

**HAIR'S THE THING: TRAIT DISCRIMINATION AND FORCED
PERFORMANCE OF RACE THROUGH RACIALLY CONSCIOUS
PUBLIC SCHOOL HAIRSTYLE PROHIBITIONS**

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“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

Justice Potter Stewart¹

INTRODUCTION

Something peculiar is happening in American schools. This something is an addendum to primary and secondary school dress codes that seems simultaneously outrageous and justifiable. American schools have historically dictated or regulated student dress. They have also placed restrictions on hair length and style, particularly for boys.² However, these polices have recently found a new target: Black children.³ Primary schools in Oklahoma,⁴ Ohio,⁵ and Florida⁶

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¹ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (finding a statute requiring public school teachers to disclose all affiliations and organizational memberships as a pre-requisite to employment unconstitutional).

² See generally Recent Cases, *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); *Stevenson v. Board of Education*, 426 F.2d 1154 (5th Cir.), cert. denied, 400 U.S. 957 (1970), 84 HARV. L. REV. 1702 (1971) (analyzing the increased trend in litigation contesting school bans on long hair).

³ I use “Black” to represent “African-Americans,” “Caribbean-Americans,” and all other individuals who are perceived or self-identify as part of the African Diaspora. As White Americans are not forced to state their place of origin as a means of self-identification (i.e., European-American, Italian-American, etc.), I see no reason to impose such a system on those of African descent.

⁴ The Deborah Brown Community School in Tulsa, Oklahoma sent seven-year-old Tiana Parker (a Black female) home from school for wearing her hair in tidy dreadlocks. The school’s dress code policy states that “hairstyles such as dreadlocks, afros, mohawks, and other *faddish* styles are unacceptable.” Rebecca Klein, *Tiana Parker*, 7, *Switches Schools After Being Forbidden From Wearing Dreads*, HUFFINGTON POST (Sept. 5, 2013),

have banned natural Black hairstyles or have threatened Black female students who wear their hair naturally with expulsion. An Ohio school attempted to ban “afro-puffs and small twisted braids.”⁷ A seven-year-old in Oklahoma was forced to switch schools after being suspended for wearing dreadlocks.⁸ In Milwaukee, a teacher punished a Black first grader by cutting off one of her braids in front of the class and throwing it in the trash.⁹

Excepting the final example, which is (hopefully) a clear-cut case of assault,¹⁰ proper resolution of these school policies is legally ambiguous. Though none of these cases resulted in litigation (likely because the schools backed down after nationwide publicity and public backlash), racially conscious school dress code policies that prohibit Black hairstyles are becoming increasingly prevalent.¹¹

This Comment addresses two questions that logically flow from consideration of this trend. First, can state-funded primary and secondary schools legally ban natural Black hair and Black ethnic hairstyles? Second, regardless of the answer to the first question, *should* these schools be allowed to ban them? Because there is no definitive

http://www.huffingtonpost.com/2013/09/05/tiana-parker-dreads_n_3873868.html (emphasis added). Tiana was forced to transfer schools to protect her hair. *Id.*

⁵ Horizon Science Academy in Lorain, Ohio updated its school policy to prohibit certain Black hairstyles. In a letter sent to parents, the school stated, “afro-puffs and small twisted braids, with or without rubber bands are NOT permitted.” Rebecca Klein, *Ohio School Apologizes After Attempting To Ban ‘Afro-Puffs’ and ‘Twisted Braids’*, HUFFINGTON POST (June 25, 2013), http://www.huffingtonpost.com/2013/06/25/ohio-school-afro-puff-horizon-science-academy_n_3498954.html. The school rescinded the ban and issued an apology in response to swift public backlash. Many parents viewed the policy as racist. *Id.*

⁶ Faith Christian Academy in Orlando, Florida threatened to expel twelve-year-old Vanessa VanDyke (a Black female) unless she cut her natural afro. Shaun Chaiyabhat, *Update: African-American girl won’t face expulsion over ‘natural hair’*, CLICK ORLANDO (Dec. 24, 2013, 5:44PM), <http://www.clickorlando.com/news/africanamerican-girl-faces-expulsion-over-natural-hair/-/1637132/23159400/-/ajs6jbz/-/index.html>.

⁷ See Klein, *supra* note 5.

⁸ See Klein, *supra* note 4.

⁹ At Congress Elementary School in Milwaukee, Wisconsin a first grade teacher cut three inches of hair from seven-year-old Lamya Cammon’s braid with classroom scissors. The teacher was frustrated that Lamya kept playing with her hair and reportedly threatened that “if you keep doing it, I am going to cut some more.” Taki S. Raton, *Teacher in Braid Cutting Incident Suspended*, MILWAUKEE COMMUNITY J. (Mar. 26, 2010), <http://www.communityjournal.net/teacher-in-braid-cutting-incident-suspended/>. The teacher threw the braid in the trash and sent Lamya back to her desk in tears while her classmates laughed at her. A week after the incident, the teacher was still teaching and Lamya was transferred to a different classroom as if she had done something wrong. *Id.*

¹⁰ The District Attorney’s office issued the teacher a \$175 fine for disorderly conduct and the Milwaukee school system initiated a disciplinary action against the teacher. As of March 26, 2010 (four months after the incident) the teacher was suspended without pay. *See id.*

¹¹ See generally *supra* notes 4–6, 9 (providing examples of school regulations on hairstyles).

legal answer as to whether state-funded primary and secondary schools can prohibit Black ethnic hairstyles, this Comment will utilize sociological inquiry and legal analysis to make its own determination. First, examination of social and psychological harms caused by these regulations demonstrates the importance of sheltering Black children from forced acquiescence to White social norms. Next, reviewing case law regarding public schools' regulation of boys' hair length, hair length discrimination as cultural discrimination, and ethnic hairstyle restrictions in an employment context provides a historical backdrop that parallels this Comment's inquiry and reveals why judicial intervention in this area is needed. Finally, dissection of the Supreme Court's Fourteenth Amendment equal protection jurisprudence offers a solution to this unsavory violation of student rights.

The facts surrounding Vanessa VanDyke's¹² struggle are illustrative in framing this inquiry. The *Huffington Post*, apparently unable to put its finger on exactly what was wrong with Vanessa VanDyke's imminent expulsion, classified her story under its "Weird News" section.¹³ Reportedly, the twelve-year-old VanDyke was being bullied at school because she wore her hair in a natural afro.¹⁴ When VanDyke finally informed school administrators about the bullying, the school responded not by chastising the offenders, but by terming her hair a "distraction" and giving VanDyke and her parents an ultimatum.¹⁵ The twelve year old could either "cut and shape her natural hair or be expelled."¹⁶ VanDyke's parents were livid and approached local news media with their story.¹⁷

In the wake of a national outcry spurred by media coverage, school administrators amended their position.¹⁸ School officials stated, "we're not asking [VanDyke] to put products in her hair or cut

¹² Though Vanessa VanDyke attended a private school (i.e., not a public-funded educational institution), her story is evocative of the structural injustice causing school administrators to prohibit Black ethnic hairstyles, and adds great value to this discussion.

¹³ See *Vanessa VanDyke Could Be Expelled After Having Her Hair Mocked*, HUFFINGTON POST (Nov. 26, 2013) [hereinafter *Vanessa VanDyke Could Be Expelled*], http://www.huffingtonpost.com/2013/11/26/vanessa-vandyke-expelled_n_4345326.html.

¹⁴ See Fran Jeffries, *Report: African-American Girl Won't Be Expelled Over Her Natural Hairstyle*, THE ATLANTA JOURNAL-CONSTITUTION, (Nov. 26, 2013, 3:47PM), <http://www.ajc.com/news/news/report-african-american-girl-faces-expulsion-over-/nb5M7/>.

¹⁵ See *Vanessa VanDyke Could Be Expelled*, *supra* note 13.

¹⁶ See Jeffries, *supra* note 14.

