

LOC(K)ED OUT: THE LEGAL IMPERATIVE FOR A FEDERAL CROWN ACT & REDEFINED IMMUTABILITY

Abstract: In 2019, California became the first state to pass the Creating a Respectful and Open World for Natural Hair (CROWN) Act, a legislative initiative created to combat race-based hair discrimination in the United States. Race-based hair discrimination in the United States is rooted in the degradation of the Black phenotype during the transatlantic slave trade. In the face of this, Black Americans have made efforts to reclaim Black power and uplift Black beauty through the Black Power Movement, and more recently through a second wave natural hair movement. Despite the pivotal role civil rights protections, like those enacted through the Civil Rights Acts of 1866, 1871, and 1964, have played in the race-discrimination landscape, existing discrimination law falls short in remedying race-based hair discrimination. Judicial rulings, particularly that in *EEOC v. Catastrophe Management Solutions*, have reinforced the concept that natural Black hairstyles are not an immutable trait, allowing employers and public institutions to enforce discriminatory grooming policies that disproportionately impact Black individuals. The CROWN Act has the potential to rectify the shortcomings of existing discrimination law by providing Black people with a legal remedy against race-based hair discrimination. This Note argues that Congress should enact a federal CROWN Act that explicitly frames natural Black hairstyling as a flexible carve-out immutable trait akin to presently established immutable traits, such as skin color. This would remedy the gap existing anti-discrimination laws have left and firmly establish race-based hair discrimination as a form of racial bias under federal law.

INTRODUCTION

Zendaya and a high schooler from Texas named De’Andre Arnold share more in common than one might expect—their choice in hairstyle, and the response both individuals received from it.¹ In 2015, then eighteen-year-old ac-

¹ See Carly Thomas, *Law Roach Says Zendaya’s 2015 Oscars Dreadlocks Led to “Global Conversation” and the Birth of the Crown Act*, HOLLYWOOD REP. (Nov. 26, 2024), <https://www.hollywoodreporter.com/lifestyle/style/law-roach-zendayas-oscar-dreadlocks-the-crown-act-change-1236072284/> [<https://perma.cc/3M97-4NUB>] (describing fashion critic Giuliana Rancic’s criticism of actress Zendaya after Zendaya wore dreadlocks (“locs”) to the 2015 Academy Awards); Leah Asmelash, *If This Texas Student Doesn’t Cut His Dreadlocks, He Won’t Get to Walk At Graduation. It’s Another Example of Hair Discrimination, Some Say*, CNN (Jan. 23, 2020), <https://www.cnn.com/2020/01/23/us/barbers-hill-isd-dreadlocks-deandre-arnold-trnd/index.html> [<https://perma.cc/VNN4-2X9U>] (reporting on De’Andre Arnold’s in-class suspension from his Texas high school and his exclusion from the school’s graduation ceremony due to his locs).

trepreneur Zendaya graced the red carpet of the Academy Awards with her hair styled in locs—a traditionally Black hairstyle composed of strands of matted hair.² Her choice of hairstyle was met with comments from fashion critic Giuliana Rancic who used a racially offensive remark to summarize Zendaya’s look.³ Rancic’s comments were viewed as distasteful and Zendaya and her team were outspoken about the negative impact Rancic’s words had on the wider conversation about the appropriateness and acceptance of natural Black hairstyles.⁴

Zendaya’s experience made it clear that global fame could not shield a Black individual from the vitriol surrounding their natural hair, and in 2019, California became the first state to take legislative action regarding race-based hair discrimination.⁵ In January 2019, the personal care brand, Dove, and the CROWN Coalition, partnered with California Senator Holly Mitchell to draft the

² Thomas, *supra* note 1. Locs can be styled in various forms, but the typical loc (a singular dreadlock) is formed from the intentional tangling of natural hair into a matted strand that can be shaped into different styles. See *Braids and Braiding: Definition, Trends and Mobile Braiding*, DASHSTYLISTS, <https://www.dash-stylists.com/braids-and-braiding-definition-trends-and-mobile-braiding> [<https://perma.cc/SDH2-6XAB>] (defining a variety of braided styles and how to achieve them); *What Are Dreadlocks? How They Work and More*, STYLESEAT, <https://www.styleseat.com/blog/what-are-dreadlocks/> [<https://perma.cc/BKU5-CM2G>] (explaining how locs are formed over a matter of months to years).

³ Emily Kirkpatrick, *Zendaya Says Giuliana Rancic’s Infamous Comment About Her Oscars Dreadlocks Made Her Think About How She Could “Have a Lasting Impact”* VANITY FAIR (Mar. 19, 2021), <https://www.vanityfair.com/style/2021/03/zendaya-giuliana-rancic-dreadlocks-comment-oscars-2015-w-magazine?srsltid=AfmBOood9WhcGbtw5sQb2dDA9X9BY8vBaaDauo2JhDbbl1PQXS5RrWMH> [<https://perma.cc/S6X5-6Y3M>] (quoting Rancic as stating Zendaya looked like “she smells like patchouli oil and weed” while wearing her locs). Patchouli oil has a scent associated with the American hippie culture of the 1960s and ’70s, when it was used to mask the scent of marijuana. *Patchouli’s Resurgence—Hippie Icon to Perfume Powerhouse*, ALPHA AROMATICS (Oct. 23, 2023), <https://www.alphaaromatics.com/blog/patchouli-resurgence/> [<https://perma.cc/6UTK-LRYX>].

⁴ See Thomas, *supra* note 1 (describing Zendaya and her stylist’s reactions to Rancic’s comments and the disrespect Zendaya felt following the comments). Rancic apologized for her remarks after Zendaya and her team publicly condemned Rancic’s comment. *Id.* Natural hair is defined as hair void of any straightening treatments such as chemical or heat-based straighteners; in essence, hair in its most unaltered state. Del Sandeen, *What Is Natural Hair? A Definition and In-Depth Look*, BYRDIE (Mar. 29, 2022), <https://www.byrdie.com/what-is-natural-hair-definition-and-in-depth-look-400268> [<https://perma.cc/X3X4-QSSX>]. Though there is no one presentation of Black natural hair, it is generally marked by a curly strand pattern ranging from looser curls to a tighter kinky-coil. *Id.* Natural Black hair often retains less moisture than non-Black natural hair textures and therefore can be fragile if not regularly conditioned and moisturized. *Id.* In line with the language of the most recent federally proposed version of the CROWN Act, this Note will focus on the application of the CROWN Act to natural Black hair. See H.R. 8191, 118th Cong. (2024) (introducing the most recent CROWN Act bill to the House which explicitly lists people of African descent as those who face discrimination because of traditionally Black hairstyles).

⁵ See S.B. 188, 2019–2020 Gen. Assemb., Reg. Sess. (Cal. 2019) (codified as amended at CAL. EDUC. CODE § 212.1 (West 2025) & CAL. GOV’T CODE § 12926 (West 2025)) (outlining an amendment to California’s Education Code that covers discrimination on the basis of hairstyles).

Creating a Respectful and Open World for Natural Hair (CROWN) Act.⁶ On July 3, 2019, Governor Gavin Newsom signed California Senate Bill 188, colloquially known as California's CROWN Act, into law.⁷ California's CROWN Act prohibits discrimination based on hairstyles associated with race.⁸ The California law also amended the definition of race under the California Fair Employment and Housing Act and the California Education Code to include hair textures and protective styles like braids, locs, and twists.⁹ The first state law protecting against hairstyle discrimination, California's CROWN Act ensures individuals cannot face discriminatory treatment in workplaces or schools because of their natural or cultural hairstyles.¹⁰

Even with California spearheading the legislative effort to combat Black race-based hair discrimination, in 2020, a Texas high school rejected 18-year-old Black student De'Andre Arnold's chosen hairstyle, jeopardizing his plan to graduate on time.¹¹ Arnold's school dress code required male students to keep their hair above their eyebrows and ears, however, Arnold's locs extended past his shoulders, similar to his fellow Trinidadian family members who wore locs culturally.¹² Arnold's disqualification from his high school graduation and his

⁶ *Creating a Respectful and Open World for Natural Hair*, THE CROWN ACT, <https://www.thecrownact.com/> [<https://perma.cc/3MTE-RK8X>]. The CROWN Coalition, comprised of over eighty community and advocacy organizations including various ACLU chapters, has advocated for the CROWN Act's passage in all fifty states. *Id.*; *The CROWN Act*, LEGAL DEF. FUND, <https://www.naacpldf.org/crown-act/> [<https://perma.cc/86X5-5LK2>].

⁷ Press Release, Gavin Newsom, Governor of Cal., Today: Governor Newsom to Sign CROWN Act in Sacramento (July 3, 2019), <https://www.gov.ca.gov/2019/07/03/today-governor-newsom-to-sign-crown-act-in-sacramento/> [<https://perma.cc/P9MM-LKLU>]. On June 21, 2019, the Assembly Floor Analysis of the then proposed California bill, SB-188, made note that federal courts have failed to recognize hairstyle discrimination. ASSEMB. FLOOR ANALYSIS UNIT, S.B. 188 FLOOR ANALYSIS, S. 2019–2020, Reg. Sess. (Cal. 2019). The assembly attributed this failure to the federal courts' distinction between racial characteristics considered biological and unchangeable (like skin tone or hair texture) and those considered cultural and changeable (such as hairstyles). *Id.* Nevertheless, the Assembly made it clear that California would proceed in defining race to include traits historically linked to racial identity, such as hairstyle. *Id.*

⁸ See EDUC. § 212.1(b)–(c) (specifying the protected hairstyles under the California Education Code amendment).

⁹ *Id.* Braids are created by taking a section of the hair, further sectioning it into three pieces, and overlapping the three pieces in a configuration that creates a woven style. See DASHSTYLISTS, *supra* note 2 (defining a variety of braided styles and how to achieve them); STYLESEAT, *supra* note 2 (explaining how locs are formed over a matter of months to years). Twists are created by sectioning a part of the hair, and further sectioning that into two or three strands of hair that are twisted together. DASHSTYLISTS, *supra* note 2.

¹⁰ ASSEMB. FLOOR ANALYSIS UNIT, S.B. 188 FLOOR ANALYSIS, S. 2019–2020, Reg. Sess. (Cal. 2019).

¹¹ Asmelash, *supra* note 1.

¹² *Id.* Arnold's family is Trinidadian, and Arnold noted it was common for men in his family to grow out long locs. ASSOCIATED PRESS, *Texas High School Student Suspended Over Dreadlocks, Family Says*, ABC13 (Jan. 25, 2020), <https://abc13.com/deandre-arnold-dreadlocks-barbers-hill-high-school-hair/5874688/> [<https://perma.cc/2L88-69XZ>]. The Rastafarian movement is both political and spiritual with roots in Trinidad, and one of the movement's main symbols is locs. Horace Campbell,

in-school suspension garnered much media attention, but he had no legal recourse against his school which was operating under its long-standing school dress code.¹³ As news outlets shared Arnold's story in early 2020, he was suspended, uncertain about his future graduation plans.¹⁴ Left without recourse, Arnold ultimately left Barbers Hill High School and earned his diploma from a high school in another district.¹⁵

Against the backdrop of Arnold's plight, several states, including New York and New Jersey, have joined California in passing CROWN Acts of their own.¹⁶ The CROWN Act debuted on the federal level on December 5, 2019, when Congressman Cedric Richmond of Louisiana introduced it as a bill in the House of Representatives.¹⁷ The House passed the bill on September 21, 2020, and on September 22, 2020 the Senate received the bill and referred it to the Senate Committee on the Judiciary where it never progressed further.¹⁸ Throughout 2020 and 2021, additional states enacted their own CROWN Acts to recognize the importance of protecting Black hair against discrimination.¹⁹ On March 19,

The Rastafarians in the Eastern Caribbean, 26 CARIBBEAN Q. 46, 46–47 (1980). In the mid-twentieth century, supporters of Euro-American culture imprisoned Rastas and shaved off their dreads to combat Rastafari anti-capitalistic resistance in the Caribbean. *Id.* at 42, 47.

¹³ See Asmelash, *supra* note 1 (explaining that Barbers Hill Independent School District had the stipulation about student hair length in place for about thirty years at the time of Arnold's suspension). Only 3.1% of the students in Barbers Hill Independent School District were Black, and at the time of Arnold's suspension none of the district's Board of Trustees were Black. *Id.*

¹⁴ *Id.*

¹⁵ *Teen Who Inspired 'CROWN Act' Testifies at Texas Legislature*, ABC13 (Apr. 29, 2021), <https://abc13.com/natural-hair-law-texas-crown-act-houston-deandre-arnold-dreadlocks-lawsuit-boy-banned-from-school-length-of/10560680/> [<https://perma.cc/7XZK-7N8J>]. Arnold went on to attend the 2020 Academy Awards as a guest of NBA athlete Dwyane Wade. Jonah Engel Bromwich, *De'Andre Arnold on First Red Carpet: The 'Kid with Dreads' Is at the Oscars*, N.Y. TIMES (Feb. 9, 2020), <https://www.nytimes.com/2020/02/09/style/deandre-arnold-oscars.html> [<https://perma.cc/F3K4-FF5B>]. Wade and his actress wife, Gabrielle Union, were producers on the short film "Hair Love" which took home the 2020 Academy Award for Best Animated Short Film. *Id.*; Gwen Aviles, *'Hair Love' Wins Oscar for Best Animated Short Film*, NBC NEWS, <https://www.nbcnews.com/news/nbc-blk/oscar-nominated-hair-love-normalizes-celebrates-black-hair-creators-say-n1132826> [<https://perma.cc/VMT5-J38H>] (Feb. 10, 2020). "Hair Love" portrays a Black father struggling to style his daughter's hair and eventually finding success. Aviles, *supra*.

