A TOTALITY OF THE CIRCUMSTANCES FRAMEWORK FOR TITLE VII: A CORRECTIVE TO THE IMPERFECTIONS OF TITLE VII ANALYSIS OF GROOMING POLICIES

by

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I. INTRODUCTION

The American workplace models a broad array of clothing, hair, jewelry, and fashion styles, reflecting in part the comparable diversity in the workforce as to race, religion, gender, and generations. More recently however, businesses have begun implementing appearance rules and dress codes in an effort to reign in the many ways their workers dress, groom, and express themselves. Make-up requests, hair restrictions, and clothing requirements represent a small sampling of the many forms taken by these appearance rules, usually established under the guise of professionalism or corporate image. The particular prescriptions and prohibitions of these different dress codes, grooming policies, or appearance rules have raised concerns about a "second generation"[1] of employment discrimination called "trait discrimination" - differing treatment based on stereotypical notions of "traits and attributes that are culturally or statistically associated with race" or other protected classes.[2] For example, the male police officer who was suspended in part for being too feminine[3] and the African-American woman sanctioned for not changing her cornrow hairstyle.[4] These new forms of discrimination have converged with other cultural developments to encourage scholars, courts and legislators to revisit and revise Title VII of the Civil Rights Act.

Part III and IV of this paper explore how employee appearance rules are decided under the current law. Part V describes three fundamental flaws of the current bright line approach to Title VII – namely cognitive bias, the immutability standard, and a confusing framework. Part VI addresses these imperfections by offering recommendations for a more nuanced totality of the circumstances application of Title VII designed to more adequately address the current concerns surrounding employment discrimination, particularly trait discrimination resulting from employee appearance rules.

II. HISTORICAL BACKGROUND OF ANTI-DISCRIMINATION LAW

The forced servitude of fellow human beings, the deadliest war in American history,[5] and the assassination of a president are all part of the sad legacy of discrimination. The post Civil War Civil Rights Act of 1866 gave citizens of all races (meaning only men at that time) the same contractual rights, which included employment, in an effort to buttress the 13th Amendment's abolition of slavery.[6] This initial Civil Rights Act was not enough by itself, however, to change the lingering prejudice and oppression, especially in the Southern Confederacy. In an effort to increase and protect the newfound rights of former slaves, Congress, prompted by Lincoln, provided constitutional help and clout in the form of the 14th Amendment (due process and equal protection of the laws),[7] the Civil Rights Acts of 1866 (known now as Section 1981)[8] and of 1871 (known by most as Section 1983),[9] and the 15th Amendment's right to vote (a right not granted women until 1920).[10] These laws helped minorities enter the workforce in a different capacity – but a workforce that unfortunately possessed similarities with their prior standing.

In the pre-industrial United States, employers enjoyed almost absolute autonomy over their labor force based on property, liberty, and contract rights. Twelve hour work days, harsh conditions, and even child labor were neither uncommon nor illegal under the prevailing doctrine of employment-at-will.[11] Blacks were still segregated from whites at schools, homes, restaurants, and jobs. But as the nature, number, and severity of oppressive practices grew, so too increased labor reforms and court decisions designed to protect these same employees. Both statutory regulations and judicial enforcement proliferated, limiting little-by-little the employer's authority, until the bargaining power between employer and employee became much less inequitable, forever changing the reality of employment-at-will.[12] The courts currently find protections for employees in contract theory (which includes collective bargaining agreements), public policy (primarily in statutory regulations), and implied covenants of good faith and fair dealing.[13] The public policy exception can be quite extensive since it is based on "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public good or established interests of society."[14] So although employers still possess great power and discretion over how to run their business, including the right to make workplace rules, appearance codes, and grooming policies, the law has chipped away at that breadth by recognizing the existence of many countervailing employee rights. The Civil Rights Act of 1964 is of course the landmark legislation embodying many of those employee rights and protections in regard to discrimination.

The Civil Rights Act (1964) outlawed discrimination in voting, public facilities, public education, housing, credit, and employment (under Title VII).[15] Even though race, sex,[16] color, national, origin and religion were all included in its protected classes, it was the prohibition of race discrimination that was the primary purpose and target of the 1964 Act.[17] Pregnancy (Pregnancy Discrimination Act of 1978),[18] age (Age Discrimination in Employment Act of 1967),[19] and disability (Rehabilitation Act of 1973[20] and Americans with Disabilities Act of 1990)[21] were subsequently given protected class status

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by separate statutes. Some individual states protect additional groups by providing anti-discriminatory safeguards for smokers, obese persons, political affiliation, sexual orientation,[22] and marital status.[23] The Civil Rights Act of 1991[24] codified much of the courts' twenty-five year perspective and rulings on the 1964 Act.

Even though forced servitude and extreme oppression have passed, the beast that was discrimination is still raising its ugly head well into the 21st Century. Globalization, immigration reform, same-sex marriage, workplace diversity, racial profiling, terrorism policy, international conflicts, genetic advancements, cosmetic surgery, [25] body art, and privacy concerns are part of the current historical and cultural context, with each revealing subtle and not-so-subtle prejudices in their own right. "Trait discrimination" is one of many examples of how the prejudices of the past have pushed their way into the present. "Diversity" has become both a description and goal of this era, with the social goals behind the civil rights of the 60's and 70's finding new voice in the diversity initiatives of the 21st Century. In order to properly prevent the myriad of dangers and detriments of discrimination to the workplace and the world, Title VII and its progeny must necessarily adapt to these new faces and forms of discrimination and their unique historical context.

This early history and current context are presented to remind us of the prominent role that the quest for equal rights played in the formation of this country and of its underlying values, as well as remind us of the horrors we have perpetrated when we have failed to properly exemplify those values. The collective civic memory must never forget the crucial role that anti-discrimination law has and should continue to play in ensuring that these past injustices will never be repeated in any way, shape or form, and even more so, in propelling our future society along a higher moral trajectory. History also reveals that the equal rights movement was originally quite messy and slow – two imperfections that current courts, legislatures and employers should do their best to avoid repeating. As we approach the 45th Anniversary of Act (and the 20th since its last revision), recent developments in business, law, and society seem to beckon Congress and the courts to revisit and revise certain aspects of Title VII.

III. Title VII of the Civil Rights Act (1964)

The Civil Rights Act (1964) outlawed discrimination in voting, public facilities, public education, housing, credit, and employment (under Title VII).[26] Title VII declared it 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.[27]

The categories protected – race, color, religion, sex or national origin (and later age, pregnancy, and disability) – were seemingly selected in part based on the representative group's political powerlessness, history of discrimination, immutability of characteristic, irrelevance to employment, and sense of injustice.[28] Congress' clear intent was to ensure equal employment opportunities for all people by prohibiting policies that serve as barriers to the identified groups historically treated unfairly in favor of others.[29] Title VII extended the various constitutional protections embodied in the 14th Amendment to private employers with over 15 employees.[30] Yet, the statutory prohibitions were deliberately balanced against the traditional rights of employers to run their business as they desire, including the making of employment decisions.[31]

Both the courts and the National Labor Relations Board have held that appearance codes are "terms and conditions of employment" within the meaning of Title VII and thus subject to its prohibitions.[32] In short, appearance codes or grooming policies that discriminate "because of" or "on the basis of" the protected categories of "race, color, religion, sex or national origin" (and age, pregnancy, and disability) violate Title VII. Unfortunately, the legal analysis of what exactly, according to Title VII, constitutes "discrimination," or "because of," or even what constitutes "race, sex, color, religion, sex or national origin (and age, pregnancy, and disability)" has proven much more challenging than anticipated. In preparing to move the law forward in this area, it is first necessary to articulate with a bit more precision the current state of the Title VII framework (or at least what it appears to be), especially its application to appearance rules.

A. Title VII's Analytical Framework: Three-Prongs of *McDonnell Douglas* & Two-Motives of *Price Waterhouse*

Title VII currently provides for three theories of employment discrimination: 1) intentional discrimination (single-intent/pretext disparate treatment), 2) mixed-motive (another form of disparate treatment), and 3) unintentional (disparate impact).[33] Each theory in turn applies a comparable three-part analytical framework established in *McDonnell Douglas* that: 1) requires plaintiff to prove a prima facie case, 2) provides for limited affirmative defenses, and finally, 3) allows for even more limited rebuttals by plaintiff to overcome those defenses.[34] What satisfies each prong varies, of course, depending on which type of discrimination - disparate treatment, mixed motive, or disparate impact - is alleged. Thus, the uniqueness of each theory manifests itself in what and how it satisfies the legal requirements of each part of the three-prong framework.

To prove a **prima facie case** of discrimination under Title VII, the statute and its judicial interpretations look for: 1) Less favorable treatment, 2) to any of the statutorily protected groups, 3) as to terms, privileges or conditions of employment, 4) perpetrated by an employer or union, 5) either intentionally, unintentionally, or with mixed-motives.[35] Direct evidence is needed to establish a single-intent cause of action, but circumstantial evidence suffices for mixed-motives and disparate

impact.[36] The courts then methodically and invariably apply the second prong of the *McDonnell Douglas* framework by evaluating whether one of the available **affirmative defenses** exists, before applying the third prong.

The affirmative defenses are, respectively, 1) Bona Fide Occupational Qualification (BFOQ)[37] and 2) and alternative nondiscriminatory business reason[38] (with no improper motive whatsoever) for single-intent and mixed-motive cases. Mixed-motive cases further benefit from the "would have taken the same action" defense as an additional avenue to reduce plaintiff's available remedies, but not to escape overall liability.[39] In disparate impact cases, 1) business necessity is the primary affirmative defense, with 2) an undue hardship enabling the employer to avoid the reasonable accommodation requirement for disability or religion. The third prong affords plaintiff the opportunity to **rebut** and overcome all of the affirmative defenses with a showing that the reasons given were nothing but a pretext.[40] The burden of proof shifts back and forth between the employer and employee for each part, with the exception that the employer need only "articulate" the legitimate other reason in single-intent case.[41]

B. Disparate Treatment: Single-Intent Discrimination "*because of* "a Protected Class

Disparate treatment refers to an employer intentionally treating an individual or group of employees differently than another similar group for reasons related directly to or "because of"[42] their race, color, religion, sex, and/or national origin (pregnancy, age, and disability). Title VII declares that it is an unlawful employment practice to make employment decisions "because of" a person's protected class (e.g., hiring men over women for the same job).[43] The courts look at the employer's motivation behind such acts to determine the legal element of intentionality derived from the statute's use of the phrase "***because of*** such individual's race, color, …" when describing discrimination.[44] Although relatively straight forward, confusion began when the courts used the words motive and intent interchangeably in their explanations of the requisite state of mind.[45] Soon, the courts clarified that the ill-will of animus was not necessary for intentional discrimination, just the purposeful use of the protected classification in coming to unfavorable employment decisions.[46] In **single-intent** cases, plaintiffs must establish with **direct evidence** that the employer **intentionally** (equated with the "because of" language in the statute) used the protected class status as a **substantial factor** in the employee's less favorable treatment.[47] The 9th Circuit recently added that plaintiffs provide sufficient evidence of discriminatory intent with a showing that employer's actions, decision or policy resulted in **unequal burdens** upon members of the protected classes.[48]

Title VII articulates an **affirmative defense** to single-intent disparate treatment, excusing it only when the trait itself (of the protected class) "is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprises."[49] For example, courts have allowed employers to hire only men to work as prison guards in an all-male maximum security jail[50] or only women to serve as shop clerks in a women's store that actually helps its female customers in the dressing rooms.[51] Race is never a valid BFOQ. This is clear from the statute's explicit omission of race and color from BFOQ status (only sex, religion, and national origin are listed as BFOQ's, while race is explicitly included most everywhere else).[52] The courts have clearly confirmed this conclusion.[53] A BFOQ is an absolute defense when proven by a preponderance of the evidence.[54] The BFOQ is a very limited exception and explains why the courts have recognized so few BFOQ's (other than to protect important privacy concerns).[55]

The Court carved out a second alternative defense for single-intent (pretext) discrimination, namely, that the decision was based on a **legitimate business reason** (alternative nondiscriminatory reason) other than a BFOQ.[56] The defendant employer need only "articulate" the legitimate business reason – for instance, bad performance reviews - in order to overcome the prima facie case of discriminatory intent.[57] In the three-prong approach, the Plaintiff may rebut the defendant by proving that the articulated legitimate nondiscriminatory reason was really nothing more than a pretext used to hide the fact of purposeful discrimination.[58]

The courts soon realized that their efforts to accurately divine the actual intention, motive, mind, and heart of the employer was not the best way to enforce Title VII, so they introduced the mixed-motives theory of disparate treatment in order to better address the complexity of the human decision-making process and to better balance the right of the employer and employee as Title VII had intended.[59]

C. Mixed-Motives (Disparate Treatment): *Price Waterhouse v. Hopkins* (1989)[60]

The Circuit Courts eventually established the ***mixed-motives*** theory of discrimination – so named since mixed-motives could motivate an employer's decisions, that is, both a legitimate business reason and an improper discriminatory reason could simultaneously contribute to adverse treatment of an employee – and each to varying degrees. The Supreme Court endeavored to clarify the doctrine by indicating that a prima facie case was established when plaintiff-employee presents "***sufficient*** [direct] ***evidence***" that the discriminatory reason or action was a "motivating, but not necessarily substantial factor" in the employee's less than favorable treatment.[61] In its 1991 Amendments, Congress codified the mixed-motives theory, but revised certain evidentiary aspects.[62] The 1991 Civil Rights Act established that the unlawful "motivating factor" necessary for a violation of the mixed-motives theory of Title VII exists "*even though other factors also motivated the practice*."[63] Meanwhile, in **mixed-motive** cases, plaintiff-employee need only provide **sufficient** evidence (which circumstantial evidence can support) [64] that the protected class was a motivating factor (however slight) in the employer's less favorable treatment (compared to the direct evidence required for single-intent cases).[65]

In addition to the same affirmative defenses afforded employers in single-intent/pretext cases (i.e., **Bona Fide Occupational Qualification (BFOQ)** or "**legitimate business reason**"), defendant employers are also afforded the "***would have taken the same action in the absence of the impermissible motivating factor***" defense.[66] As the phrase "mixed-

motives" implies, the employer also had non-discriminatory reasons for the unfavorable employee decision. For example, even when sufficient evidence exists to establish that a female employee was dismissed "because of" the company's bias against women, the employer sought sanctuary in the affirmative defense that it "would have taken the same action" based on a ***legitimate business reason*** such as her poor attendance and inadequate sales performance.[67] But the 1991 Act altered the understanding and completeness of this still "*would have*" affirmative defense,[68] no longer recognizing it as an absolute defense if the illegitimate discriminatory motive had any influence whatsoever on the unfavorable employment decision.[69] Defendant-employer may still utilize the "***would have taken the same action***" defense,[70] but only to reduce the employee's available remedies.[71] The defendant arguably can still fully overcome the prima facie case, but only by proving that his/her decision was based ***actually and solely*** on a legitimate nondiscriminatory business reason (which would essentially repudiate even the existence of a mixed-motive).[72]

Plaintiff-employees may still overcome the employer's affirmative defenses in intentional disparate treatment cases by proving with either direct or circumstantial evidence that the employer's legitimate reason was really a pretext. The Court even allows the jury to infer a pretext from the evidence, including the poor reasoning of the defendant.[73] However, the *Hicks'* Court diminished the power of the pretext rebuttal when it held that proof of pretext does not necessitate that judgment be rendered for plaintiff-employee since all the circumstances can be considered.[74] Clearly, from its inception, Title VII's intent or motive requirement proved challenging, with the courts establishing not just two separate theories of intentional discrimination (single-intent/pretext, and mixed-motives), but a third theory that addressed discrimination when intent was either impossible to determine or in fact non-existent.

D. Disparate Impact: Unintentional Discrimination "*on the basis of*" a Protected Class

Much earlier in *Griggs v. Duke Power Co*., the Supreme Court made "disparate impact" an alternative theory of discrimination under Title VII, to accompany disparate treatment.[75] The Court recognized that certain policies could adversely impact one of the Act's protected groups, albeit inadvertently and without ill-will, yet leave them without the very protection or remedy intended by Title VII's implementation. In *Griggs*, all employees were required to have a high school diploma or pass a standardized test, which on its face seemed to be a fairly neutral policy. However, in the 1970's South, this requirement naturally affected blacks more than whites because minority educational opportunities had been limited for so many years.[76] Since, on its surface, the rule applied equally to all groups, it did not seem to display the discriminatory intent or motive necessary for a finding of a Title VII transgression. Finding no such bad intent, the lower courts held the policy legal since it also seemed based on the legitimate business purpose of assuring the quality of workers. The Supreme Court, believing such a result contravened the intention and purpose of Title VII, established the "disparate impact" theory as an additional cause of action under Title VII.

In **disparate impact** cases, intentionality is not required, but a showing of materially adverse less favorable treatment upon the protected group is still necessary to establish a prima facie case (i.e., "a **disparate impact on the basis of** race, color…").[77] Either circumstantial evidence or direct evidence, often statistical, meet the Plaintiff's initial burden of proof in such cases. The unintentional discrimination of disparate impact can be attributed to a particular employment practice or to an "inseparable decision-making process."[78] Either way, the plaintiff must establish that the practice in question had a "***materially adverse impact***" upon the terms or conditions of employment to a protected group.[79] What constitutes "materially adverse" was and continues to be a debate of significant importance, which led the EEOC to issue explanatory guidelines that included the 4/5th or 80% rule.[80] The Supreme Court indicated that statistics can be used by comparing the sample size, the available workforce and application pool with the relevant labor market,[81] but the statistical evidence, although legitimate and admissible, is not conclusive.[82] Under different circumstances, credit status, marital standing, criminal or arrest record, education, height, weight, strength and even some appearance requirements have all been held to be "screening devices" that created a disparate impact.[83] Grooming policies and dress codes seem to be the most recent scheme or oversight causing a discriminatory impact upon different groups. The percentage rule and the overall need to display an adverse impact on the group is why most disparate impact actions take the form of class actions.