¹⁷ See Chaiyabhat, *supra* note 6 (expressing VanDyke's mother's anger concerning the school's actions).

¹⁸ *Id.* (reporting that the school's response was to say they did not ask VanDyke to put products in or cut her hair but "to style her hair within the guidelines according to the school handbook").

her hair. We're asking her to *style* her hair within the guidelines according to the school handbook."¹⁹

The student handbook states “[h]air must be a natural color and must not be a distraction”; prohibited hairstyles “include but [are] not limited to: mohawks, shaved designs, and rat tails, etc.”²⁰ The handbook seems reasonable enough, but school administrators faced a major problem in its application against Vanessa VanDyke: she was not purposefully styling her hair in a prohibited hairstyle. She was letting it grow naturally from her head.²¹ When VanDyke’s peers bullied her because of her natural hair, the school labeled her a “distraction” and suspended her.²² Unfortunately, there are currently no clear legal standards that prohibit schools from engaging in this type of behavior.

In order to protect Black children’s rights, Americans must recognize that physical and cultural traits, such as hair texture and hairstyle, are increasingly used as a proxy for race. School dress code policies that prohibit ethnically Black hairstyles have two fundamental issues. The first is a devaluation of racially-constructed “Blackness.” Prohibition of Black traits has become a politically palatable way of devaluing the Black body. In the same way boys’ hair length regulations implicitly devalue a feminized attribute (having long hair), the prohibition of cornrows, afros, dreadlocks, and other ethnically Black hairstyles implicitly devalues Black persons and Black culture. Secondly, these dress code policies target and disproportionately affect Black children while appearing to be facially neutral rules. On paper, banning cornrows might affect all students equally, but if cornrows are almost exclusively worn by Black children then the ban, in fact, primarily affects this racial minority group.

To combat school dress codes that are racist implicitly and in effect, courts must reinvigorate Fourteenth Amendment equal protection. To protect vulnerable populations, Americans must recognize trait discrimination for what it is: a mere proxy for race discrimination.

¹⁹ Jeffries, *supra* note 14 (emphasis added).

²⁰ FAITH CHRISTIAN ACADEMY, STUDENT HANDBOOK 2012/2013 4, available at <http://www.fcalions.org/wp-content/uploads/2013/02/FCA-Large-Student-Handbook-12-13.pdf>.

²¹ See Jeffries, *supra* note 14 (“An African-American girl who said she was told to cut and shape her *natural* hair or be expelled won’t be booted from her Orlando private school after all, according to a news report.” (emphasis added)).

²² See *Vanessa VanDyke Could Be Expelled*, *supra* note 13 (noting that VanDyke complained of being teased and the school’s response).

I. DETANGLING THE POLITICS OF RACIALLY CONSCIOUS DRESS CODES
—A SOCIOLOGICAL ANALYSIS OF RACIAL BIAS, TRAIT DISCRIMINATION,
AND CULTURAL ASSIMILATION

Nowhere is the cultural construction of race in America more apparent than in the case of Alexina Morrison, “kidnapped” slave and self-professed White woman.²³ In 1857, Alexina ran away from her master and convinced the local parish jailer (William Dennison, a White man) that she was a White woman who had been kidnapped into slavery.²⁴ Dennison took Alexina home and introduced her to White society, taking her to “balls and other amusements with his family.”²⁵ With the help of Dennison and his community, she sued her master for her freedom.²⁶ Though Alexina could certainly pass for White with her “blue eyes and flaxen hair,” this was not the main argument her new friends and neighbors made on her behalf at trial.²⁷

Alexina’s witnesses assured the jury that she had fit in perfectly at their balls, that she had slept in their beds with their daughters, and that they surely would have known if she had a drop of African blood. . . . Several doctors testified on her behalf that the shape of her hair follicles and the arches of her feet proved her Whiteness.²⁸

Though Alexina’s physical appearance was a necessary condition to establish her Whiteness, she also had to prove her *conduct* was White to win at trial.²⁹ Skin color, though highly visible, was only one aspect of race.³⁰ Consideration of multiple traits—physical, social, and cultural—went into a determination of whether someone was Black or White.³¹

The slave master’s defense is just as telling. In addition to providing documentation to prove Alexina was a slave of the Morrison family, he used scientific language to show that race “could not [be] discovered through appearances, [but was] *something that required expertise to discern.*”³² Alexina’s alleged slave master attacked her “White char-

²³ See ARIELA J. GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 1 (2008).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1–2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1 (emphasis added).

acter” to prove her “negro blood.”³³ Indeed, the slave master “call[ed] her sexual virtue into doubt . . . and question[ed] her witnesses about her behavior at public balls.”³⁴ Despite these tactics, Alexina ultimately prevailed.³⁵ Though she “was undoubtedly a slave, and almost certainly had some African ancestry, she repeatedly won over White jurors . . . [by] perform[ing] the role of a White woman, and convince[ing] others of her moral worthiness.”³⁶

Over 150 years after Alexina’s fight for freedom, the concept of race in America remains relatively unchanged. People *still believe* race is about more than skin color. Race lies in performance of certain racially-coded actions and attributes. A study on racial stereotypes in the early 1930s found that “Whites were viewed as smart, industrious, and ambitious, whereas Blacks were viewed as ignorant, lazy, and happy-go-lucky.”³⁷ Though such blatant racism against Blacks has largely faded, modern racism remains and is characterized by more subtle and insidious racial biases.³⁸ Studies from the late 1980s and 1990s suggest that “[n]on-Blacks exhibit subtle racism when it is safe and socially acceptable to do so, or when the racism is easily rationalized.”³⁹ Blacks and non-Blacks alike are indoctrinated with negative stereotypes about Black people and Black culture, simply by virtue of growing up in the United States.⁴⁰ Additionally, “Implicit Association Tests (IATs) provide compelling evidence that many Whites [still] hold negative stereotypes that are frequently associated with Blacks.”⁴¹

33 *Id.* at 2.

34 *Id.* at 2.

35 *Id.*

36 *Id.* at 3.

37 Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407, 413 (2007).

38 *Id.* (“[T]his blatant racism was replaced by more subtle forms of negative biases—referred to as aversive racism, symbolic racism, and modern racism.”).

39 *Id.* at 413–14.

40 *See id.* at 414 (“[T]hey all agree that merely by growing up in the United States, Whites learn of the negative stereotypes associated with Blacks from their parents, peers, culture, and society. As a result of this upbringing, Whites frequently attach feelings of negative affect to Blacks.”).

41 *Id.* Ashleigh Shelby Rosette and Tracy L. Dumas describe IATs in their article: “In the IAT, participants sort Black and White faces and positive and negative words into their respective columns. One portion of the test mixes these stimuli, with the instruction to group White faces and positive words into one column, and to group Black faces and negative words into another. Participants typically performed this task quickly and easily. . . . A subsequent part of the test switched these values, instructing participants to group White faces with negative words and Black faces with positive words. Participants experienced a significant difference in response time and made more errors in grouping when asked to associate Black faces with positive words.” *Id.*

Though race in America is a cultural creation rather than a biological reality,⁴² “[i]t is a brutal fact of life for millions of citizens, and an inescapable problem for the rest”⁴³ This ingrained racial bias leads to the type of school policies that prohibited Vanessa VanDyke from proudly wearing her afro. These policies are examples of trait discrimination that encourage physical and cultural assimilation to the dominant ideal. The policies are, at their core, an effort to eradicate Black physical and cultural traits and replace them with White ones.

Suppose you are an employer preparing to interview a fictional young woman named Shaquanda Jackson.⁴⁴ You only have a résumé, but you try to anticipate what she will be like. What race is she? How does she speak? What type of clothes does she wear? Is she skinny or fat? Morally upright or wild and promiscuous? What did you presume about her spelling and grammatical abilities after simply glancing at her name? Most Americans have answers to those questions, based on experience, prejudice, or other seemingly justifiable reasons.⁴⁵ More likely than not, the answers to most or all of those questions have negative connotations.⁴⁶ Despite being a name on a page, completely divorced from physical attributes and general conduct, Shaquanda Jackson is racialized. Shaquanda Jackson is Black, and not in a good way. But then, is “being Black” in an employment or educational setting ever a good thing?

