile environment, and retaliatory discharge claim, arguing that she was discriminated against by coworkers who spoke predominately Spanish at work, and that she suffered retaliation when she complained about their behavior.[474] The district court granted the defendant employer summary judgment on the hostile work environment claim because it concluded that the there was no evidence in the record that her coworkers' "speaking of Spanish constituted harassment 'sufficiently severe or pervasive to alter the conditions' of Plaintiff's job."[475] The court next granted summary judgment to the employer on the plaintiff's retaliation claim, concluding that the plaintiff-employee had not engaged in protected activity.[476] The court indicated that in order to establish that she had engaged in protected activity, the plaintiff was required to show that her complaints to the employer specifically characterized the Spanish-speaking as an act of discrimination, rather than, for example, a practice to which she objected for personal reasons.[477] Furthermore, because her employer likely was aware at that time that an EEOC ruling had prohibited English-only rules, the employer reasonably concluded that plaintiff could not be asking it to institute a rule that would make it liable under Title VII.[478]

Without a clear framework to resolve this conflict between groups of low-status minority workers, the court is unsure how to address the African American employee's discrimination concerns as balanced against the Spanish-speaking employees' interest in ethnic performance. After reading the decision, one still is unclear about its meaning. Although the court placed weight on the fact that the EEOC had provided some protections for Spanish-speaking in the workplace, it failed to address whether the exercise of this privilege could be used in a pattern of aggression sufficient to intimidate another minority worker.

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[473] 992 F. Supp. 1382 (S.D. Fla. 1998).

[474] *Id.* at 1384–85.

[475] *Id.* at 1389 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

[476] *Id.*

[477] *Id.*

[478] *Id.* at 1389–90.

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The race/ethnicity performance framework teaches that the most important consideration in the *Webb* case was the content and context of the Spanish-speaking that was the subject of the complaint. If the employee could establish that the Spanish-speaking contained racial epithets about African Americans, or was being used to exclude her from workplace discussions, this kind of behavior would trigger hostile environment concerns. If the African American employee simply objected to the occasional use of Spanish at work, this would suggest that she was attempting to preserve the status of her group and prevent the perceived encroachment of Latino culture. The court, however, does not explore these points; it instead summarily concludes that the harassment was not severe or pervasive.[479] Additionally, the court's resolution of the retaliation claim avoids the most difficult, but central issue in the dispute: whether Webb reasonably believed that the Spanish-speaking was sufficient to constitute a hostile environment under Title VII. Again, the court avoids looking at the content and context of the workers' use of Spanish and instead summarily concludes that Webb's complaint was "personal."[480] Interestingly, the primary focus of the court's concern appears to be Webb's employer's perception of her complaint, specifically that, given the EEOC's directive indicating that English-only rules in some circumstances were violative of Title VII, her employer reasonably could have believed that her complaint was personal and not a violation of Title VII.[481] Again, by failing to use the race/ethnicity performance framework the court failed to resolve the dispute equitably.

This case presents a snapshot of some of the factional race- and culture-based battles being fought in workplaces. The scenario painted by the *Webb* case provides a glimpse into the contentious workplace politics that can occur in urban centers with large, competing, and strongly culturally identified immigrant populations. In the future, we are likely to see Title VII cases between and within "racial" groups based on ethnicity, including disputes between Haitians and Dominicans, El Salvadorians and Puerto Ricans, African Americans and Haitians. Also, there likely will be a large number of cases concerning traditional or historically familiar conflicts between whites and other racial groups.

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[479] *Id.* at 1389. The court then granted summary judgment to the defendant employer because there was no evidence that the employer was aware that the plaintiff was being harassed or that it endorsed the practices she found troubling. *Id.*

[480] *Id.*

[481] *Id.* at 1389–90.