¹⁶ See Assemb. B. A07797A, 2019–2020 Gen. Assemb., Reg. Sess. (N.Y. 2019) (outlining New York's CROWN Act); S.B. 3945, 218th Gen. Assemb., Reg. Sess. (N.J. 2019) (outlining New Jersey's CROWN Act).

¹⁷ See Representative Cedric L. Richmond, CONGRESS.GOV, <https://www.congress.gov/member/cedric-richmond/R000588> [<https://perma.cc/3QFT-W839>] (Representative Richmond's congressional biography including his member activity). Richmond, a graduate of Tulane Law School, has held positions on multiple House Committees and formerly co-chaired President Joe Biden's presidential campaign. Alina Hernandez, *Law Alumni Greene, Richmond Join Forces Against Hair Discrimination*, TUL. UNIV. L. SCH., <https://law.tulane.edu/news/law-alumni-greene-richmond-join-forces-against-hair-discrimination> [<https://perma.cc/3WJ6-GCGK>].

¹⁸ See H.R. 5309, 116th Cong. (2020) (outlining the proposed Act as approved by the House).

¹⁹ See Dove and the CROWN Coalition Proclaim Victory in the Commonwealth of Virginia and the State of Colorado Making Them the Fourth and Fifth States to Join the CROWN Act Movement,

2021, New Jersey Representative Bonnie Watson Coleman reintroduced the CROWN Act in the House.²⁰ The House passed the bill on March 18, 2022, by a final vote of 235-189.²¹ Still, the bill did not receive enough votes in the Senate to enact it as a federal law.²² On April 30, 2024, Representative Watson Coleman once *again* reintroduced the CROWN Act in the House, where it currently remains under consideration.²³

Therefore the question lingers: why has Congress declined to enact a federal CROWN Act?²⁴ Amidst continued legislative developments on both the state and federal level, as of the writing of this Note, the CROWN Act is law in only twenty-eight states, Washington D.C., Puerto Rico, and the U.S. Virgin Islands and is not a federal law.²⁵ One clear cause of the CROWN Act's stag-

THE CROWN ACT (Mar. 9, 2020), <https://www.thecrownact.com/virginia-and-colorado> [<https://perma.cc/XHB6-R3W3>] (announcing Virginia and Colorado as the newest states to pass state-level CROWN Acts); *Governor Signs Morgan Bill to Prohibit Hair Discrimination*, WASH. HOUSE DEMOCRATS (Mar. 19, 2020), <https://housedemocrats.wa.gov/morgan/2020/03/19/governor-signs-morgan-bill-to-prohibit-hair-discrimination/> [<https://perma.cc/HT6X-D6EU>] (announcing Washington state as yet another state to pass a state-level CROWN Act).

²⁰ Representative Bonnie Watson Coleman, CONGRESS.GOV, [<https://perma.cc/TG8G-LC24>] (listing Representative Watson Coleman's congressional biography including her member activity).

²¹ See H.R. 2116, 117th Cong. (2021) (outlining the second CROWN Act bill passed by the House and rejected by the Senate); Jaclyn Diaz, *The House Passes the CROWN Act, a Bill Banning Discrimination on Race-Based Hairdos*, NPR (Mar. 18, 2022), <https://www.npr.org/2022/03/18/1087661765/house-votes-crown-act-discrimination-hair-style> [<https://perma.cc/3QBK-RHYF>].

²² See Sarah Salvatore, *Senate Republicans Block Watson Coleman's Hair Discrimination Bill*, PATCH, <https://patch.com/new-jersey/princeton/senate-republicans-block-watson-coleman-s-hair-discrimination-bill> [<https://perma.cc/6595-K2X8>] (Dec. 14, 2022) (describing Senate Republicans' rejection of H.R. 2116). Even among House members, there was opposition to H.R. 2116. See Diego Mendoza, *Legislation Prohibiting Discrimination Against Black Hair Passed by House*, WHAS 11, <https://www.whas11.com/article/news/nation-world/house-passes-crown-act/507-a1652236-c226-429b-8bb5-fc6c86c5c4cb> [<https://perma.cc/M5PS-TJHN>] (Mar. 18, 2022) (reporting on H.R. 2116's passage in the House and some Republican House members' comments on the passage). Jim Jordan, a Republican Representative of Ohio, made remarks on this attempt to pass the CROWN Act, implying the act was not of importance to Americans and far too much time had been dedicated to entertaining the bill. *Id.* Lauren Boebert, a Republican Representative of Colorado, stated the bill was a "bad, hair bill." *Id.*

²³ Representative Bonnie Watson Coleman, *supra* note 20; see H.R. 8191, 118th Cong. (2024) (outlining the third CROWN Act bill introduced to the House).

²⁴ See *supra* notes 18, 22, and accompanying text (documenting the two failed attempts to federally enact the CROWN Act).

²⁵ See *About: Creating a Respectful and Open World for Natural Hair*, THE CROWN ACT, <https://www.thecrownact.com/about> [<https://perma.cc/7FYL-MP4G>] (citing the exhaustive list of states and territories that have enacted the CROWN Act). As of August 2025, the list of states and territories that have enacted a version of the CROWN Act are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Texas, Virginia, Vermont, Washington, Washington, D.C., Puerto Rico, and the U.S. Virgin Islands. *Id.*

nancy is partisan divide in Congress.²⁶ Since the CROWN Act's introduction in the House in 2019, it has faced opposition from Republicans in both chambers of Congress.²⁷ Congressional Republicans have expressed various sentiments about the CROWN Act, including that hairstyle discrimination is not a pressing policy concern and that the existing federal protections against race discrimination provide protections equivalent to those the CROWN Act seeks to offer.²⁸

Despite the unpredictable and conflictual nature of partisan disagreement, this Note argues for the enactment of a federal CROWN Act based on existing state CROWN Acts and the recognition of natural Black hairstyles as a flexible carve-out immutable trait.²⁹ Part I of this Note lays out a history of Black hair discrimination and assimilation in the United States, discusses judicial interpretations of immutability, and describes the current safeguards against discrimination.³⁰ Part II examines the existing arena of anti-discrimination law by evaluating the body of judicial decisions surrounding such laws and how they fall short in protecting against natural Black hairstyle discrimination.³¹ Part III argues that the failure to recognize natural Black hairstyles as an immutable characteristic has led to inadequate legal interpretations of existing anti-discrimination laws and necessitates a federal CROWN Act that posits natural

²⁶ See Erin Brady, *Rep. Jim Jordan Calls CROWN Act a Distraction from Issues People Care About*, NEWSWEEK, <https://www.newsweek.com/rep-jim-jordan-calls-crown-act-distraction-issues-people-care-about-1689535> [<https://perma.cc/D9QQ-JVKW>] (Mar. 18, 2022) (describing the remarks of Congressman Jim Jordan in response to House bill H.R. 2116—the second introduction of the CROWN Act to the House—in which he portrayed the bill as a distraction from more important legislative efforts).

²⁷ See *id.* (documenting Rep. Jim Jordan's opposition to the CROWN Act); Press Release, Off. of Rep. Bonnie Watson Coleman, Senate Republicans Block Passage of CROWN Act (Dec. 14, 2022), <https://watsoncoleman.house.gov/newsroom/press-releases/senate-republicans-block-passage-of-crown-act> [<https://perma.cc/5KH4-YPT9>] (relaying Congresswoman Watson Coleman's comments on the blockage of H.R. 2116's passing in the Senate attributing the blockage to a lack of Republican support for the bill).

²⁸ See *supra* note 26 and accompanying text (describing Congressman Jim Jordan's stance that the CROWN Act is a distraction from other legislative efforts). In a 2022 Yahoo News article, Senator Rand Paul expressed his feelings that the 1973 Supreme Court ruling in *McDonnell Douglas Corp. v. Green* adequately provided the protections the CROWN Act seeks to establish by holding that disguising discrimination with a pretextual reason violates federal civil rights law. See Jayla Whitfield-Anderson, *Senate Republicans Block CROWN Legislation Again. But Advocates Aren't Deterred*, YAHOO NEWS (Dec. 21, 2022), <https://www.yahoo.com/news/senate-republicans-block-crown-legislation-again-but-advocates-arent-deterred-200840509.html> [<https://perma.cc/96B8-8A7G>] (reporting on the failure to pass the CROWN Act through the Senate for a second time).

²⁹ See Nadiyah Campbell, *Protecting the Black Crowning Glory: Why Legislation Is Needed to Make Up for Federal Discrimination Statutes' Failure to Protect Black Hair*, 13 DREXEL L. REV. 143, 160–61 (2020) (defining immutable characteristics as characteristics that are unchanging); *infra* notes 86–95 and accompanying text (discussing the current legal standing of immutability).

³⁰ See *infra* notes 33–148 and accompanying text.

³¹ See *infra* notes 149–197 and accompanying text.

Black hairstyles as a flexible carve-out immutable trait akin to currently recognized immutable traits.³²

I. A STORY OF BLACK HAIR: FROM SLAVERY TO THE CROWN ACT

Prior to the transatlantic slave trade, in West and Central African societies, Black hair was a symbol of cultural and social identity, especially for women.³³ Long, thick, styled hair could convey information about fertility, marital status, wealth, age, religion, and rank within a community.³⁴ Hair held spiritual significance, particularly in Senegal and Benin, where its proximity to the sky, and therefore the divine, gave hairdressers a priest-like status.³⁵ Across Africa more generally, hairstyles carried deep cultural meaning, serving as markers of identity and heritage.³⁶ Historically (and presently), intricate hairstyles such as braids, twists, and locs required hours of work to create, transforming the hairstyling process into a bonding event for family and friends.³⁷ Today, natural hairstyles like locs, cornrows, twists, Bantu knots, and Afros remain closely tied to Black identity, symbolizing pride and enduring cultural practices.³⁸

The pride and symbolism imbedded in the original concept of Black hairstyling has been subject to upheaval stemming from the othering of Black people during and after the American slave trade.³⁹ Black hairstyling in the United States has undergone many adaptations framed by Euro-centric beauty standards that have compelled a culture of Black hair assimilation.⁴⁰ Against a profusion of social, political, and legal efforts to ridicule Black hair, the natural hair movement has seen a resurgence in the United States in recent years.⁴¹ The reawakening of natural Black hairstyling in recent years lends itself to the

³² See *infra* notes 198–217 and accompanying text.

³³ Sylviane Ngandu-Kalenga Greensword, *Historicizing Black Hair Politics: A Framework for Contextualizing Race Politics*, 16 SOCIO. COMPASS 1, 2 (2022).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Taylor Ray Cook, Raymond P. Dudlo & Rhea M. Jones-Price, *Knots, Locs, and Law: A Legal and Social Perspective on the Crown Act and the Right to Wear Natural Hair*, 67 RES GESTAE 12, 13 (2023).

³⁷ *Id.* at 13–1; see DASHSTYLISTS, *supra* note 2 (defining braids twists and locs); see also STYLESEAT, *supra* note 2 (describing the formation process for locs).

³⁸ Cook et al., *supra* note 36, at 14.

³⁹ See *infra* notes 48–55 and accompanying text (providing a broad strokes summary of the origins of Black hair erasure during the transatlantic slave trade).

⁴⁰ See *infra* notes 57–75 and accompanying text (summarizing the prevalence of straightening techniques in Black hairstyling).

⁴¹ See *infra* notes 129–133 and accompanying text (describing the modern-day natural Black hair movement). The natural Black hair movement is defined by a rejection of hair alteration via chemical and heat-based hair straighteners and other hairstyling that smooths or straightens the natural hair state. Katherine P. Sandberg, J. Drei Munar & Amber D. Rogers, *Natural Hair Movement Spurs Nationwide Legislative Response to Prevent Hairstyle Discrimination*, 48 LAB. & EMP. L. 6, 6 (2020).

Black community's defiance of race discrimination and support for legal movements like the CROWN Act.⁴² This Part of the Note provides a history of Black hair discrimination in the United States, and the modern issues said discrimination causes.⁴³ Section A of this Part documents the origins of Black hair discrimination in the United States stemming from the transatlantic slave trade.⁴⁴ Section B of this Part frames the current judicial construction of the term immutability.⁴⁵ Section C of this Part discusses the provisions of Titles II and VII, as well as 42 U.S.C. § 1981 and 42 U.S.C. § 1983, and the shortcomings of these laws with regard to race-based hair discrimination protection.⁴⁶ Section D of this Part takes note of the current natural hair movement and existing state CROWN Acts.⁴⁷

A. The Origins of Black Hair Discrimination in the United States

The American concept of Black hair discrimination begins with the transatlantic slave trade, where the cultural significance of African hairstyles faced deliberate erasure.⁴⁸ European slave traders routinely shaved the heads of enslaved Africans upon their capture, severing those who were enslaved from their cultural identity.⁴⁹ Moreover, enslaved Africans were not afforded hair care tools nor the chance to maintain good hygiene including hair grooming, perpetuating the erasure of traditional African hairstyles.⁵⁰ The lack of opportunity for personal grooming created a hierarchy rooted in hair texture, placing enslaved individuals with straighter hair texture in roles involving less outdoor

⁴² See *infra* notes 129–133 and accompanying text (explaining the current landscape of the CROWN Act in the United States stemming from the current natural hair movement).

⁴³ See *infra* notes 48–148 and accompanying text.

⁴⁴ See *infra* notes 48–85 and accompanying text.

⁴⁵ See *infra* notes 86–95 and accompanying text.