A trait is “a quality that makes one person or thing different from another.”⁴⁷ When Americans see the name Shaquanda Jackson, and

42 See, e.g., DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 4 (2011) (discussing how race is a political system rather than a biological category).

43 Laura Miller, Book Note, *Are You White Enough? From Jim Crow Laws to Workplace Discrimination, the History of Race and the American Courtroom Is Incendiary*, 34 MONT. LAWYER 22, 22 (2008) (reviewing ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008)).

44 A Google search for “Shaquanda” brings up a posted question in yahoo.com’s forum. The poster asks, “why do Black people have names like shaquanda, mortisha, lashanique, etc?” The poster implies these names are ridiculous, and later wonders whether “they” [Black persons] give their children these names for cultural reasons. This query and subsequent responses typify negative connotations to Black linked traits like Black names. See *Why Do Black People Have Names Like Shaquanda, Mortisha, Lashanique, etc?*, YAHOO! ANSWERS, <http://answers.yahoo.com/question/index?qid=20100616131705AAoMaDm> (last visited Jan. 27, 2014).

45 See Rosette & Dumas, *supra* note 37, at 414 (“[M]erely by growing up in the United States, Whites learn of the negative stereotypes associated with Blacks from their parents, peers, culture, and society.”).

46 See *id.* (“Whites frequently attach feelings of negative affect to Blacks.”).

47 *Trait Definition*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/trait> (last visited Jan. 27, 2014).

mentally distinguish her from others by designating her as a “Black person,” her very name becomes a trait associated with Blackness. Acknowledging this relationship is fundamental in understanding trait discrimination. Americans hear a name like Shaquanda Jackson or see a hairstyle like dreadlocks, and mentally code both name and hairstyle as racially Black. Trait discrimination takes this mental recognition a step further, by actively prohibiting speech, names, clothing, hairstyles, etc. that Americans mentally associate with a specific race. Though Black persons are not born with dreadlocks or pre-destined to be named Shaquanda, these traits become avatars of Blackness. Because race is such a real and tangible thing in American culture,⁴⁸ these avatars cannot be separated from their racial significance.

Identification and prohibition of socially disfavored traits is an attempt to culturally assimilate persons who have these unpalatable characteristics. Racial biases cause Americans to associate Black persons with negative attributes; as a result, characteristics associated with Black persons are imbued with these negative attributes. Historically, this type of bias (coupled with the obvious economic and social incentives) resulted in Black enslavement⁴⁹ and Black persons’ explicit relegation to the lower classes via Jim Crow laws.⁵⁰

But when the historical vehicles for explicitly degrading Black persons were prohibited by law, employers and society as a whole changed tactics.⁵¹ Americans stopped overtly stigmatizing race and started attacking *traits associated with race*.⁵² This social convention keeps Blacks who embody stereotypically Black traits in the socio-political underclass,⁵³ while allowing Blacks who perform “Whiteness”

48 ROBERTS, *supra* note 42, at 4.

49 The very Constitution of the United States acknowledges slavery via the Three-Fifths Compromise. Though slavery was later abolished, its legacy continues to haunt U.S. race relations. See U.S. CONST. art. I, § 2, cl. 3.

50 After slavery was abolished in the United States, many states adopted a system of laws designed to maintain White supremacy and enforce racial segregation between Blacks and Whites. These laws are collectively known as Jim Crow laws. See Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 500–501 (2004) (discussing the foundation of *Brown*).

51 See Kimberly A. Yuracko, *Trait Discrimination As Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 365–66 (2006) (“Title VII has been extremely effective at ending such blatant forms of status discrimination. Discrimination today often takes a different and more complex form. It may be driven, not by racial status per se, but by traits and attributes that are culturally or statistically associated with race.”).

52 *Id.*

53 PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 13, 468–69 (Richard Nice trans.) (1984) (discussing how and why the social and cultural capital of wealthy and middle class persons are perpetuated).

(i.e., adopt enough “White” traits to be palatable and unobtrusive to culturally White society) to flourish.⁵⁴

Though performance of Whiteness is an accepted (if greatly resented) part of succeeding in the United States, for Black persons, forced performance (also known as socially mandated cultural assimilation) is of even greater concern. By limiting Black children to hairstyles that change, subdue, or materially alter their natural hair, state-funded primary and secondary schools engage in race discrimination, using Black traits as a proxy for the disfavored racial group. It is deeply and inherently wrong to inculcate Black persons (or any non-White persons) with the understanding that their ethnicity and natural bodies are unpalatable, unprofessional, and unworthy. Using state-sanctioned institutions (i.e., public schools and charter schools) to enforce this sense of physical and cultural inferiority upon children, whose sense of self-worth and identity is still forming, is an even greater injustice. Such injustice warrants protection through adequate enforcement of Fourteenth Amendment guarantees.

II. A BARBERSHOP AND A HAIR PIECE: LESSONS LEARNED FROM MALE HAIR LENGTH REGULATIONS AND EMPLOYEE HAIRSTYLE PROHIBITIONS

Before evaluating legal responses to a problem with few common law or statutory analogs, this Comment considers two parallel areas of jurisprudence: male hair length restrictions and race-conscious employee hairstyle prohibitions. Analysis of these cases reveals a need for both legal clarity and increased protection of rights, particularly for vulnerable populations like children and ethnic minorities. I look first to cases evaluating the legitimacy of public school boys' hair length regulations. Examining relevant Supreme Court jurisprudence and varied responses by lower courts provides valuable insight into potential legal responses to our problem.

⁵⁴ My understanding of “performing Whiteness” is heavily influenced by Law Professor Kenji Yoshino’s discussion of “covering” (i.e., retaining a visible trait that is socially unpalatable, but making this trait less obtrusive by engaging in conduct designed to deflect attention from it), and Pierre Bourdieu’s contention that certain cultural competencies are favored by society and reproduced by disfavored classes in hope of attaining social status. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 18 (2006) (adopting the term “covering” from sociologist Erving Goffman, who defines it as the downplaying of one’s own traits so that others focus on different qualities); BOURDIEU, *supra* note 53, at 468–69.

A. *Hair Length Discrimination as Sex Discrimination: An Overview of Boys' Hair Length Cases*

The U.S. Supreme Court has not determined whether schools can regulate students' hair length and style.⁵⁵ However, in *Tinker v. Des Moines Independent Community School District*, the Court considered whether public school students wearing black armbands in school to protest the Vietnam War violated the school dress code.⁵⁶ In *Tinker*, primary and secondary public school students wore black armbands to school to protest the Vietnam War, in violation of a known school policy under which students who refused to remove these armbands when asked would be suspended.⁵⁷ Though the Court distinguished the armband prohibition at issue from dress code regulations for attire and hairstyle,⁵⁸ the Court's holding still provides guidance for interpretation of school hairstyle regulations. According to the Court, "where there is no finding and no showing that engaging in the forbidden conduct [(here, wearing black armbands)] would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."⁵⁹

However, the Supreme Court later backed away from the *Tinker* standard.⁶⁰ In *Morse v. Frederick*, the Court allowed a principal to suspend a student for displaying a banner reading, "BONG HiTS 4 JESUS," at a school sponsored event.⁶¹ The Court found deterring illegal drug use was an important and compelling interest that warranted restricting student speech.⁶² The Court held that *Tinker's* "mode of analysis . . . is not absolute," since the Court does not always

55 See Alison G. Myhra, *No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 SETON HALL CONST. L.J. 337, 345 (1999) (stating that there is an absence of Supreme Court precedent regarding whether public schools can regulate student dress and appearance).

56 393 U.S. 503, 504 (1969).