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3. *Concerns about Employer Liability*

Employers already are embroiled deeply in workplace conflicts involving race/ethnicity performance,[482] and, therefore, contrary to critics' projections, this new paradigm will not expand the bases for their liability. Rather, it will provide a more reasoned basis for resolving employees' complaints.[483] Additionally, predictions that race/ethnicity performance protections will transform the workplace into the Tower of Babel are unwarranted. With or without Title VII protections, workers will engage in race/ethnicity performance and already are bringing their own race- and ethnicity-specific styles and practices to bear on the workplace, triggering conflict.[484] At present, employers face these disputes with no sense of their obligations: While some capitalize on racism or ethnic prejudice, others adopt a laissez-faire attitude that leaves their minority employees vulnerable to harassment. Still others make the intrepid attempt to impose disciplinary sanctions against persons who discriminate based on race/ethnicity performance, with the risk that they may be accused of violating Title VII.

Again, the question becomes, what are courts to do with these insights? First, they should treat workplace rules prohibiting race/ethnicity performance on "workplace harmony" grounds as inherently

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[482] *See, e.g.*, Upshaw v. Dallas Heart Group, 961 F. Supp. 997 (N.D. Tex. 1997). In *Upshaw*, plaintiff offered two comments as direct evidence of her employer's discriminatory intent: her employer's directive that she "'get that nigger rap music off' the telephone hold" and a comment her coworker told another coworker that she overheard in which the supervisor who terminated the plaintiff said that she was being fired because "she sounded too black" and that she intended to pad plaintiff's personnel file with unfavorable evaluations in order to establish a nondiscriminatory basis for firing her. *Id.* at 1000. The court concluded both that the various party admissions described above were inadmissible on evidentiary grounds and, even if admissible, were insufficient to establish the requisite racial animus. *Id.*; *see also* Jeffery v. Dallas County Med. Exam'r, 37 F. Supp. 2d 525 (N.D. Tex. 1999) (granting summary judgment to employer on employee's disparate treatment and hostile environment claim when evidence presented alleged that supervisor made comments about his wearing gold jewelry and listening to "gangsta rap" and had inappropriately targeted him for criticism about his allegedly substandard performance).

[483] Balkin explains that hostile environment rules and other antidiscrimination laws should not be assumed to reduce employer control over the workplace. Rather, in some ways these laws give them increased control, as they use federal antidiscrimination statutes as reasons to regulate employee behavior for often tangential concerns and actually are addressing issues of workplace efficiency and productivity. *See* Balkin, *supra* note 221, at 2318–20.

[484] Indeed, the expression of prejudice itself may be a form of "race performance" that triggers hostile environment claims. For example, in *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000), the court granted summary judgment to an employer on a white plaintiff's Title VII religious discrimination claim. The employee objected to his employer's requirement that he cover a tattoo on his arm indicating his affiliation with the Klu Klux Klan after several black employees complained about it to the employer. *Id.* at 978, 981.

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suspect, and only validate rules narrowly designed to address circumstances in which the performative behaviors at issue clearly were being used to harass or exclude outgroup employees. However, an employer's mere assertion that difference is a distractor is per se unreasonable. Also, courts should be aware of the racial/ethnic composition of the workforce when viewing these claims to determine whether one ethnic group has seized the cultural center in the workplace and is using this power to intimidate other workers. They also should be aware that the employer may be engaging in laissez-faire discrimination or capitulating to pressure from the group of ethnic employees with the strongest presence in the workplace to prevent any behavior that threatens to disrupt that group's hegemonic control over the workplace's cultural baseline. Additionally, they should consider whether workers' complaints about race/ethnicity performance simply represent thinly veiled antipathy for a new, rising immigrant group.

Rather than aggravate the tendency for these disputes, the race/ethnicity performance model provides courts with a better paradigm to resolve these problems, accounting for the interests of all involved as well as the employer's concerns in adjudicating these disputes. Most importantly, it provides us with a bright line rule for resolving these workplace cross-racial conflicts: An employee's right to engage in race/ethnicity performance ends when she begins to trample upon the interests of other employees.[485]

Finally, employers will argue that they should not be required to bear the social cost of eradicating discrimination triggered by voluntary race/ethnicity-associated behaviors and that the proposed new framework increases their obligations just when they are beginning to achieve success in combating morphology-based discrimination.[486]

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[485] Courts already have been called upon to recognize these conflicts as religious discrimination claims. *See id.* (granting summary judgment to employer on white employee's Title VII religious discrimination claim to challenge employer's rule requiring him to cover KKK tattoo at work). The employer in this case requested that the employee cover his tattoo because several black employees had complained about the tattoo and he worried that it would create a hostile environment for those employees. *Id.* at 978. Importantly, the tattoo more easily can be understood as germane to the white employee's performance of whiteness in the workplace, a performance which had begun to intrude on black employees' workplace rights.