Under the Civil Rights Act of 1991, Congress codified the disparate impact theory and clarified that the businesses' affirmative defense was "***to demonstrate***" that the business practice was "***job related*** to the position in question" and "consistent with ***business necessity***."[84] Congress clarified that in disparate impact cases, the burden of proof shifts throughout the three prongs.[85] The business necessity defense protects the defendant unless, similar to mixed-motive cases under disparate treatment, plaintiff can prove (by the usual preponderance of the evidence in civil cases) that the other reason was merely a pretext for a discriminatory action. For disparate impact cases, the 1991 Amendment to Title VII also placed some responsibility on the employer to reasonably accommodate the employee. An additional rebuttal is available if the plaintiff can show that a reasonable alternative employment practice with less unfavorable consequences was rejected by the employer in favor of the practice in dispute.[86] For this rebuttal to succeed, the employer must have had awareness of the alternative and affirmatively rejected it in favor of the allegedly discriminatory practice.[87] Lastly, the courts have identified specific exceptions to the doctrine, such as seniority systems, merit systems, and drug testing.[88]

Congress intended Titled VII to remove the discriminatory barriers to employment opportunities and thereby improve the well-being of individuals in protected groups, businesses, and of overall society.[89] Arguably, Title VII has accomplished part of its goal by significantly reducing the overt racism and sexism that existed in 1964, when the Civil Rights Act was first passed. EEOC cases dealing with animus have dropped drastically and equal opportunities and diversity

in the workplace have increased significantly.[90] Yet, as the over 75,000 charges of discrimination filed with the EEOC in 2006 clearly reveal, unequal treatment in employment still exists.[91] One new form or manifestation of discrimination causing concern is called ***trait discrimination.***

IV. TRAIT DISCRIMINATION: A CLOSER LOOK AT APPEARANCE RULES UNDER TITLE VII

Trait discrimination is the unequal treatment of legally protected groups (i.e., race, sex, religion, etc.) resulting from the classification of employees based on their ***traits*** (like hairstyle or clothing). For example, a rule prohibiting employees from wearing cornrows as a hairstyle may impact a larger number of minority workers (both women in general and African-American women) since they statistically wear more cornrow hairstyles. Employers often use traits as informal proxies for assessing the abilities and attitudes of individuals and their compatibility with the organization. Using traits in this manner is described as discrimination because it is based on stereotypes against and causes greater harm to the exact groups discrimination law was created to protect. This prejudice and bias, often rooted in unconscious prejudices, bubble to the surface in a variety of discriminatory behaviors, the implementation of appearance rules being just one.[92] Unfortunately, this form of unequal treatment has generally circumvented Title VII protection for various reasons.

Most courts have permitted employers to institute and enforce dress-codes and similar workplace rules as long as they are reasonable, work-related, based on neutral criteria, and applied equally to all employees.[93] For example, the courts have upheld rules that require employees to wear suits, dress in accordance with gender, be clean shaven, cut their hair, remove or cover tattoos, avoid certain hair styles, restrict jewelry or the associated piercing, or even act and talk in a certain manner (e.g., "conservative").[94] Conversely, shaving policies, weight restrictions, tattoo prohibitions, and gender stereotyping have all been found to violate Title VII under certain limited circumstances. These cases have allowed courts to introduce new concepts like cognitive bias, group identity, immutability, assimilation, and stereotypes to Title VII, which have provided legal insights and nuance to the traditional categories of intent, material adversity, and business necessity – especially when applied to the new forms of trait discrimination. This paper investigates these new concepts in more detail after first looking at their impact on the traditional protected categories of sex, religion, disability, age, and race.

A. Appearance or Trait Discrimination Based on Sex or Gender Stereotypes

The "**because of sex**" language in Title VII was originally understood narrowly to mean the **biological dimension** of the person, with gender issues generally excluded from the Act as a social construct.[95] For example in *Phillips*, the employer refused job applications from women with pre-school age children, but did not restrict applications from men with such children.[96] The Court essentially said that "without more," the mere existence of different policies for men and women (sex-differentiated) and for different sub-groups of women (intra-sex distinctions)[97] were not absolutely determinative of a Title VII violation.[98] The Supreme Court's opinion in *Phillips*[99] unwittingly led to the "*sex plus"* discrimination doctrine as one way to violate the Civil Rights Act.[100] Accordingly, most courts did not even consider sex-differentiated dress codes to fall under Title VII, explaining that they failed to meet the "because of…sex" condition necessary for protection under Title VII since they dealt with appearance and not with sex in its biological dimension.[101]

1. Sex-Differentiated Policies and Sex-Plus Discrimination

The "more" or "plus" factor of the **sex-plus theory** was subsequently interpreted by the courts to mean an immutable trait or fundamental right.[102] A no marriage rule for female flight attendants was ruled to be in violation of Title VII, inconsistent in its intra-sex distinction that infringed on the fundamental right to marry.[103] However, this perspective was so narrow that it even led the Supreme Court to permit discrimination based on pregnancy,[104] which Congress immediately remedied via statute[105] and the Court subsequently confirmed.[106] The sex-plus theory was later used to find certain appearance rules discriminatory (e.g., women, but not men had to wear color coordinated uniforms;[107] and only women clerks had to wear smocks over clothes),[108] but found others, mostly dealing with men's hair length acceptable.[109] Although this position seems much more tenuous post *Price Waterhouse* and after the 1991 Amendments, the current understanding of Title VII remains somewhat intact – that **sex-differentiated appearance policies** are not violative of Title VII by their mere nature (in and of themselves), and thus they are permissible under most circumstances unless they **impose unequal burdens** or are **applied inconsistently**.[110]

The *Willingham* court held exactly that - sex-differentiated appearance rules do not usually violate Title VII - in approving a grooming policy that prohibited only men from wearing long hair.[111] The *Willingham* court also explained how Title VII expects some degree of **equality and consistency in the enforcement** of the workplace appearance rules, not just in their stated requirements.[112] For example, a weight policy that applied only to women was a clear violation of Title VII.[113] Similarly, different **weight classifications** for men (large frame) and women (medium frame) airline attendants were ruled discriminatory since they resulted in greater burdens upon the women than upon the men.[114] In another instance, a women's retail clothing store required all its employees to "wear clothes that reflect fashions sold in the store appropriate for the season."[115] The policy is most likely a reasonable and non-discriminatory dress code since it applies to all employees and has a legitimate business purpose. However, that same company might find itself facing charges of discrimination if it admonishes and punishes a black employee for violating that same dress code by "wearing her Islamic over-garments, which were comprised of a long robe and a head scarf," while taking no action against a "white, non-Muslim employee at the store [who] frequently violated the dress code by wearing midriff-baring shirts, body piercings, and colored hair."[116] In fact, what

began as a reasonable rule is probably the source of discrimination based on race, religion and retaliation, due to inconsistent enforcement.

2. Sex as a BFOQ

Even if a dress code is found to come under Title VII scrutiny for intentional discrimination, proof of a valid BFOQ will still legitimize the policy,[117] with some courts explicitly ruling that sex-differentiated appearance rules fit within the BFOQ defense.[118] Sex has been held to be a BFOQ for prison guards in a maximum security prison,[119] nurses who would be caring for female patients,[120] restroom and dressing room attendants, primarily in respect of customer privacy.[121] The EEOC acknowledges an exception for "the purpose of authenticity or genuineness…e.g., an actor or actress."[122] Customer concerns about bodily privacy are often at the source of the BFOQ exception for sex, yet even bodily privacy does not guarantee a BFOQ if there exists a way to minimize encroachment upon the customer's privacy.[123] For instance, sex was not a BFOQ for customer preference in a massage therapist.[124]

The BFOQ is a very narrow defense, however, since the employer is intentionally treating women differently than men, but arguing that distinction is quite necessary for the performance of the job.[125] For example, the United Airlines' imposition of different weight requirements for men (large-frame standard) and women (medium-frame standard) flight attendants had no BFOQ to justify it.[126] Nor did the 7th Circuit find a BFOQ to support the rule "women to wear uniforms and men to wear customary business attire."[127] The requirement that women clerks wear smocks, while male clerks wear shirts was ruled an invalid dress code requirement with no supporting BFOQ.[128] Requiring a female lobby attendant to wear an openly provocative uniform was similarly in violation of Title VII due to the sexualized nature of the unequal burden imposed on woman without any justifiable BFOQ.[129]

In *Fernadez*, the Wynn Oil Company (Wynn) argued that it did not promote Fernandez, a woman, because the position required interactions with Latino and other nations that may forego doing business with women.[130] Wynn's position was that male sex was a BFOQ[131] for jobs in foreign countries where women are barred from business because of that country's gender bias.[132] The Court rejected **customer preferences as a BFOQ**, especially when rooted in sexual stereotypes.[133] Southwest Airlines also failed in its bid to convince the courts that its attempt to market and provide "heterosexual male titillation" lifted its female hiring practices to that of a BFOQ.[134] The EEOC's Guidelines make it very clear that the BFOQ "exception as to sex should be interpreted narrowly" and thus not warranted "because of the **preferences of coworkers, the employer, clients or customers**."[135] Overall, the BFOQ defense is very limited, with the courts placing great emphasis on the connection between the protected class status of the sex itself (not just the policy) and the central and essential functions of the business.[136] An immodest example is that sex (women) is a BFOQ for the Playboy club because its focus is on entertainment for men, while sex is not a BFOQ for Hooter's since its central function is the serving of food, and its entertainment considered secondary.[137]

In general, Title VII does not extend BFOQ protection to employment decisions based on physical or sexual attractiveness,[138] even though these reasons may satisfy the business necessity defense for disparate impact. "Economists argue that physical appearance is a… valid hiring consideration" because personal satisfaction, customer comfort, and co-workers contentment with that appearance will all influence the workplace and its productivity.[139] Physical appearance may reach the legal level of a business necessity for acting jobs, Playboy clubs, or possibly a TV newscast.[140] Appearance rules and grooming policies require closer scrutiny, however, when they become entangled with characteristics associated with a protected class. For example, the cornrows of an African-American woman raise both gender and race issues. Thus, customer preference may not be a satisfactory reason, but safety might. In addition to the BFOQ, the "*would have taken the same action*" affirmative defense now removes the case outside of single-intent scrutiny and provides a limited escape in mixed-motive cases like *Price Waterhouse*, which established it.[141]

3. *Price Waterhouse*[142] and Gender Stereotypes

In *Price Waterhouse v. Hopkins*, the Supreme Court held that making employment decisions based on gender stereotypes is discriminatory.[143] The Court found that the plaintiff was wrongly denied partnership in her accounting firm based in part on "stereotypical notions about women's proper deportment."[144] Until this landmark opinion, the "because of sex" component of Title VII had been interpreted to mean predominantly the biological dimension, with gender issues generally excluded as a social construct.[145] The *Price Waterhouse* Court changed that limited view, expanding the reading of Title VII to prohibit discrimination rooted in **gender stereotypes** associated with the protected class of sex and "with equal force to discrimination based on race, religion, or national origin."[146] Thus, stereotyping now satisfies the motivating factor requirement needed to establish disparate treatment discrimination.

Even with Price Waterhouse, most dress code cases still fail under Title VII for a variety of reasons – lack of intent, legitimate other reason, would have taken the same action, and no real harm or adverse affect to the employee. In fact, the defendant employers in *Price Waterhouse* attempted to argue that they would have still put Ms. Hopkins' partnership on hold because of her "abrasiveness" with staff members.[147] Although her difficulties with staff had some probative value, contrary evidence identifying her many attributes as "an outstanding professional"[148] seemed to dispute defendant's affirmative defense that they would have made the same decision based on a legitimate business reasons. Their affirmative defense was all the more precarious when the gender stereotyping evidence was considered. For example, one partner suggested that she "walk more femininely, talk more femininely, dress more femininely, wear-make-up, have her hair styled, and wear jewelry" in order to improve here chances for partnership.[149] This and other evidence like it clearly provided the sufficient evidence

that gender stereotyping was a motivating factor, established "because of sex" causation in support of the prima facie case of mixed-motives, and outweighed any evidence of a contrary legitimate business reason. The fact that the *Price Waterhouse* Court switched the burden of proof to the defendants to establish their affirmative defense only made Hopkins position that much more impregnable.

Price Waterhouse's recognition of gender stereotyping under Title VII's "because of sex" softened, if not altogether eliminated, the earlier distinction between sex as biological and gender as social, a distinction which kept gender issues outside the purview of Title VII.[150] Yet, the Court did not decide what aspects or what degree of stereotyping or dress codes were required to substantiate impermissible forms of discrimination. A very broad reading of *Price Waterhouse* would consider any stereotyping whatsoever a violation of Title VII. Such a view would theoretically render any and all appearance codes discriminatory since they are all based at least in part on social constructs of what is acceptable gender appearance (i.e., gender stereotypes). Disciplining men for wearing dresses and make-up to work, for instance, would thus violate Title VII, which it in fact has according to the few courts who read *Price Waterhouse* in this expansive manner.[151] Title VII was intended to protect employees from certain forms of discrimination, but not to completely eradicate the rights of the employers to determine workplace decorum.[152]

Congress quickly responded by passing the 1991 Amendments to the Civil Rights Act. Congress codified the mixed-motives theory created in *Price Waterhouse*, but revised certain evidentiary aspects. The Act required the plaintiff-employee "to ***demonstrate***[153] that race, religion, color, sex, or national origin was a ***motivating factor*** for any employment practice, even though other factors also motivated the practice."[154] The Supreme Court interpreted this new language to allow circumstantial evidence and inferences to be used in establishing a prima facie case of mixed-motive discrimination.[155] This created anew questions over how much stereotyping was too much and whether sex-differentiated dress codes rooted in even minimal gender norms "demonstrated" that stereotyping was a "motivating factor" in violation of Title VII.

4. *Jespersen*[156] and the Undue Burdens of Make-up

The *Jespersen* court decided that a make-up requirement did not discriminate against women in violation of Title VII. At first blush, *Jespersen* appeared simply to reinforce the legal status quo, which allowed employers to implement appearance rules as long as one protected class of employees is not adversely affected compared to another (or if so, with legally acceptable justification). The *Jespersen* court introduced the concept of **unequal burdens** as a litmus test for establishing in part a prima facie case of discrimination.[157] However, the court seemed to apply the unequal burdens test not simply to the material adversity requirement in line with legal precedent for disparate impact cases, but as evidence of motive and intent for disparate treatment. The 9th Circuit, in its somewhat infamous and inimitable way, appeared to merge the disparate treatment and disparate impact theories in their concept of undue burdens.

In addressing these questions, the *Jespersen* court rejected that a sex-differentiated policy was proof in itself of discriminatory intent without a showing of unequal burdens upon one party.[158] The ***unequal burdens test***, if met, would "demonstrate" the motivating factor necessary for a finding of mixed-motive discrimination under Title VII as amended.[159] The unequal burdens also seemed to satisfy the material adversity needed for both disparate treatment and disparate impact cases. The ***unequal burdens test*** seemed to be an explicit effort by the court to apply the stereotyping principles of *Price Waterhouse* and the new language of Title VII to dress codes in general. The *Jespersen* court held that appearance requirements that apply equally to men and women, albeit somewhat different in character, are usually upheld as "excluded from the reach of *Price Waterhouse.*"[160] The court elaborated that "sex-based differences in appearance standards alone, without any further showing of disparate effects" do not establish a prima facie case of intentional discrimination.[161] Thus, the majority of the court (7 to 4 en banc) did not consider the gender stereotyping implicit and inherent in most appearance rules to rise to the level of the gender stereotyping perpetrated and prohibited under *Price Waterhouse* – because the rules did not incur unequal burdens on one protected class over another.[162] The majority also reasoned that the costs, time, and hassles of putting on make-up were not an unequal burden (including the emotional hardships associated with complying unwillingly to gender stereotypes).[163] Or maybe more accurately, the court decided that insufficient evidence was presented by *Jespersen* for the court to reach that conclusion.[164] Either way, the four dissenters thought otherwise, arguing that the extra time, costs, and discomfort of make-up were in fact a burden, and unequal in that only women had to comply.[165] Two of those four found that the make-up policy in and of itself was in fact a form of gender stereotyping prohibited by *Price Waterhouse* and thus enough evidence to demonstrate an improper motivating factor as required by Title VII.[166]

Under certain circumstances, stereotyping, gender and otherwise, may provide enough evidence of the Title VII elements of: 1) "because of sex" motivating factor (either single-intent or mixed-motive), 2) the adverse affect upon the protected group, and/or 3) a disparate impact upon the group.[167] The unequal burdens caused by the stereotyping may reach a level that supports one or all of these dimensions of discrimination, while lower levels of socially normative stereotyping do not seem to satisfy any of the elements. Restated, "different appearance standards are permissible under Title VII if they impose ***equal*** burdens" (but not identical) upon both men and women employees and prohibited if they impose "unequal burdens" upon one protected group compared to another.[168] Accordingly, a company need ***not*** have identical appearance, grooming or clothing requirements for both men and women in order to avoid liability, as long as the dress code places comparable expectations and burdens upon the protected groups. For example, grooming policies that have different requirements for men and women as to hair length and style are not by themselves sufficient evidence for a prima facie case of discrimination under Title VII.[169]

A grooming policy that mandates everyone must adhere to **socially constructed stereotypes** and is then **enforced equally and consistently** would seem to be adhering to Title VII expectations. The *Jespersen* court touched on this, albeit a bit confusingly, in its explanation of unequal burdens. *Price Waterhouse* implied it since only the female employee (Hopkins) appeared to be held to any stereotypical standards for the job decision. Under current cases, it would seem that "sex-differentiated dress and appearance requirements" are valid to varying degrees when they are based on **socially acceptable, "normative stereotypes**."[170] "Thirty years of precedent reveals that it is not sex discrimination for employers to require members of each sex to dress as dictated by the socially accepted standards prescribed by our culture."[171] Adamantis references hair length and clothing cases to conclude that "where grooming and attire policies apply to both sexes, they may distinguish between the sexes based on generally accepted social norms or standards."[172] Although the courts seem to recognize that some socially acceptable standards and community norms may in fact contain and perpetuate racist and sexist perspectives and that employment decisions based on non-conformity to these stereotypes raise real concerns about discrimination, it does not seem that they intend to wipe out the employer's right to consider social norms, customs, and conventions when adopting appearance rules.[173] Even the improper weight restrictions that had a disparate impact on a sex would have been upheld if some legitimate business reason supports it.[174]

These protections afforded employers are vast, but not absolute. For example, the different weight standards for men and women that United Airlines applied did create unequal burdens in violation of Title VII.[175] Thus, if the distinctions in the appearance requirements themselves or in the application of such rules reach a certain level of difference or of stereotyping, then the grooming policy will violate Title VII (absent an overriding business justification).