57 *Id.*

58 *Id.* at 507–08 ("The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. . . . Our problem involves direct, primary First Amendment rights akin to 'pure speech.'").

59 *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

60 See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that a school principal did not violate a student's First Amendment rights by confiscating a banner that promoted illegal drug use and suspending the student for ten days).

61 *Id.* at 397–98, 403.

62 *Id.* at 407.

conduct *Tinker's* “substantial disruption” analysis.⁶³ Ultimately, the Court supplemented *Tinker* without overturning it. To restrict students’ rights, schools must prove the prohibited behavior “‘materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,’”⁶⁴ or, that curbing certain activities serves an “‘important . . . [and] compelling’ interest.”⁶⁵

From *Tinker* and *Morse*, I glean two legal rules to evaluate the validity of public school dress code policies: (1) whether schools have an important or compelling interest in restricting the student action,⁶⁶ and (2) whether the prohibited student action “materially and substantially disrupt[s] the work and discipline of the school.”⁶⁷ These tests are not mutually exclusive.⁶⁸ Courts could use one or both to evaluate a public school dress code prohibition.⁶⁹

Based on the legal framework dictated by the Supreme Court, lower courts have come to a variety of different conclusions when adjudicating public school dress code restrictions on boys’ hair length.⁷⁰ “A bare majority of courts has held that school rules that absolutely prohibit a student from wearing long hair are unconstitutional.”⁷¹ Only when the long hair satisfies one or both of the Supreme Court’s tests by causing disruption,⁷² or undermining an important or compelling school interest,⁷³ can these restrictions stand. However, even taking these tests as given, there is rampant discord among courts as to their proper application in boys’ hair length cases.⁷⁴ “Federal appellate courts in the First, Fourth, Seventh, and Eighth Circuits have invalidated such [dress code] rules; federal appellate courts in the Fifth, Sixth, Ninth, and Tenth Circuits, have upheld them.”⁷⁵

⁶³ *Id.* at 405. A substantial disruption is one that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.” *Tinker*, 393 U.S. at 509, (quoting *Burnside*, 363 F.2d at 749).

⁶⁴ *Tinker*, 393 U.S. at 509, (quoting *Burnside*, 363 F.2d at 749).

⁶⁵ *Morse*, 551 U.S. at 407.

⁶⁶ *See id.* (noting that deterring drug use is one such interest).

⁶⁷ *Tinker*, 393 U.S. at 513.

⁶⁸ *See Morse*, 551 U.S. at 405 (citing case law that shows that the First Amendment analysis varies in different cases and can apply both principles).

⁶⁹ *See id.* (citing case law in which one or both principles were applied).

⁷⁰ *See generally* 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 755 (2d ed. 2005) (noting the differences among the circuits on this topic).

⁷¹ *Id.*

⁷² *See Tinker*, 393 U.S. at 513 (holding that student conduct that disrupts classwork or involves substantial disorder is not protected by the Constitution).

⁷³ *See Morse*, 551 U.S. at 407 (holding the school’s action constitutional because deterring drug use was a compelling interest).

⁷⁴ *See generally* KRAMER, *supra* note 70 (discussing the division among circuits in these cases).

⁷⁵ *Id.* at 755–56.

Though a significant amount of case law based on First Amendment protections, state regulations, and other constitutional rights exists in this area,⁷⁶ this Comment will focus on Fourteenth Amendment sex discrimination claims, as these cases most closely approximate responses to racially conscious dress codes. Despite this focus, a distillation of the case law reveals a number of considerations that remain constant among the varied legal responses:

In determining the constitutionality of a public school's "grooming rule" that limits the length of boys' hair, the outcome depends on balancing the male student's right to be free from gender discrimination and the educational policy which the school seeks to further by teaching grooming and hygiene, instilling discipline, maintaining order, and teaching respect for authority. The outcome also depends on a showing as to whether the activity which the school is attempting to regulate (*i.e.*, the wearing of long hair) is one which, if not regulated, will disrupt or materially interfere with the school's mission to educate students⁷⁷

Unfortunately, some courts accord greater deference to public schools in determining and enforcing student hairstyle prohibitions than is warranted by the Supreme Court's decisions. The Fifth Circuit went so far as to adopt "a per se rule that such [school hairstyle] regulations are constitutionally valid."⁷⁸ In effect, the Fifth Circuit completely subordinated the constitutional rights of public primary and secondary school students to the whim of school authorities. In *Karr v. Schmidt*, the Fifth Circuit declared,

district courts need not hold . . . evidentiary hearing[s] [for these] cases Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted.⁷⁹

In this case, the Fifth Circuit denied the plaintiff's Fourteenth Amendment equal protection claim, and viewed judicial oversight of school hairstyle cases as a violation of federalism that sapped legitimate state power.⁸⁰ The Fifth Circuit refused to utilize a higher standard of scrutiny despite the policy's unequal application between

⁷⁶ See Robin Cheryl Miller, Annotation, *Validity of Regulation by Public-School Authorities as to Clothes or Personal Appearance of Pupils*, 58 A.L.R. 5th 1 (1998) ("This annotation collects and analyzes the cases discussing the substantive validity of the regulation of the clothing or personal appearance of public-school students, regardless of whether the regulation applies to students in general or only some subset of students, and regardless of whether the challenge to the regulation's validity is on its face or as applied.").

⁷⁷ 2 KRAMER, *supra* note 70, at 756-57.

⁷⁸ *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972) (holding that there is no constitutionally protected right to determine the length and style of one's hair in public high school).

⁷⁹ *Id.* at 618.

⁸⁰ *Id.* at 611, 616.

male and female students; female students were allowed to have long hair but male students were not.⁸¹ However, had the plaintiff alleged discrimination based on the suspect classification of race, the court would have been forced to apply a more “rigorous” standard of equal protection scrutiny.⁸²

Other courts, like the Seventh Circuit, recognize these policies as a sex-based denial of equal protection.⁸³ In *Crews v. Cloncs*, the Seventh Circuit directed a public high school in Indiana to admit a male student with long hair.⁸⁴ The court found the school’s exclusion of the student “resulted primarily from a distaste for persons . . . who do not conform to society’s norms as perceived by [the school].”⁸⁵ Because school administrators offered no reasons why health and safety objectives that preclude boys from having long hair were “not equally applicable to high school girls,” the school’s action constituted “denial of [Fourteenth Amendment] equal protection to male students.”⁸⁶ Constitutional protection from racially conscious public school hairstyle prohibitions is a logical extension of the Seventh Circuit’s logic in *Crews v. Cloncs* and the Fifth Circuit’s concession in *Karr v. Schmidt*.

B. Hair Length Discrimination as Cultural Discrimination: The Case of Ho Ah Kow v. Nunan

Ho Ah Kow, a Chinese man living in California in the 1870s, did not need a barber.⁸⁷ In accordance with a Chinese custom, Kow shaved the hair from the front of his head and wore the remainder in a braided queue.⁸⁸ Shaving off the queue was considered a mark of disgrace and misfortune in his cultural tradition.⁸⁹ In 1878, Kow was convicted under an unrelated lodging statute and imprisoned for five days in the county jail.⁹⁰ During his imprisonment the local sheriff, the defendant, cut off Kow’s queue with full knowledge of the cultur-

81 *Id.* at 616 (noting that the classification at hand not based on a suspect criterion such as “race or wealth”).

82 *Id.*

83 *Crews v. Cloncs*, 432 F.2d 1259, 1266 (7th Cir. 1970) (holding that a public school hairstyle prohibition for male students was a violation of male students’ constitutional rights on the theory of sex-based discrimination).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 253 (C.C.D. Cal. 1879) (No. 6,546).

88 *See id.* (describing Kow’s hairstyle and the Chinese custom).