[486] *But see* Balkin, *supra* note 221, at 2304–05. Balkin explains that employers are uniquely positioned to intervene in these workplace cultural conflicts because they have more information about the collective actions of coworkers which, individually, might not trigger Title VII concerns but cumulatively create problems. *Id.* at 2304. Additionally, employers are better positioned to anticipate the types of conflicts that may occur. *Id.* Lastly, he explains that employees themselves may have little incentive to prevent hostile environments due to collective action problems. *Id.* at 2305.

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However, employers' substantive obligations would not increase if Title VII imposed a prohibition barring employers from marketing their products in ways that capitalize on discrimination or made them liable for allowing the hazing of employees engaging in race/ethnicity performance behavior. Rather, the new prohibition simply would take the additional steps needed to ensure that employers do not use racial/ethnic animus to achieve their business objectives. This is the purpose of Title VII and other workplace discrimination laws: These laws "push[ ] employers toward functional justifications for their actions" and ensure that "employers have strong incentives to articulate 'legitimate reasons' for their decisions," or to show that their selection procedures "'are demonstrably a reasonable measure of job performance.'"[487] The race/ethnicity performance framework does much to advance us in this regard.

It is important to remember that, at present, employees have no protection in this area. Karl Klare explains:

> It is one thing to say that managerial interests must be weighed in a balance, where the employer produces evidence of a genuine conflict between employee appearance choices and an agency's efficient performance of its mission. . . . But the cases do not call for such an inquiry. Rather, they effectively allow the employer merely to state its attitudes in order to make out a showing of "managerial interests," and then put the employee to the impossible task of demonstrating that these attitudes are wholly irrational.[488]

By increasing the employer's burden to demonstrate a rational basis for her decisions, the race/ethnicity performance framework locates the balance at a level that better comports with our stated goal of workplace equality.

C. *Political Issues*

The last group of arguments against the race/ethnicity performance framework centers on concerns about the framework's effect on American political life. Scholars are suspicious of any model that will aggravate the separatist and essentialist trends set in motion by the identity politics movements of the past two decades, namely proprietary claims of races or ethnic groups over culture,[489] the irreducibility

[487] Post, *supra* note 16, at 13.

[488] Klare, *supra* note 94, at 1404–05 (discussing management prerogative).

[489] *See* K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* Appiah & Gutmann, *supra* note 419, at 30, 90.

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of their experiences,[490] and the tendency to brandish difference as an insurmountable barrier to coalition politics.[491] Each of these concerns, however, is accounted for in the race/ethnicity performance framework. Moreover, the model promises to help create the cross-cultural respect and understanding necessary for a cohesive citizenry in a multiracial and multi-ethnic country.

1. Race as Distractor

Various scholars have expressed the view that paradigms which encourage individuals to focus on race or ethnicity may do us a disservice, as they encourage people to affirm racial and ethnic identities instead of exploring more productive, substantive bases for coalition that more accurately reflect their shared interests. One view is that race is in some ways a distractor—it encourages people from a variety of different backgrounds to imagine that there are connections between their racial groups when, in fact, the only thing that unites them is a similar morphology that has triggered oppression in the United States.[492] Another view is that efforts to achieve equality that are made based on categories like race and sex are inherently limiting, as they petition for rights based on the parcel of benefits offered the white, male, middle-class subject without ever challenging whether the parcel of rights accorded this position are just and fair in their own right.[493]

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[490] Minow, *supra* note 423, at 671–72 (explaining that identity politics fails to teach people how to "talk[ ] across differences and divides" in manner that would allow them to recognize similarities in their experiences).

[491] *See id.* at 647–50 (discussing identity politics). Minow discusses this impulse in the context of identity groups demanding representatives who "look like them," based on the assumption that a person of the same sex or race has the same experience and political perspective and that they cannot rely on a member of another group to adequately represent their experiences. *Id.* at 650–53.