5. *Smith*[176] and GLBT

It should be noted that courts have used the "stereotyping" reasoning to extend coverage, in very limited circumstances, to situations involving sexual orientation and transgender status.[177] But these courts make it quite clear that they do so based on the stereotyping and roundly reject equating "gender-stereotyping" prohibitions to sexual orientation and transgender status.[178] In *Smith*, for instance, the court held that the suspension of a transsexual police officer for being too effeminate violated Title VII's "because of sex" prohibition**.** The *Smith* case followed *Price Waterhouse's* finding of discrimination based on sex-stereotyping to rule that other gender issues such as transsexualism could be the basis of discrimination "because of sex" in contravention of Title VII.[179] The court explained that Price Waterhouse clearly extended Title VII's "because of sex" protections beyond its earlier biological understanding without rooting it in unprotected categories like homosexuality.[180]

Although sexual orientation and transgendered status are not protected categories under Title VII, their mere presence does not automatically defeat a Title VII action. Even though both classifications have been explicitly rejected as fitting directly within the statute's "because of sex" language, some courts have nevertheless found coverage for transsexuals or people with Gender Identity Disorder or Dysphoria (GID) based on theories of gender stereotyping as established by *Hopkins*. For example, Title VII was found to protect a transsexual police officer who was refused promotion because of his more feminine demeanor.[181] The court believed gender-stereotyping was the motivating factor behind such treatment, not his transexualism.[182] Yet, in another, the rejection of a job applicant for being too effeminate was upheld by the court, which believed the employer reacted to the transexuality of the prospective employer more than a gender stereotype.[183] The deciding factor in these cases appears to be whether the court determines the discrimination to be motivated primarily by gender stereotypes (protection given) or by bias surrounding sexual orientation or sexual identity (protection denied). The majority of courts seem to avoid a finding of gender-stereotyping, instead granting summary judgment for employers, "concluding…that the tendered evidence revealed only hostility to the plaintiff's sexual orientation or transgendered identity."[184] But some scholars see a shift towards protection for transsexual and related cases resulting in part from *Price Waterhouse*.[185]

In general, employer dress codes that involve sex and gender categories lose their general protection when they are clearly unequal in expectations, applied inconsistently, or are clearly rooted in unnecessary gender-stereotypes (including toward transsexuals).[186]

B. Appearance or Trait Discrimination Based on Religion: Reasonable Accommodations for Hair, Tattoos, Peircings and Body Art

Religion, like sex and race, is also a protected class under Title VII, thus precluding employers from discriminating against employees because of religion, which "includes all aspects of religious observance and practice, as well as belief."[187] The religious practices of Muslim men calls for facial hair, of Jewish men to wear a yarmulke, and of Christian women to wear medals. Appearance codes requiring workers to be clean-shaven and to refrain from headwear and jewelry all have religious implications upon the above groups and invoke the scrutiny of Title VII. Yet, a major difference and limitation exists between the protections afforded religion compared to race and sex under Title VII.

Title VII and its protections no longer apply to religion when "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[188] Stated affirmatively, businesses must ***reasonably accommodate*** employees as to "all aspects of religious observance and practice, as well as beliefs" unless such accommodation creates "***an undue hardship*** on the conduct of the employer's business."[189] One of the most common examples of reasonable accommodation is when an employer must alter an employee's work schedule in accordance with the employee's Sabbath.[190] Appearance rules, likewise, must try to reasonably accommodate an employee's religious observances in regards to attire.[191]

For example, a hospital reasonably accommodated employees' religious beliefs when it allowed "Muslim women to wear skirts instead of uniform pants."[192] A women's religious vow to continuously wear an anti-abortion button was reasonably accommodated by allowing her to wear it, but covered during work hours.[193]

Accommodations, on the other hand, that create an undue hardship upon the business are no longer reasonable, and thus no longer required.[194] An "undue hardship" is anything more than a minor, or "de minimis," burden on the employer.[195] Even in Sabbath cases, an undue burden is created when the scheduling accommodation would disrupt a variety of other employees work schedules, contradict a seniority system, or violate a collective bargaining agreement.[196] Similarly in dress code cases, courts have found it an undue hardship to accommodate appearances that may impact safety and health. For example, Chevron did not have to accommodate a Sikh employee's desire to retain his beard (which was part of his religious tradition) in violation of the clean-shaven requirement of the company dress code because the policy promoted important employee-safety related to "wearing a respirator with a gas-tight face seal."[197] According to a very similar international version of the business necessity defense, a Sikh was legally required to switch to a lower paying job because he could not and would not wear a necessary hard hat over his turban.[198] Conversely, the UK courts protected a Sikh from having to wear a food company's hat on top of his turban since the turban adequately satisfied the same hygiene goals.[199] It was also legal for the "UK airline BMI to ban flight crews from wearing crucifixes or Saint Christopher medals [or to carry bibles] on flights to Saudi Arabia to avoid offending Muslims."[200] An appearance code accommodation rooted in religion will no longer be reasonable nor required if it compromises safety and health concerns, creating an undue hardship outside the protections of Title VII.

The employer's non-safety arguments for undue hardship based on customer, co-worker or employer preference are much less decisive when addressing reasonable accommodations for religion. For example, the First Circuit held that "Costco had no duty to accommodate an employee who wanted to wear an eyebrow ring because it could not do so without undue hardship."[201] The employee claimed her piercing was protected by her membership in the Church of Body Modification.[202] The court validated professionalism in appearance as a legitimate business necessity by agreeing that ignoring the jewelry rule would be an undue hardship since it would be "detracting from the company's business image."[203] The employee would not accept Costco's reasonable accommodation (according to the court) of wearing her ring covered with a band-aid (which ironically the store had previously rejected when the employee originally suggested it).[204] Employees seem to share in the duty to find a reasonable accommodation (with the employer), as a complete exemption from a policy is often viewed as an undue hardship since it impairs the ability to enforce the policy in the future.[205] The Costco court "emphasized that accommodation went both ways."[206] The court explained that "an ***employee*** has a duty to cooperate with an employer's good faith efforts to reasonably accommodate an employee's religious beliefs."[207] The court went so far as to say that the employer does not have "a duty to grant an employee's preferred accommodation."[208] Accordingly, the court sided with Costco because it had a valid business reason and offered a reasonable accommodation, which was rejected by the employee. The earlier example of a hospital reasonably accommodating employees for religious beliefs when it allowed "Muslim women to wear skirts instead of uniform pants,"[209] also exemplified the mutuality of the accommodation by the fact that the skirts had "to be short enough to remain off the floor" in the interests of employee-safety.[210]

The Costco court gave customer preference more clout than most courts do, although it carefully avoided holding that customer preference is a sufficient justification in and of itself.[211] Although EEOC guidelines reject customer preference as substantiating a BFOQ, they acknowledge that these preferences might support a business necessity.[212] One may presume that the consideration of appearance rules, upheld in Costco for a cashier, would only increase with employment positions where appearance and professionalism may be seen as even more essential to the business function. The question remains to what degree appearance can be a business necessity when involving sex, race, or national origin since no reasonable accommodation is required.

Tattoos, piercings and body art raise religious discrimination issues in the private sector apart from the expression questions they create in the public sector. Although an immutable trait in one sense, the general ease in which tattoos may be covered renders them relatively mutable in the eyes of the court, securing less protection for them under Title VII. Courts seem to consider how closely the wearing of the tattoo is related to the overall religion or group identity of the religion.[213] The closer the tattoo is related to the wearer's religion, the more likely the law protects him/her, the more the tattoo ventures toward personal preference, the less protection its wearer can presume.[214] Red Robin Gourmet Burgers recently settled a suit brought by the EEOC on behalf of a worker terminated for refusing to cover up tattoos received as part of a ceremony in his Kemetic religion.[215] Due to the religious significance of the tattoos and the fact that the employee was a cook with very limited customer interaction, covering them up was not considered a reasonable accommodation by the EEOC. Government employees have also brought and lost body art cases that have argued constitutional protection.[216] Rules against tattoos and piercings are not isolated concerns since approximately 50% of employees under 40 wear them,[217] raising concerns about unintended discrimination and the retention of quality employees.

C. Appearance or Trait Discrimination Based on Disability (or Age)

Although the vast majority of dress codes would be evaluated under sex, race, and religion as original classes protected under Title VII, the Americans with Disabilities Act of 1990 (ADA)[218] deserves a brief mention since it could be and has been invoked in certain cases. The ADA adds disability to the protected classes given equal employment opportunity protection. The ADA defines disability as physical or mental impairment that substantially limits one or more…major life

activities" (like walking, seeing, eating, hearing).[219] The ADA prohibits employers from discriminating against people based on their disabilities, which include conditions like blindness, alcoholism, obesity, cancer, and AIDS/HIV.[220] Allergies, even to perfume, may qualify as a disability.[221] The ADA, like Title VII with religion, requires employers to make reasonable accommodations for persons with disabilities, so as to allow them to work.[222] Company weight expectations have led to a handful of cases under the ADA since obesity has been recognized as a disability that deserves the protection of a reasonable accommodation.[223] Cosmetic disfigurement is recognized by the ADA as a protected physical impairment when it substantially limits a major life activity.[224] In certain circumstances, the perception of the disability may be enough to receive protection under the ADA because the "impairments become substantially limiting only because of the negative reaction towards the impairment…by co-workers or clients."[225] Accordingly, employer's prejudicial "perception" to certain physical traits may invoke ADA scrutiny. People with facial burns, cleft palettes, and Treacher Collins Syndrome have received protection under the ADA.[226]

Like their counterparts that impact religion, appearance rules rooted in customer or co-worker preferences may run afoul of the ADA. Despite the similarity in the laws, Congress and the courts seem to exhibits a bit more concern about the potential prejudices faced by disabled in appearance policies than by those encountered by the original protected classes in Title VII. Lynn Vo points this out perceptively with the Supreme Court's statement that "society's accumulate myths and fears about disabili[ties],…[which] are as handicapping as the physical limitations that flow from actual impairment."[227] This is the same logic behind the criticism of employment appearance rules for other classes: that the socially constructed stereotypes and cognitive biases regarding race or gender will interfere with an individual's right to pursue gainful employment and to be protected from psycho-social harm. Yet, the courts do not seem to display the same level of sensitivity to these other classes when it comes to so-called "attractiveness."

The current culture's obsession with youth and beauty also manifests a form of appearance discrimination against the elderly (and others). Businesses that pursue youthful looking employees may run counter to the prohibitions of the ADEA (the Age Discrimination in Employment Act of 1967), which precludes unfair treatment to people over 40 in regards to employment).[228] Most ADEA cases were disparate treatment, rather than disparate impact, some courts rejecting even the possibility of the latter theory under the ADEA.[229] More recently, the Supreme Court recognized the availability of a disparate impact claim under the ADEA.[230] Appearance policies challenged under the ADEA for their impact on employees over 40 will most likely be ruled acceptable because the ADEA only requires a reasonably business policy to support it, not a business necessity.[231] For example, if youthful appearance is at all related to the job (e.g., modeling youth clothing), the company would likely avoid liability. Although ADEA cases need not adhere strictly to the Title VII prima facie framework,[232] the courts clearly look to Title VII for ADEA guidance and the ADEA for Title VII guidance as the text, tone and purpose of each are very similar.[233]

D. Appearance or Trait Discrimination Based on Race, Color or National Origin

Due to the history of race relations, discrimination based on race is especially abhorred and strictly scrutinized. Although other minority groups and classes were given protection under Title VII, the equal opportunities for people of all races, especially African-Americans, was clearly the driving force behind the Act. Congress essentially codified this point by purposely omitting race from the BFOQ defense (but not the others), wanting to do all it could to curtail intentional race discrimination.[234] The courts have done their best to follow the statutes intent by closely examining any policy with racial implications. The paradigmatic example was *Griggs*, where an apparently neutral policy requiring workers to have a high school diploma ended up disqualifying many more black job applicants than whites due to the educational inequalities that had existed for years.[235] In *Griggs*, the Supreme Court went so far as to create the disparate impact doctrine to protect against race discrimination that lacked the requisite intent.[236]

More recent policies target African-American appearance through clothing, jewelry, hair and tattoo restrictions. For example, no dreadlocks, braided, or long hair all impact blacks in disproportionate numbers. No dew rags, throwback jerseys, or visible jewelry do the same.[237] In addition to all of the invidious and overt forms of discrimination suffered by African-American men and women over the years, grooming policies often exact new harm upon them in the form of forced covering, assimilation, and subordination – which discrimination is every bit as injurious. For example, many clean-shaven or no-beard policies raise questions of discrimination against African-American men who suffer in disproportionate numbers from pseudofolliculitis barbae (PFB) (severe shaving bumps).[238] The requirement to be clean-shaven is usually considered a mutable trait excluded from Title VII scrutiny. However, courts have ruled such policies to affect an immutable trait for people with PFB, and thus a violation of Title VII for its disparate impact upon black men since they suffer in greater numbers than others from the condition.[239] As in any disparate impact cases, employers avoid judgments of discrimination if the policy is proven to be job related, consistent with business necessity, and no reasonable alternative exists. For example, the shaving policy is justified for firemen who need to wear respirators[240] and for supermarket employees who work with food.[241]

The EEOC itself has honored this concern with trait discrimination by declaring that a company's no-Afro or bushy hair policy would be a form of racial discrimination because "the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice."[242] Yet, courts struggle to fully adopt this rationale, confined by the immutability standard. And even when discrimination is found, it is often based on the discriminatory manner of its application rather than on the

discriminatory nature of the appearance rule itself.[243] For example, the court acknowledged that a grooming policy prohibiting ponytails was potentially applied in a discriminatory manner when only African-American workers were reprimanded for said hairstyle even though it was worn by others.[244]

Similar scrutiny is given to policies that target cultural traits related to national origin. The EEOC defines discrimination based on national origin in an expansive manner that clearly covers trait discrimination, prohibiting unequal treatment in employment: "because of an individual's or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[245] The 9th Circuit Court, rejecting the business necessity defense, held that a "height requirement for sheriffs…was racially discriminatory against Mexican-Americans."[246] The 10th Circuit similarly found "in favor of a Native American who was fired for refusing to cut his long hair, which was an integral part of his heritage."[247]

The Courts, however, have been inconsistent in their response. For example, although national origin seldom satisfies the BFOQ requirements, it can and was in fact held to have in a case where possession of Japanese culture, language, and heritage were considered essential for the ability to do business in Japan with Japanese companies.[248] Meanwhile, English-only policies have been upheld as non-discriminatory.[249] Accents are another trait that has occasioned different interpretations by the courts. Courts have permitted employment restrictions when the accent "interferes materially with job performance"[250] and prohibited those where the accent would not impair job performance.[251] The *Garcia* court upheld the validity of an English-only policy by reasoning that the language requirement was a mutable trait generally outside the protections of Title VII.[252]

An employer's characterization of "beauty" may also lead to issues of discrimination. Abercrombie & Fitch (AF) settled a lawsuit related to its hiring of young, white males as "brand representatives," while restricting workers of different races and colors to non-sales-floor jobs like the stockroom.[253] The class-action discrimination claim was filed by Asians, Latinos, African Americans, and females alleging that they were placed in les desirable, non-customer contact positions compared to the young, white males. AF tried to argue the young, white males were necessary to the business image that they were trying to convey to its consumers.[254] Although Abercrombie and other companies have tried to argue that such rules are rooted in the business necessity of image and appearance favored by customers and co-workers, the courts become very scrutinous when they seem to involve race or gender in addition to the alleged appearance even though the EEOC recognizes customer preference as a possible business necessity (unlike its rejection of it as a BFOQ).[255] The more closely related to race or gender, the courts may even require a BFOQ..

E. Appearance or Trait Discrimination Based on More than One Protected Class

Multi-group consequences or "intersectionality"[256] is an interesting consideration for the courts when calculating the degree and breadth of the trait's impact on the group's identity under both disparate treatment and disparate impact. Certain groups possess combined identities and/or sub-classifications within a group.[257] Looking at Roger's again, the cornrow policy arguably impacted Rogers and others as both an African-American and as a woman. The fact that she is impacted in two capacities increases the severity of the harm so that she should receive special scrutiny under disparate treatment. The courts should consider what impact the inter-group or intra-group status had upon the questionable treatment.[258] Some plaintiffs have combined disability claims with sex-differentiated dress code discrimination claims, especially when transgender issues are at play, for this exact reason.[259] The courts have affirmed this position to some degree by acknowledging black women as a distinct protected group under Title VII.[260]

Intra-racial distinctions and other forms of unequal treatment among members within the same protected class also raise similar questions of discrimination. Treating one woman who dresses "flamboyantly" one way and another who dresses "conservatively" another way, or favoring an African American who conforms more to the prevailing attire of corporate America than another black man who manifests his heritages more predominantly in his clothing and mannerism should not be excepted from Title VII simply because it involves people within the same protected groups.[261] The unequal treatment upon the one person is just as unequal, unfair and unjustified as it would be if done in relation to someone outside the protected class.