89 *Id.*

90 *Id.*

al implications of this act.⁹¹ The sheriff cut Kow's queue in accordance with a local ordinance that required "every male person imprisoned in the county jail . . . [to] have the hair of his head 'cut or clipped to a uniform length of one inch from the scalp . . .'"⁹² Unimpressed by the ordinance, Kow sued the sheriff for "imposing a degrading and cruel punishment upon a class of persons who are entitled . . . to the equal protection of the laws."⁹³

The court agreed with Kow, dismissing the defendant's health and disciplinary justifications for the ordinance as "mere pretense."⁹⁴ The ordinance was colloquially known as the "Queue Ordinance" and was only enforced against Chinese men.⁹⁵ Though the ordinance was expressed in general terms, it had the effect of harming Chinese men.⁹⁶ According to the court, "[m]any illustrations might be given where ordinances, general in their terms, would operate only upon a special class . . . with exceptional severity, and thus incur the odium and be subject to . . . legal objection . . ."⁹⁷ Facially neutral policies enacted to harm a class of racial minorities are not legal based on equal protection analysis.⁹⁸ Surely a general policy banning Black hairstyles, that school administrators must know primarily harms their Black pupils, would incur the rancor of this court as the Queue Ordinance did long ago, and cannot be legal.

C. Black ≠ Professional: How Courts Have Allowed Systematic Devaluation of Blacks and Black Culture Through Employee Hairstyle Prohibitions

This Comment next looks to racially conscious hairstyle prohibitions in an employment context, via examination of *Pitts v. Wild Adventures*⁹⁹ and *Rogers v. American Airlines*.¹⁰⁰ Though courts largely fail

⁹¹ *Id.*

⁹² *Id.* (internal citations omitted).

⁹³ *Id.*

⁹⁴ *Id.* at 254.

⁹⁵ *Id.* at 255.

⁹⁶ *Id.* ("The class character of this legislation is none the less manifest because of the general terms in which it is expressed.")

⁹⁷ *Id.*

⁹⁸ *Id.* at 255 ("[W]here an ordinance, though general in its terms, only operates upon a special race, sect, or class, it being universally understood that it is to be enforced only against that race, sect, or class, we may justly conclude that it was the intention of that body adopting it that it should only have such operation, and treat it accordingly.")

⁹⁹ No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008).

¹⁰⁰ 527 F.Supp. 229, 232–33 (S.D.N.Y. 1981) (holding that American Airlines' decision to prohibit all-braided hairstyles was permissible because the policy applied equally to all employees, and that the policy did not violate the Black female plaintiff's constitutional rights). My treatment of *Rogers* in this Comment will be brief in light of the extensive

to recognize and protect harm caused by employee hairstyle prohibitions,¹⁰¹ the rich body of legal critique¹⁰² spawned by such decisions will guide this discussion.

In *Pitts*, the plaintiff, a Black female, worked as a Guest Services Supervisor for the defendant/employer Wild Adventures.¹⁰³ The plaintiff's boss, a White female, "disapproved of [plaintiff's] cornrow hairstyle" and told the plaintiff to "get her hair done in a 'pretty style.'"¹⁰⁴ Plaintiff catered to her manager's wishes by styling her hair in "two strand twists," but her manager disapproved of this new hairstyle as well because it "had the look of dreadlocks."¹⁰⁵

Plaintiff refused to restyle her hair again because the defendant did not have a written hairstyle policy at the time.¹⁰⁶ In response, the defendant issued a memo prohibiting "'dreadlocks, cornrows, beads, and shells' that are not 'covered by a hat/visor.'"¹⁰⁷ Plaintiff filed a complaint with the defendant's human resources department, filed an EEOC complaint, and later started litigation because she believed the company's grooming policy was racially discriminatory as it prohibited only "Afrocentric" hairstyles.¹⁰⁸

In denying plaintiff's argument that the grooming policy disparately impacted Black employees, the court found she could not

establish a prima facie case of discrimination (under Title VII of the Civil Rights Act of 1964) by showing that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) similarly situated employees outside of her protected class were treated more favorably; and (4) she was qualified to do the job.¹⁰⁹

body of legal commentary focused on this case. For deeper analysis of the *Rogers* decision, see *infra* note 102.

101 See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1093–94 (2010) (stating that courts often uphold employer bans on natural Black hairstyles).

102 The *Rogers* decision, for example, has enjoyed extensive treatment by feminist and legal theorists. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370 (1991) (examining *Rogers* and hairstyle discrimination and its relation to broader race and gender discrimination); D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 407 (2011) (same); Onwuachi-Willig, *supra* note 101, at 1093 (same); Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and A Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115, 162 (2001) (same).

103 *Pitts*, 2008 WL 1899306, at *1.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.* at *1, *3.

109 *Id.* at *4.

The court concluded the plaintiff was not discriminated against based on her race,¹¹⁰ since “[g]rooming policies are typically outside the scope of federal employment discrimination statutes because they do not discriminate on the basis of immutable characteristics.”¹¹¹ This determination is flawed in that it presumes the necessity of protective hairstyles is not an “immutable characteristic” for certain hair textures, and forces Black women to adopt hairstyles that damage their hair.

This approach is similar to the one used in the *Rogers* decision, where the court upheld an American Airlines’ grooming policy that prohibited certain ethnic hairstyles.¹¹² Because an all-braided hairstyle was not a “natural” state for hair, the court found American Airlines could prohibit flight attendants from wearing braids.¹¹³ Further, “[t]he court in *Rogers* referred to all-braided hairstyles as ‘not [being] the product of natural hair growth but of artifice’ and then, in the same breath, offered American Airlines’ suggestion for [plaintiff] to use a hairpiece as an alternative for her in covering up her naturally grown hair.”¹¹⁴ “Such language exposes the court’s incomplete understanding of the full implications of tightly coiled and kinky hair for [B]lack women in the United States.”¹¹⁵ In essence, the *Pitts* court, like the *Rogers* court, based its reasoning on the faulty premise that White hair textures are “natural” for all people.

The *Rogers* court explicitly favored White hair textures through its suggestion “that the use of a ponytail of straight, artificial hair was an appropriate alternative to the all-braided hairstyle that it called ‘artifice.’”¹¹⁶ Further, by suggesting the plaintiff in *Rogers* could easily pull her hair back in a bun, as White women can, the court demonstrated a fundamental misunderstanding of hair diversity that varies from the norm.¹¹⁷ Most importantly, the *Rogers* court “rejected what Blacks identify as a natural hairstyle—a hairstyle that allows Black women to wear their hair down and long while retaining the natural structure and texture of their hair.”¹¹⁸ Though there are a wide variety of hair

110 *Id.* at *5.

111 *Id.*

112 *Rogers v. Am. Airlines*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

113 *Id.* at 232.

114 Onwuachi-Willig, *supra* note 101, at 1093 (quoting *Rogers*, 527 F. Supp. at 232–33).

115 *Id.*

116 *Id.*

117 *See generally id.* (“In reality, it is extremely difficult to get natural, tightly coiled and kinky hair to stay down and pull it back into a bun.”).

118 *Id.*

types and textures within the Black community (and outside of it),¹¹⁹ the *Rogers* and *Pitts* courts did not acknowledge hairstyles or hair textures outside of the “natural” White norm.

In addition to the courts’ illogical assumption that there is a baseline “natural” hair texture, the *Rogers* and *Wild Adventures* decisions raise the question of “why Black women are put to the task of justifying a hairstyle particular to their culture when White women and even Black men are not.”¹²⁰ Racially conscious hairstyle prohibitions by employers “degrade[] and de-legitimize[] Black women by denying them the right to self-expression and determination [D]eclaring a hairstyle as categorically unprofessional and unacceptable degrades the class of people that view the hairstyle as a symbol of ethnic pride.”¹²¹ Court decisions like *Rogers* and *Pitts* must be overturned to protect the bodies and identities of Black Americans.