⁴⁶ See *infra* notes 96–128 and accompanying text.

⁴⁷ See *infra* notes 129–148 and accompanying text.

⁴⁸ See Ngandu-Kalenga Greensword, *supra* note 33, at 2 (describing the journey enslaved Africans endured crossing the Atlantic and the customs of enslavers to cut off enslaved Africans' hair).

⁴⁹ *Id.* (noting that shaving the heads of enslaved Africans served the utilitarian purpose of preparing enslaved people for the long unhygienic journey across the Atlantic, but that its primary purpose was Black hair erasure). The shaving of enslaved people's hair was also a tactic used to dehumanize them, and slavers even referred to Black hair as "fur." Afiya M. Mbilishaka et al., *Don't Get It Twisted: Untangling the Psychology of Hair Discrimination Within Black Communities*, 90 AM. J. ORTHO-PSYCHIATRY 590, 591 (2020).

⁵⁰ See Mbilishaka et al., *supra* note 49, at 591 (explaining that a lack of access to hygiene care left enslaved Africans susceptible to parasites and infections); Ngandu-Kalenga Greensword, *supra* note 33, at 2 (stating that few combs made the journey across the Atlantic, or were permitted during the slave trade); see also Campbell, *supra* note 29, at 150 (explaining that a lack of opportunity for grooming and hairstyling led many enslaved people to experience hair breakage or go bald).

labor and those with a more tightly coiled texture in roles involving more physically demanding tasks.⁵¹

The slave trade established a framework in the United States that de-marked Black hair as unattractive and inferior, and as early as 1786 the law echoed this social sentiment.⁵² In 1786, Louisiana governor Esteban Rodríguez Miró enacted the Tignon Laws which decreed that all women of African descent must cover their hair with a tignon (a handkerchief) to mark themselves as part of the slave class, regardless of whether they were enslaved or free.⁵³ When Black hair was visible, it was regarded as unattractive.⁵⁴ Enslavers created a culture where Black features were classified as unattractive, and it became commonly accepted for Black people to assimilate their hair to match white beauty standards.⁵⁵

Since the eighteenth century, the acceptance of white features as superior attributes has shaped Black hair culture and hierarchy.⁵⁶ This hierarchy has been seen through customs such as wearing wigs to cover natural hair and using noxious chemical hair straighteners to achieve a more Eurocentric aesthetic.⁵⁷ After the Civil War, upper-class Black individuals formed social clubs called Blue Vein Societies to align with prevailing definitions of desirable features.⁵⁸ The first Blue Vein Societies emerged in Northern cities and were composed of fairer-skinned Black people, often with looser natural hair textures.⁵⁹ After emancipation, Black people without the privilege of less textured

⁵¹ Mbilishaka et al., *supra* note 49, at 591; see Campbell, *supra* note 29, at 151 (describing how a hair hierarchy relegated enslaved people working outside to wearing scarves whereas enslaved people working inside enslavers' homes were expected to be groomed, leading those indoors to adopt styles like braids, cornrows, and plaits). Furthermore, headwraps and scarves became the common uniform for enslaved individuals working outside for the dual purposes of protecting against the sun and insects, and to hide their more unseemly hair. Campbell, *supra* note 29, at 150–51.

⁵² See Cook et al., *supra* note 36, at 14 & n.1 (describing that at the time the Tignon Laws were enacted, Black women commonly adorned their hair with jewels and accent pieces in a style distinct from white women); see also Daniel Jefferson, *The Roots of the Problem: How the Crown Act Could Remedy the Inadequacies of Title VII Hair Discrimination Protections in the Entertainment Industry*, 17 FLA. A & M U. L. REV. 185, 187–88 (2023) (reiterating that the impetus for the Tignon Laws were the elaborate hairstyles Black women adorned at the time which drew the focus of white men).

⁵³ Cook et al., *supra* note 36, at 12.

⁵⁴ Mbilishaka et al., *supra* note 49, at 591.

⁵⁵ See Campbell, *supra* note 29, at 151 (describing a white-engineered social hierarchy in which African features were negatively stereotyped whereas white features were elevated as superior).

⁵⁶ Mbilishaka et al., *supra* note 49, at 592; see Jefferson, *supra* note 52, at 188 (explaining that natural Black hair was commonly referred to as “wool” disparagingly).

⁵⁷ Alexis Boyd, *Hair Me Out: Why Discrimination Against Black Hair Is Race Discrimination Under Title VII*, 31 AM. U. J. GENDER SOC. POL’Y & L. 75, 81 (2023).

⁵⁸ Campbell, *supra* note 29, at 152. Blue Vein Societies employed a membership acceptance test that required a potential member to pass a comb through their hair to demonstrate their hair texture was straight enough for membership. *Id.*

⁵⁹ Christopher E. Koy, *Applying Strategies of the Snobographer: Charles W. Chesnutt’s Use of Thackeray in Two “Blue Vein Society” Stories*, 8 AM. & BRIT. STUD. ANN. 1, 5–6 (2015); see Camp-

hair utilized systems of hair straightening and wig and weave application.⁶⁰ At the end of the 19th century, Black women began using sodium hydroxide-based products to straighten their hair.⁶¹ Early forms of hair straightening also consisted of using bacon grease for hair softener, heated knives to curl hair, and a lye and potatoes mixture to alter hair texture.⁶²

Heading into the twentieth century, as Black Americans sought conformity with white hair standards, eugenics-driven ideologies in pre-Nazi Germany led to the first demarcation of hair types.⁶³ In 1905, Dr. Eugen Fischer, a German anthropologist and later Nazi party member, created the first hair typing tool comprised of thirty hair samples of various colors ranging from light blonde to black.⁶⁴ Tainted by a desire to uplift the Aryan race, Dr. Fischer's work contributed to the first conceptualizations of inherited genetic traits defining race or ethnicity rather than simplistic notions of perceived skin tone.⁶⁵

Later on in the twentieth century, at-home straightening systems gave way to mass-produced consumer products specifically marketed to the Black community.⁶⁶ In the early twentieth century, Madam C.J. Walker patented her creation of the "hot comb," also called the "pressing comb."⁶⁷ She was the first Black woman to promote a revolutionary straightening tool like this directly to

bell, *supra* note 29, at 152 (describing Blue Vein Societies as spaces that reinforced Eurocentric beauty norms and afforded their members social privileges).

⁶⁰ Campbell, *supra* note 29, at 153.

⁶¹ Chanel Donaldson, *Hair Alteration Practices Amongst Black Women and the Assumption of Self-Hatred*, APPLIED PSYCH. OPUS, https://wp.nyu.edu/steinhardt-appsych_opus/hair-alteration-practices-amongst-black-women-and-the-assumption-of-self-hatred/ [<https://perma.cc/VD99-NXQX>].

⁶² See Campbell, *supra* note 29, at 153 (noting Black people employed home remedies to remove texture from their natural hair).

⁶³ See Shannin N. Moody et al., *Impact of Hair Type, Hair Sample Weight, External Hair Exposures, and Race on Cumulative Hair Cortisol*, PSYCHONEUROENDOCRINOLOGY, Aug. 2022, at 1, 2 (describing Eugen Fischer's creation of a hair typing system in the early 1900s that categorized hair texture to compare "lesser" hair phenotypes to the more "ideal" blonde hair).

⁶⁴ *Tool Used to Classify Hair Color in Racial Studies Conducted in Nazi Germany*, U.S. HOLOCAUST MEM'L MUSEUM, <https://collections.ushmm.org/search/catalog/irn3690> [<https://perma.cc/GVR5-PVPY>] (Apr. 11, 2025). Dr. Fischer and Dr. Karl Saller went on to update this hair typing tool in 1928, and eventually, the Nazi party adopted Dr. Fischer's published works to bolster its ideology on the superiority of the white race. *Id.* The most recent version of Dr. Fischer and Dr. Saller's hair typing tool is housed in the United States Holocaust Memorial Museum. *Id.*

⁶⁵ Andrew D. Evans, *Race Made Visible: The Transformation of Museum Exhibits in Early-Twentieth-Century German Anthropology*, 31 GERMAN STUD. REV. 87, 90, 93 (2008). Modern studies on genetics have found the textured hair of those with African ancestry is unique and defined by measurable genetic markers. See Deborah B. Oladele, Ewa Markiewicz & Olusola C. Idowu, *The Genomic Variation in Textured Hair: Implications in Developing a Holistic Hair Care Routine*, COSMETICS, Oct. 2024, at 1, 2, 4 (explaining that Afro-textured hair varies from all other hair types when observing its follicle, bulb, density, and composition).

⁶⁶ See Cheryl Thompson, *Black Women and Identity: What's Hair Got to Do with It?*, 22 MICH. FEMINIST STUD. 78, 79–80 (2009) (discussing the inception of the "hot comb" and chemical relaxers).

⁶⁷ *Id.*

fellow Black women.⁶⁸ The hot comb, a metal comb heated over an open flame or stove, straightened curls as it was pulled through the hair in sections.⁶⁹ Although this technique could offer short-term straightening results, the hot comb could lead to serious burns and extensive hair and skin damage.⁷⁰ Walker's innovations in Black hairstyling did not end with the hot comb, and around 1910 she established the first college dedicated to training Black women in Black hair maintenance.⁷¹ Walker's entrepreneurial pursuits centered around the idea that having straight hair was a catalyst for professional and social success.⁷² Another development in the realm of mass-produced Black hair products was the creation of "relaxer."⁷³ George E. Johnson introduced relaxer during the 1960s; it was a chemical straightener advertised as a less harmful, less painful option than the hot comb.⁷⁴ Relaxer could be applied at home and would chemically alter hair to keep it straight for long periods of time, only needing reapplication every few months.⁷⁵

Starting in the 1960s, the Black Power Movement sparked a paradigm shift in the Black community around their hair—now there was a cry to decon-

⁶⁸ *Id.* The identity of the original patentor of the hot comb is fiercely debated due to the various names the tool went by, and the multitude of inventors who made some form of the tool. Moriah James, *Sizzle: Annie Turnbo Malone, Madam C.J. Walker, and the Complicated History of the Hot Comb*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE (Jan. 10, 2019), <https://nmaahc.si.edu/explore/stories/sizzle> [<https://perma.cc/8766-NBHR>]. It is believed that white women used some iteration of the hot comb in late eighteenth century Europe. *Id.* Annie Malone, whose parents were formerly enslaved, is credited with marketing a heat styling comb called the "Marcel Comb" in the 1920s. *Id.* Madam C.J. Walker was an agent who worked for Malone's hair care business and became the face of the hot comb's mainstream debut. *Id.*

⁶⁹ Campbell, *supra* note 29, at 153.

⁷⁰ See *id.* at 153–54 (noting that Black men and women continued to use this potentially dangerous system of hair straightening to conform to white beauty standards).

⁷¹ Ngandu-Kalenga Greensword, *supra* note 33, at 5.

⁷² *Id.* A 1904 advertisement in the *Rising Son* promoted Curl-I-Cure products, stating, "Attractiveness will contribute much to your success—both socially and commercially. Positively nothing detracts so much from your appearance as short, matted, un-attractive, curly hair." *Id.* (citation omitted). The brand, Curl-I-Cure, portrayed Black curls as a condition needing treatment. *Id.*

⁷³ See Thompson, *supra* note 66, at 79–80 (describing the development of the relaxer in the 1960s as a chemical straightener for Black hair).

⁷⁴ *Id.* Relaxer is a common term for any chemical hair straightening method, and its use can be accompanied by severe side effects. Joane Nathache Hatsbach de Paula, Flávia Machado Alves Basilio & Fabiane Andrade Mulinari-Brenner, *Effects of Chemical Straighteners on the Hair Shaft and Scalp*, 97 ANAIS BRASILEIROS DE DERMATOLOGIA 193, 195 (2022). Side effects may include chemical burns and pain, weakening of the hair and, in some cases, alopecia. *Id.*

⁷⁵ Thompson, *supra* note 66, at 79–80. As of June 30, 2024, the hair relaxer market was valued at \$717.06 million with a projected growth to \$839.1 million by the year 2029. Winnie Awa, *Why Relaxers Are Growing in Popularity Despite Health Risks*, BEAUTYMATTER (June 30, 2024), <https://beautymatter.com/articles/why-relaxers-are-growing-in-popularity> [<https://perma.cc/2GYX-WGN2>]. These numbers are starkly higher than they have been in past years, for example, the hair relaxer market was valued at \$152 million in 2013. *Id.*

struct previous social norms regarding Black hair.⁷⁶ The Black Power Movement coincided with the Civil Rights Movement, and from both movements sprung activist groups such as the Black Panthers whose members donned afros as a symbol of Black cultural pride.⁷⁷ Wearing natural hair during the Civil Rights Era was a form of protest, a cultural embrace of Black identity, and a symbol of Black power; for example, political activists such as Angela Davis and celebrities of the time sported natural hair.⁷⁸ In the 1970s, the natural hair movement flourished, with afros and braided styles like cornrows and individual braids gaining popularity among Black people.⁷⁹ During this time, braided styles in particular began to be associated with Black urban communities through the subgenre of movies called Blaxploitation, which portrayed stereotyped Black characters.⁸⁰ Nonetheless, the movement began to wane in the 1980s as many Black people transitioned from wearing braids and afros to adopting Jheri curls and other texturized hairstyles.⁸¹ Furthermore, by the 1990s a large number of Black women had returned to using chemical hair straighteners and wearing wigs and weaves.⁸²

In the 1990s, hairstylist Andre Walker debuted a new hair typing system on the Oprah Winfrey Show, and today it is the prevailing system for grouping hair textures.⁸³ The system consists of four categories of hair type each with

⁷⁶ See Mbilishaka et al., *supra* note 49, at 592 (describing the Black Power Movement and the Natural Hair Movement in the 2000s as acting in tandem to oppose the degradation of Black hair).