F. The Interplay of Other Anti-Discrimination Laws

Title VII is not the exclusive remedy for employment discrimination (except for federal employees against the federal government).[262] Depending on the protected status of the employee, discrimination claims possibly could be brought under the Age Discrimination in Employment Act (ADEA), the ADA, the Equal Pay Act, the NLRA, Title IX, the Religious Freedom Restoration Act (RFRA), The Federal Tort Claims Act, The Free Exercise, Freedom of Speech, Equal Protection, and Due Process Clauses, Sections 1981 and 1983, and certain state discrimination laws. Parallel private actions are permissible in most cases, except by federal employees.[263] Although there was and still seems to be some split among the Circuits[264] as to the legitimacy of concurrent claims under Title IX, Section 1983, FTCA, and state laws with a Title VII action, the Supreme Court seems very reluctant to preclude simultaneous suits.[265]

Accepting that concurrent causes of actions are permitted, we look to the similar statutes for possible differences in their scrutiny of appearance rules, but more so as possible sources of insight as how to best refine Title VII. This follows the legal footsteps of the courts who have indicated that the Equal Pay Act should be read in harmony with Title VII, careful to avoid discordant interpretations.[266] The courts have also looked to Title VII for ADEA, NLRA, and Title IX guidance and visa versa as the text, tone, and purpose of each are very similar.[267]

1. Due Process and Fundamental Rights & Equal Protection and Suspect Classes

In addition to Title VII, dress codes among "state actor"[268] employers may have to pass constitutional muster if they impact certain constitutional guarantees like freedom of speech, freedom of religion, privacy, due process and equal protection.[269] Religious clothing, tattoos, piercings, union symbols, confederate flags, politically charged statements, all seem to contain a degree of protected expression. In fact, the 3rd Circuit Court of Appeals ruled that even an inmate in a County prison could pursue a "religious-freedom lawsuit" based on "constitutional grounds" for being forced over objections to "handle roast pork" as part of "his cook's job," and then being moved to a "lower-paying janitorial job."[270] Constitutional analysis of dress code law is helpful to private employers because the protections guaranteed in the Constitution are in many ways the source and inspiration for those protections established by Title VII.[271] In fact, "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section 1983."[272]

The **Equal Protection and Due Process Clauses**[273] are interpreted to restrict the federal and state governments, as well as state actors, from implementing laws and rules that unfairly impact a fundamental right or a protected class.[274] The prohibition, like in all the amendments, is not absolute, allowing state actors to put into practice constitutionally questionable laws if there is a justifiable reason.[275] The courts decide about the constitutionality of the law or rule by evaluating the reason or objective behind it and the rule's relevance or fit in bringing about the desired objective. The courts apply one of three levels of scrutiny (strict, intermediate/heightened, or rational basis), depending on the right or group in question.

The Freedoms to Speech and Religion and the Right to Privacy, although hallowed nationally, are not absolute. The Supreme Court has held that government may regulate these First Amendment liberties when the restriction is "narrowly tailored to serve a compelling state interest."[276] This standard of strict scrutiny is the measure "when the government is acting as sovereign, but not when it occupies the role of employer, landlord, or primary or secondary school educator, where it has a bit more discretion."[277] The courts have permitted restrictions for sedition, hate speech, defamation, and obscenity.[278] Dress codes could possibly impact freedom of speech, which includes symbolic and nonverbal forms of expression, as well as freedom of religion.[279] The Supreme Court recognized the fundamental **right to privacy** was implicitly guaranteed by the Constitution within the "penumbra" of the Constitution's explicitly guaranteed protections.[280] Private employees seem to be granted a limited right to privacy in the workplace based on the expectation of such privacy and combination of other laws, both common and statutory.[281] California's constitution ensures the right to privacy even in private employment.[282] Business may generally intrude on an employee's privacy for legitimate business reasons, safety being one.[283] Privacy has many layers and meanings, "protection from intrusion and protection for autonomy" being two more prominent perspectives.[284] The employee's right to privacy, which protects in part personal autonomy, seems to allow for an individual to decide how to dress and look in the workplace.[285] Although considered a fundamental right, privacy loses that stature in the workplace, especially in the private arena.[286] Still, courts should consider the right when calculating whether an appearance code is too intrusive (how substantial and offensive is the intrusion into one's privacy).[287]

The Equal Protection Clause, of course, joins Due Process in the 14th Amendment, instructing that no State (which includes the Federal Government) "deny any person within its jurisdiction the equal protection of the laws."[288] Strict scrutiny, intermediate (or heightened scrutiny), and rational basis are still the measures utilized by the court, but which standard used depends on the class of persons impacted as opposed to the right. For example, race, nationality and citizenship (as suspect classes that receives strict scrutiny) are given greater deference than gender and age (quasi-suspect classes which receive heightened/intermediate scrutiny). All other classes receive very little protection under rational basis review.

2. International Anti-Discrimination Laws

"International and regional human rights instruments, as well as the domestic law of certain countries proscribe discrimination on the basis of culture in addition to discrimination based on race, national origin, and religion."[289] For example, the United Nations declares that persons have a "right to enjoy their own culture…and use their own language…without any form of discrimination."[290] Many European countries have comparable laws with their respective courts trying to balance the interests and rights of the employee and the employer when deciding on the reasonableness of a business' dress code.

According to a very similar international version of the business necessity defense, a Sikh was legally required to switch to a lower paying job because he could not and would not wear a necessary hard hat over his turban.[291] Conversely, the UK courts protected a Sikh from having to wear a food company's hat on top of his turban since the turban adequately satisfied the same hygiene goals.[292] It was also legal for the "UK airline BMI to ban flight crews from wearing crucifixes or Saint Christopher medals [or to carry bibles] on flights to Saudi Arabia to avoid offending Muslims."[293] However, the employee interests are given a bit more credence in Spain since Spain's Constitution "establishes a fundamental right to one's image."[294] This right allows employers to set workplace appearance rules only if they are "strictly necessary for the correct performance of the company's activity."[295] Sexual orientation, physical appearance, and political position also receive a degree of protection among many in the European Union.[296]

Meanwhile, France does not allow Muslim women to wearing the *hijab*, their religious head scarf or the *burqa*, full-covering.[297] The European Court of Human rights upheld a similar ban in Turkey.[298] The Dutch found discrimination when one business required the headscarf and when another prohibited it based on both denying the employee's choice to exercise her religion as she wanted.[299] In another case, the "Dutch Equal Treatment Commission decided that the Regional Education

Center discriminated indirectly on the basis of religion" for barring a Muslim women from a teacher-training program because she refused to shake men's hands in observance of her religion.[300] Britian's highest court, the House of Lords, ruled that a "secondary school could prohibit a female Muslim student from wearing a *jilbalb*, a loose, ankle-length gown, instead of the regular school uniform."[301] The rights of others and the variety of outfit options available to the student were considered to justify the restriction and avoid discrimination based on religion. [302] All of these cases seem to try and balance employee protections with employer rights, with the more important aspect in that situation determining the outcome of the case. One major exception is the Friendship, Commerce and Navigation (FCN) Treaties that the U.S. has with nations like France, Korea, Japan, and Greece, which essentially permit domestic subsidiaries to discriminate in favor of citizens from their nation for employment positions, exempt from Title VII and other anti-discrimination laws.[303]

3. Labor Law and Collective Bargaining Agreements

A collective bargaining agreement (CBA) is a formal, enforceable contract between an employer and the employees about the terms and conditions of employment. Because the collective bargaining agreement is approved by the majority of employees after being freely negotiated, the courts give great deference to the contents of said agreements.[304] However, certain nuances do exist. First, employers generally cannot amend portions of a validly authorized collective bargaining agreement that deals with mandatory subjects of bargaining.[305] "The National Labor Relations Board has held that appearance codes are 'terms and conditions of employment' within the meaning of the NLRA and thus 'mandatory subjects of bargaining.'"[306] Thus, the employer's unilateral implementation of a dress code without explicit good faith bargaining arguably violates fundamental tenets of labor law.[307] The NLRB has held as much in other grooming policy cases.[308] Of course, employer's often respond that the union either consented to such changes or waived the right to negotiate over it.[309] Conversely, unions have "successfully challenged employers' appearance codes on the grounds that the ***employer*** had given up the right to implement the code under some other provisions of the collective bargaining agreement," including the usual just cause provisions.[310] Although the debate over the factual or linguistic interpretation of the CBA is outside the scope of this essay, the general impact that collective bargaining agreements have over certain statutory rights still deserves mention.

Public policy precludes the employer and union from agreeing to eliminate certain statutorily guaranteed rights or similarly imposed responsibilities, but not all. For example, the collective bargaining agreement can relinquish the right to strike,[311] yet it cannot agree to pay scales below the federally guaranteed minimum wage.[312] As to equal employment opportunity laws and the appearance codes they cover, the Supreme Court has explicitly held that collective bargaining agreements cannot eliminate protections guaranteed under the Civil Rights Act.[313] The Court elaborated that:

> [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike [citations omitted]….These rights are conferred on employees ***collectively***…. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an ***individual's right*** to equal employment opportunities…. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.[314]

Certain legal rights can be waived only by the individuals themselves and not by representation through a collective bargaining agreement (or at all). Accordingly, as extensive as the powers granted employers and the legal deference granted collective bargaining agreements in general, neither would have the legal fortitude to impair Title VII rights. Title VII rights are substantive rights guaranteed to and possessed ***by each individual***, and thus, cannot be waived – even by the individuals themselves, let alone by collective bargaining representatives.[315] Even the procedural rights to enforce the substantive rights granted under Title VII can only be relinquished by the individuals possessing them, and not by any CBA.[316]

For example, the Supreme Court has held that individuals may sign away their right to pursue a Title VII lawsuit through a clear arbitration agreement,[317] but more significantly, employees may only alter their ***procedural protections*** and cannot negate their ***substantive rights*** granted under Title VII.[318] Specifically, such arbitration agreements must keep in tact the substantive protections under Title VII, only altering the process by which their enforcement is initially pursued.[319] In short, an employee or his/her representatives can agree to pursue Title VII rights exclusively via ADR, but neither the employee nor his/her union can alter the actual substantive protections afforded under Title VII.[320]

V. THE IMPERFECTIONS OF TITLE VII: THE NAKED AND UGLY TRUTH

Congress intended Titled VII to remove the discriminatory barriers to employment opportunities and thereby improve the well-being of individuals in protected groups, businesses, and in overall society.[321] Arguably, Title VII has accomplished part of its goal by significantly reducing much of the overt racism, sexism, and other "isms" that existed in 1964, when the Civil Rights Act was passed. Yet, as the over 75,000 charges of discrimination filed with the EEOC in 2006 clearly reveal, unequal treatment in employment still exists.[322] Current employment discrimination retains many of its traditional forms, but new manifestations of unequal treatment are revealing themselves in the modern workplace, created in part by the complexity and convergence of the unique cultural context of current society and its employment arenas (e.g., globalization and diversity).

Trait discrimination is one of these new forms of discrimination - which is of course the current concern and focus of this article – especially trait discrimination perpetrated through dress codes and comparable appearance rules. Unfortunately, this form of unequal treatment has generally circumvented Title VII in part because the origin of prejudice

often resides in the subconscious mind as a form of cognitive bias.[323] Title VII's failure to adequately address cognitive bias is one of its three primary imperfections, with the over-reliance on the immutability/mutability measure and the procedural and substantive confusion within its analytical framework comprising the other two. Together, these flaws permit great harm to be perpetrated against the very groups Title VII was passed to protect. Thus, these three imperfections of Title VII are its naked, ugly truth.

A. Imperfection #1: Failure to Adequately Consider Cognitive Bias and Stereotypes

Employers, knowingly or not, often use physical traits that are relatively irrelevant to job criteria as a proxy for job-pertinent attributes. For example, employers may relate grooming, hairstyle, jewelry, glasses, color, style, and material of clothing with characteristics like intelligence, honesty, loyalty, and discipline.[324] Facial features, nose size, skin color, eye shape, height, and weight also carry certain connotations about personality and performance, as do behavioral traits like language, accents and smoking.[325] Employers use these traits as signals to assess the abilities and attitudes of individuals and their compatibility with the organization and its values. [326] Categorizing employees in this manner has been called trait discrimination[327] and workplace profiling[328] because it results in prejudicial, harmful, and unequal treatment of groups protected under Title VII.

Although making employment decisions in accordance with such appearance-based associations appear to be legal on their face (pun intended), they raise real concerns about more subtle forms of discrimination rooted in bias and stereotypes. This concern arises because the employer, again knowingly or unknowingly, intellectually connects the visible signals of the person's outward appearance, not with actual work abilities, but rather with stereotypical perspectives about a certain race, religion, or gender. This is an oversimplified description of cognitive bias dynamics and, unfortunately, Title VII's "motivating factor" and "substantial factor" delineations do not adequately account for or protect against the various manifestations of cognitive bias.

For instance, a dress code could be implemented with the full intention of discriminating against women or African-Americans, yet due to the neutrality of the dress code's form, the remedies available under disparate treatment will be lost to the disadvantaged employee. Trait discrimination often avoids disparate treatment because it is based on a mutable trait (like hairstyle) and not the immutable identity of a protected group (like African-American women). Similarly, Ms. Hopkins would never have won against *Price Waterhouse* if the partners either kept their stereotypical notions to themselves or were simply unaware of them. The fact that an employer could escape disparate treatment liability and its penalties when irrational conscious stereotypes are actually involved is a serious flaw and concern of Title VII.

Ironically, the courts entrusted to safeguard these interests and protect against discrimination are equally subject to prejudicial perspectives rooted in cognitive bias. For example, judges and juries may bring their own biases to bear in accent and other Title VII cases when listening to and observing employees court.[329] Moreover, judges may and do consider **community norms** when evaluating dress codes.[330] These norms are typically colored by a white-male bias and perspective, making one of the factors used by judges to determine discrimination (i.e., community norms) biased in itself. Thus, the courts may in fact render decisions that perpetuate prejudices as opposed to restrict them. That being said, judges seem to be in the best position to address these concerns on a case-by-case basis – as long as they are sensitive to the various forms, causes and manifestations of cognitive bias.[331] For instance, cognitive bias (and thus improper motives) can be conscious or unconscious, rational or irrational, prejudicial or stereotypical, and malicious, neutral, or even benign.

In establishing disparate impact and later mixed-motive and their use of "motivating factor" language, both the courts and Congress seemed to acknowledge how cognitive bias and stereotypes might turn seemingly neutral policies into devices of unintended discrimination. Dress codes seem to be one area where the different levels of stereotypes and related biases get played out and are thus in need of a more informed and nuanced approach to their legal analysis. It may be time for Congress to duplicate its activities of 1991 – when it chose to clarify and revise Title VII so that it would more adequately achieve its equal opportunity goals in a world that had changed significantly since its inception in 1964.

B. Imperfection #2: The Overemphasis on Immutability as the Measure of Material Adversity & Protected Class Status

In order to prove that an employment practice is discriminatory, Title VII clearly articulates the need for the aggrieved parties to establish that their employment situation was "adversely affected" and that such impact was "because of [or on the basis of] such individual's race, color, religion, sex, and national origin."[332] Unfortunately, "the courts have, without sufficient justification, read an 'immutability requirement' into both the meaning of adversity" and into the qualification for protected class status, which has rendered Title VII protection inconsistent.[333] This somewhat narrow and rigid application of the "immutability requirement" is one of the primary imperfections of Title VII, especially in addressing the trait discrimination within appearance rules.

In determining whether different treatment based on a person's trait rises to the level of illegal discrimination, courts have focused on the ease or difficulty of altering said trait (its immutability or mutability). Thus, treating someone differently based on their skin color would clearly be illegal because it is an immutable trait clearly associated with a protected class (i.e., race or color) and the cause of real harm or adversity that an employee cannot avoid through change. [334] Conversely, a grooming policy that burdens a mutable trait will generally not be considered to have an adverse effect upon a protected class.[335] For example, since courts view hairstyle easily changed and jewelry easily removed, a dress code infringing on both would not cause enough adversity to invoke the protections of Title VII. Plus, even if the impact is considered material, the courts still do not invoke Title VII coverage because they usually find mutable characteristics only tenuously related to a

protected group.[336] Currently, the classification of a trait as **mutable or immutable** plays a critical role in establishing both the "because of" and "adverse affect" necessary for a prima facie case of discrimination.[337] This over-reliance on the immutability/mutability measure significantly impairs Title VII's effectiveness in prohibiting trait discrimination and other forms of unequal treatment.

1. Congress did not Intend Immutability to be the Primary Measure for Title VII

Disparate impact cases from the beginning did not use immutability as the sole criteria for determining discrimination. In *Griggs*, a high school diploma, a clearly mutable trait, was the source of the disparate impact upon unschooled minority employees. The court did not rely or focus on the mutability of the trait as the source of Title VII protection – since in fact the educational requirement was not immutable since one can go to school and earn a diploma or even get a GED more quickly. The relatedness of the classification to the protected class was not the critical issue, but rather the unequal consequences upon individuals within a protected group. The court believed that the fact that black men were impacted more adversely by the diploma requirement was the exact type of policy Title VII was passed to prevent.[338]

Similarly, grooming policies can be as neutral as they want, but once they clearly have a more detrimental impact upon one protected group over another, then a prima facie case of disparate impact discrimination seems to exist legally, regardless of immutability/mutability. Employers currently use appearance traits as a proxy or leading indicator for certain characteristic they consider important for the job.[339] Title VII currently prohibits use of traits in this manner only if they cause a disparate impact upon a protected group and they cannot be shown to validly predict job performance.[340] Unfortunately, the courts seem to circumvent this fact by reasoning that the mutability renders the consequences not material or adverse enough to require legal redress and the association of said trait to a protected class too tenuous to necessitate coverage.[341] This judicial reasoning is clearly in error since mutability does not necessarily render the changing of a trait less adverse, less material, or less relevant.