III. HAIR WE GO: REINVIGORATING FOURTEENTH AMENDMENT EQUAL PROTECTION TO PROVIDE SOLUTIONS FOR STATE-FUNDED EDUCATIONAL INSTITUTIONS

How then, can Americans help the children of Alexina Morrison feel comfortable in their own skin, hair, and culture? How can a supposedly post-racial society help Black boys and girls combat their “proud” American heritage: the indoctrination of White cultural and social supremacy through state-funded education? Though the Supreme Court has not specifically addressed the constitutionality of public school hairstyle restrictions, Justice William Douglas made his opinion on the matter clear.¹²² “It seems incredible that under our federalism a State can deny a student education in its public school system unless his [or her] hair style comports with the standards of the school board.”¹²³ “Hair style,” he continued, “is highly personal, an idiosyncrasy which I had assumed was left to family or individual

119 This website alone logs four different categories of curl patterns for Black women, with a variety of subtypes within each category. It is a legal fallacy for a court to determine that certain hairstyles are “unnatural” for particular hair types. See Black Girl With Long Hair, *Natural Hair Type Guide: Which Type are You?*, BGLH (Mar. 27, 2012), <http://www.Blackgirlonghair.com/2012/03/natural-hair-type-guide-which-type-are-you/> (last visited Jan. 31, 2014) (examining a variety of natural hair types).

120 Turner, *supra* note 102, at 162.

121 *Id.*

122 See Miller, *supra* note 76 (discussing Douglas’s views).

123 *Olf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1042 (1972) (Douglas, J., dissenting) (arguing against the denial of petitioner’s request of a writ of certiorari in regards to a case concerning boys’ hair length regulation in public school).

control and was of no legitimate concern to the State.”¹²⁴ Justice Douglas’s thoughtful and impassioned reasoning guides this discussion of legal remedies to the plight of Vanessa VanDyke and other similarly situated ethnic minorities—children whose bodies are a battle ground for assimilation to the White cultural norm.

Still, making the case for legal protection is no easy task. The majority of schools that contemplated or implemented racially conscious student hairstyle prohibitions were charter schools.¹²⁵ Policing charter schools is sometimes difficult, as these schools straddle the line between public and private.¹²⁶ Charter schools receive government funding while enjoying increased autonomy (like private schools) in return for high academic performance.¹²⁷ The distinction between public and private is extremely important. If charter schools are public schools, they are state actors and Fourteenth Amendment protections extend to students.¹²⁸ If charter schools are private entities, student rights are much more limited because the Fourteenth Amendment only protects individuals from state actors.¹²⁹ In advocating possible solutions to racially conscious student hairstyle prohibitions, I contend that charter schools are, or should be, state actors for purposes of student-focused equal protection litigation. After establishing the applicability of this constitutional protection, we will look to Fourteenth Amendment equal protection to end this cultural war against Black children.

A. *Charter Schools as Public Schools for Purposes of Student-Focused Equal Protection Litigation*

The charter school state actor debate is based on the language of 42 U.S.C. § 1983. When a U.S. citizen is deprived of “rights, privileges, or immunities secured by the Constitution and [federal] law” by a private actor working “under color” of state law, the deprived party

124 *Id.*

125 *See supra* notes 4–6.

126 *See* Jennifer Rose Jacoby, *Race-Conscious Charter Schools and the Antibalkanization Perspective of Equal Protection*, 15 U. PA. J. CONST. L. 1561, 1568 (2013) (discussing the nature of charter schools).

127 *See id.* (discussing the funding of charter schools and the conditional exemptions they enjoy).

128 *See* Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1308–09 (1998) (“[T]he nature of charter schools—created through state legislation, approved by state officials, and designed to fulfill state functions—suggests that they are state actors.”).

129 *Id.* at 1305 (discussing the entities to which the Fourteenth Amendment applies).

can bring a legal action against the private/state actor for redress.¹³⁰ But how do we know when a private actor is working under color of state law?¹³¹ Two recent Ninth Circuit cases, *Caviness v. Horizon Community Learning Center, Inc.* and *Nampa Classical Academy v. Goesling*, best illustrate when a private organization, specifically a charter school, becomes a state actor for purposes of § 1983.

In *Caviness*, the Ninth Circuit considered whether “a private non-profit corporation” running a public charter school was a state actor.¹³² Regarding personnel decisions specifically, the court determined charter schools in Arizona were not state actors.¹³³ The plaintiff, a former teacher and athletic coach at the defendant charter school, was fired for having a questionable relationship with a female student.¹³⁴

Because of allegedly false and defamatory statements made by the defendant charter school’s executive director, the plaintiff was unable to secure another teaching job.¹³⁵ He asked for a “name-clearing” hearing on the matter, but the defendant did not respond.¹³⁶ The plaintiff later filed a complaint against the charter school under § 1983, alleging the executive director’s statements, under color of state law, deprived him of his liberty interest in finding and obtaining work without due process of law.¹³⁷

After de novo review of the facts, the Ninth Circuit upheld the District Court’s dismissal of the plaintiff’s complaint. Both courts found the defendant charter school was not a state actor for purposes of § 1983, and dismissed the case under Rule 12(b)(6).¹³⁸ In determining whether the defendant charter school acted “under color” of state law when firing the plaintiff, the Ninth Circuit emphasized the importance of identifying what function the school served. Only by identifying a private actor’s function could the court determine

¹³⁰ 42 U.S.C. § 1983 (2012).

¹³¹ The Supreme Court’s state action jurisprudence, specifically the nexus doctrine, may be a useful background. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (finding that “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State”); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970) (“[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.”).

¹³² *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010).

¹³³ *Id.*

¹³⁴ *Id.* at 810.

¹³⁵ *Id.*

¹³⁶ *Id.* at 811.

¹³⁷ *Id.*

¹³⁸ *Id.*

whether “there [was] such a close nexus between the State and the challenged action” for purposes of § 1983.¹³⁹ The mere fact that a state statute identifies an entity as a state actor does not mean said entity functions as a state actor in all cases.¹⁴⁰ Private entities may be state actors for some purposes and not others.¹⁴¹

Because Arizona exercised very limited control or influence over its charter schools, these schools were not state actors in and of themselves. The court held private entities in Arizona may be considered state actors for some purposes,¹⁴² but Arizona charter schools do not act under color of state law in their capacity as employers.¹⁴³ The Ninth Circuit clarified this point by citing an earlier decision where a terminated employee sued a private correctional facility in California.¹⁴⁴ In that case, California granted the private entity “‘certain powers and privileges under the law to allow [it] to function adequately’ as a prison.”¹⁴⁵ Though the court tacitly admitted the entity functioned as a state actor in some respects, the “relevant inquiry” was whether the facility acted under color of state law in its “*role as an employer*.”¹⁴⁶ In that case, as in *Caviness*, the private entity was not a state actor in an employment context.¹⁴⁷

This functional distinction (that a private entity may be a state actor for some purposes and not others¹⁴⁸) is vital in portraying charter schools as state actors. Based on the Ninth Circuit’s analysis, a prisoner in a private correctional institution could bring a § 1983 suit against the prison, because the facility acts under color of state law in regard to prisoners’ incarceration.¹⁴⁹ Similarly, courts may be more likely to recognize private charter schools as acting under color of state law if students, rather than employees, bring suits.

Further, state influence alone can convert private charter schools into state actors. In *Nampa Classical Academy*, the Ninth Circuit found

139 *Id.* at 812 (quoting *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 955 (9th Cir. 2008)).

140 *Id.* at 814.

141 *Id.* at 812–13.

142 *See id.* (focusing on the functions of the entities in making this determination).

143 *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 817 (9th Cir. 2010) (rejecting the plaintiff’s arguments for why charter schools are state actors).

144 *Id.* at 813 (citing *George v. Pacific–CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996)).

145 *George*, 91 F.3d at 1230.

146 *Id.*

147 *Id.*; *Caviness*, 590 F.3d at 818.

148 *Caviness*, 590 F.3d at 812–13.