⁷⁷ See Ra'Mon Jones, *What the Hair: Employment Discrimination Against Black People Based on Hairstyles*, 36 HARV. BLACKLETTER L.J. 27, 29 (2020) (explaining that Black Panthers wearing afros prompted Black people to sport afros at school and work).

⁷⁸ See *id.* at 29–30 (describing how the Black Power Movement caused the afro to become a mainstream hairstyle among Black Americans, and particularly among Black youths). Black people embraced natural and afro hairstyles to celebrate self-worth and turn away from white aesthetic standards. See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 319 (1997) (“We have to stop being ashamed of being [B]lack. A broad nose, a thick lip and nappy hair is us and we are going to call that beautiful whether they like it or not” (noting the remarks of activist Stokely Carmichael)).

⁷⁹ Jones, *supra* note 77, at 30.

⁸⁰ Ngandu-Kalenga Greensword, *supra* note 33, at 6 & n.6. During the 1970s, the rising Afro-Caribbean immigrant population in the United States, as well as Canada, introduced Rastafarian aesthetics to North Americans as a new expression of Afrocentricity. *Id.* at 6. This ideology celebrated locs, emphasized reconnecting with pre-colonial African roots, and caused African American women to embrace braiding styles as an authentic expression of African culture. *Id.*

⁸¹ See Jones, *supra* note 77, at 30 (stating the Black Power Movement began to wane in the 1980s). In the 1980s, Curly Kits were marketed as an at-home Jheri curl system to achieve chemically altered soft curls. Danielle Broadway, *Jheri Curls Are Making a Comeback*, BYRDIE, <https://www.byrdie.com/jheri-curls-inspiration-tips-and-how-5096909> [<https://perma.cc/UL88-PTP3>] (Oct. 4, 2021). Similarly to relaxer, the Jheri curl process involves applying chemical straightener to the hair. *Id.* The intended aesthetic of a Jheri curl is a loose curl that is softer than the typical Black hair texture. *Id.*

⁸² Broadway, *supra* note 81 (noting that some Black individuals continued to sport natural Black hairstyles despite this regression back to straight hairstyles).

⁸³ See Aimee Simeon, *The Controversial History of the Hair Typing System*, BYRDIE, <https://www.byrdie.com/hair-typing-system-history-5205750> [<https://perma.cc/8556-YF6B>] (Oct. 25, 2021)

three subcategories, A through C, which offer further texture differentiation.⁸⁴ Following the push to categorize hair types more comprehensively, in the twenty-first century, scientific research determined hair texture variation is a product of genetics.⁸⁵

B. What Is Immutability?

Immutability is a concept of both legal and social construction and, importantly, it is the focal point of the legal discourse surrounding race-based hair discrimination.⁸⁶ Traditionally, courts have only recognized immutable traits as “accidents of birth,” (or more simply, unchanging characteristics) in the context of race discrimination, limiting the scope of the term’s reach.⁸⁷ The U.S. Supreme Court first grappled with immutability in the 1973 case *Frontiero v. Richardson*, where it held sex is an accident of birth and therefore an immutable trait.⁸⁸ The Court developed its analysis of immutability further in 2004, in *Vieth v. Jubelirer*, where it held political leaning is not an immutable trait because it is a changeable trait.⁸⁹

Despite this seemingly precise binary of accidents of birth defining immutability, the 2020 case *Bostock v. Clayton County, Georgia* marked a shift in

(documenting the first version of Andre Walker’s hair typing system that included only four categories, “straight, wavy, curly, and coily”); Andre Walker Hair, *Andre Walker Gold System TV Advertisement*, YOUTUBE (Nov. 19, 2016), <https://www.youtube.com/watch?v=DEbgF-I8n74> [<https://perma.cc/9CF7-ZFCH>] (displaying an advertisement for Andre Walker’s haircare brand where he references both his position as Oprah Winfrey’s hair stylist, and his hair typing system).

⁸⁴ See Oladele et al., *supra* note 65, at 12 (describing the Andre Walker method of hair typing as the quintessential typing system still rooted in notions of white hair dominance).

⁸⁵ See Roland de la Mettrie et al., *Shape Variability and Classification of Human Hair: A World-wide Approach*, 79 HUM. BIOLOGY 265, 279 (2007) (concluding through scientific testing on hair types that “[h]air shape is a quantitative, continuous trait, just as skin color intensity or stature is”); see also Oladele et al., *supra* note 65, at 2 (affirming that African-textured hair is the result of genetics, and specifically, traceable differences in DNA structure).

⁸⁶ See Amir Jaima, *In Defense of the Crown Act*, 51 PHILOSOPHIA 1977, 1983 (2023) (noting that race discrimination can be complex as it can be based on both immutable and mutable traits that are racial markers or proxies for race).

⁸⁷ Aaron Roberson, *White Hair Only: Why the Concept of Immutability Must Be Expanded to Address Hair Discrimination Against Black Women in the Workplace*, 99 U. DET. MERCY L. REV. 223, 232 (2022). Said in another form, immutable traits are those that are unchanging and fundamental to personal identity. Jaima, *supra* note 86, at 1987. Thus, the existing protected classes under Title VII include race, color, sex, national origin, religion, disability, age, and genetic information. *Id.* One could argue humans can have characteristics that do not occur as an accident of birth but are socially recognized as stable, such as unchanging attributes like parental and criminal record status. *Id.*

⁸⁸ 411 U.S. 677, 686 (1973). In *Frontiero*, the Court held a military provision was an unconstitutional violation of the Due Process Clause because it required female uniformed service members to prove their spouse was a dependent to receive spousal benefits, whereas male uniformed service members automatically received spousal benefits. *Id.* at 679, 680–81.

⁸⁹ 541 U.S. 267, 287 (2004). In *Vieth*, a group of disgruntled Pennsylvania voters sued the state arguing that its new congressional district map was an unconstitutional gerrymander in favor of Republicans. *Id.* at 272.

the Court's previously rigid concept of immutability.⁹⁰ In *Bostock*, the Court held that sex discrimination could be predicated on both immutable traits such as sex assigned at birth, *and* on mutable traits such as the ability to become pregnant and one's life expectancy.⁹¹ In sum, the Court acknowledged that a trait such as motherhood status, though not an accident of birth, serves as a proxy for sex because of its association with the female sex.⁹² Therefore, discrimination on the basis of motherhood status would constitute sex discrimination.⁹³ Nevertheless, courts have not applied the logic of *Bostock* to recognize traditionally Black hairstyling as a trait that, even if deemed completely mutable, can be the basis of race discrimination.⁹⁴ The general sentiment within the American court system is that traditionally Black hairstyles are not foundational to Black identity because no one traditional Black hairstyle is adopted by all Black people.⁹⁵

C. Existing Safeguards Against Hair Discrimination

There have been multiple iterations of the Civil Rights Act throughout American history, with each new form of the Act addressing different facets of discrimination in line with the social ills prevalent at the time Congress passed the Act.⁹⁶ The Civil Rights Act of 1866—the first Civil Rights Act—enacted 42 U.S.C. § 1981 and the Civil Rights Act of 1871 enacted 42 U.S.C. § 1983.⁹⁷

⁹⁰ See 590 U.S. 644, 680 (2020) (holding that an employer cannot discriminate against an employee based on their sexuality or transgender status because these two identities fall under the umbrella of sex discrimination). The Court found Title VII broadly protects against sex discrimination without exceptions. *Id.* at 669. Therefore, the Court must incorporate sexuality and transgender status as identities based on sex just as courts had previously done with the statuses of motherhood and sexual harassment. *Id.* at 669–70 (internal citations omitted).

⁹¹ See *id.* at 668 (explaining the Court's determination that actions taken with the intent to discriminate against motherhood are equivalent to sex discrimination regardless of whether the perpetrator has explicit intent to discriminate against someone based on their motherhood status).

⁹² See *id.* at 645–46. Ultimately, the name or motivation behind a discriminatory policy does not change the nature of the form of discrimination taking place, as the Court identified past precedent where life expectancy was used as a proxy for sex. *Id.*

⁹³ *Id.*

⁹⁴ See generally Roberson, *supra* note 87, at 241 (arguing that hair discrimination is a form of race discrimination that the court system does not recognize). This reasoning ignores the social and cultural significance of Black hairstyling to the Black identity and experience. *Id.*

⁹⁵ *Id.* Religion as a protected characteristic provides a counter example to the lack of protection Black hairstyling receives. See Jaima, *supra* note 86, at 1987 (pointing out that religious status is a protected characteristic despite technically being mutable).

⁹⁶ See Mehrunnisa Wani, 8 *Key Laws That Advanced Civil Rights*, HISTORY (Feb. 7, 2025), <https://www.history.com/news/civil-rights-legislation> [<https://perma.cc/MES6-DX95>] (documenting a timeline of American civil rights developments from 1865 to 1968).

⁹⁷ CHRISTINE J. BACK, CONG. RSCH. SERV., IF12535, 42 U.S.C. § 1981'S CONTRACT CLAUSE: RACIAL EQUALITY IN CONTRACTUAL RELATIONSHIPS 1 (2023), <https://www.congress.gov/crs-product/IF12535> [<https://perma.cc/XMW3-ENN5>]; WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10853, HEALTH & HOSPITAL CORPORATION OF MARION COUNTY V. TALEVSKI: DETERMINING WHEN A STAT-

Both § 1981 and § 1983 provide a basis for plaintiffs to pursue claims for violations of civil rights, particularly in cases involving racial discrimination in contracts (§ 1981), or the deprivation of a constitutional right by a state actor (§ 1983).⁹⁸

Section 1981 sought to secure equal rights for newly freed slaves after the Civil War and the Thirteenth Amendment's abolition of slavery.⁹⁹ It guarantees equal rights, including the ability to create, as well as enforce, contracts; the provision applies to both private and public discrimination.¹⁰⁰ Most claims under § 1981 focus on this contract clause, which protects individuals against private discrimination or discriminatory state laws.¹⁰¹ Section 1981's guarantee of equal rights in contract enforcement provides an avenue for addressing workplace discrimination.¹⁰² Even so, it has limitations, primarily that § 1981 only addresses intentional discrimination and does not extend to disparate impact claims.¹⁰³ Additionally, successfully claiming discrimination under § 1981 is challenging because the provision applies solely to immutable traits and requires proof of intentional discrimination.¹⁰⁴

UTE CREATES A FEDERAL RIGHT ACTIONABLE UNDER 42 U.S.C. § 1983, at 1 (2022), <https://www.congress.gov/crs-product/LSB10853> [<https://perma.cc/LTY3-SFE2>]. The Civil Rights Act of 1866 was the first Civil Rights Act in American history and it sought to weaken the Black Codes of 1865. Wani, *supra* note 96. The Black Codes were a set of laws aimed at restricting the freedoms of Black Americans after the abolition of slavery. *Black Codes*, HISTORY, <https://www.history.com/articles/black-codes> [<https://perma.cc/Z6XV-5VYB>] (May 28, 2025). The Civil Rights Act of 1866 aimed to overturn the Supreme Court's 1857 *Dred Scott* decision, which held Black Americans were not U.S. citizens. *Id.*; see *Scott v. Sanford (Dred Scott)*, 60 U.S. (18 How.) 393, 410 (1857) (holding that enslaved Africans are not citizens of the United States as the Constitution intended), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁹⁸ 42 U.S.C. § 1981; 42 U.S.C. § 1983.

⁹⁹ BACK, *supra* note 97, at 1. Congress reenacted the Civil Rights Act of 1866 in 1870 following the Fourteenth Amendment's ratification, later codifying it as 42 U.S.C. § 1981. *Id.*

¹⁰⁰ *Id.* The Supreme Court has linked § 1981 to enforcing both the Thirteenth Amendment, which addresses the remnants of slavery and allowing actions against private and state actors, and the Fourteenth Amendment, which targets racial and other forms of discrimination but only against state actors. *Id.*

¹⁰¹ *Id.* Section 1981 protections are not limited to racially discriminatory contract formation and can cover violations such as termination of a contract motivated by discriminatory animus. *Id.*

¹⁰² See Campbell, *supra* note 29, at 162 (explaining that § 1981, though historically seen as addressing only discrimination in the creation and enforcement of contracts, was revised in 1991 to explicitly include prohibitions against discrimination within employment relationships). See generally 42 U.S.C. § 1981 (laying out a statement of equal rights in the process of contract making and enforcement).