The Supreme Court never intended, nor held, nor actually used immutability as the sole criteria for the determination of suspect class status.[342] Justice Marshall explained that "no single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny."[343] Although immutability was considered important, the Court also clearly considered the group's political powerlessness and history of discrimination in coming to a determination about its classification.[344] The Supreme Court itself has "more than once recited the characteristics of a suspect class without mentioning immutability."[345] They have also classified groups as suspect even without an immutable condition (e.g., aliens,[346] age, and legitimacy – even religion and sex can be changed). Names, accents, age, language, religion, mannerisms, and some disabilities are all mutable characteristics that have been recognized as possible forms of discrimination. Conversely, they have also allowed restrictions against groups with immutable traits such as height and blindness.[347] And even if immutability were a prerequisite for finding discrimination, it still seems inaccurate to view immutability in so narrow and rigid a manner (i.e., the absolute inability to change the characteristic in question) or to reduce it to a biological basis.[348]

Arguably, neither did Congress intend for immutability to be such a determinative factor when passing the Act itself.[349] Davison argues that:

> "Rather, the plain language and legislative history of the act indicate that Congress chose those categories because they reflect unacceptable employment standards, not because they were immutable. Furthermore, the inclusion of religion [and also age, pregnancy, citizenship, legitimacy], which is obviously a mutable category implies that the distinction between immutable and mutable traits should not determine whether protection is afforded under Title VII and Title VII prohibits all distinctions based on sex or race, regardless of whether the characteristic is labeled as mutable or immutable."[350]

Thus, to use immutability as the sole and definitive criteria for protected class status or material adversity under Title VII, the Equal Protection Clause, or other similar anti-discrimination law is just simply erroneous.

2. Immutability Fails to Measure the Real Harms of Stigmatization, Assimilation, and Subordination

The overemphasis on the so-called immutability/mutability requirement for determination of protected class status is not its only misuse. It is no less wrong, maybe even more so, to use the immutability standard as the single or primary measure of material adversity when evaluating the complexities of trait discrimination. To do so leaves many grooming policies unrestrained, free to perpetrate various damages upon protected groups and individual members – harms such as stigmatization, covering, subordination, and assimilation.[351] With the implementation of such policies, protected groups feel compelled to "cover their race and gender by conforming their behavior and appearance to a white, male norm (known as workplace assimilation)."[352] In addition to the harm to personal autonomy and identity this causes, the different forms of covering also reinforce the subordination and stigmatization experienced by the overall protected group in the workplace and in society. These adversities and harms are very real, material, and injurious. Thus, Title VII's immutability requirement is a source of discriminatory injury to the very groups it was created to protect.

Title VII pursues the reciprocal purposes of assuring equal employment opportunities and prohibiting discriminatory practices. The decrease in Title VII lawsuits over the years indicates that the law has had some effectiveness. However, that drop in lawsuits, especially when it comes to trait discrimination, can also be explained in part by employee **assimilation** - the changing of one's identity in some degree and manner because of external pressure to accommodate the prevailing appearance norms of the majority.[353] Assimilation is a real harm suffered by minorities because of the immutability

requirement read into Title VII and the various manifestations of cognitive bias in the workplace. "Workplace assimilation demands that [require employees to] suppress signals of identification with socially salient groups are likely to perpetuate stereotypes and intergroup hostility"[354] and to reinforce the related subordination and social inequities. The pressure to assimilate at work, to partially sacrifice one's individual and/or group identity to fit more easily into the broader workplace culture and norms, is clearly a harm of the worst kind and arguably a form of discrimination. Unfortunately, courts "fail to recognize that 'sometimes assimilation is not an escape from discrimination, but precisely its effect.'"[355]

Assimilation, covering, and subordination are all "material adverse" consequences that employees suffer precisely because the trait in question is mutable. In such cases, the change exacerbates the adversity, rather than alleviates it. The EEOC itself has honored this reasoning by holding that a company's no-Afro or bushy hair policy would be a form of racial discrimination because "the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice."[356] Racial and other protected group identities are rooted in more than the color of skin or type of genitalia – clothing, hairstyles, and accents all contribute significantly to identity. To change any part of one's identity is naturally going to involve some degree of harm.

In regard to appearance codes, Yoshino identifies covering (downplaying an underlying and known identity), passing (masking an underlying identity), and converting (changing an underlying identity) as three methods of assimilating.[357] In a comparable theory of racial identity performance (called "volunteer discrimination"), Onwuachi-Willig, identifies [sic] "accommodating (adopting dominant cultural norms as a means of advancement), distancing (distinguishing oneself as a conforming outsider from nonconformists), and resigned modeling (adopting norms in position as role model, even though do not accept them)."[358] Both theories recognize the harm perpetrated against protected classes pressured to conform to the dominant cultural norms of the majority. In addition to the very significant harms to identity and autonomy, assimilation also leads to low self-esteem, eating disorders, poor performance, shopping sprees, and surgical makeovers.[359]

Employers encourage assimilation and its harms in a variety of subtle manners, including questions, comments, jokes, and looks.[360] For example, both formal and informal comments about an employee's wardrobe, hairstyle, choice in music, facial expressions, speaking voice, choice of vocabulary, intonation and accent, and handshake style are just a few of the many ways employers send subtle and sometimes not-so-subtle messages that guide, pressure, and evaluate assimilation.[361] More concretely, constantly asking the black employees in the group what they think about an African-American political candidate or basketball player calls attention to their race. Even sincere compliments or simple questions about hair and clothing send signals about appropriate and inappropriate appearance in the workplace when more closely associated with a person's race ("I wish I could wear my hear in cornrows"), national origin ("what do the symbols on your Equal Rights Amendment pin represent'), or religion ("I really admire that you pray five times a day" to a Muslim). The harm caused by assimilation can be emotional, economical, physical, professional, relational – and significant.[362] The more an employee is forced to assimilate, the greater the harm. They suggest, as do we, that this harm be factored into the discrimination analysis of Title VII.[363]

In addition to the harm to personal autonomy, privacy, and identity, the different forms of assimilation also reinforce the **subordination** and **stigmatization** experienced by the protected classes in the workplace and society. The negative stereotypes surrounding certain protected groups lead to a stigmatization (i.e., defining that group and individuals within it primarily by those pejorative stereotypes), which then lead to various forms of subordination (i.e., the inferior or dependent status/dynamic they occupy in the workplace, community, and larger society). Dress codes and their tendency to reflect the white-male workplace, and Title VII's protection of them, unfortunately perpetuate assimilation, subordination, and stigmatization, instead of trying to challenge these various problems, which are some of the exact causes of the social and economic inequality that Title VII was created to rectify. Adding insult to injury, it is the dominant white-males who both design and implement these discriminatory rules in their image, preserving their power over and subordination of the protected classes. Moreover, the judicial system entrusted to protect against discrimination possesses its own prejudicial perspectives rooted in cognitive bias. Even the community norms used to determine discrimination contain varying degrees of stereotypes and bias.

Paradoxically, recognizing and protecting certain traits as essential to the group identity – whether by the courts, Congress, or even employers - may have the unintended effect of categorizing the protected class in a way that is inaccurate or, worse yet, in a manner that perpetuates hurtful and debilitating stereotypes. "Legally enshrining existing group-identified traits" (i.e., **essentialism**) may do more harm by deepening the "hierarchy, oppression, and social subordination" resulting from these traits.[364] These "essential traits" "may themselves be the result of social subordination," created an ugly cycle of discrimination and subordination.[365] This echoes some of the concerns voiced about affirmative action as to how it may also harm its beneficiaries.[366] Certain negative stereotypes also lead to an anxiety-provoking phenomenon called "stereotype threat" that impairs performance.[367] In short, drawing attention to the stereotype may in fact reinforce the very biases the law wants to eradicate. Assimilation is often chosen as the easier path, but one that leads to the same undesirable destination of social subordination and stigmatization.[368]

Although immutability/mutability is one factor for measuring adversity and relatedness to the protected class, there are many other factors that should be evaluated in order to determine if prohibited discrimination has occurred, which is exactly why this paper's primary recommendation involves the application of a totality of the circumstances approach to Title VII analysis.[369] Outlining a more inclusive and nuanced approach to appearance rules, the **TOC** hopes to facilitate the kind of

intergroup interaction that helps to reduce biases, subordination, and overall inequality.[370] If nothing else, the **TOC** will simplify Title VII analysis.

D. Imperfection #3: The Unwieldiness and Confusion of Title VII's Analytical Framework

Initially, the three-prong approach to Title VII (prima facie case, affirmative defense, and rebuttal) as crafted by the Supreme Court provided a certain helpful framework for addressing discrimination cases. Unfortunately, as discrimination became more nuanced, the Court's attempt to be similarly nuanced led to confusion, rather than to greater clarity. No one less than Justices Kennedy, Rehnquist and Scalia found Title VII to be "an area of the law already difficult for the bench and bar" and worried that the *Price Waterhouse* majority was only going to create "more disarray" in this already complicated area of law.[371] Their concerns proved clairvoyant as the confusion materialized in three particular cases, *St. Mary's Honor Center v. Hicks* (1993), *Desert Palace v. Costa* (2003), and *Jespersen v. Harrah's Casino* (2006), as well as in the 1991 Act.

1. The Confusion over the Burden of Proof and Standards of Evidence

Price Waterhouse precipitated the procedural problems by establishing mixed-motives as a separate theory of intentional discrimination, by recognizing stereotyping as an improper motive that supports a Title VII action, by shifting the burden of proof for affirmative defenses in mixed-motive cases to the defendant, and by creating the ***"would have taken the same action"*** defense to escape liability even when a bad motive had been proven.[372] In an effort to address these changes, or maybe to further them, Congress revised Title VII in 1991 by diminishing the impact of the ***"would have"*** affirmative defense to the reduction of the employee's available remedies.[373] The alternative legitimate business reason was no longer an absolute defense to disparate treatment if the illegitimate discriminatory motive had any influence whatsoever on the unfavorable employment decision.[374] Price Waterhouse and the 1991 Act seemed to indicate a philosophical shift towards greater protection for employees since the mixed-motive prima facie case was easier to establish, the burden of proof for the affirmative defense had now shifted, and the extent of its protection downgraded. Moreover, disparate treatment was becoming more confusing and inconsistent in its application of "poorly understood legalisms,"[375] which could and did confuse jurors and "result in error."[376]

In its 1991 Amendments, Congress codified the mixed-motives theory, but revised certain evidentiary aspects. The 1991 Act stated that "an unlawful employment practice is established when the complaining party ***demonstrates***[377] that race, color, religion, sex, or national origin was a ***motivating factor*** for any employment practice, ***even though other factors also motivated*** the practice."[378] This opened the door for the courts to allow circumstantial evidence and any degree of improper motive to meet the burden of proof and support a prima facie case of mixed-motive intentional discrimination, thus eliminating the requirement of direct evidence as imposed by *Price Waterhouse*. In *Hicks* and *Costa*, the Supreme Court willingly walked through said metaphorical open door carrying circumstantial evidence in hand as a valid way to establish a prima facie case of mixed-motive discrimination.[379] The Court essentially expanded what types of evidence would support a prima facie finding of intent for disparate treatment cases and the corresponding affirmative defenses. Although at first glance both decisions seem somewhat insignificant and logical, *Hicks* and *Costa* essentially meant that a prima facie case for mixed-motives would almost always exist since the adverse employment decision ***in itself*** would seemingly suffice to circumstantially establish an improper motivating factor and discrimination.

In *Hicks*, the Court used the new language in the 1991Act to explain that a jury may infer a pretext and thus intentional discrimination from the falsity of the alternative explanation provided by the business (as well as from the already established prima facie case against it)**.**[380] However, the Court also held that the proof of a pretext no longer required judgment for the plaintiff.[381] This seemed to render the three-prong approach, especially rebuttals, less determinative and distinctive, and the legal analysis even more unclear.[382] When *Costa* held that circumstantial evidence could establish a mixed-motive, it broke down even further the distinctions among the three-prongs and their evidentiary analysis.[383] This also led to confusion among the circuit courts, which have various understandings about what qualifies as "direct evidence" or "sufficient evidence."[384] Also, judicial decisions and jury instructions regarding the shifting burden of proof (or lack thereof) are still a major source of error in Title VII cases.[385]

For example, after *Hicks* and *Costa*, it seemed that direct evidence was required to prove a prima facie case of single-intent intentional discrimination, but upon the employer's mere "articulation"[386]of an alternative legitimate business reason the complaint seemed reclassified as a mixed-motives case (which could be established by either direct or circumstantial evidence), at which time the burden shifted again to the employer to prove the "***would have taken the same action***" affirmative defense with either direct or circumstantial evidence, with the burden then shifting back to plaintiff-employee to overcome said defense by proving it was no more than a pretext (which the jury could infer from the evidence) - the same jury that even upon a finding of a pretext no longer was required to render judgment for the plaintiff.[387] Confused? This confusion is one of the major reasons that Title VII needs to be revised.

The different types and burdens of proof make it more difficult for employees to establish single-intent than a mixed-motive, thus reducing the available remedies. However, it also puts employers in the awkward position of arguing on one hand (or side of mouth) that they would have taken the same action regardless of the existence of an impermissible motive (to preserve the affirmative defense for mixed-motive) and on the other hand (or other side of mouth) that there was no improper factor at all, only the legitimate business reason (in an effort to avoid complete liability). It seems that a mixed-

motive case would almost always exist, subjecting defendant employer to some form of damages. This is another imperfection of Title VII necessitating some form of revision.

2. The Convergence of the Three Prongs and Three Theories of Title VII Discrimination

With the explicit nature of the three-levels now diminished, a natural overlap began to appear among the three different prongs (prima facie, affirmative defense, rebuttal) and the three different theories (single-intent disparate treatment, mixed-motives, and disparate impact). The *Costa* reasoning combined with *Price Waterhouse* and *Burdine* to arguably merge single-intent and mixed-motive cases since upon an employer's easy burden of "articulating" the alternative legitimate business reason is met,[388] a prima facie case of single intent discrimination will be avoided and a mixed-motive case will have appeared.[389] Add in the fact that *Hicks* does not require a finding for plaintiff under single-intent even with a finding of pretext, then all non-BFOQ disparate treatment cases seem destined for mixed-motive status. This was arguably the beginning of a totality of the circumstances approach by the Courts to Title VII cases.[390]

The 9th Circuit read (or misread) the above cases to link disparate impact analysis with disparate treatment elements to further transform the three-prong framework into a totality of the circumstances design. The *Jespersen* Court decided that a make-up requirement did not discriminate against women in violation of Title VII.[391] At first blush (pun intended), Jespersen seemingly reinforced the legal status quo, which allowed employers to implement sex-differentiated appearance rules as long as one protected class of employees is not adversely affected compared to another, coining the concept **unequal burdens**, which was to be used as a litmus test for establishing in part a prima facie case of discrimination.[392] However, the court applied the unequal burdens test not simply to the material adversity requirement in line with legal precedent, but as evidence of motive and intent. *Jespersen* seemed to do one of two inexplicable things: 1) use the "adverse impact" part of disparate treatment to satisfy the "because of" part of Title VII needed for intent;[393] or 2) used the disparate impact theory to support the intent necessary for a disparate treatment case.[394] Either reasoning seems to mix the legal equivalent of apples and oranges in order to avoid the instructions of *Price Waterhouse*, and to just simply muddy up the legal waters about stereotyping that flowed forth from *Price Waterhouse*.

Jespersen argued that the necessary element of intent to discriminate was met by the unequal burdens test. Yet, Jespersen focuses on the impact upon the employee to infer the motive or intent or "motivating factor" of the actor-employee's decision[395] Focusing on the emplo***yee's*** burdens seems to be a very imperfect way to establish the requisite state of mind of the emplo***yer***. Although Title VII law allows the burden of proof to be met by direct or circumstantial evidence and inferences based on either, the unequal burdens test seems to be a fragile formula for finding intent to discriminate. *Price Waterhouse* somewhat began this trend by recognizing that stereotyping could satisfy the intent and protected class needed for disparate treatment If utilized however, it seems that the inequality of the burdens should be quite significant, so as to support the inference of intentional discrimination.

Another layer of confusion was added when the courts focused on the impact upon the entire protected group instead of the harm to the individual. Title VII and its progeny clearly protect individuals from discrimination that impairs their equal employment opportunities. Because neither the text nor history of Title VII mandates proof of group harm for recovery, this additional expectation required by some courts may be attributed to the confusion surrounding the evidence requirements, shifting burdens of proof, and understanding of pretext.[396] Title VII clearly was passed to ensure equal opportunities and protections for certain classes of people that had suffered a history of discrimination,[397] but it should be remembered that Title VII also protects "individuals" within a protected group - not just the overall class. So although the stereotyping inherent in an appearance policy may not discriminate against or unequally burden an entire class, it is also precluded from overly burdening subgroups or individuals within the class.[398]

The courts made sure to add a bit of confusion to **disparate impact cases** as well. They seemed to further shift the law in favor of the employer-defendant in *Wards Cove Packing Co. v. Antonio*[399] when they instructed that the burden of proof remains with the plaintiff throughout the case. The Court even required plaintiff to rebut the business reason given by the employer for the policy by proving that it would not "serve in a significant way, the legitimate employment goals of the company."[400] Even the use of immutability became confusing. In the *Garcia* disparate impact case for example, the *Garcia* court seemed to utilize the immutability/mutability test to determine whether the policy was based on a protected class, instead of the more logical and common use by other courts to determine if the employee was "adversely affected."[401] The *Wards Cove* decision combined with Price *Waterhouse* and a few other decisions in that same year to spur Congress to revise the Civil Rights Act.[402]

Under the Civil Rights Act of 1991, the disparate impact theory was amended to clarify certain aspects of Congressional intent for the doctrine. For example, the revisions permitted defendant-business "***to demonstrate***" (via burden of production, persuasion, and thus burden of proof)[403] that the business practice was both "***job related*** to the position in question" and "consistent with ***business necessity***."[404] Unfortunately, the intended clarity has not really materialized, with multiple interpretations of the statutory language creating even more confusion. Clearly, congress shifted the burden of proof to the defendant to establish their affirmative defense of business necessity. Congress also seemed to increase the standard or type of business reason required to escape liability by choosing the stronger words of "business necessity" in directly renouncing the *Wards Cove* Court's previous standard of "legitimate employment goals"[405] But not all Circuit courts agreed or understood the exact meaning or application.