[492] Appiah, *supra* note 394, at 160–61. Appiah worries that concepts like race substitute "gross differences" of morphology with "subtle differences" not correlated with such features and are standing in for the more accurate ways of grouping people, by shared culture. *See, e.g.*, Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, *in* "Race," Writing, and Difference 21, 36 (Henry Louis Gates, Jr. ed., 1986). Wendy Brown addresses another dimension of the same problem, explaining that certain oppositional identities founded on the need for "recognition," the hallmark of identity politics, hold questionable value in a liberatory project as they are focused on recrimination, rancor, and disdain freedom rather than hold it as an ideal. Wendy Brown, States of Injury: Power and Freedom in Late Modernity 52, 55 (1995).

[493] Brown, *supra* note 492, at 60–61. Brown explains that many identities rely on a "white masculine middle-class ideal" as proof of their exclusion but, in doing so, fail to realize that their positioning of this identity as center renders invisible certain social forces (i.e., capitalism) and insulates them from critique. Therefore, reform efforts to give excluded groups the same rights as this middle-class subject already are limited in their revolutionary potential and appeal even as they are conceptualized. *Id.* at 61.

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While these concerns are certainly valid with regard to certain aspects of the identity politics movement, neither holds true with regard to the race/ethnicity performance framework. The race/ethnicity performance framework remains attentive to discontinuities within racial groups and does not assume a shared culture. The paradigm also accounts for the fact that the markers of race are as multiple and varied as the ethnic groups captured by racial constructions, and acknowledges that sometimes these markers are merely side effects of segregation.[494] Because of this focus on diversity, the race/ethnicity performance model discourages the simplistic understanding of race that seduces people into thinking that they have affinities beyond the shared experience of being marked as a member of a stigmatized racial group.[495] Indeed, it focuses on the fact that these markers, rather irrationally, have been stigmatized because of racial constructs, focusing race group members' attention on the actual source of their problem.

Also, the model does not fall prey to the concern that race-based movements simply further legitimize the goal of affording each individual the parcel of rights provided to the white, male, bourgeois subject instead of imagining something beyond it. To the extent that race/ethnicity performance behaviors are motivated by or expressive of values that depart from the norms associated with a white male, bourgeois subject, it opens the door for a discussion of competing values and world views.[496]

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[494] *See supra* text accompanying note 94.

[495] *Id.*; *see also* Minow, *supra* note 423, at 663–64 (arguing that common history of oppression may be primary source of group identification).

[496] Its transformative effect might be felt even in second-order practices that do not immediately trigger thoughts about rights and values. For example, because the race/ethnicity performance paradigm recognizes that individuals may need accommodations for cultural and other race/ethnicity-associated differences, it holds the possibility of changing both the requirements that employers impose on employees and customers' expectations with regard to services. Under the current regime, a rule that prohibited workers with strong accents from customer service roles might make business sense, as we are encouraged to treat these workers as invisible, interchangeable, and reduce them to their instrumental value. However, under a race/ethnicity performance regime, where these workers were employed in such positions, the caller would be forced to do more interpretive work in the exchange, the conversation would be more personal as this was negotiated, and the attitude and expectation one brings to the call would be forced to change. Some will argue that ignoring a person's accent in these circumstances or providing special training amounts to unfair special treatment; however, these accommodations may be necessary simply to level the playing field for all workers. *See* Amy Gutmann, *Responding to Racial Injustice*, *in* APPIAH & GUTMANN, *supra* note 419, at 106, 109 (explaining that in some instances, it is necessary to treat members of various groups differently in order to treat them fairly).

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2. *Proprietary Claims over Culture*

Appiah gives us insight into the concern that the race/ethnicity performance paradigm might encourage further proprietary race-based claims over culture.[497] Specifically, he argues that identity politics often gives rise to attempts by individuals to claim exclusive credit for the creations of their race.[498] I argue that this phenomenon must be understood within the logic of group position theory, as yet another method of establishing the relative status of their race as compared with other races. Identity politics, it is argued, often causes some individuals, based solely on racial identity, to claim credit for the cultural, political, and social products of a wide array of civilizations' contributions over time merely because the icons most associated with these cultural products display morphology or claim membership in a particular racial group.[499] Whites therefore, for example, might try to claim the accomplishments of every civilization constructed as "white," from the Ancient Greeks, to America's founding fathers, to country music. Similarly, African Americans might claim the cultural legacy of the Ancient Egyptians, the birth of American jazz and gospel music, as well as the creation of rap.