¹⁰³ Campbell, *supra* note 29, at 162. In 1991, lawmakers amended § 1981, which had traditionally addressed discrimination related to creating and enforcing contracts, to explicitly prohibit discrimination within employment contracts. *Id.* This clarification coincided with the codification of the disparate impact theory. *Id.*

¹⁰⁴ *Id.* at 160–61. Immutable characteristics are defined as characteristics one has “no control [over] or ability to change.” *Id.*; see *What Is Disparate Treatment Discrimination—And How Is It Proven?*, THOMSON REUTERS LEGAL (May 10, 2022), <https://legal.thomsonreuters.com/en/insights/articles/the-basics-of-disparate-treatment-discrimination-under-title-vii> [<https://perma.cc/U9C7-DJ72>]

Section 1983, part of the Civil Rights Act of 1871, allows individuals to sue those acting under the color of law for violating rights the Constitution or federal laws protect.¹⁰⁵ In 1980, in *Maine v. Thiboutot*, the U.S. Supreme Court confirmed that § 1983 covers violations of both constitutional and statutory rights.¹⁰⁶ The Court rejected limiting the law to civil rights cases, emphasizing that Congress included no such restriction.¹⁰⁷ Even so, the Court later clarified in 1989, in *Golden State Transit Corporation v. City of Los Angeles*, that § 1983 applies only when a state actor infringes on a federally protected right, not just any federal law.¹⁰⁸

Along with the Civil Rights Era came the Civil Rights Act of 1964, a body of civil rights law divided into eleven “Titles” that remain a cornerstone of anti-discrimination law in the United States.¹⁰⁹ The Civil Rights Act of 1964 combats discrimination across various areas, including voter registration, business segregation, and public school policies.¹¹⁰ Although its eleven titles prohibit discrimination based on race, color, religion, national origin, and sex, lawmakers primarily passed the Act to address racial segregation and bias.¹¹¹ Each Title differs significantly in the conduct it bans, enforcement mechanisms, covered entities, and available remedies for violations.¹¹² This Section

(defining disparate impact); *see also* notes 123–128 and accompanying text (describing how courts have upheld the same immutability standard construed in § 1981 applicability to Title VII applicability, further restricting Title VII’s ability to protect against race-based hair discrimination).

¹⁰⁵ NOVAK, *supra* note 97, at 1. Section 1983 found its inception in the Civil Rights Act of 1871, also called the Ku Klux Klan Act, which authorized federal military intervention against groups conspiring to violate constitutional rights. *See* Wani, *supra* note 96 (documenting a timeline of American civil rights development from 1865 to 1968). The Civil Rights Act of 1871’s aim was to combat southern racial terrorism, specifically targeting the Ku Klux Klan, other white supremacist groups, and other violent organizations. *See id.* (describing the timeline of American Civil Rights Acts and, in particular, the Civil Rights Act of 1871).

¹⁰⁶ *See* 448 U.S. 1, 3–4 (1980) (laying out the holding of *Maine v. Thiboutot*).

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *See* 493 U.S. 103, 106 (1989) (holding that although the language of § 1983 should be broadly interpreted, it plainly omits language of sweeping protections for violations of federal law and instead speaks of federally protected rights). In *Golden State Transit Corp.*, the Supreme Court re-addressed a case where it previously held that the City of Los Angeles broke federal law. *Id.* at 105. The city had refused to renew a taxi company’s license unless the company settled an ongoing labor dispute with its workers. *Id.* On remand, the lower court held a party cannot recoup monetary compensation under § 1983 because the National Labor Relations Act (NLRA) did not explicitly allow for it. *Id.* In this re-hearing of the case, the Supreme Court addressed whether the NLRA gives individuals a legally enforceable right under § 1983 *Id.*

¹⁰⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

¹¹⁰ *See generally* CHRISTINE J. BACK, CONG. RSCH. SERV., IF11705, THE CIVIL RIGHTS ACT OF 1964: ELEVEN TITLES AT A GLANCE 1 (2020), <https://www.congress.gov/crs-product/IF11705> [<https://perma.cc/5F79-NS9L>] (providing an overview of what each of the eleven Titles of the Civil Rights Act of 1964 cover).

¹¹¹ *Id.*

¹¹² *See id.* at 1–2 (providing an overview of the coverage of each of the eleven Titles of the Civil Rights Act of 1964). Title I prohibits discriminatory voting practices, such as the use of voter literacy tests and unequal voter qualification standards. *Id.* at 1. Title II bans racial segregation and discrimina-

will focus on Titles II and VII as the Titles most relevant to analyzing race-based hair discrimination because these Titles protect against discrimination in public accommodations and employment respectively; arenas where race-based hair discrimination frequently manifests.¹¹³

Title II of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, or national origin in places of public accommodation, such as hotels, restaurants, and theaters.¹¹⁴ Its primary aim is to dismantle systemic racial segregation and ensure equal access to public facilities.¹¹⁵ Nonetheless, the application of Title II to cases of race-based hair discrimination has been limited.¹¹⁶ For example, in 2007, the American Civil Liberties Union (ACLU) filed one of the only Title II lawsuits against a Virginia Beach night-spot that prohibited patrons with certain hairstyles, including braids, locs, twists, and cornrows, alleging that the policy discriminated against Black people through race-based hair discrimination.¹¹⁷

tion in public accommodations, including hotels, restaurants, and theaters. *Id.* Title III ensures the desegregation of public facilities like libraries, parks, and prisons. *Id.* Title IV mandates the desegregation of colleges and public schools, authorizing federal enforcement action to enforce this. *Id.* Title V expands the authority of the U.S. Commission on Civil Rights to investigate and report on civil rights violations. *Id.* Title VI prohibits discrimination by recipients of federal financial assistance, allowing federal agencies to withhold funds from non-compliant programs. *Id.* at 1–2. Title VII outlaws employment discrimination based on race, color, religion, sex, or national origin and establishes the Equal Employment Opportunity Commission (EEOC) to enforce these protections. *Id.* at 2. Title VIII directs the Secretary of Commerce to collect voter registration and voting data based on race and national origin. *Id.* Title IX permits appellate review for civil rights cases and gives authority to the Attorney General to take control of lawsuits alleging Equal Protection Clause violations. *Id.* Title X establishes the Community Relations Service to mediate disputes related to racial discrimination. *Id.* Title XI contains miscellaneous provisions, including clarifications on the Act’s relationship with state laws and enforcement procedures. *Id.*

¹¹³ See 42 U.S.C. § § 2000a (laying out the provision of the Civil Rights Act of 1964 that is referred to as Title II); 2000e-2 (laying out the provision of the Civil Rights Act of 1964 that is referred to as Title VII). Note that neither Titles II and VII explicitly protect against race-based hair discrimination. See generally *id.* §§ 2000a, 2000e-2 (displaying the language of both Title’s II and VII).

¹¹⁴ *Id.* § 2000a.

¹¹⁵ See 88 CONG. REC. 9830–36 (1964) (describing comments from the 88th Congress as they discuss the inclusion of Title II in the Civil Rights Act). During Senate discussions on the inclusion of Title II of the Civil Rights Act, Senator Gore supported addressing valid concerns in the civil rights bill, recognizing the need to remove unjust racial barriers. *Id.*

¹¹⁶ See *infra* note 117 and accompanying text (describing one of the only cases brought under Title II for alleged race-based hair discrimination).

¹¹⁷ Press Release, ACLU of Va., Nightspot with Racially Discriminatory Policy Settles Case with DOJ; ACLU Lawsuit Pending (Feb. 12, 2008), <https://www.acluva.org/en/press-releases/nightspot-racially-discriminatory-policy-settles-case-doj-aclu-lawsuit-pending> [<https://perma.cc/6RUA-BTXY>]; see Complaint at 1, *Hines v. Anchor Inn., LLC*, No. 2:07-cv-00031 (E.D. Va. Jan. 18, 2007) (laying out acts of discrimination the plaintiffs experienced, and a claim for relief under Title II). The ACLU represented Myron Evans and Kimberley Hines, who were denied entry to Kokoamos Island Bar in Virginia Beach due to their hairstyles, whereas white patrons with unconventional styles were admitted to the establishment. Complaint at 2–3, *Hines*, No. 2:07-cv-00031. Despite prior warnings from the ACLU to change its policies, Kokoamos did not act, prompting the lawsuit. Press Release, ACLU of Va., *supra*. Local news also exposed instances of racially biased enforcement of the dress code. *Id.*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals based on race, color, sex, religion, or national origin.¹¹⁸ Title VII covers the majority of private-sector employers, state and local governments, federal agencies, employment agencies, and labor unions that have at least 15 workers.¹¹⁹ Title VII establishes two liability theories: it bans discrimination that results from disparate treatment and it bans facially neutral policies that have a disparate impact.¹²⁰ Disparate treatment involves intentional discrimination against an individual based on their protected characteristic (such as race), whereas disparate impact arises where policies or practices that are neutral on their face disproportionately affect a protected group without a valid justification.¹²¹ To establish a disparate impact claim, a plaintiff must provide evidence that reasonably suggests employer liability; mere allegations of discrimination—for example, a claim that a grooming policy is discriminatory—are insufficient.¹²²

Despite its broad scope, courts have narrowly construed Title VII's protections, particularly regarding race-based hair discrimination.¹²³ Courts have often distinguished between immutable traits, such as skin color, and mutable characteristics, like hairstyles, ruling that mutable traits are not protected under

Ultimately, the Department of Justice settled the allegation of racial discrimination against Kokoamos Island Bar. *Id.* This settlement required the establishment owner to enforce a non-discriminatory dress code and monitor staff behavior. *Id.*

¹¹⁸ Jefferson, *supra* note 52, at 190. President John F. Kennedy originally proposed the passage of Title VII, but the act's signage into law occurred following Kennedy's assassination. *Id.* The language of Title VII reads:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

¹¹⁹ See Jefferson, *supra* note 52, at 190 (noting Title VII covers the majority of the organizations in the United States).

¹²⁰ Campbell, *supra* note 29, at 161.

¹²¹ See THOMSON REUTERS LEGAL, *supra* note 104 (defining disparate treatment and disparate impact).

¹²² Jefferson, *supra* note 52, at 192–93. In 1981, in *Carswell v. Peachford Hospital*, a Black woman was terminated for violating grooming policies that prohibited beads at the ends of her cornrows. No. C80-222A, 1981 WL 224, at *1 (N.D. Ga. May 26, 1981). She argued the policy disproportionately impacted Black people, but the court rejected her claim, deeming the policy valid because it targeted mutable traits and the defendant evenly applied it to all employees. *Id.* at *2.

¹²³ See Jones, *supra* note 77, at 31 (explaining the balancing approach courts apply when evaluating race-based hair discrimination).

Title VII.¹²⁴ Judicial interpretations of Title VII have relied heavily on the concept of immutability, which limits protections to traits that cannot be altered, such as skin color.¹²⁵ Title VII does not explicitly protect against hair or hair-style discrimination, as courts have deemed them a mutable characteristic.¹²⁶ In 1976, in *Jenkins v. Blue Cross Mutual Hospital Insurance*, the U.S. Court of Appeals for the Seventh Circuit deviated from typical Title VII race-based hair discrimination jurisprudence, providing a win for the Black community.¹²⁷ In *Jenkins*, the Seventh Circuit held afros are protected under Title VII in cases of race discrimination due to the considerable connection afros have to race.¹²⁸

D. The CROWN Act Gets Its Footing

Despite the natural hair movement's regression in the 1990s, a new natural hair movement is emerging in the United States.¹²⁹ Starting early in the 2000s, and through the 2010s, natural hairstyling regained momentum.¹³⁰ This renewed movement was not linked to political activism—like the movement of the 1960s—but instead centered on a social effort to redefine and strengthen beauty ideals for Black individuals, especially Black women seeking to escape the damage chemical relaxers and excessive heat treatments cause to their hair.¹³¹ Despite this renewed, growing acceptance of natural hair, white societal norms still dictate the idea of what constitutes a professional appearance.¹³²

¹²⁴ See Jefferson, *supra* note 52, at 194 (describing the immutability standard applied by courts to Title VII protections). In 2016, in *EEOC v. Catastrophe Management Solutions*, a Black woman refused to cut her locs after a potential employer informed her they would not hire employees with “excessive hairstyles.” 852 F.3d 1018, 1020, 1022 (11th Cir. 2016). The EEOC filed a lawsuit on the woman’s behalf, seeking to broaden Title VII’s definition of race to include traits linked to cultural identity. *Id.* Ultimately, the Eleventh Circuit affirmed the dismissal of the case on appeal, ruling that the complaint failed to argue locs are an immutable trait of Black people. *Id.* at 1034–35.

¹²⁵ Campbell, *supra* note 29, at 160–61.

¹²⁶ Jefferson, *supra* note 52, at 191; see Jones, *supra* note 77, at 31 (describing how the court system’s immutability standard has created a loophole that allows employers to use grooming policies and dress codes as pretext for hairstyle discrimination).

¹²⁷ See generally 538 F.2d 164, 169 (7th Cir. 1976) (holding Title VII protects afros from race discrimination).

¹²⁸ *Id.* at 165, 169.

¹²⁹ See *supra* notes 76–80 and accompanying text (describing the first natural hair movement stemming from the Black Power Movement of the 1960s); see also Jones, *supra* note 77, at 30 (referencing a resurgence of the natural hair movement starting in the 2000s).

¹³⁰ Jones, *supra* note 77, at 30. The coronavirus pandemic boosted sales of natural Black hair products as the closure of salons and barbershops led to increased demand for at-home styling products. Cassandra Maas, *Cashing in on Culture? Dove and the Crown Act*, 40 J.L. & COM. 179, 185–86 (2021). Although interest in these products was rising before 2020, the sales of some products doubled during this time. *Id.* Large retail chains began stocking more natural hair products, and influencers on social media seized the opportunity to promote and profit from the growing popularity of curly and coily hair textures. *Id.*

¹³¹ Jones, *supra* note 77, at 30. In the past twenty years, the Neo-Soul and Hip-Hop movements revived afros, braids, and natural hairstyles on a broad scale, and pop culture further supported these

In light of the current natural hair movement, the CROWN Act fills the gap that existing civil rights laws leave open: the matter of consistent and uniform protection against race-based hair discrimination.¹³³ Despite the stymied attempts to pass the CROWN Act at the federal level, there are currently twenty-eight states and three U.S. territories that have passed their own CROWN Acts.¹³⁴ California became the first state to enact the CROWN Act on July 3, 2019, when Governor Newsom signed Senate Bill 188 into law.¹³⁵ California's CROWN Act expanded the definition of race under the California Fair Employment and Housing Act and the state Education Code to include traits historically connected to race, such as, but not restricted to, texture of one's hair and protective styles like braids and twists.¹³⁶ The Act explicitly mentions protective hairstyles, such as locs, braids, and twists.¹³⁷

Following California's lead, New York and New Jersey swiftly adopted their versions of the CROWN Act in 2019.¹³⁸ Additionally, in 2019, the New York City Commission on Human Rights (NYCHR) published the document "Legal Enforcement Guidance on Race Discrimination on the Basis of Hair" to

looks. *Id.* Many well-known Black artists and athletes began wearing natural and Afrocentric styles, inspiring others to do so as well. *Id.* See Samantha Callender, *11 Celebs on Choosing to Embrace Their Natural Hair Textures*, ESSENCE (Oct. 26, 2020), <https://www.essence.com/hair/4c/celebs-who-love-their-natural-hair/#73646> [<https://perma.cc/P7E5-3W5S>] (listing Janelle Monae, Erykah Badu, and Viola Davis among the Black celebrities who wear their hair in natural styles during their public Hollywood appearances).