For one reason, the various courts have different understandings about what qualifies as "direct evidence" or "sufficient evidence" and thereby of what establishes a "substantial factor" or motivating factor" for disparate treatment and mixed-motive respectively.[406] Some courts have lower thresholds for each type of evidence, while some demand very high forms of proof to satisfy direct evidence.[407] Another reason for the uncertainty is that some courts seem to emphasize the "job related" language of the affirmative defense while others stress the "business necessity" component. It seems that both prongs were meant to be read together, but even that does not necessarily clarify the meaning.[408] For example, the 11th Circuit addressed a no-beard grooming policy of the fire department defendant that had a disparate impact on blacks due to PBF, and found the safety reason of wearing a respirator a "business necessity" that justified the policy.[409] No problem or confusion until they equated business necessity with "an important business goal"[410] – which seemed to either eliminate the distinctiveness of job related or utilize the overruled standard from *Wards Cove*. The EEOC has offered guidelines meant to explain how businesses can validate through statistical evidence that their policies that have a disparate impact are in fact job related and consistent with business necessity.[411] Yet, the confusion remains and is severe enough that Congress should probably intervene and clarify what they desire through an amendment since it was the various court interpretations of the Act's very language that has been a primary source of this confusion.[412]

3. The Confusion and Costs Surrounding Title VII Litigation and Remedies

The confusion surrounding Title VII does not stop with its analysis, but continues with the available **remedies**. Title VII remedies are both inconsistent and inadequate. For example, compensatory and punitive damages are only available for intentional discrimination.[413] The combined award for such damages is also capped based on the number of employees (between $50,000 if less than 200 employees and $300,000 if over 500 employees).[414] However, private actions under Section 1981 of the 1866 Civil rights act for race discrimination in contracts, which includes employment, have no limit.[415]

No compensatory damages may be awarded in a disparate impact case and certain mixed-motive cases.[416] Equitable remedies, however are available for all Title VII cases and include reinstatement, changing the questionable policy, hiring requirements, prohibition on retaliation, removal of poor performance records, declaratory relief, other injunctions, back pay, front pay, attorney's fees and costs.[417] Mixed-motive cases prohibit damages and certain direct employment remedies like reinstatement when the defendant employer has proven he would have done the same thing based on non-discriminatory reasons or based on after-acquired evidence.[418] Furthermore, employers would be subject to the time and expense of the now permissible jury trials. *Costa* shifted the law in favor of the employee - making it easier to establish a prima facie case, more challenging for defendant to prove an affirmative defense, and more costly (win or lose).[419] With over 150,000 discrimination complaints brought every year to the EEOC and over 20,000 federal cases filed, the current confusion over the law creates significant time, cost, and policy implications for employers. [420]

The primary concern regarding all of these imperfections is that they prevent Title VII from fulfilling its mandate of prohibiting workplace discrimination, of providing equal employment opportunities, and of advancing social equality and harmony. Other imperfections to Title VII surely exist, but it is the above three that support the need for a revision of Title VII. The failure to adequately consider cognitive bias, the overemphasis on immutability instead of other harms like assimilation, and the overall lack of analytical clarity would each in themselves be sufficient reason to review Title VII, but the combination of the three, especially in the historical context we now find ourselves, truly demands that Congress and the courts revisit, revise, and renew Title VII and its legislative objectives. In order to encourage that review, to simplify the law and its application, and to help address the discrimination issues of our time, this paper now offers some modest suggestions for revising Title VII.

VI. RECOMMENDATIONS: MAKEOVER TIPS TO DRESS-UP TITLE VII

Many legal scholars have addressed the imperfections of Title VII outlined above by suggesting ways for Congress and the courts to extend its coverage of the disparate treatment ***and/or*** disparate impact theories of discrimination so as to better include and scrutinize appearance rules, dress codes, and grooming policies.[421] Congress has revisited Title VII before - in 1978 (with the Pregnancy Discrimination Act) and again in 1991 (with the 1991 Civil Rights Act). In both instances, Congress corrected the courts overly restrictive interpretations by broadening the coverage of Title VII so that it would be able to more properly pursue its legislative goals. Current cases and historical circumstances may again be calling for Congress to revisit, revise, and renew Title VII in a manner more likely to prohibit trait discrimination and promote equal opportunity in the workplace and world of today and tomorrow. In anticipation of modifications by either Congress or the courts, this article proposes a **totality of the circumstances (TOC)** framework for analysis of Title VII cases.

A. The Courts Should Use a (TOC) Framework that Combines Disparate Treatment and Disparate Impact

The **TOC** combines disparate treatment and disparate impact theories into a more comprehensive, yet simplified analytic framework, which ultimately weighs the harm to the protected employee against the business justification of the employer. The **TOC** deemphasizes any independence in the two theories and sees them as much more coordinated and complementary, which when combined can more comprehensively cover and protect employees from the vast majority of discrimination issues, especially these newer, more subtle, but just as injurious forms of prejudice (e.g., trait discrimination), while still preserving employer autonomy.

In applying the totality of the circumstances standard, the courts will find themselves in familiar territory. The courts already apply **TOC** to a variety of cases, which include the determination of probable cause,[422] proper police force,[423]

defamation,[424] and the waiver of Miranda rights of children.[425] But even more pertinent, important, and validating, is that the courts also use the totality of the circumstances in discrimination cases involving jury selection,[426] voting rights,[427] equal protection in employment,[428] and even sexual harassment under Title VII.[429] The First Circuit even admitted that in "appeals after trial, this and other courts have recognized the need for flexibility and have sometimes bypassed these [three-prong] approaches and instead looked at whether the totality of the evidence permits a finding of discrimination."[430] To ask the courts to broaden its use within Title VII is thus most reasonable and appropriate. Justice Marshall agreed:

> To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community.[431]

Congress confirmed this role for the courts when it purposely chose not to explicitly define the business necessity defense, but rather delegate the responsibility to the courts to resolve disparate impact cases as their judicial discretion deemed best.[432] In its indefiniteness, Congress honored the role courts play in both fulfilling and furthering legislative intent and initiatives. Justice Marshall similarly acknowledged the symbiotic and synergistic relationship between Congress and the courts:

> Courts do not sit in a social vacuum….Constitutional principles of equality…like liberty, property, and due process, evolve over time….[influenced by] shifting cultural, political and social patterns….It is natural that evolving standards of equality come to be embodied in legislation…[and] judicial action has catalyzed [much] legislative change.[433]

Furthermore, the formal consideration of these factors by the courts will only make them more cognizant of their presence and influence, enabling them to better balance a variety of factors in deciding which trait restrictions reach the level of discrimination, and which remedies are the most appropriate. Even though the courts entrusted to this task are equally subject to prejudicial perspectives and cognitive bias, judges seem to be in the best position to address these concerns on a case-by-case basis. Thus, the courts should utilize a **totality of the circumstances (TOC)** framework to evaluate employment actions and policies under Title VII.

In one sense, the courts are still looking for the same fundamental elements of discrimination as outlined by the Supreme Court and Title VII: 1) Less favorable treatment (material adversity), 2) to any of the statutorily protected groups, 3) as to terms, privileges or conditions of employment, 4) by an employer or union, 5) either intentionally (or unintentionally) [because of or based on a protected class].[434] Yet, instead of bright line standards or threshold limits for each element, which then shift back and forth confusingly and inconsistently under the current three-prong framework, the **TOC** strives for a degree of simplicity to help clarify Title VII analysis and advance its comprehensiveness. Furthermore, the **TOC** does its best to integrate current law into the new framework (e.g., BFOQ and business necessity), but in a slightly more nuanced and understandable manner. Finally, the **TOC** addresses better the various forms of discrimination since it considers all of the elements and their relative weight together in deciding whether Title VII was violated, and if so, the appropriate remedies. In this way, the **TOC** hopes to better balance the various interests of the protected groups, the employers, and of society in accordance with the values and objectives of Title VII and equal employment opportunity law.

The totality of the circumstances approach essentially balances the **adverse impact** and harm suffered by a protected employee against the importance of the employer's **business reason** for the policy or action that resulted in such harm. The **TOC** does this by considering a variety of factors that contribute to the injury (both **quantitative** and **qualitative** harms) and a variety of others that contribute to the justification of said business policy. The **TOC** considers each of the circumstances as being on a continuum, which after individual analysis are then looked at together for their overall determination about discrimination. The **TOC** then weighs the harm suffered by the employee against the employer's business justification in coming to a decision about the existence and degree of discrimination under the totality of the circumstances. The court then has the freedom to choose from a variety of remedies in order to best address the discriminatory actions and their degree of harm (damages, injunctions, costs, etc.).

Arguably, the **TOC** is nothing more than a refined theory of disparate impact. We take no offense at such categorization because the refinement is quite comprehensive, providing Title VII with a more thorough and uncomplicated analytical framework in which to evaluate discrimination cases. We also find ourselves in good company with Gonzalez and others who have argued that disparate impact and its element of materially adverse impact may be the best way to rectify the current deficiencies in discrimination law.[435] Let us now look at each circumstance more closely, recognizing that each is a recommendation of sorts in its own right.

1. ADVERSE IMPACT: ***The courts should comprehensively gauge the material adversity and harm suffered by the protected group and the individual employees.***

For a finding of discrimination, Title VII requires employees to prove that they suffered a materially adverse change in their opportunities, terms, conditions or privileges of employment.[436] Obvious examples of adverse employment actions include suspensions, missed promotions (like to Hopkins) and dismissal. The totality of the circumstances approach recognizes that harms to employees occur in many other ways beyond these. In an effort to more accurately assess the adverse impact, the **TOC** measures both **quantitative** and **qualitative** harms. The **quantitative adverse impact** considers: 1) the number of individuals within the protected group who are adversely impacted, 2) the disparity of the impact compared to others (unequal burdens and inconsistency of application), 3) the severity of the impact upon tangible employment

conditions, and especially 4) the protected class involved (including their history with discrimination in general, in the industry, and with this employer).

a. <u>Hierarchy of Protected Groups</u>. The **TOC** recommends that courts, when determining the level of protection to afford a class of people under either Title VII or the Fourteenth Amendment, give more weight to the importance of the group's interest, the history of their unequal treatment, and their political powerlessness than to the so-called immutability of the group's trait.[437] Accordingly, appearance policies that impact race are given greater scrutiny; or rather, the harm to the protected group is given greater weight and consideration than it might be given when suffered by other classes under similar circumstances. Some might contest this hierarchy of protected classes, but Congress and the courts have arguably delineated the hierarchy over much time and with much detailed deliberation. Justice Marshall explains:

> Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, 'a page of history is worth a volume of logic.'[438]

The Supreme Court has read the Equal Protection Clause[439] to afford greater protections to the suspect classes of race, nationality, citizenship, and religion[440] than to the quasi suspect classes of sex, age, legitimacy, and disability.[441] Meanwhile, scholars like Corbett[442] have ranked the strength of federal employment anti-discrimination law by calculating the protections afforded each respectively through the above factors, the absence of reverse discrimination protection for age[443]and disability, the success rate for plaintiffs under each category, the availability and strength of defenses or safe harbors for employers, and the difficulty of proving a prima facie case based on the statutory language.[444] Based on these factors, Corbett ranked the strength of legal protection in descending order to be: 1) race (national origin), 2) sex, 3) age, 4) religion, and 5) disability.[445] Corbett implied what we explicate: that Congress and the courts have purposely manifested a hierarchy of protected classes, with some groups entitled to greater legal protection.

The **TOC** framework tries to incorporate these rankings into its analytical framework by having the courts consider which group is in fact being mistreated when coming to a decision. In keeping with the philosophy behind and the approach of the TOC framework, the overall circumstances of the protected classes themselves are evaluated closely when calculating the adverse impact suffered by the group; namely, the TOC looks carefully at the group's history of discrimination in general, of discrimination in the respective industry, record of it with this employer, and the group's current political powerlessness. So even though the history of women arguably contains much to elevate gender to the level of race in terms of protected status, the history and reading of Title VII would support providing more protection to traits associated with race, as that was the group whose protection was the original and driving force behind Title VII.[446] The absence of race as a BFOQ further supports the interpretation that race was given especially privileged and protected status under Title VII. The special protection is further substantiated by the fact that Congress has continued to permit race, under the 1866 Civil Rights Act, to be the only protected class entitled to compensatory damages even in cases without intentional discrimination.[447] There is also some evidence to indicate that the gains made by women in the workplace since the 1964 Civil Rights Act have exceeded those made by racial minorities.[448] Lastly, as much as women have and continue to suffer, the history of discrimination against people of color has been especially abhorrent in this country.

Multi-group consequences are an interesting consideration for the courts when calculating the degree and breadth of the trait's impact on the group's identity under both disparate treatment and disparate impact. Looking at Roger's again, the cornrow policy arguably impacted Rogers and others as both an African-American and as a woman. A company policy that impacts more than one group should naturally receive a closer review. The courts affirmed this position to some degree by acknowledging black women as a distinct protected group under Title VII.[449] Some plaintiffs have combined disability claims with sex-differentiated dress code discrimination claims, especially when transgender issues are at play, for this exact reason.[450] Intra-racial distinctions and other forms of unequal treatment among members within the same protected class also raise similar questions of discrimination.[451] Even to broaden the potential evidence admitted in such cases so as to gain a more accurate perspective into the effects of gender identity issues is a move in the right direction.

In addition to the specific protected class impacted by the appearance policy, the **TOC** also measures the degree of this adverse impact by looking at the **<u>number of employees impacted</u>** and the disparity of impact upon a protected class compared to others. Without applying the 4/5ths rule formally, the **TOC** takes notice of the fact that certain grooming policies impact a few hundred women and only a few men, without precluding individual claims. Similar to most sex-differentiated appearance codes, the **TOC** also looks at the difference in its burdens and in its application, if any.[452] For example, the additional time, money, and energy involved in adapting to the dress requirements would be considered in assessing their impact. Although not considered enough in the *Jespersen* case to find discrimination, the **TOC** analysis would give the unequal burdens aspect consideration along with other factors. Furthermore, the consistency (or inconsistency) of the applications of rules in place is another factor for consideration. An apparently race-neutral hairstyle policy creates an adverse impact when it is applied more harshly against one group, for instance African-American women, than others.[453] Under current law, the inconsistent application would most likely substantiate a Title VII claim (even for disparate treatment possibly).[454] Under the **TOC** it is not a conclusive factor of discrimination, but a very significant factor in the calculation of overall harm upon the employee. Finally, the severity of the consequence on a tangible employment condition is considered (e.g., firing or suspension versus higher clothing expenses). The impact to group or individual identity via covering,

assimilation or subordination, which this paper considers a very significant tangible employment condition, is evaluated under the qualitative factors of adverse impact, to which we now turn.

To find unlawful discrimination under Title VII, the courts require some showing of an adverse impact on conditions or terms of employment.[455] However, a "bruised ego, a mere inconvenience, or an alteration of job responsibilities is not enough to constitute an adverse employment action."[456] Yet, for many people, compromising their gender identity to conform to stereotypes is extremely adverse to their sense of self, let alone their employment situation, and not just an inconvenience. Consequently, the **TOC** considers the **qualitative adverse impact** of an employment policy or practice by assessing: 1) the importance of the trait to the group's identity, 2) the importance of the trait to the individual's personal identity, 3) the employer's level of cognitive bias, and 4) the severity, degree and offensiveness of the compromise (which considers the mutability of the characteristic involved). The **TOC** assesses the evidence in deciding where the appearance code lands on the continuum of employee harm - closer to hurt feelings or to materially adverse harm. The courts already do this for sexual harassment cases and other hostile work environment claims under Title VII, when they look at the nature, context, severity, pervasiveness, and offensiveness of the actions.[457] The **TOC** does the same, allowing judges and juries to consider a variety of factors in determining the degree of harm appearance rules have caused employees when coming to legal conclusions.

The **TOC** framework moves beyond mutability as the sole or primary factor for determining whether a trait deserves protection under Title VII. The **TOC** and the courts should still consider mutability, but mutability should not render a trait automatically outside the coverage of Title VII nor immutability within it. Mutability now becomes one important factor (but less so) among others in assessing the overall adverse impact of the grooming policy upon employees as a group or as individuals. Furthermore, legal immutability is redefined to be understood on a continuum – relative to the difficulty or ease in making a change.[458] The TOC determines adverse affect or disparate impact by looking at group and personal identity, cognitive bias, autonomy, privacy, emotions, economics, and more in its calculations.

b. Group Identity and Individual Harm. The symbolic importance or saliency of a trait to a protected group's identity is one factor that can be quite significant and should be considered carefully by the court. The courts should make a determination about where the trait falls on the continuum of "**group identity trait**." The courts can look at the totality of the circumstances to determine if a certain trait is so clearly associated with a group's identity that it deserves a level of protection commensurate with the protected class itself. The court actually acknowledged this possibility in an equal protection case, recognizing that a mutable trait could be so identified with the group as to deserve disparate treatment consideration and protection.[459] For example, speaking Spanish and certain accents may be so related to Mexican identity that a policy prohibiting their use should not be seen as a facially neutral policy. [460] In order to measure the importance of the trait to the group identity, Yuracko suggests considering related factors like the nature, meaning, prevalence, visibility, and group perception of the trait.[461] The closer a trait is identified with a protected class the greater importance it holds to the group identity, and the more severe the harm suffered when such a trait is compromised by an appearance policy. Thus, the more weight the courts should give it in the TOC analysis, and visa versa. Some courts see this as a "**soft immutability standard**" based less on biological characteristics and more on traits associated with or intentionally chosen to signal one's membership in a group (including dress, behaviors, and speech).[462]

For instance, dress codes can cause various injuries, which include cultural profiling, subordination, assimilation, marginalization, stereotype threat, conflict, covering, compromising of group and individual identity, limits to freedom of expression and overall autonomy, loss of personal dignity, prejudice, bias, lower innovation, less authenticity, reduced trust, stress, dissatisfaction, disrespect, inequality, lost energy, which all impair the productivity and culture of the organization.[463] If the harms caused by a dress code outweigh its potential benefits, then they further deprive individuals of the equal employment opportunities intended under Title VII, thus becoming a form of discriminatory employment practice prohibited by Title VII. Furthermore, these harms carry themselves out from the workplace into broader society, countering the larger purpose and goals, hopes and aspirations of Title VII. Trait discrimination causes very real and very severe harms in the workplace and the world, and should be recognized as doing so under Title VII. In general, EEO law should give careful consideration to the harms caused by policies that restrict traits closely identified with protected groups. Some scholars argue for a very strict prohibition of such policies, irrespective of its impact, since the potential to stigmatize is high.[464] The TOC believes that the potential to stigmatize is just one of many factors the courts should weigh in coming to its decision – but weigh it appropriately they must.