The irony is that often the individuals who make race-based claims about culture have little or no relationship to the cultural and political products they claim as part of their so-called racial heritage.[500] Moreover, the effect of this kind of discourse is to make certain areas of culture "off limits" to outgroups, discouraging efforts at cross-cultural understanding and discrediting the efforts of persons who do feel affinities with the cultural products associated with other races.[501] The repercussions of this critique are already in clear view, as persons who attempt to cross the "race-culture" divide often face challenges as to their "authenticity."

The race/ethnicity performance regime, however, actually undermines proprietary claims over culture. Certainly there will be simplistic interpretations of the model which suggest that because it recognizes the link between racial stigma and certain practices, it cordons off certain cultural practices for a particular race or ethnic group. Again, this error is based on a facile and oversimplified reading. Because the model establishes that racial/ethnic signification operates

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[497] *See* Appiah, *supra* note 489, at 90 (discussing race-based claims specifically).

[498] *Id.* at 90–91.

[499] *Id.*

[500] *See id.* at 90 (arguing that racial group members do not necessarily have interest in or know anything about particular cultural practices associated with that group).

[501] *See id.* (noting that idea of exclusive claims to culture "deprives white people of jazz and black people of Shakespeare").

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through practices, it rejects the fundamental premise that in order to trigger social codes for a particular racial/ethnic status, one must exhibit the physical markers associated with that racial group.[502] Because the model posits that persons of ambiguous racial/ethnic morphology—or a person morphologically marked as a member of a high-status racial/ethnic group—still may engage in behavior that signifies a different, historically subordinated racial/ethnic status, it compromises any one racial/ethnic group's ability to claim these practices as their sole province. Therefore, under this model, persons morphologically marked as black are not the only persons who potentially can raise race performance claims concerning black signification. Rather, the regime makes room for the possibility that, in some circumstances, a morphologically "white person," who wears braids or dreads and plays reggae music at her workstation, may be discriminated against because she has signified blackness in a way that upsets the cultural tenor of the workplace. These kinds of cases stand in opposition to essentialist claims by a group attempting to bind its cultural practices unto itself and, moreover, protect those who in good faith do engage in cross-cultural exchange out of a desire for affiliation.[503]

3. *Race/Ethnicity Performance as a Vehicle to Cultivate a Cosmopolitan Citizenry*

In his well-regarded book, *Postethnic America*, David Hollinger echoes numerous scholars who argue that, in order to achieve a cohesive, cosmopolitan, multiethnic citizenry, we must move beyond race.[504] These scholars contend that existing racial constructs power a dysfunctional identity politics: They attempt to forge solidarity among ethnic groups that have no actual cultural connections and encourage them to continue to identify based on a shared experience of exploitation.[505] This dynamic, Hollinger argues, is the biggest threat to our effort to achieve a cohesive American citizenry. A survey of the divisive race-based political debates of the late 1980s and 1990s makes this

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[502] *See supra* Part I.A.2 (discussing race/ethnicity performance-based ascription).

[503] Additionally, the model avoids the "authenticity problems" that may prevent a worker from raising a race performance claim. That is, a white worker raised in an urban ghetto may speak "Black English" and offer evidence that she was discriminated against on that basis. Rather than doubting the legitimacy of her experience, the worker could bring a Title VII disparate treatment claim, challenging her employer's adverse treatment of her based on this racialized display.

[504] Hollinger, *supra* note 28, at 107.

[505] Minow, *supra* note 423, at 666–67 (worrying that "identity politics may freeze people in pain and also fuel their dependence on their own victim status as a source of meaning"); *see also* Brown, *supra* note 492, at 220 (explaining that some identity groups cannot let go of past suffering "without giving up [their] identity as such").

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view attractive, even common sense. But what if Hollinger and his admirers are wrong? What if the society they prefer could be achieved with existing racial constructs, corrected by the existing antidiscrimination paradigm? If this were true, the unity they seek through a "postethnic" citizenry might be closer than they imagine.