149 *See George*, 91 F.3d at 1230 (recognizing that an entity could “be a state actor for some purposes but not” others).

an Idaho charter school did not have standing to sue a fellow state actor because the charter school itself was a “creature[] of Idaho state law that [is] funded by the state, subject to the supervision and control of the state, and exist[s] at the state’s mercy.”¹⁵⁰ Idaho legislators passed numerous provisions to regulate charter schools.¹⁵¹ Taken as a whole, these provisions “demonstrate[d] that Idaho charter schools [were] governmental entities.”¹⁵² Based on the Ninth Circuit’s reasoning, whether a charter school acts under color of state law will vary by state and situation. In states, like Idaho, that influence policy for educational institutions, charter schools may be de facto state actors. In states like Arizona, where charter schools have more discretion, they may only function under color of state law in specific situations. Still, even where charter schools are not de facto state actors, state influence and intervention can bring a charter school within the purview of § 1983. Charter schools can and should be considered state actors for purposes of protecting minority students. This classification would greatly aid students by securing their rights via Fourteenth Amendment equal protection.

B. Finishing Touches: Brown v. Board of Education and Palmore v. Sidoti as Keys to Resuscitating Fourteenth Amendment Equal Protection

The Supreme Court’s Fourteenth Amendment equal protection jurisprudence is often characterized in terms of anticlassification and antistatutory principles.¹⁵³ “[T]he anticlassification principle tolerates practices that are facially neutral but have a disparate impact on minorities; but it is intolerant of any use of racial classification”¹⁵⁴ In contrast, proponents of the antistatutory principle are less concerned with the facial classification, and more concerned with protecting members of traditionally disadvantaged groups from the “harms of unjust social stratification.”¹⁵⁵ Further, because the antistatutory principle seeks to curb practices that

150 *Nampa Classical Acad. v. Goesling*, 447 F. App’x 776, 777–78 (9th Cir. 2011).

151 *See id.* (explaining why Idaho charter schools are governmental entities).

152 *Id.* at 777.

153 Proponents of the anticlassification principle believe all racial classifications are unconstitutional on their face, regardless of the classification’s effect on historically marginalized groups. Proponents of the antistatutory principle are concerned with laws that adversely affect historically marginalized groups, rather than whether the law is racially neutral on its face. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287–89 (2011) (describing these two positions).

154 *Id.* at 1288.

155 *Id.*

“disproportionally harm members of marginalized groups, it can tell the difference between benign and invidious discrimination.”¹⁵⁶

Unfortunately, the Supreme Court narrowed its analytical focus over time, thus losing the benefit of a dual anticlassification and antisubordination analysis. In the 1960s, the Supreme Court began shifting away from antisubordination analysis and toward a “general presumption that racial classifications are unconstitutional under the Fourteenth Amendment.”¹⁵⁷ Though possible negative impacts on racial minorities were considered, racial classification itself became taboo. By the 1970s, the Court had increasingly conflated *Brown v. Board of Education*’s “holding with the presumption against racial classifications.”¹⁵⁸ Even governmental use of racial classifications to benefit minorities (such as affirmative action) received heightened scrutiny from the Court based on the well-intentioned but ill-founded view that all racial classifications are more likely evil than not.¹⁵⁹ More recently, some Supreme Court Justices have implicitly used an antibalkanization principle in deciding these cases. Under this principle, the Justices attempt to prevent majority backlash against programs that benefit minorities by requiring strong public interest justifications for these policies.¹⁶⁰

Though a presumption against racial classification was well-intentioned and useful in a time when laws clearly reflected racial biases, it is considerably less helpful in combatting facially neutral laws that target minorities, or rules that implicitly value White traits while disparaging Black ones. The Supreme Court’s ruling in *Palmore v. Sidoti* reflects an understanding of these dangers.¹⁶¹ *Palmore* is a child custody case.¹⁶² The child’s mother (a White woman) had custody, but when she re-married a Black man, the child’s father (a White man) sued to gain custody.¹⁶³ The state court sided with the child’s father.¹⁶⁴ This court’s decision was not based upon the stepfather’s race in the strictest sense, but because of the “damaging impact on the child from remaining in a racially mixed household.”¹⁶⁵

156 *Id.* at 1289.

157 *Id.* at 1290.

158 *Id.* at 1291.

159 *See* Siegel, *supra* note 153, at 1291 (discussing the Court’s use of heightened scrutiny for racial classifications)

160 *See id.* at 1300 (discussing the Justices’ use of the antibalkanization principle).

161 466 U.S. 429 (1984).

162 *Id.* at 430.

163 *Id.*

164 *Id.* at 431.

165 *Id.* at 431–32.

The Supreme Court reversed, keying in on the fact that commonly held racial biases, if not race itself, motivated the Florida state court's decision.¹⁶⁶ In the words of Chief Justice Warren Burger,

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations We have little difficulty concluding that they are not.¹⁶⁷

Whatever negative traits the state court (and society at large) attributed to the child's Black stepfather were inappropriate considerations to determine custody, especially since the lower court took no issue with his qualifications or those of the child's mother.¹⁶⁸

Courts cannot make decisions based on the dictates of American society's racial bias, whether that bias manifests against a racial group or traits associated with that group. State-funded institutions, like public primary and secondary schools, are not exempt from this prohibition. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹⁶⁹

Racially conscious public school hairstyle prohibitions are an excellent example of rules that primarily target ethnic minorities and ethnic traits. Unfortunately, the current judicial trend toward eradicating suspect classifications¹⁷⁰ with a single-minded focus makes it difficult to identify and eliminate rules evocative of the state court's *Palmore* decision. To adequately assess the hairstyle prohibitions in question, we must return to the Supreme Court's understanding in

¹⁶⁶ See *id.* at 434 (focusing on "[t]he effects of racial prejudice").

¹⁶⁷ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

¹⁶⁸ *Id.* at 430.

¹⁶⁹ *Id.* at 433.

¹⁷⁰ The Supreme Court first suggested that more stringent standards of judicial review should be used for certain marginalized groups, including racial minorities, in the famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The Supreme Court's suspect classification jurisprudence emerged gradually after this case, eventually mandating that the highest standard of judicial scrutiny, strict scrutiny, be used in consideration of race-based equal protection cases. "[A]ll race-conscious governmental actions, whether state or federal, benign or discriminatory, when challenged under the Equal Protection Clause [are] subject to the highest standard of constitutional review, strict scrutiny, which Gerald Gunther famously described as "'strict' in theory and fatal in fact." Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 261 (2002) (citation omitted). This theory presumes the Constitution is "color blind" and strikes down governmental actions that acknowledge race, while largely ignoring facially neutral laws that negatively impact minorities. See Osagie K. Obasogie, *Can the Blind Lead the Blind? Rethinking Equal Protection Jurisprudence Through an Empirical Examination of Blind People's Understanding of Race*, 15 U. PA. J. CONST. L. 705, 743 (2013) (arguing that the judicial approach to race depends on the conception that race is something that is seen).