The courts should also consider how important said trait is to the **individual's identity**, as well as determining how adversely said trait and the corresponding identity are compromised by said policy. A dress code that impacts individuals more than a group should ***not*** be rendered automatically valid and beyond challenge. Clothing, facial hair, and speech are often significant expressions of personal image, self-identity, and personal autonomy. Assimilation, covering and subordination by individuals are still very serious harms caused directly by grooming policies. Haircuts and other changes that continue to impact the employee beyond the workplace arguably cause greater harm since they impact a wider spectrum of the employees' life and identity, and thus employers will need a better reason to justify the greater harm these policies incur.[465] The impact on both the individual and group need careful consideration, beyond immutability, when evaluating an employer's requirement to change one's appearance. At the very least, the more adverse the impact on personal identity and/or group identity, the more convincing and clear the reason behind the appearance rule needs to be.[466]

c. <u>Privacy</u>, religion and freedom of expression are all fundamental rights impacted by appearance rules, which would require strict scrutiny under Section 1983 (needing a compelling reason, which the law/rule must be necessary to accomplish). Accordingly, appearance rules that do in fact impact these rights should be scrutinized somewhat more than Title VII currently advises. This extra scrutiny traditionally applies to the business reason behind the rule, but more importantly, grooming policies that intrude on these fundamental rights should be viewed as more invasive and thus more severe in their adverse impact – to the group and to individuals. The weight the court gives such factors might, like the constitutional standards of review, fluctuate a bit based on the right or class impacted. Of course, the degree of such infringement, whether it is slight or substantial, should also be considered. Lastly, if more than one constitutional right is involved, then it seems that such "hybrid" claims deserve special consideration by the courts, whether occurring as a result of a private employer's appearance rules or a state actor's dress code.[467]

Privacy has many layers and meanings, "protection from intrusion and protection for autonomy" being two more prominent perspectives.[468] Both approaches to privacy seem to secure protection for an individual to decide how to dress and look in the workplace.[469] The **TOC** simply wants the level of the adverse impact in such cases to be accurately assessed. The infringement on privacy by appearance rules causes serious harm through humiliation and subordination.[470] To compromise one's personal identity, privacy, and autonomy as expressed in choices of clothing, hair and other appearances can potentially cause severe harm. Most states, according to Fisk, determine the level of harm by considering the expectation of privacy, the offensiveness of the invasion, the reason behind the policy, and the existence and rejection of reasonable alternatives.[471] Fisk extols the nuances of this approach as far superior to current anti-discrimination law.[472] The similarities with the **TOC** are obvious, as to both process and principles. Furthermore, the concern of essentialism as a criticism of **TOC** is diminished when privacy rights are factored into the equation because privacy is a right granted to all people, regardless of their color or creed. So restricting appearance rules that infringe on privacy works to protect all employees, emphasizing a right valued by all more than the unequal protection of a certain protected class.

The harm caused by the infringement of an employee's autonomy (subordination) also cannot be understated or undervalued. Both Title VII in its identification of protected groups and the Equal Protection Clause in its determination of suspect class refer to the powerlessness of one group, and the oppressive exercise of it by another.[473] It would seem to contradict the legislative purpose of both to let employers abuse their power through the implementation of dress codes against the less powerful groups the law intended to protect. The courts can utilize the **TOC** approach to make sure that does not happen.

Although the **TOC** framework expands its considerations beyond mutability for determining whether a trait deserves protection under Title VII, the TOC and the courts should still consider immutability as one of a few factors in assessing the **<u>severity or seriousness of the compromise</u>** to the group and personal identity. The degree and offensiveness of the compromise are considered along with its immutability. This allows for a more qualitative, yet accurate, assessment of the harm caused by a grooming policy. The benefit is obvious in PBF or haircut cases involving dreadlocks or an afro, which are often closely identified with race, religion, or national origin. In such cases, the courts have struggled to uphold the anti-discriminatory objective behind Title VII by somewhat manipulating the ***immutability standard***. They seemed to consider the difficulty and pain in changing a trait, not its complete impossibility, as the criteria for legal immutability. We applaud such an effort, especially when it unequally impacts a protected class, while asking the courts and legislatures to consider going even farther in protection and pursuit of the equal opportunities envisioned under Title VII. "Being forced to abandon a trait that is integral to one's sense of self may be personally costly even if physically painless."[474] So why not protect people from having to alter so-called mutable traits that are just as difficult and painful to change in terms of their racial, religious, or gender identity as PBF is to change physically? The courts already do this for sexual harassment cases and other hostile work environment claims under Title VII, when they look at the nature, context, severity, pervasiveness, and offensiveness of the actions.[475] The TOC also recommends that courts, when determining the level of protection to afford a class under either Title VII, carefully assess the severity of harm caused to the group and personal identity by looking closely at the type, degree, seriousness, and offensiveness of the compromise commanded – in addition to and more than the so-called immutability of the trait.[476] The court's previous determination of the trait's importance and visibility will of course impact the corresponding degree of compromise.

d. <u>Cognitive Bias</u>. The **TOC**'s combination of disparate treatment and disparate impact is most clearly manifested in its placement of intent or motive, or rather **<u>cognitive bias</u>**, as just another factor among many (albeit very important) in determining the overall adverse impact experienced by the protected group. The **TOC** recommends that the ***legal understanding of motive and intent be expanded to include a cognitive bias continuum***. This hierarchy of harmful motives begins at one end with a neutral or unintentional disposition (no real motivating factor related to a protected class) and concludes with clear *animus* at the other end.[477] In between these two extremes of intention exists a progression of harmful motives beginning with ***unconscious stereotypes*** (either ***rationally or irrationally*** based proxies), then to ***conscious stereotypes*** (similarly based), and then on to ***bias or prejudice***, similarly distinguished by unconscious or conscious and rational or irrational levels.[478] According to the continuum, bias (with its pejorative connotations) is worse than a stereotype, conscious bias (awareness of prejudice) is worse than an unconscious bias, and an irrational conscious bias is worse than a rational conscious bias (which is tenuously rooted in some fact or history).[479] Even a ***benign proxy*** (positive association with a protected class) or ***benign intention toward a bias*** (negative association, but still want to help group) would still be a

legally questionable motive on the continuum since it would be based on some degree of cognitive bias about the protected class. The current understandings of mixed-motives, stereotypes (under *Price Waterhouse*), and pretext can still be factored into the courts calculations of overall cognitive bias, but now with a fuller appreciation of the factors contributing to the prejudices that motivate discrimination and without it leading to an all or nothing categorization.

The *Price Waterhouse* Court, by recognizing mixed motives and stereotyping, has already begun implementing cognitive bias and a form of the **TOC**. Congress, in its Title VII language of "motivating factor" and "substantial factor" implicitly acknowledged and approved some notion of cognitive bias. The *Desert Palace* Court's approval of using both circumstantial and direct evidence in establishing intent implicitly approved the use of a **TOC** approach.[480] Title VII currently treats an employer that implements a dress code rooted in a conscious and irrational prejudice (e.g., no employees with tattoos since dishonest criminals wear tattoos) virtually the same as an employer who adopts a grooming policy based on an unconscious rational stereotype (e.g., weight limits purported for attractiveness or health, yet unconsciously targeting women with children believing they take more sick days). In fact, both most likely would avoid Title VII violations under most circumstances. The TOC wants to avoid this discrepancy and at least increase the possibility of Title VII protection when warranted. So instead of an all or nothing approach as to the existence of an improper motive, which, even when proven, could still be excused by a BFOQ or the "would have taken the same action" defense, the **TOC** enables the court to investigate all the factors to determine where the employer's motivations fall along the cognitive bias continuum. The TOC and the courts can evaluate the employer's motive as more prejudice or stereotype, more conscious or unconscious, more rational or irrational, and more neutral or nefarious – each along their own mini continuums or spectrums. The TOC allows the courts to integrate motive or intent to some degree in coming to an overall conclusion about harm inflicted upon the employee – as opposed to an all or nothing approach to disparate treatment and the limited remedies under disparate impact.

Some advocates simply want to account for cognitive bias and other shortcomings by expanding Title VII coverage to include various **traits as a protected class**.[481] The fact that the Civil Rights Act of 1991 uses the qualifier "***only if***" when delineating what establishes "an unlawful employment practice based on disparate impact" arguably precludes the use of unmentioned traits (gender or otherwise) from disparate impact consideration at this time.[482] Some states and cities concur and have already provided additional protection for employees in connection with sexual orientation, gender identity, marital status, family status, family responsibilities, smoking habits, height, weight, matriculation, weight, arrest records, source of income, political affiliation, place of residence, location of business, and even physical appearance.[483] One benefit of this approach is that that it allows the "community norms" to be more properly decided and implemented on the local level.[484] Such an approach still comes with the caveat that the local majority and their "norms" come with their own set of cognitive biases that may suppress and subordinate the local minorities and their equal opportunities. Although the suggested approach of adding traits is clearly more protective and probably helpful, it is still a bright line approach that detracts from the nuances, sensitivity and reasoning afforded under a totality of the circumstances approach. Such an approach often leads to a choice between employee rights or employee autonomy, with protection to employees often coming at too great a sacrifice to employer autonomy and rights (or in some cases the reverse). The TOC strives to balance the interests of both employees and employers.

Title VII itself and the courts application have always tried to strike a reasonable balance between protection of employee opportunities and employer autonomy. The courts have balanced these interests primarily by distinguishing between mutable and immutable traits. A more reasonable approach may be to simply consider stereotyping or prejudice as one factor among many in evaluating appearance codes. The courts could allow evidence about the stereotypes and their underlying presumptions that foster or perpetuate the discrimination that Title VII was enacted to obviate. This approach purposely evades elevating the use of gender traits to a presumption of discrimination without sufficient corroborating evidence of its impact in order to avoid unduly burdening businesses since "neither the logic nor the language of *Price Waterhouse* establishes a cause of action for…discrimination in every case" of stereotyping.[485]

e. Socially Acceptable Stereotypes. Although the courts seem to recognize that employment decisions based on non-conformity to gender stereotypes raise real concerns about discrimination, it does not seem that they intend to wipe out the employer's right to consider social norms, customs, and conventions when adopting appearance rules.[486] The reality is that it is extremely difficult, if not impossible, to completely ignore social norms as to gender, race and religion when implementing employment policies. However, some socially acceptable standards and community norms may in fact contain and perpetuate racist and sexist perspectives,[487] and because of their potential discriminatory impact, dress codes and the like (and their underlying social norms) should be scrutinized for the burdens they might impose upon a protected class. Part of that scrutiny should investigate whether the origin of certain community standards has a demeaning or offensive history of stereotypes or bias.[488] Some courts and communities might downplay the harm of assimilation to a person's identity and to their employment opportunities, or overemphasize the employer's freedom to make business decisions (or possible the opposite). Even with these concerns, neither Congress nor the courts has suggested or sanctioned the complete rejection of community norms as a solution to discrimination and neither does the **TOC**.[489]

The **TOC** framework recommends considering community norms, but with a profound awareness of their inherent cognitive biases, their possible discriminatory origins, and their current prejudicial connotations.[490] This approach enables the **TOC** to better balance the concerns of both the employee and employer in coming to a decision. The TOC allows Title VII to retain its purpose, enforced through the wisdom and insight of judicial discretion that reduces the risk of off-handedly

invalidating business policies. In applying the TOC, the courts should weigh the amount of harm inflicted upon the employees by the appearance policy against the importance and value of the employer's business reason for it in a case-by-case approach that serves the interests of both parties in coming to a just decision.

2. <u>BUSINESS REASON</u>: *The courts should assess the importance and fit of the business reason behind the rule*.

The TOC evaluates the **<u>business reason</u>** behind the rule or policy by considering its importance or necessity, its relatedness to the job or objective, and the existence and ease of possible alternatives. In one sense, the TOC business reason takes the two parts of the ***business necessity defense*** and tempers them with the three equal protection standards in evaluating the legitimacy of the alleged business purpose. But instead of a bright line, specific standard, litmus test approach to justifying the business purpose behind the policy, the business reason of the **TOC** derives an overall weighted value for the business reason by looking at the rules importance and relatedness and then determines if that value of the rule justifies the adverse impact it inflicts upon the protected class.

The Civil Rights Act of 1991 clarified certain aspects of Congressional intent for disparate impact. For example, the revisions permitted defendant-business "***to demonstrate***" that the business practice was both "***job related*** to the position in question" and "consistent with ***business necessity***."[491] Each prong creates a unique requirement with both needing to be satisfied to satisfy the defense since both prongs were meant to be read together.[492] Congress purposely avoided a strict definition of business necessity in order to allow the courts to utilize their discretion as case circumstances might demand and to also protect employer autonomy to some degree.[493] The totality of the circumstances framework presented here is helpful because it takes into account various factors that may impact both the job relatedness and level of necessity of the policy, which together comprise its business reason. The **TOC** suggests a model similar to the three standards used by the courts for constitutional issues (strict, intermediate or heightened, and rational basis), which vary depending on the various class impacted (suspect, quasi suspect, non-suspect). The **TOC** takes a similar approach to both the "relatedness" and "necessity" component of the business reason, except instead of requiring the business to meet a specific level for each part, the TOC assesses and assigns a value to the importance of the reason and likewise to the fit between the employment practice and its stated purpose. The **TOC** is therefore not restricted to one size fits all or litmus test understanding of business necessity, but allows for a more fluid standard that depends on the adversity imposed upon the protected class by the policy. The less serious the harm, the less related and/or necessary the rule may need to be; conversely, the more serious the harm, the more important and related the business reason should be for justification.

In evaluating the necessity or fit of the rule, **<u>reasonable alternatives</u>** are also considered. The reasonableness of any alternative, like with reasonable accommodations, is determined by looking at expense, ease of implementation, and impact on operations.[494] The awareness and/or rejection of a reasonable alternative by the employer arguably reduces the mandatory nature or rating of any grooming policy – and possibly increases the harm to the employee. Conversely, an employee's rejection of an alternative or accommodation offered by the employer arguably reduces the level of harm. A rating for the business reason is derived from evaluating theses supporting factors. The **TOC** framework then weighs the business reason against the adverse impact to decide if the business reason justifies the policy despite its harm.

In its effort to "present a clean, neat environment…Starbucks "requires employees to cover all tattoos and remove certain piercings."[495] The **TOC** would consider both the "importance" of the business reason behind the grooming policy and the "job-relatedness" of the policy in achieving those business objectives.[496] The high level of customer interaction and/or the importance of image would increase the importance and job-relatedness of this and many dress-code requirements since studies indicate that dress codes may facilitate professional behavior and promote a more favorable image to customers.[497] Some appearance rules promote homogeneity and conformity in an effort to increase trust, fairness, loyalty, and performance.[498] Both conventional business wisdom and independent studies advise that dressing more formally for work may increase productivity, professionalism, and company image.[499] While other organizational experts suggest that casual dress improves employee attitude, creativity and performance.[500] Yet, these views must be monitored because they also risk surrendering to cognitive biases. Community standards and other important contextual dynamics could also be considered in evaluating both the importance and necessity of the appearance policy.[501] Business basics of safety, efficiency and productivity are of course important considerations. The **TOC** differs from current standards in that it permits consideration of customer preference, co-worker preference, and of course employer preference in determining a rules business value. Like current law, none of these can justify a discriminatory action by itself, but they can be considered, with its probative value depending in part on the supporting statistical evidence, industry studies, and expert testimony.[502]

Title VII, like its constitutional counterparts, should also look at ***the fit between the company rule and the business reason*** (how closely or tenuously are they related?). The fit between the rule and purpose is simply another valid factor for the court to consider in evaluating a dress code, without requiring the private employer to so narrowly tailor the rule so as to make it "absolutely necessary" for the promotion of the interest. This corresponds more closely with the "job related" component of the traditional business necessity defense. The **TOC** can and should integrate the EEOC guidelines regarding validation into its analysis about the job-relatedness and business necessity of the employer's policy. Content validity (the knowledge, skills, and abilities related to that job), construct validity (general characteristics important to job performance), and criterion-related validity (criteria that is predictive of job performance) can all be part of the business reason analysis, and to varying degrees depending on the level of infringement upon the protected class.[503]

The purpose here is not convince the courts to apply constitutional standards explicitly to private employment issues, but rather, to recognize some guiding factors for analysis of employee dress codes. In practice, the courts already use similar standards for disparate impact and equal protection cases and for disparate treatment and due process cases.[504] For example, race can only be restricted under equal protection with a compelling reason that is necessary, while Title VII does not allow it to be a BFOQ. In this instance race is arguably given more protection under Title VII. However, the same cannot be said for religion, gender, and age, which seem to receive greater protections under the Constitution than Title VII. The argument here is not to require the courts to apply the identical level of justification under Title VII as they do under EP and DP, but rather to give much more consideration to the reason behind the appearance rules than they currently do.

Title VII, from its inception, gave serious consideration to the traditional rights of employers to run their business as they desire, balancing their rights and autonomy against the prohibitions of discrimination. The Supreme Court confirmed this Congressional intent "to protect managerial prerogatives of employers," leaving them "undisturbed to the greatest extent possible."[505] The Court interpreted the statute's Bona Fide Occupational Qualification (BFOQ) defense as further evidence of "Congress's unwillingness to require employers to change the very nature of their operations in response to the statute."[506] The BFOQ exception (to disparate treatment), the valid alternative business reason defense (to mixed-motive), the business necessity defense (to disparate impact), and the undue hardship limitation to reasonable accommodations for disability or religion display the intention of Congress and the courts to respect the rights and interests of the employer when coming to a decision, which the TOC endeavors to accomplish.