The "postethnic" community Hollinger prefers, in place of the current racially dominated American culture, would organize people into groups with permeable boundaries, which allow potential group members to join and defect at will.[506] Individuals would be taught to see their ethnic orientations not as genetically predetermined "identities," but as a long process of social formation, the ultimate goal of which is to allow them voluntarily to choose their communities of affiliation.[507] For the postethnic community to be successful, the individual's affiliation choices must be respected, even if they abandon the ethnic community into which they were born.[508] Once racial and ethnic groups lose their ability to invoke genetics as a basis for proprietary claim over their members, he argues, we will see an end to the divisive identity politics debates that fracture our society.[509] Instead, individuals will be more willing to recognize that, despite these ethnic differences, they are united by a unique American democratic culture, one that shapes their identity just as much as ethnic affiliation.

Hollinger's "postethnic" America, however, fails to account for the role stigma plays in individual choice and social relations. That is, one of the unspoken premises of his work is that, for the postethnic America to be realized, we must create a context in which ethnic groups' practices can compete fairly in the "affiliation" contest. Stated alternatively, in order for a person's affiliation choices to be truly free, she must come to form her opinions about outgroups' ethnic practices without being affected by irrational stigmas that trigger her to devalue certain groups and celebrate others. Ironically,

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[506] HOLLINGER, *supra* note 28, at 116 ("Postethnicity prefers voluntary to prescribed affiliations, appreciates multiple identities, pushes for communities of wide scope, recognizes the constructed character of ethno-racial groups, and accepts the formation of new groups as a part of the normal life of a democratic society. . . . Individuals should be allowed to affiliate or disaffiliate with their own communities of descent to an extent that they choose, while affiliating with whatever nondescent communities are available and appealing to them.").

[507] *Id.*

[508] *Id.* at 118 ("Not every descent-community will retain its members; some of these communities can be expected, over time, to decrease their role in the lives of individuals and of the larger society.").

[509] *Id.* at 107–08 (explaining that postethnic perspective remains attentive to those elements from different cultures that reflect shared ethos); *see also id.* at 126 (explaining that postethnic perspective resists will to descend, using genetics as basis for proprietary claims about culture).

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Hollinger imagines that the most difficult part of creating the postethnic America is to make groups realize that their boundaries are permeable or to teach individuals that they have choices about their ethnic or racial affiliations.[510] However, individuals already are acting based on these premises on a number of fronts, contesting the racial labels imposed by their communities, by the government, and even at work.[511] The biggest project in a country dominated by racial status hierarchies is not to encourage permeable boundaries between groups, but to eliminate the stigma that racial constructions impose on certain ethnic communities.[512]

The question is: How do we eliminate the powerful stigma imposed upon ethnic groups because of their association with historically disfavored race groups? I believe that if courts adopt the race/ethnicity performance paradigm, they could use our existing antidiscrimination regime to interrupt the processes by which race is used to stigmatize ethnic groups in the workplace. This would, in effect, create the atmosphere of free choice necessary for the development of a cosmopolitan citizenry, willing to make its affiliation choices purely on individual desire.

Indeed, much of the race/ethnicity performance framework is consistent with Hollinger's theory of "affiliation" or identity formation. The race/ethnicity performance model posits that individuals experiment with racially or ethnically marked practices from which they ultimately select particular behaviors and aesthetics to express "affiliation" with particular groups.[513] Moreover, each racial construct covers more than one ethnic community, and individuals who sample within these categories are more likely to respect or even adopt practices from several of these ethnic identities in the creation of their own "racial identity." However, as explained above, the race/ethnicity performance model recognizes that, in many cases, stigma forestalls the transmission of racialized ethnic practices beyond a particular racial group. It also recognizes that reaction to stigma makes disfavored racial and ethnic groups more willing to attach significance to racial constructions; to make proprietal claims over all positive aspects associated with these racial constructions; and to disrespect

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510 *Id.* at 117–19.

511 *See* Wijeyesinghe, *supra* note 153, at 140–42 (discussing multiracial people's options for claiming various racial identities).