¹³² Jones, *supra* note 77 at 30. In a 2015 study, researchers found that when asked to evaluate hypothetical job candidates, both Black and white participants ranked Black women sporting natural Black hairstyles as both less professional and more "dominant." Tina R. Opie & Katherine W. Phillips, *Hair Penalties: The Negative Influence of Afrocentric Hair on Ratings of Black Women's Dominance and Professionalism*, FRONTIERS PSYCH., Aug. 31, 2015, at 1, 10. The study's findings even uncovered that Black participants were more critical of Black job candidates with natural hairstyles. *Id.* The researchers concluded Black participants may have a better understanding of the negative connotations sporting natural Black hair can carry in professional settings because of their lived experiences within the Black community. *Id.*

¹³³ See *supra* notes 98–128 and accompanying text (noting the limitations of existing civil rights laws).

¹³⁴ See *supra* notes 25–28 and accompanying text (describing the challenge of passing a federal CROWN Act).

¹³⁵ See *supra* note 5 and accompanying text (documenting when California signed its CROWN Act into law).

¹³⁶ CAL. EDUC. CODE § 212.1(b)–(c) (West 2025).

¹³⁷ *Id.* § 212.1(c).

¹³⁸ See Campbell, *supra* note 29, at 186 (noting that New York's CROWN Act is Assemb. B. A07797A, 2019–2020 Gen. Assemb., Reg. Sess. (N.Y. 2019)); *id.* at 187 (explaining how New Jersey enacted the CROWN Act one year after wrestler Andrew Johnson's locs were forcibly cut during a match). New York's legislation broadens the definition of race to include color, ancestry, ethnic identity, and traits tied to race, such as protective styles and hair texture. *Id.* at 186. The state aligned its definition of "race" and "protective hairstyles" with California's CROWN Act. *Id.* Introduced alongside Bill A07169, Bill A07797A requires businesses contracting with the state to disclose public pay data by gender, race, and ethnicity, addressing wage inequality. *Id.*

prohibit discrimination based on natural hairstyles.¹³⁹ Similarly, New Jersey's legislation mirrored that of California and New York, banning public discrimination on the basis of hair and defining race to include traits tied to race, such as hair texture, type, and protective styles like locs, braids, and twists.¹⁴⁰ In 2020, the CROWN Act gained momentum, with states like Virginia, Colorado, and Washington passing their own versions.¹⁴¹ Virginia's CROWN Act expanded the definition of race under the Virginia Human Rights Act to include hairstyles historically associated with racial identity, echoing the language of previously passed state CROWN Acts.¹⁴² Colorado's version of the Act explicitly cited the harms race-based hair discrimination causes, stating that such discrimination perpetuates systemic racism and undermines educational and professional opportunities for Black individuals.¹⁴³

Despite the growing support, some states have faced resistance in enacting CROWN Acts.¹⁴⁴ Opposition often stems from concerns about expanding the definition of race, with critics arguing that such laws may create ambiguity in enforcement.¹⁴⁵ Moreover, states that have passed a version of the CROWN Act use varied statutory language, which can lead to discrepancies in the protections each offers.¹⁴⁶ For example, New York defines race as encompassing "traits historically associated with race" whereas Maryland defines race to include "traits associated with race" leaving open the potential for different statutory interpretations of each state's act.¹⁴⁷ More gravely, a lack of uniformi-

¹³⁹ *Id.* at 177. The New York City Commission on Human Rights guidance addressed the ongoing issue of anti-Black racism in New York City, highlighting its persistence in bans on natural hair and styles often linked to Black individuals. *Id.* at 177–78. It emphasized that choosing a hairstyle is a deeply personal choice, with unique reasons for hair expression varying by person. *Id.* at 178. Additionally, it described natural hairstyles and challenged the racist attitudes tied to them, explaining that Black hair can naturally form into locs or be cultivated into them. *Id.*

¹⁴⁰ *Id.* at 187.

¹⁴¹ *Dove and The CROWN Coalition Proclaim Victory in the Commonwealth of Virginia and the State of Colorado Making Them the Fourth and Fifth States to Join the CROWN Act Movement*, *supra* note 19; *Governor Signs Morgan Bill to Prohibit Hair Discrimination*, *supra* note 19.

¹⁴² See S.B. 50, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (laying out the new CROWN language in the Virginia statute).

¹⁴³ See H.B. 20-1048, 72nd Gen. Assemb., 2nd Reg. Sess., at 2–3 (Colo. 2020) (describing the United States' history of race discrimination and Colorado's role in dismantling these historic practices through the passage of their state CROWN Act).

¹⁴⁴ See Gabrielle Hays, *When CROWN Acts Stall in States, Cities Step in to Ban Hair Discrimination*, PBS NEWS (July 3, 2023), <https://www.pbs.org/newshour/nation/when-crown-acts-stall-in-states-cities-step-in-to-ban-hair-discrimination> [<https://perma.cc/D2YU-SN7T>] (describing Missouri's multiple failures to further a proposed state CROWN Act bill).

¹⁴⁵ Salvatore, *supra* note 22 (describing the comments from Republican members of Congress in opposition of the CROWN Act); Brady, *supra* note 26 (same).

¹⁴⁶ See *infra* note 147 and accompanying text (describing the differences in phrasing between the New York and Maryland state CROWN Acts).

¹⁴⁷ Compare Assemb. B. A07797A, 2019–2020 Gen. Assemb., Reg. Sess. (N.Y. 2019) (the New York CROWN Act), with H.B. 1444, 2020 Gen. Assemb., Reg. Sess. (Md. 2020) (the Maryland CROWN Act).

ty across existing CROWN Acts has allowed for weak anti-discrimination protections in states like Texas.¹⁴⁸

II. IMMUTABILITY: THE MISSING PIECE

Central to any discussion of the CROWN Act is an examination of how the existing protections of Titles II and VII and § 1981 and § 1983 fall short in protecting against race-based hair discrimination.¹⁴⁹ Among the laws that provide protection against general discrimination, none explicitly regulate discrimination against Black hair or hairstyles, which hinders judges from fully considering the necessity of expanding discrimination protections to cover natural hair in existing statutes and grooming policies.¹⁵⁰ More precisely, existing legal protections against discrimination lack an acceptance of natural Black hairstyles as an immutable characteristic.¹⁵¹ On this point, existing CROWN Acts provide a way to raise the standard for immutability to encompass natural Black hairstyling.¹⁵²

This Part discusses the shortcomings of the existing federal anti-discrimination protections as they relate to race-based hair discrimination and explores how the American court system grapples with the concept of immutability.¹⁵³ Particularly, Section A of this Part reviews the jurisprudence surrounding § 1981 and § 1983 through legal cases analyzing race discrimination.¹⁵⁴ Section B of this Part similarly reviews the jurisprudence surrounding Titles II and VII through discussing legal cases analyzing race discrimination with a specific focus on different courts' analysis of immutability.¹⁵⁵

A. The Jurisprudence of § 1981 and § 1983

Sections 1981 and 1983 have played a significant role in shaping the legal landscape of race discrimination, with courts applying these statutes to a wide

¹⁴⁸ See *supra* notes 94–126 and accompanying text (describing the existing safeguards for race-based discrimination).

¹⁴⁹ See *infra* notes 156–180 and accompanying text (describing the current state of § 1981 and § 1983 legal protections).

¹⁵⁰ Layne Nicole Lightfoot, *Perspectives and Proposals: An Educational Exploration into America's Past, Present, and Future Struggle with Hair Discrimination*, 15 ALA. C.R. & C.L. L. REV. 257, 273 (2024).

¹⁵¹ See *infra* notes 190–197 and accompanying text (discussing the holding of *EEOC v. Catastrophe Management Solutions* that hairstyle is not an immutable characteristic).

¹⁵² See *supra* notes 129–148 (describing the history of the CROWN Act and its differing state provisions).

¹⁵³ See *infra* notes 156–197 and accompanying text (describing existing civil rights protections in the context of race-based hair discrimination).

¹⁵⁴ See *infra* notes 156–181 and accompanying text.

¹⁵⁵ See *infra* notes 182–197 and accompanying text.

range of claims challenging discriminatory practices.¹⁵⁶ Section 1981 protects against race-based discrimination in contracts, whereas § 1983 provides a mechanism for individuals to sue state actors for violating their constitutional and statutory rights.¹⁵⁷ A key issue in the cases brought under these statutes is how courts define and apply the concept of immutability—whether race is understood strictly as an inherent characteristic or if traits closely associated with racial identity, such as hair texture and cultural expression, receive similar protections.¹⁵⁸

Section 1981 provides a legal avenue to challenge race-based hair discrimination, and is often raised in tandem with Title VII claims.¹⁵⁹ In *Rogers v. American Airlines, Inc.*, a 1981 case before the U.S. District Court for the Southern District of New York, the plaintiff, a Black woman who worked for American Airlines, challenged the airline's grooming policy that banned certain groups of employees from wearing a full set of braids with cornrows.¹⁶⁰ The plaintiff argued that the policy violated her rights under § 1981 and Title VII by discriminating against her as a Black woman.¹⁶¹ Specifically, the plaintiff pointed to the airline's rejection of her chosen hairstyle as the crux of the discriminatory behavior.¹⁶² The court held that American Airlines's grooming policy did not constitute race or sex discrimination under § 1981 or Title VII.¹⁶³ The court's holding hinged on an assessment of immutability, determining that a fully braided hairstyle constitutes a deliberate styling choice that is not the natural state of one's hair, which itself would be immutable.¹⁶⁴ Ulti-

¹⁵⁶ See BACK, *supra* note 97, at 1 (providing a historical background for the use of § 1981); NOVAK, *supra* note 97, at 1 (describing the legal parameters for using § 1983).

¹⁵⁷ See *supra* notes 96–98 and accompanying text (explaining the enactment and coverage of § 1981 and § 1983).

¹⁵⁸ See ASSEMB. FLOOR ANALYSIS UNIT, S.B. 188 FLOOR ANALYSIS, S. 2019–2020, Reg. Sess. (Cal. 2019) (discussing the distinction between racial characteristics considered biological and unchangeable and those viewed as cultural and changeable).

¹⁵⁹ See BACK, *supra* note 97, at 1–2 (explaining that the provisions of § 1981 and Title VII overlap in their coverage because both are tailored to protect employees).

¹⁶⁰ 527 F. Supp. 229, 231 (S.D.N.Y. 1981). At the time of the suit, plaintiff, Renee Rogers, had worked at the airline for over eleven years, including more than one year as an airport operations agent. *Id.* Her duties included frequent passenger interactions such as greeting passengers, checking luggage, and giving out boarding passes. *Id.*

¹⁶¹ *Id.* The plaintiff additionally claimed the airline's grooming policy was a violation of her Thirteenth Amendment rights. *Id.* The court determined that plaintiff's § 1981 and Title VII claims were indistinguishable and therefore analyzed them together. *Id.*

¹⁶² *Id.* The plaintiff specifically raised the argument that cornrows are a hairstyle of special importance for the Black community. *Id.* Moreover, she bolstered her argument by referring to cornrows as holding a historical essence for Black women and asserting that cornrows are a cultural remnant of slavery. *Id.* at 231–32.

¹⁶³ *Id.* at 233–34.

¹⁶⁴ *Id.* at 232. The court accepted the plaintiff's claims about the historical significance of cornrows for Black women as true; nevertheless, the court noted that the airline's grooming policy applied equally to all employees. *Id.* Additionally, the court recognized that a ban on natural hairstyles like

mately, the court determined that the airline's policy was not discriminatory against women or Black people, but its policy was indeed applied in an inconsistent, discriminatory fashion.¹⁶⁵

Similarly, in *Pitts v. Wild Adventures, Inc.*, a 2008 case before the U.S. District Court for the Middle District of Georgia, the plaintiff, a Black employee of a theme park, brought a § 1981 claim against her employer after a supervising colleague told her that she must style her cornrows in a more attractive style.¹⁶⁶ In response, the plaintiff installed extensions and fashioned her hair into two-strand twists but the supervisor still deemed this hairstyle unattractive.¹⁶⁷ Within a few days of this series of interactions, the defendant—the theme park—implemented a ban on “[locs], cornrows, beads, and shells” unless covered by a hat or visor.¹⁶⁸ The plaintiff's claim alleged that the supervisor's request to change her hairstyle, and the employer's policy declaration constituted both disparate treatment and retaliation.¹⁶⁹ Still, the court found this

afros might violate anti-discrimination laws by targeting an immutable trait. *Id.* Ultimately, the court did not mandate that the plaintiff change her hairstyle but allowed the plaintiff to wear her hair as she preferred outside work. *Id.* at 232, 233. While at work, plaintiff was given the option of covering her cornrows with a wrap or hair piece. *Id.* at 233.