Palmore, and to the quintessential case where both anticlassification and antisubordination principles were used to determine whether a public primary school policy was unconstitutional under Fourteenth Amendment equal protection: *Brown v. Board of Education*.¹⁷¹

In *Brown*, the Supreme Court utilized aspects of both principles to outlaw racial segregation in the United States.¹⁷² Oliver Brown, the plaintiff who lent his name to the case, challenged the so-called Separate but Equal Doctrine in Kansas that prohibited his Black child from attending a White school.¹⁷³ Oliver Brown and his fellow plaintiffs contended that though White and Black schools were equal on paper, in practice White schools were of higher quality.¹⁷⁴ Further, “[t]he plaintiffs contend[ed] that segregated public schools [were] not ‘equal’ and [could] not be made ‘equal.’”¹⁷⁵ Because schools were equal on their face but discriminatory in practice, the plaintiffs were deprived of equal protection of the laws. The Court ultimately agreed with the plaintiffs, ending legalized racial segregation in the United States.¹⁷⁶ The Court’s reasoning is an excellent study in anticlassification and antisubordination principles working in tandem.¹⁷⁷

In analyzing the Separate but Equal Doctrine and its application, the Court first looked to whether the law in question engendered inequality on its face and found that it did not: “[T]he Negro and white schools involved [were] equalized, or [were] being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”¹⁷⁸ Strictly speaking, the law did not discriminate between Blacks and Whites. Taking the policies at face value, the racial classifications contained in the Separate but Equal Doctrine were not discriminatory. However, in analyzing the law’s effects, the Court acknowledged two very important principles: (1) that racial classification in and of itself is sometimes harmful, and (2) that laws may appear benign while masking horrible injustice and

171 See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (declaring racial segregation in public schools, and the Separate but Equal Doctrine, unconstitutional under Fourteenth Amendment equal protection), *enforced*, 349 U.S. 294, 301 (1955) (reiterating that the respondent public schools should desegregate “with all deliberate speed”).

172 See Siegel, *supra* note 153, at 1290 (arguing that both principles were at work in *Brown*).

173 Ogletree, *supra* note 50, at 523.

174 *Brown*, 347 U.S. at 488.

175 *Id.*

176 *Id.* at 495.

177 Siegel, *supra* note 153, at 1289 (discussing *Brown* and the two principles).

178 *Brown*, 347 U.S. at 492.

targeting traditionally marginalized groups.¹⁷⁹ The Court's "decision, therefore, [could] not turn on merely a comparison of these tangible factors."¹⁸⁰ Rather, the Supreme Court looked to the effect of segregation on public education.¹⁸¹ Utilizing both anticlassification and antisubordination theories, the Court determined the Separate but Equal Doctrine violated the Fourteenth Amendment Equal Protection Clause.

Applying the *Brown* Court's two-step anticlassification *and* antisubordination analysis to primary public school hairstyle prohibitions, we find that these facially neutral hairstyle policies mask subordination of Black children's bodies to a White cultural ideal. Here, as in *Brown*, the rule itself is not inherently discriminatory.¹⁸² In schools like Vanessa VanDyke's, all children would be prohibited from wearing afros, dreadlocks, and small twisted braids, regardless of race.¹⁸³ However, as in *Brown*, "[o]ur decision... cannot turn on merely a comparison of these tangible factors We must look instead to the effect of [the policy] itself on public education."¹⁸⁴ Even looking to the effect of these hairstyle prohibitions, a modern day proponent of a "color blind"¹⁸⁵ legal system might miss the significance of a prohibition on dreadlocks. These critics, like the courts in *Rogers* and *Pitts*, claim hairstyle is fluid and that hairstyle prohibitions cannot affect races differently. However, a sociological examination of how blind persons, who are racially "color blind" in the most literal sense, identify and internalize race provides a strong rebuttal to this contention.¹⁸⁶

179 The Supreme Court acknowledged that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children . . . [as] the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." *Brown*, 347 U.S. at 494 (internal quotation marks omitted). Further, the decision "cannot turn on merely a comparison of . . . tangible factors We must look instead to the effect of segregation itself on public education." *Id.* at 492.

180 *Id.* at 492.

181 *Id.*

182 *Id.*

183 See *supra* notes 4–6 and accompanying text for a discussion of schools that imposed (or tried to impose) universal bans on certain Black ethnic hairstyles.

184 *Id.*

185 Proponents of anticlassification analysis in equal protection jurisprudence often believe that "the law is colorblind." Jacoby, *supra* note 126, at 1562.

186 See Obasogie, *supra* note 170, at 762 (finding that current equal protection jurisprudence overemphasizes the importance of visual conceptions of race and lacks "a more sophisticated understanding of the social practices that make certain groups visible targets of discrimination to begin with").

One blind man notes that hair takes on special significance as a proxy for race in the dating context.¹⁸⁷ “[W]hen someone doesn’t know our race,” he says, “they’ll find some way to reach out and touch our hair. People want to know, and that’s the one [racial clue] they can always get”¹⁸⁸ In the United States, visual perceptibility is inherent to the concept of race. Even the Civil Rights Act of 1964 prohibits discrimination based on race without feeling compelled to define race.¹⁸⁹ Despite the presumptive visual nature of race, racial biases based on non-visual cues are alive and well among the blind community: “You can see [someone] kind of pursuing somebody [that they find attractive]. And they’ll go for the hair and then they’ll change their mind. They’re always still friendly But you’re Black.”¹⁹⁰ Here, hair texture and hairstyle function as a fundamental proxy for race. “[H]air texture [and hairstyle are] sought out as a proxy for the visual cues associated with race as a way to determine the terms, limits, and boundaries of social interactions.”¹⁹¹ Race exists even in a truly “color blind” community through its integral association with hair texture and hairstyle.

Though hairstyle can change, certain hair textures are associated with certain hairstyles. These hairstyles come to be imbued with as much cultural significance as the hair itself. Afros, afro-puffs, dreadlocks, small braided twists, and cornrows are examples of such hairstyles. Racially conscious public school hairstyle prohibitions discriminate against Black students in the same way the “Queue ordinance” discriminated against Chinese men in *Ho Ah Kow v. Nunan*.¹⁹² Such school policies elevate White hairstyles while denoting the inferiority of Black hairstyles. The negative psychological impact on Black children is greater when these policies have the sanction of the law.¹⁹³

Racially-motivated school dress code policies may not discriminate on their face (and may well pass muster under suspect classification analysis), but review of these policies based on antidisubordination concerns reveals that they negatively impact Black children physically and psychologically. Physically, these policies force Black children to adopt White hairstyles that are often unsuitable for their hair, and

187 *Id.* at 751.

188 *Id.*

189 See 42 U.S.C. § 2000(e) (declining to define race).

190 Obasogie, *supra* note 170, at 751.

191 *Id.*

192 See *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (1879) (No. 6,546) (noting that the ordinance was only enforced against the Chinese).

193 See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (discussing the psychological impact of segregation on Black children).

psychologically, these policies tell those children their natural hair is unacceptable and wrong. The presence of racial bias in favor of White hair in American society is insufficient to justify these policies. A culturally White majority may deem dreadlocks and cornrows “un-professional” or “distracting,” but such biases cannot be given effect by state funded educational institutions. As the Supreme Court concluded in *Palmore*, “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹⁹⁴ Courts should consider antisubordination concerns as dictated in *Brown*, *Palmore*, and *Ho Ah Kow* in evaluating the legitimacy of such policies. Close scrutiny reveals that racially conscious school hairstyle prohibitions are inherently discriminatory, and negatively impact Black students physically, psychologically, and socially.

SPLIT ENDS: CONCLUDING THOUGHTS ON THE LEGALITY AND
DESIRABILITY OF PUBLIC SCHOOL HAIRSTYLE PROHIBITIONS

This comment had twin aims: to determine whether publicly funded primary and secondary schools are legally able to institute racially conscious hairstyle prohibitions, and to determine whether they should be able to do so. The answer to the latter question is obvious. School dress codes that prohibit afros, afro-puffs, dreadlocks, small twisted braids, and other culturally Black styles imply the Black body is unacceptable, unruly, and unprofessional. These policies result in forced assimilation that is damaging to the psyche of Black children. However well-intentioned, these policies subtly say that White traits are good while Black traits are bad. Because this implication is inherently discriminatory and damaging, and because these facially neutral policies target a historically marginalized and highly visible racial group, public school hairstyle prohibitions are unacceptable and should be banned.

Unfortunately, the law has yet to acknowledge this alarming reality. Despite evidence that the policies are discriminatory, current understandings of race in Fourteenth Amendment equal protection jurisprudence allow such policies to continue. Only by utilizing both antisubordination *and* anticlassification perspectives in equal protection analysis to expand the law's limited conception of race, can Americans outlaw these policies and protect Black students' rights and persons.

¹⁹⁴ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).