512 Hollinger argues that contemporary models of identity are too genetic or "fixed," arguing that "the concept of identity is more psychological than social, and . . . [fixed models] can hide the extent to which the achievement of identity is a social process by which a person becomes affiliated with one or more acculturating cohorts." HOLLINGER, *supra* note 28, at 6.

513 *See supra* note 176 and accompanying text.

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the practices of outgroup ethnic communities associated with other "races."

By focusing attention on the varied nature of race/ethnicity performance, the model requires a recognition of the multiple ethnic communities associated with a particular racial construct and the role race plays in making these practices the basis for social sanction. Once actors are prevented from sanctioning individuals on this basis, these practices can proliferate undeterred and face a far better prospect of competing for respect and admiration on their own terms.[514] Also, the paradigm allows courts to protect members of outgroups who are willing to experiment with and affiliate themselves with ethnic communities and practices that are associated with disfavored race groups. In circumstances where they are subject to sanction because of this "race" performance, an employer can be held accountable for this kind of sanction.[515]

It is tempting to be dismissive of race/ethnicity performance cases; however, the stakes at issue in these disputes should not be underestimated. As this Article shows, in addition to the individual expression concerns, race/ethnicity performance disputes involve the same racial and status hierarchies that inform morphological discrimi-

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[514] Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 9 (1977) ("The principle of equal citizenship, nourished to fruition, offers all of us the opportunity to belong to a national community while continuing to identify ourselves with smaller groupings of diverse and even conflicting values. Equal citizenship, then, is one institutional response to the tension between autonomy and community.").

[515] Certainly, Hollinger and his colleagues still may resist the creation of race performance protections out of concern that they might subsidize race/ethnicity-associated differences and prompt litigation based on these differences. They may argue that race performance runs the risk of further escalating an already deleterious trend in subordinated minority communities: the tendency to privilege ethnic specificity over their right to participate in, shape, and feel ownership of American culture. This concern takes on additional import in light of the high rates of residential segregation in the United States, which serve to isolate minority communities and increase their distinctiveness. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 160–62 (1993); Douglas S. Massey & Nancy A. Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970–1980*, 52 AM. SOC. REV. 802, 823 (1987) (noting blacks trapped in segregated racial enclaves have very narrow horizons and do not often venture beyond their community). Also, in my view, the decreasing interest of the middle class in funding, cultivating, and making use of urban public space, as evidenced by the growth of suburbs and gated communities, aggravates matters, as it further decreases opportunities for cross-cultural contact. Consequently, the workplace takes on additional importance as it remains one of the few places for required cross-cultural interaction. In my view, however, it would be far better to furnish a vehicle for preventing ethnic communities from being further stigmatized by racial constructs and that draws attention to the subtle ways in which this occurs. The focus must be on the atmosphere in the workplace years after the litigation, when different ethnically marked workers are forced into coalition together.

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nation. Allowing workers to engage in these practices at work can have transformative effects beyond the dignitary benefit that accrues to individual workers. Exposure to different cultural practices in an atmosphere of mutual respect is necessary for the development of a cosmopolitan citizenry. When employees are forced to cooperate with strongly ethnically marked outgroup members, they learn that these cultural differences need not be a barrier to friendships or mutual cooperation.[516] Moreover, they are encouraged and given the opportunity to ask questions about cultural differences, a necessary precondition to becoming a cosmopolitan citizen. Karl Klare goes further, suggesting that "[n]onconforming appearance choices can be highly subversive of the status quo."[517] He notes that performance practices "sometimes disrupt and shake-up settled understandings and roles, and they may dramatically suggest . . . the need for new discursive possibilities and altered power relationships."[518] For example, the stark differences in aesthetic values between Italian American and Caribbean American employees might emphasize the separate nature of their worlds and lead employees to question why such dramatic differences exist. Individuals will have more opportunity to compare their ethnic communities' disparate ways of coping with similar social pressures. These productive interchanges initially will lead to more productive conversations about race and ethnicity and ultimately will require an examination of the ethnic orientation that actually informs these coping mechanisms.[519]

I recognize that this atmosphere of mutually respectful questioning about ethnic practice is not possible in many workplaces at present. Indeed, the aversive racist, when presented with unfamiliar race performance behavior, feels "anxiety and uneasiness."[520] Also, group position theory teaches that groups will be tempted to "crack down" on outgroup members' cultural performances out of fear and

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[516] Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 60–61 & nn.51–54 (1997–98) (explaining that whites who work in workplaces with high black representation are twelve times more likely to have black friend). Estlund also cites studies suggesting that working in a mixed community seems to be even more effective than living in a desegregated community if the goal is increasing the potential for productive interracial interaction. *Id.* at n.52.