¹⁶⁵ *See id.* at 233–34 (holding that the airline's grooming policy was not in violation of § 1981).

¹⁶⁶ No. 7:06-cv-62, 2008 WL 1899306, at *1, *3 (M.D. Ga. Apr. 25, 2008).

¹⁶⁷ *Id.* at *1. Plaintiff refused to restyle her hair, noting that defendant had no written policy specifying acceptable hairstyles at the time. *Id.*

¹⁶⁸ *Id.* The theme park posted this memo in the break room and distributed it to managers. *Id.* Plaintiff viewed the policy as racially discriminatory as it targeted only Afrocentric hairstyles. *Id.* She raised her concerns with the theme park's human resources manager but found his response lackluster. *Id.* She then wrote to the theme park's owner stating that the policy restricted her ability to express her Black heritage. *Id.* Defendant never responded to her letter. *Id.* Similarly, in *Carswell v. Peachford Hospital*, a Black employee of a private hospital brought suit under § 1981 against her employer's grooming policy that banned the wearing of beads in one's hair. No. C80-222A, 1981 WL 224, at *1 (N.D. Ga. May 26, 1981). Plaintiff wore her hair in individual braids with beads at the end and refused to take out the beads after her employer told her multiple times that they violated her employer's dress code. *Id.* Plaintiff was ultimately suspended and later fired for her refusal to remove her beads. *Id.* The *Carswell* court determined that the hospital's dress code did not disproportionately affect Black individuals, rooting part of its decision in the conclusion that there was no proof that Black individuals wear beads more often than white individuals. *Id.* at *2. On the contrary, the use of beads in Black hairstyling predates even the Atlantic slave trade, having been used in hairstyling among African countries as early as the fifteenth century for spiritual and symbolic purposes. Pia Velasco, *Here's the Beautiful History of Beaded, Black Hair: This African Tradition Has Been Preserved for Centuries*, HELLO GIGGLES (Mar. 2, 2021), <https://hellogiggles.com/black-beaded-hair-history/> [https://perma.cc/LZ6T-B39Q]. In fact, despite white slaver attempts to extinguish ornate Black hairstyling during the transatlantic slave trade, blue beads have been uncovered at various southern plantations in the United States indicating enslaved Africans brought remnants of their hair culture to the United States. *Id.*

¹⁶⁹ *Pitts*, 2008 WL 1899306, at *4. The court noted it would analyze plaintiff's § 1981 claim using the same framework as Title VII claims. *Id.* The court granted summary judgement to the defendant on the plaintiff's Title VII claim of discrimination because the plaintiff failed to file any charge of discrimination with the EEOC. *Id.* As set out by Title VII, in order to bring a charge of discrimination under the title, an individual must file a charge with the EEOC within one hundred and eighty days after the discriminatory action(s) took place. 42 U.S.C. § 2000e-5(e)(1).

claim meritless, supporting its decision on the ground that courts generally exclude grooming policies from federal employment discrimination statutes because they do not target immutable traits.¹⁷⁰

Section 1983 provides another legal avenue to challenge race-based hair discrimination, allowing one to challenge a constitutional or federal statutory right that a state actor violates.¹⁷¹ For example, in *Arnold v. Barbers Hill Independent School District*, a 2020 case before the U.S. District Court for the Southern District of Texas, co-plaintiffs and cousins, De'Andre Arnold and K.B., brought a § 1983 claim against their public high school challenging the school's grooming policy as racially discriminatory.¹⁷² K.B. complied with the school's policy stating hair could not go past a student's eyebrows, earlobes, or the top of a T-shirt collar by wearing his long locs tied back with a headband.¹⁷³ Despite this, K.B. testified that he was the subject of scrutiny from school officials who would go so far as to pull him out of class to monitor whether his hair complied with the school's grooming code.¹⁷⁴ Eventually, the school changed their grooming policy to ban hair that extends past the eyebrows, earlobes, or the top of a T-shirt collar *even when* let down, implicating K.B. as a violator of the policy.¹⁷⁵ The court in *Arnold* ultimately found that the case facts established a high likelihood that a § 1983 case would prevail due to the inconsistent enforcement, procedural deviations, and progressively stricter changes to the school grooming policy.¹⁷⁶ Notably, the determination of

¹⁷⁰ *Pitts*, 2008 WL 1899306, at *5. The court reasoned that grooming policies fall within an employer's discretion to manage business operations rather than implicating fundamental rights, relying on the holding from the Fifth Circuit case *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975); *Pitts*, 2008 WL 1899306, at *5. *Willingham* held that Title VII only prohibits discrimination based on immutable characteristics, such as race or national origin, and not on mutable choices like hair length. 507 F.2d at 1092–93.

¹⁷¹ See *supra* notes 96–98 and accompanying text (explaining the enactment and coverage of § 1983).

¹⁷² 479 F. Supp. 3d 511, 515–18, 525 (S.D. Tex. 2020); see *supra* notes 11–14 and accompanying text (providing background on De'Andre Arnold's racially discriminatory experience with Barbers Hill High School in Texas as referenced in the *Arnold* suit). K.B.'s mother brought the *Arnold* suit on K.B.'s behalf, with co-plaintiffs De'Andre Arnold and Arnold's mother. *Arnold*, 479 F. Supp. 3d at 518 n.2.

¹⁷³ *Arnold*, 479 F. Supp. 3d at 516.

¹⁷⁴ *Id.* at 516–17.

¹⁷⁵ *Id.* at 517. This change forced K.B. to either cut his hair or face disciplinary action. *Id.* K.B. refused to cut his hair and received an in-school suspension where he was isolated, denied interaction with peers, and left without instruction from teachers. *Id.* Unable to continue his education under these conditions, he transferred to another high school. *Id.*

¹⁷⁶ *Id.* at 528. The court concluded its opinion by granting plaintiff's motion for a preliminary injunction. *Id.* at 531. Cases involving hair discrimination on the basis of race are frequently dismissed due to rulings that policies are race neutral. Lightfoot, *supra* note 150, at 275. *Arnold* demonstrates how a court is more likely to recognize a school's actions as racially motivated when statistical evidence shows the school disproportionately enforced a hair length policy against Black students. 479 F. Supp. 3d at 531.

the court did not hinge on any discussion of immutability, but rather an analysis of the volatile nature of the school grooming code and how the school applied it.¹⁷⁷

Additionally, in 2013 in *Fennell v. Marion Independent School District*, a mother and her three children brought a suit against the children's public school and its employees under § 1983 in the U.S. District Court for the Western District of Texas, arguing the school subjected the children to multiple forms of race-based harassment.¹⁷⁸ Among a host of allegations detailing various forms of racialized harassment, plaintiffs alleged that a white athletic director reprimanded one of the student plaintiffs for sporting micro-braids.¹⁷⁹ In regard to these allegations, the district court denied both the defendant's motion to dismiss the claims against the athletic director and the defendant's request that the athletic director receive qualified immunity, finding it unconstitutional under § 1983 to harass or embarrass a student with intent to racially discriminate.¹⁸⁰ Later, the district court granted defendants' summary judgment as to all claims and the U.S. Court of Appeals for the Fifth Circuit affirmed the decision, dismissing the claims against the athletic director and stating the student plaintiff in question was in violation of the school's dress code that prevented dying one's hair an unnaturally occurring color, and the athletic director was simply upholding this dress code through his actions.¹⁸¹

¹⁷⁷ *Arnold*, 479 F. Supp. 3d at 531.

¹⁷⁸ See 963 F. Supp. 2d 623, 628–32 (W.D. Tex. 2013) (laying out the factual allegations of plaintiffs' suit). The three girls, Kyra, Kyana, and Kavin, endured various forms of racialized bullying including other students using racial slurs to address them and receiving racist imagery, including a text message containing a Ku Klux Klan animation. *Id.* at 628, 629. Despite the three girls reporting these incidents, the school allegedly failed to discipline the white students involved, while also punishing the plaintiffs for responding to the harassment. *Id.* at 642. Specifically, a white student physically attacked Kavin and faced no consequences whereas Kavin was suspended from school and a fellow student gave Kyana a racist note, someone placed a noose near her car, and school officials made racially discriminatory comments about Kyana's hairstyle and personal life. *Id.* at 629, 640–41. Plaintiffs also alleged that coaches and administrators treated them unfairly in extracurricular activities, such as excluding Kyra from her softball team's photo. *Id.* at 631. After repeated complaints, including the students filing grievances with the school board, the district allegedly dismissed Kyra, Kyana, and Kavin's concerns, leading Ms. Fennell-Kinney to transfer Kyra and Kavin to a different school. *Id.* at 631–32.

¹⁷⁹ *Id.* at 629. The case facts note that plaintiff Kyana was wearing micro-braids at the time because her hair was damaged. *Id.*

¹⁸⁰ *Id.* at 636.

¹⁸¹ *Fennell v. Marion Indep. Sch. Dist.*, No. SA:12-cv-941, 2014 WL 4274299, at *14 (W.D. Tex. Aug. 28, 2014), *aff'd*, 804 F.3d 398 (5th Cir. 2015). In *Fennell v. Marion Independent School District*, the district court found that photo evidence of plaintiff Kyana's hair at the time of the athletic director's alleged behavior indicated she did not have microbraids in but rather had dyed her hair an uncommon color. *Id.* at *7, *14. Despite evidence that the athletic director made racially offensive comments towards Kyana—stating Black people spend lots of time doing their hair—the court ultimately found that this comment was a one-off incident, and the crux of their analysis hinged on Kyana's violation of the school grooming code pertaining to dying one's hair. *Id.* The Fifth Circuit affirmed this logic. See generally *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 415–16 (5th Cir.

B. The Jurisprudence of Titles II & VII

Although neither portion of the statute explicitly references hair, Titles II and VII of the Civil Rights Act serve as key legal frameworks for addressing race-based hair discrimination in public accommodations and workplaces.¹⁸² Nonetheless, judicial interpretations of these statutes have varied, with some courts severing the relationship between race and hairstyle, thus limiting the statutes' ability to provide race-based hair discrimination protections.¹⁸³

With regard to claims of discrimination under Title II, courts often focus their decisions on upholding the constitutional validity of Title II and interpreting the congressional intent behind it, rather than expanding its applicability to Black hair discrimination.¹⁸⁴ For example, in a 1964 case before the U.S. Supreme Court, *Heart of Atlanta Motel, Inc. v. United States*, the appellant, a motel owner, challenged the constitutionality of Title II after a district court judge ruled that they could not refuse to offer lodging to Black patrons.¹⁸⁵ The Supreme Court held it was within Congress's enumerated rights to enact Title II and that the law was constitutional.¹⁸⁶ The Court supported their decision with an analysis of the Commerce Clause, finding that Congress relied on evidence showing the harmful impact racial discrimination has on interstate commerce, and this economic burden made Title II a permissible use of Congress' Commerce Clause powers.¹⁸⁷ Even in the 2006 U.S. Court of Appeals for the Fourth Circuit case of *Denny v. Elizabeth Arden Salons, Inc.*, where potential race-based hair discrimination was at the crux of the alleged facts, the court focused their analysis on the types of public accommodations Title II covers.¹⁸⁸ There, where a beauty salon told a Black woman that it did not style Black hair, the court reasoned that a salon was not a covered public accommodation

2015) (ruling that the athletic director's critiques of plaintiff Kyana's hair did not indicate differential treatment despite the racial animus present in the athletic director's comments).

¹⁸² See *supra* notes 112–126 and accompanying text (explaining the general provisions and coverage of both Titles II and VII).

¹⁸³ See *infra* notes 183–195 and accompanying text.

¹⁸⁴ See *infra* notes 185–189 and accompanying text (analyzing race-discrimination cases brought under Title II that merely uphold the Title's constitutionality rather than elaborating on its coverage).

¹⁸⁵ 379 U.S. 241, 242–43, 244–45 (1964).

¹⁸⁶ *Id.* at 249.

¹⁸⁷ *Id.* at 257.

¹⁸⁸ 456 F.3d 427, 437 (4th Cir. 2006). In *Denny*, Seandria Denny purchased a \$295 spa package for her mother, Jean Denny. *Id.* at 429–30. The package included, among various spa treatments, a hairstyling. *Id.* When Jean visited the salon to redeem her package, Seandria called the salon to request an additional hair coloring service for Jean. *Id.* at 430. When Seandria arrived to check on her mother, the salon receptionist stated that the salon did not style Black hair. *Id.* The salon manager allegedly confirmed that none of the stylists were willing to do Jean's hair. *Id.*

under Title II, that Congress intentionally limited Title II's scope by specifying covered establishments, and therefore the plaintiff's Title II claim was moot.¹⁸⁹

Although there are scarce Title II claims that directly address the issue of race-based hair discrimination, Title VII case law has provided a more solid foundation upon which one can analyze race-based hair discrimination.¹⁹⁰ Central to the jurisprudence around race-based hair discrimination is the U.S. Court of Appeals for the Eleventh Circuit's 2016 case, *EEOC v. Catastrophe Management Solutions*.¹⁹¹ In *Catastrophe*, Chastity Jones, a Black woman with locs, applied for and secured a customer service position with Catastrophe Management Solutions (CMS), outperforming numerous other applicants.¹⁹² Yet, after receiving a conditional job offer, CMS's human resources manager informed Jones that she could not be hired with locs because of the company's grooming policy that required a professional appearance and prohibited what it considered excessive hairstyles.¹⁹³ Jones, who had worn her locs throughout the interview process without issue, refused to cut her hair, leading CMS to rescind her job offer.¹⁹⁴ The EEOC filed suit against CMS, arguing their grooming policy discriminated against Black employees by targeting a hairstyle closely associated with Black culture and natural hair texture.¹⁹⁵ The EEOC contended that race is

¹⁸⁹ *Id.* at 431, 437. The Court determined salons differ significantly from the listed entertainment venues in Title II, making it unlikely that they fall under the statutory language "other place of exhibition or entertainment" in 42 U.S.C. § 2000a(b)(3). *Denny*, 456 F.3d at 431. The court took a literal interpretation of the term, "place of entertainment," and construed it as a place that exists primarily to entertain. *Id.* at 431–32. In contrast, the court found a salon is focused on providing body care services under a business structure, rather than providing amusement or entertainment. *Id.*

¹⁹⁰ See *Laws We Enforce: Title VII of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., C.R. DIV., <https://www.justice.gov/crt/laws-we-enforce> [<https://perma.cc/6GG2-E3NF>] (Feb. 12, 2025) (detailing the broad categories of race, religion, sex, national origin, and color discrimination that Title VII protects employees from).

¹⁹¹ 852 F.3d 1018, 1020–21 (11th Cir. 2016).

¹⁹² *Id.* at 1021.

¹⁹³ *Id.* at 1021–22. The human resources manager specifically told Jones that her locs were not allowed because they have a tendency to get messy and that other Black applicants had also been required to remove their locs to secure employment. *Id.*

¹⁹⁴ *Id.* at 1022. The treatment of Jones in *Catastrophe* can be framed as gender stereotyping how a professional woman presents herself. Ainsley C. Bandrowski, Comment, *Twisted Up: The Eleventh Circuit Standard for Immutability in EEOC v. Catastrophe Management Solutions*, 64 B.C.L. REV. E-SUPP. II-34, II-48 (2023), <https://bclawreview.bc.edu/articles/3064/files/642eed12313c0.pdf> [<https://perma.cc/Q6G9-2PVW>]. Therefore, banning racial discrimination rooted in gender stereotyping is one framework attorneys may employ in their attempts to fight race-based discrimination in employment cases. *Id.* at II-48–49.

¹⁹⁵ *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1023–24 (11th Cir. 2016). Campbell notes in her article, titled *Protecting the Black Crowning Glory: Why Legislation Is Needed to Make up for Federal Discrimination Statutes' Failure to Protect Black Hair*, that one possible shortcoming of *Catastrophe* was the EEOC's decision not to explicitly argue that the policy had a disparate impact. Campbell, *supra* note 29, at 169 n.187. She further notes that, although some wording in their argument hinted at a disparate impact theory, the EEOC clarified that they were solely pursuing a disparate treatment claim. *Id.*

a social construct encompassing cultural characteristics, including grooming practices, and that locs should be considered a racial characteristic similar to skin color.¹⁹⁶ Nonetheless, the Eleventh Circuit rejected this argument, holding that although hair texture is an immutable trait protected under Title VII, hairstyle is a mutable characteristic and thus not covered by the statute.¹⁹⁷

III. A FLEXIBLE CARVE OUT IMMUTABILITY TRAIT

Despite the legal protections provided under Titles II and VII and § 1981 and § 1983, courts at all levels have consistently failed to recognize natural Black hairstyles as an immutable racial characteristic.¹⁹⁸ This gap in the available legal protections has left Black individuals vulnerable to hair-based discrimination in workplaces and public accommodations.¹⁹⁹ Judicial precedent, particularly that from *Catastrophe*, has reinforced the flawed distinction between hair texture (take the afro, considered immutable) and hairstyle (such as braids and locs, considered mutable), preventing existing law from adequately addressing race-based hair discrimination.²⁰⁰ Present legal shortcomings necessitate the enactment of a federal CROWN Act that provides uniform protections against race-based hair discrimination and that posits natural Black hairstyling as a carveout category of immutability.²⁰¹

Judicial decisions illustrate how courts have failed in framing natural Black hairstyling as an inconsequential personal choice rather than a practice inextricably tied to an expression of racial and cultural identity and tailored to

¹⁹⁶ *Catastrophe*, 852 F.3d at 1023–24.

¹⁹⁷ *See id.* at 1034 (holding that the characteristic of hair the court examined in this case is not an immutable characteristic). In sum, the *Catastrophe* court found the mutability of a racial trait is irrelevant because anti-discrimination law focuses on preventing bias based on racial characteristics, not just immutable traits. *Id.* The court reasoned that although the law prohibits discrimination based on immutable characteristics, these traits serve as proxies for racial identity rather than defining race itself. *Id.*

¹⁹⁸ *See supra* notes 86–128 and accompanying text (referencing the shortcomings of current anti-discrimination law).

¹⁹⁹ *See supra* notes 86–128 and accompanying text (referencing the shortcomings of current anti-discrimination law).

²⁰⁰ *See supra* notes 191–197 and accompanying text (providing a summary of the facts and decision in the case *Catastrophe*). Some would argue the decision in *Catastrophe* was a failure by the court, and distinguishing afros from all other forms of natural Black hair applies an improper analysis of immutability. Cortney Bryson, ‘Hair’ Today, Gone Tomorrow: How Immutable Traits May Become the New Face of Discrimination as Interpreted in Equal Employment Opportunity Comm’n v. *Catastrophe* Mgmt. Sols., 39 N.C. CENT. L. REV. 166, 174 (2017). The issue is not whether an employee can cut their locs to conform to workplace norms, but whether they should be forced to sacrifice a key part of their cultural identity to gain acceptance in the workplace. *Id.*

²⁰¹ *See supra* notes 16–28 and accompanying text (providing a legislative history on the CROWN Act).

protect the unique texture of Black hair.²⁰² By distinguishing between immutable traits—like skin or eye color—and mutable characteristics—where current judicial interpretations would place hairstyles—courts have effectively excluded natural Black hair from federal employment and public accommodations protections.²⁰³

Although twenty-eight states and three U.S. territories have passed CROWN Acts, their scope and definitions vary, leading to inconsistent protections.²⁰⁴ Additionally, courts in states without CROWN Acts are left with inadequate interpretations of Titles II and VII and § 1981 and § 1983 to combat claims of race-based hair discrimination, further perpetuating unequal protections for Black individuals based on geographic location.²⁰⁵ A federal CROWN Act would ensure uniformity in the application of race-based hair discrimination protection, eliminating the now existing patchwork of state laws.²⁰⁶ This would guarantee that Black individuals nationwide are protected from race-based hair discrimination in work and public spaces.²⁰⁷ Without federal legislation, individuals in states without CROWN Acts remain vulnerable to policies

²⁰² See *supra* notes 48–62, 76–81 and accompanying text (discussing the history of natural Black hairstyling in America and the two American waves of the natural Black hair movement). In *Catastrophe*, the Eleventh Circuit narrowly interpreted Title VII, ruling that locs are a mutable characteristic and therefore not protected under federal anti-discrimination law. See *supra* notes 190–197 and accompanying text (providing a summary of the facts and decision in the case *Catastrophe*). This decision aligns with earlier rulings, like that in *Rogers v. American Airlines, Inc.*, where the court dismissed a joint § 1981 and Title VII challenge to a policy banning braided hairstyles. See 527 F. Supp. 229, 231, 234 (S.D.N.Y. 1981); *supra* notes 160–165 and accompanying text (providing a summary of the facts and decision in the case *Rogers*).

²⁰³ See *supra* notes 86–118 and accompanying text (analyzing existing anti-discrimination protections and how they apply the concept of immutability).

²⁰⁴ See *supra* notes 146–147 (describing the differences in phrasing between the New York and Maryland state CROWN Acts).

²⁰⁵ See *supra* notes 184–197 and accompanying text (analyzing the lackluster protections of Title II and VII against race-based hair discrimination); see also *supra* notes 156–181 and accompanying text (analyzing the lackluster protections of § 1981 and § 1983 against race-based hair discrimination).

²⁰⁶ See *supra* note 134 and accompanying text (recognizing twenty-eight states have passed a version of the CROWN Act, despite support for the bill on a federal level); see *supra* note 136 and accompanying text (describing the provisions of the California CROWN Act that model the language on protected hairstyles like the proposed federal CROWN Act).

²⁰⁷ See Jasmine Payne-Patterson, *Half of U.S. States Have Passed the CROWN Act to Ban Hair Discrimination*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 1, 2014), <https://www.epi.org/blog/half-of-u-s-states-have-passed-the-crown-act-to-ban-hair-discrimination/> [https://perma.cc/4M3D-AR88] (calling for the enactment of a federal CROWN Act in light of individual states varying in their adoption of the Act). In a 2013 study, the CROWN Coalition found that “[a]pproximately 2/3 of Black women (66%) change their hair for a job interview.” *CROWN Act Research Studies*, THE CROWN ACT, <https://www.thecrownact.com/research-studies> [https://perma.cc/48UE-9Q2M]. Moreover, nearly half of these women changed their hair from a curly style to a straight style. *Id.* Furthermore, Black women who have “coily [or] textured hair” experience more microaggressions than their Black counterparts with “straighter hair,” and more than twenty percent of surveyed Black women ages twenty-five to thirty-five have been dismissed from work “because of their hair.” *Id.*

that disproportionately target natural Black hairstyles, reinforcing systemic barriers to economic and social mobility.²⁰⁸

To ensure robust legal protections, a federal CROWN Act should define natural Black hairstyles as flexible carve-out immutable traits.²⁰⁹ Similarly to the Supreme Court's logic in *Bostock* that tied sexuality and transgender status to sex, an immutability carveout for natural Black hairstyles would tie hairstyles to the conception of race.²¹⁰ This specific distinction would recognize that although individuals can change their hairstyles, the cultural and racial significance of historically Black hairstyles such as locs, braids, and twists makes them functionally immutable.²¹¹

Courts have historically used the concept of immutability to limit discrimination claims to characteristics that cannot be changed, but this rigid framework ignores the reality that Black individuals have a unique natural hair texture.²¹² This unique hair texture is tied to culturally significant hairstyles that cannot be compared to Eurocentric beauty standards that do not capture the essence of Black hairstyling.²¹³ Moreover, scientific inquiry into hair composition has laid bare the uniqueness of Black hair in quantitative terms.²¹⁴ Black natural hairstyles developed as an essential corollary of the texture and structure of Afrocentric hair.²¹⁵

A federal CROWN Act should clarify that hairstyles closely associated with race—such as locs, braids, twists, and afros—are extensions of immutable Black racial identity and must be protected under anti-discrimination law.²¹⁶

²⁰⁸ See *supra* notes 156–181 and accompanying text (analyzing the lackluster protections of § 1981 and § 1983 against race-based hair discrimination); *supra* notes 184–197 and accompanying text (analyzing the lackluster protections of Title II and VII against race-based hair discrimination).

²⁰⁹ See *generally supra* notes 33–82 and accompanying text (tracking a social and cultural history of Black hair in the United States, establishing Black hairstyles as historically tied to the identity of Blackness).

²¹⁰ See *supra* notes 90–91 and accompanying text (discussing the holding of *Bostock* where the Court recognized mutable traits such as motherhood and life expectancy were tied to sex in the context of discrimination).

²¹¹ See *generally supra* notes 33–82 and accompanying text (tracking a social and cultural history of Black hair in the United States, establishing Black hairstyles as historically tied to the identity of Blackness).

²¹² See *supra* note 4 (describing the unique texture of Black natural hair); *supra* notes 86–95 and accompanying text (discussing the legal concept of immutability).

²¹³ See Dede K. Teteh et al., *My Crown and Glory: Community, Identity, Culture, and Black Women's Concerns of Hair Product-Related Breast Cancer Risk*, 4 COGENT ARTS & HUMANS., June 25, 2017 at 1, 7 (describing the enduring impact of Black mothers teaching their Black daughters how their hair will be perceived by the world).

²¹⁴ See *supra* notes 84–85 and accompanying text (explaining the biological basis for Black hair texture and the present system of hair typing).

²¹⁵ See *supra* note 4 (explaining Black hair is uniquely susceptible to damage due to its lack of moisture retention).

²¹⁶ See *supra* note 9 and accompanying text (defining natural Black hairstyles such as braids, locs, and twists).

By framing natural Black hair within the concept of a flexible carve-out immutable trait, the law would eliminate the artificial distinction between hair texture and hairstyling, preventing employers and institutions from using grooming policies to enforce racial conformity.²¹⁷

CONCLUSION

The failure of existing civil rights laws to fully protect natural Black hairstyles from race-based discrimination has created a legal void that allows race-based hair discrimination to persist. The judicial distinction between immutable and mutable traits regarding Black hairstyles is used to justify discriminatory policies and actions, leaving Black individuals without adequate legal recourse. A federal CROWN Act is essential to ensuring that natural Black hairstyles are recognized as a protected racial characteristic inextricable from the already accepted mutable characteristics of race. Hairstyling in Black culture is not a flippant choice devoid of significance. Black hairstyling is its own sect of Black culture and identity. Framing natural Black hair as a flexible carve-out immutable trait in a federal CROWN Act would eliminate the misguided reasoning courts have relied on to reject race-based hair discrimination claims and provide consistent, nationwide protections for natural Black hairstyling.

HALEY COLE

²¹⁷ See *supra* note 128 and accompanying text (stating afros are a natural Black hairstyle protected under Title VII due to an analysis of hair texture over hairstyle).