[517] Klare, *supra* note 94, at 1411.

[518] *Id.*

[519] Ferdman & Gallegos, *supra* note 31, at 44 (discussing anti-black prejudice as existing within Latino communities and occasionally causing intra-Latino splits and discrimination within group based on color).

[520] Dovidio et al., *supra* note 207, at 90; Gaertner & Dovidio, *Aversive Racism*, *supra* note 123, at 63–64; *see supra* Part II.B (discussing aversive racism).

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concern that their race group will lose standing in the workplace.[521] What is required is a legal regime that interrupts this dynamic, one that prevents scenarios in which persons from a contingently more powerful ethnic or racial group can coerce an outgroup member to suffer sanctions for her behavior.[522]

Conclusion

This Article is intended to demonstrate how current interpretations of Title VII do little to advance the cause of equality because the manner, circumstance, and rationalization of discriminatory behavior have changed. This Article has shown that the natural/artifice distinction, and other attempts to divide race into its involuntary and volitional components, fail to provide a principled basis for identifying the aspects of racial and ethnic identity that should be afforded protection from discrimination. Because these doctrinal constructs fail to account for the role that volitional behavior or race/ethnicity performance plays in defining individual identity, courts cannot construct coherent narratives in cases involving race/ethnicity performance, a prerequisite to equitable resolution of these claims. Moreover, because they fail to understand these cases as group status contests involving racial hierarchies, courts cannot equitably sort out reasonable business judgment claims from attempts at cultural domination. The hope is that this Article having marshaled the scholarship in prejudice studies and provided a theory that shows how these insights are born out in race/ethnicity performance cases, courts will recognize the need for a shift in paradigm.

Some scholars may find flaws with the race/ethnicity performance concept as this Article has defined it, arguing that it is not the proper vehicle for a more comprehensive analysis of discrimination. Whether or not these criticisms find their mark, one thing is clear: We cannot

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[521] *Cf.* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2336–37 (1997) (arguing that opposition to gay rights is caused by fear of resulting decline in heterosexual status); *see supra* Part II.B (discussing group position theory).

[522] At this juncture, our discussion about the cultivation of the cosmopolitan citizen nicely dovetails with legal scholarship on the issue of white privilege. Barbara Flagg argues that once whites are deprived of a context in which their race identities exist unproblematically, they will be forced to develop their race identities on a more equal plane with people of color. Flagg, *supra* note 216, at 957. She explains that, in such a workplace, whites will be called upon to "develop[ ] a positive white racial identity, one neither founded on the implicit acceptance of white racial domination nor productive of distributive effects that systematically advantage whites." *Id.*; *cf.* Butler, *supra* note 16, at 59–60 (recognizing that, at present, whiteness is unmarked social sign that structures our existence, whereas blackness is social sign that is marked and imbued with meaning). While these scholars rightly argue that whites should be encouraged to take critical appraisal of how race constructs inform their identities, ethnic minorities would benefit from doing so as well.

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avoid the contemporary phenomenon of discrimination simply because we fear that the process of identifying and labeling race/ethnicity performance behavior may be too complicated or political to be risked by courts. Our present regime's failure to account for the role that race/ethnicity performance behavior plays in the experience of racial and ethnic identity simply subsidizes "discrimination by proxy": It allows discriminatory employers to wield "neutral" employment rules to perpetrate the same exclusionary and subordinating practices that they enforced before Title VII prohibited morphology-based race and ethnic discrimination. These patterns will continue unless we develop a more comprehensive model of racial and ethnic identity. This Article provides a start—a paradigm for understanding race, ethnicity, and discrimination—that takes into account both how behavior and physical traits become racially and ethnically inflected, and the circumstances in which these coded signatures work to the disadvantage of the person who claims them.

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