The TOC combines the wisdom of the scrutiny standards used for equal protection and due process with the BFOQ, business necessity, and "other legitimate reason" defenses of Title VII, its legislative intent and respective EEOC Guidelines. Together, this provides the court a nice framework within which to evaluate the legitimacy of employment decisions based on dress codes and appearance rules. The **TOC** eradicates much of the confusion around business necessity, nuances its application in a way more likely to balance the rights of both the employee and employer in line with the goals of Title VII and the Civil Rights Act.

3. <u>BURDEN OF PROOF</u>: ***The courts should weigh the harm suffered by employees against the business reason of the employer.***

The **TOC** framework instructs the courts to balance the harm and adverse impact caused by an appearance rule against the business reason behind said rule. The more harm a dress code causes to a protected class the more justification it requires in order to avoid being declared discriminatory in violation of Title VII. The courts already have familiarity with an analogous balancing test the Supreme Court established in *Pickering*, which weighed the interest in protecting the employees' expressions of public concern against the government's interest "***as an employer***, in promoting the efficiency of the public services it performs through its employees."[507] Furthermore, the courts already "have a great deal of discretion in deciding whether a proffered business concern is sufficient enough to outweigh the adverse affects of a discriminatory appearance policy and tend to use this discretion in the employer's favor."[508] The **TOC** simply recalibrates the courts' evaluative mechanism in a manner that removes any presumptive favoritism. The **TOC** balancing test allows the court some flexibility in considering both sides of the equation in coming to a judgment.

Taking Harrah's Personal Best Grooming Policy[509] as an example, the court would apply the TOC framework by first gauging the harm perpetrated by said policy – the quantitative then qualitative harm. ***Quantitatively***, the fact that the impact is upon women is important, considering the history of their discrimination in society and the workplace. The number of individuals impacted was significant since women comprised a large portion of the relevant Beverage Service Personnel covered by the policy. There is a very valid argument that women were burdened to a greater degree than men – based on the time, cost, and energy involved in makeup and hair care and maintenance for females. We still assign only a 5 (out of 10) for the quantitative measure of harm here – based in part on its underwhelming impact on most women. Of course, the **TOC** need not, and maybe should not, be reduced to a specific number or mathematical equation, but we provide numbers here primarily to help explain the dynamics. The courts will know how to best evaluate and articulate the totality of the circumstances since they have done it in other types of cases.

Qualitatively, the TOC assesses employee-harm based on the importance of the trait (appearance requirements) to the group identity (women), and to individuals, the severity of harm to each based on the mutability of the trait, the offensiveness, and degree compromised, and the level of cognitive bias involved. Dress and appearance are important to group and individual identity, albeit relatively mutable, with the qualitative depending in part on the degree of compromise. Because the employees still get to choose what type of makeup, hairstyle, and jewelry to wear to some degree, they retain an element of freedom over their appearance and how they want it expressed. The harm is lower than it would be if the employees were forced to wear a specific hairstyle, make-up, or jewelry that is not natural to their identity. Although stereotypical in its requirements, the harm to group identity is relatively low based on the facts.

Dress codes, although rooted in industry norms and job needs to some degree, can still create varying levels of harm that need to be justified with a very strong business reason. For instance, the dress code that expected female lobby attendants to wear an openly provocative uniform was in violation of Title VII due to the sexualized nature of the unequal burden imposed on woman without any justifiable BFOQ.[510] Southwest Airlines also failed in its bid to convince the courts that its attempt to market and provide "heterosexual male titillation" lifted its female hiring practices to that of a BFOQ.[511] The TOC does not necessarily require a BFOQ in such cases, but clearly would a high rating for the business necessity and job relatedness of the dress requirement in order to justify the harm caused to employees. The context in *Jespersen* reduces the

harm to some degree. However, the harm to individual identity is very high since Darlene Jespersen never wore make-up nor wore her hair as now required.[512] The TOC carefully considers individual at Title VII expects, but not as much as it would if the majority of women were compromising their identities to this degree.

On the continuum of cognitive bias, we clearly see a conscious stereotype, but no animus. In fact, the stereotype at play is really directed at the customers – and customer preference, with Harrah's believing that customers will prefer and spend more with women dressed stereotypically. However, the connotation may render the bias more of a prejudice since it is a very limited and potentially pejorative perspective of women. Although some mixed-motive exists and no real pretext is apparent, the improper motive under our cognitive bias would raise the overall qualitative harm to about a seven (7). This gives us a total harm score of 12. We next turn to the business reason analysis to see if the discriminatory harm can be justified.

Fisk and others recommend shifting the burden of proof back and forth between employee and employer similar to the current state of Title VII for disparate impact and mixed-motive cases.[513] Others have mentioned raising the burden of proof to clear and convincing evidence for either the affirmative defense or pretext – depending on your predilection toward the employer or employer. Although clear and convincing evidence is required for affirmative defenses against claims of retaliation under Sarbanes-Oxley,[514] both the Supreme Court[515]and Congress[516] have clearly rejected the standard for Title VII cases. Furthermore, a major purpose behind **TOC** is to simplify the analytical process, something less likely with the use of clear and convincing evidence or a shifting of burdens. The burden of proof should remain with the plaintiff employer with the courts having the benefit of evaluating a variety of factors.

What is the importance of the ***reason*** behind the dress code? Safety? Unlikely. The dress code seems designed to promote professionalism, customer satisfaction, and sales - all valid and legitimate reasons, but not compelling. We would probably give this reason a three or four, except for the context that casino patrons may come in part for the glitzy atmosphere contributed in part by the attractive and costumed appearance of many workers. This increases the importance of the reason, but only slightly since the concern is not overwhelming. Thus, we give the importance of the reason a five (5). We then turn to the job-relatedness, fit, or necessity of the rule in bringing about the desired goals of customer satisfaction and sales. The context, like explained above, clearly displays some degree of relatedness, but again on the lower end of the continuum, maybe a four (4) at most. The reason for this lower rating is simply that the attire of the wait staff pales in comparison to the gambling, entertainment, actual food and drinks, and other business elements found and expected in such an establishment. The fact that reasonable alternatives exist to some degree as to hair styles, make-up and jewelry lowers the overall fit to probably a rating of three (3). Once could argue for a greater reduction since alternatives to the ultimate goal of image could easily be implemented, but respect for employer choice must remain in tact to some degree. Overall, the business reason merits only 8 points, clearly not justifying the harm of 12 it causes.

The **TOC** concludes that Harrah's dress code is discriminatory in violation of Title VII. Obviously, more weight was given to one employee than in the original case – but Title VII clearly protects the rights of individuals within the protected class – not just the class itself.[517] This TOC result would likely conflict with the three-prong approach of McDonnell Douglas and its progeny –as evidenced by the *Jespersen* decision itself.[518] A disparate impact argument would surely fail because the immutability/mutability standard would be applied to the dress expectations.

So we now turn to available remedies under the **TOC**, which is another one of its advantages. The courts, with the full compliment of remedies available them in all cases, can really discern and implement the most appropriate remedy or combination thereof based on the totality of the circumstances as analyzed.

4. <u>REMEDIES</u>: ***The full gamut of remedies should be available for all Title VII cases.***

Compensatory, consequential and punitive damages should be available for all types of Title VII cases. The disparate treatment-disparate impact distinction as to damages is erased under **TOC** including the requirement of intent for compensatory damages. This is not that significant a change in one sense since many race discrimination cases circumvented this restriction by including allegations under the 1866 Civil Rights Act, which allows for compensatory damages regardless of intent.[519] The **TOC** simply extends that possibility to other protected classes. Still, the factor of intent, as well as the others should influence the determination of damages. Compensatory damages under Title VII should no longer be reserved just for cases of intentional discrimination,[520] but to those deemed severe enough under the **TOC**. As cognitive bias studies have established, an individual may suffer extreme harm from discrimination even when classified as unintentional and involving a so-called immutable trait. The extension of available damages hopefully serves to more adequately compensate victims and deter employers. The previous restrictions and limits were arguably another weakness in the Title VII make-up.

Establishing a cap for damages based on the number of people defendant employs remains a reasonable practice, as long as the amounts properly compensate victims and deter discriminators. Congress seems best suited and positioned to determine the appropriate amounts, although the current cap may not deter many larger companies. Declaratory relief, injunctions, rehiring, back pay, attorney fees and costs should of course remain, but should be calculated by considering the harm suffered by employees and the legitimate business reason offered by the employer.[521] In the same way that the Civil Rights Act of 1991 allows the court ***<u>in its discretion</u>*** to award declaratory relief and limited injunctive relief,[522] so too does the **TOC** place the appropriate remedies within the discretion of the court, but just more of them. The **TOC** approach benefits the court by linking the factors that determine liability with those that determine the appropriate remedy. If the court believes otherwise, it is always free to bifurcate the trial in order to accurately assess liability at one time and remedies at another.

The **TOC** analysis of the Harrah's dress code found it discriminatory by a margin of 12 to 8. The court could easily enjoin parts or all of the dress code, then award costs to the employees. Other damages would of course be up to the court's discretion and proof of there existence. But more appropriately, Harrah's could excuse employees who feel compromised by the dress code as long as they could establish that they are meeting its goals of attractive appearance, customer satisfaction, and sales. If Darlene Jespersen continues to be the very presentable and productive worker she was before the grooming policy, then she should be reasonably accommodated. Damages for past hassles and harm are up to the court. Also, the court could require the employer to provide clothing or make-up expenses if it can be shown that the requirements increase the costs to women over men.

The courts should also consider whether some sort of **reasonable accommodation** can be reached. Extending the requirement of accommodation beyond religion and disability, provides both the courts and business a practical method for balancing the rights of employees to be free of trait discrimination and of employers to run their business efficiently, protecting each without the complete compromise of the other. Or what is more practical, the employee and employer decide on a compromise as to the offensive element in their pursuit to discover a reasonable accommodation. One solution suggested here is to find the overall policy valid, but allow for reasonable accommodations (with occasional exceptions) to the negatively impacted individuals. It would allow the courts to carve out remedies, exceptions or a reasonable accommodation for the burdened individual without necessarily nullifying the entire policy. Accent discrimination is another example of where the law could expand slightly to apply reasonable accommodation standards. Courts have already ruled that employers have discriminated based on national origin or race when the accent would not impair job performance.[523] The judges themselves have appeared to be the final arbiter as to the comprehensibility of the accent. The business could arguably provide some sort of language training for the employee to move beyond the perceived barrier of the accent or possibly modify the job responsibilities enough so as to diminish "the need for precise oral communication skills."[524]

The real hope of Title VII (and of the **TOC**) and of most good laws is not just to compensate victims, but rather influence behavior so that there are no more victims.[525] Arguably, Title VII has exhibited some success as cases have declined over the years – especially those of intentional discrimination.[526] As desired by the statute and its backers, businesses have advanced from being hotbeds of discrimination to locations of equal employment opportunity. With that optimistic attitude, we now look at how businesses (instead of the courts) might design their appearance rules to be more in line with the totality of the circumstances approach to Title VII and its underlying principles.

B. TOC Workplace Appearance Rules: A Makeover in the Image of a Dressed-Up Title VII

What would employee appearance rules look like if the legislative intent of Title VII was more fully attained through the implementation of the totality of the circumstances approach? First, it seems that appearance rules are very beneficial, if not necessary. The growing diversity in the workplace, the differences in expectations and perspectives about appearance, the potential conflicts and litigation over such matters, and the alleged benefits that accrue to the workplace together support the creation and implementation of appearance rules in the workplace.

In general, the diversity or discrimination training that is so thankfully present among businesses should be augmented and refined to emphasize cognitive bias information. The training's intent is to diminish the various levels of cognitive bias by becoming more aware of the assumptions and stereotypes that influence our decision–making process. The explicit recognition and conversation about stereotypes, although a delicate topic in diversity training, has proven helpful in reducing the impact of stereotypes through the increase in sensitivity and awareness.[527] Simply spending more time with applicants, resumes, review process, evaluations, recommendations, disciplinary decisions should lead to a decrease in the influence of biases.[528]

The development of dress codes should be a collaborative project, benefiting from the perspectives and insights of employees. The belief is that that the "intergroup contact at work," especially "with signals of group identification" will "reduce prejudice and stigma," traditional barriers to the equal opportunities and social equity envisioned by Title VII. [529] Furthermore, in allowing the individual employees to choose their "signals of group identification" through dress, appearance, and behavior instead of managers or courts identifying them, the risks of essentialism are avoided and personal autonomy is protected.[530] In fact, the benefits of workplace diversity increase more when the employer accommodates group identity to some degree, as opposed to increasing workplace assimilation demands through appearance rules.[531]

Employers should strive to develop criteria for qualifications or advancement as neutral as possible, in both substance and terminology. Review the criteria for its possible association with the group identity of any protected class. Any such identification (if needed at all) needs to be proportionately outweighed by the underlying business reason and the clear connection of the rule to advancing the reason's objective. The stigmatization and stereotype threat often associated with such appearance rules can be diminished by dissociating the rules with any of the protected classes by clarifying the business reason and its relatedness to the rule. Management would be wise to explain the criteria and reasoning behind the appearance rules in light of the business' mission, goals, objectives, overall image, location, industry, types of clients, and the forms and frequency of interaction with those customers. This should be clearly identified within the rules themselves, but also explained by top management. Both positive and negative incentives help, rewarding employees for their furtherance of the mission through the grooming policy, rather than just disciplining them for violations. The EEOC provides helpful guidelines to document impact[532] and to validate job criteria, constructs and content.[533]

Appearance rules should have **prescriptive** (affirmative requirements) and **proscriptive** dimensions (negative restrictions), mandatory and optional provisions, and general and specific elements. Boeing Co., for example, permits employees to display "non-offensive" tattoos and allows piercings, provided they don't pose safety risks. Retail giant Wal-Mart Stores Inc. abides by a similar policy regarding tattoos, but prohibits facial piercings. Subway Restaurants allows "discreet" tattoos and limits piercings to one per ear.[534] What would Darlene Jespersen, an outstanding worker for years, find acceptable under the "Personal Best" grooming policy? Conway recommends that employers keep abreast of changing community and industry standards and other important contextual dynamics that might influence the appropriateness of an appearance policy.[535] She advises this so that employers do not discriminate by unwittingly "enforcing archaic [appearance] policies that limit an employee's opportunities."[536] Generalized guides like "business casual" or "professional" are usually less problematic than specific prohibitions like no chains, pendants, or medallions. If necessary, specific restrictions should be clearly supported by a legitimate business reason, avoid any correlation to protected class identity, and retain employee autonomy as much as possible. It may even make sense to make restrictions so specific and narrow that they are only targeting truly problematic appearance concerns.

Probably the most important aspect of any policy is to allow for reasonable accommodations (or alternatives). This exhibits respect for both the protected class and the individual, let alone satisfies the legal requirements for certain cases. It can also find companionship and guidance in the reasonable accommodation for religion and disability. Employers of course voice there concern about having to make different accommodations for everyone, expending time and energy without avoiding the problem of inconsistent application of the rules. Although some legitimacy in this criticism, any differences arise because the employer is trying to accommodate the employee as opposed to restricting one group over another. Businesses that implement a policy of reasonable accommodation would most likely increase sensitivity to discrimination, reduce prejudices, and strengthen the employer-employee relationship.[537] It is also one of the most direct, least cumbersome, and inexpensive ways to facilitate group identity recognition, intergroup contact, and the related antidiscrimination benefits of both.[538] The fact that less-than-half of American businesses have a dress code supports the need for further research on the topic.[539]

C. Advantages and Disadvantages of the TOC Recommendation

The TOC is a simple yet comprehensive framework. The quantitative and qualitative measures for adverse impact are much more accurate and nuanced in their assessment of a dress code's impact than current approaches. Furthermore, the TOC is based mostly on current legal precepts, yet coordinated in a more palatable analytical framework. For instance, the TOC still addresses the traditional requirement of intent or motivating factor, but through the more helpful cognitive bias continuum. The TOC truly tries to consider the various perspectives of both employees and employers and to balance their respective concerns in way that promotes and protects their various rights and freedoms. With the full complement of remedies available, the TOC returns judicial discretion to its rightful status in Title VII cases.

Employers question such an approach for its interference with their autonomy, their judgment, and the business benefits derived from grooming policies. Employers posit that appearance policies promote professionalism, decorum, values, behavior, solidarity, loyalty, productivity, customer satisfaction, structure, obedience, employer autonomy and rights, and avoid essentialism.[540] Opponents counter that these same benefits are actually more likely to result from flexibility and diversity in appearance rules than in rigidity and uniformity.[541] A major advantage of the **TOC** approach is that it enables the courts to evaluate more accurately the benefits and burdens associated with a particular dress code, grooming policy, or appearance rule – with careful consideration of everyone's position. The **TOC** allows courts to better perform this function and to even determine a reasonable accommodation for both positions, hopefully maximizing the benefits of appearance rules, while minimizing their challenges

Some critics argue that this approach goes beyond Congress' initial intent in enacting the Civil Rights Act and beyond acceptable levels of judicial activism. But the Supreme Court rejected this reasoning when it extended the understanding of Title VII to cover sexual harassment and same-sex sexual harassment.[542] To leave no doubt, the Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils and it is ultimately the provisions of our laws rather than the principal concerns of our legislatures by which we are governed."[543] The Court has recognized elsewhere that even "Constitutional principles of equality…liberty, property, and due process, evolve over time" influenced by "shifting cultural, political and social patterns."[544] Certain forms of trait discrimination are a "reasonably comparable evil" that courts should address by considering a variety of factors when deciding on the discriminatory effect of a company appearance policy.

Critics also question the wisdom of giving courts this much discretion since they are equally subject to prejudicial perspectives and cognitive bias. Yet judges still seem to be in the best position to address these concerns and overcome their biases on a case-by-case basis. Justice Marshall again explained, that "to this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community."[545] He continued, that "courts do not sit in a social vacuum" and "judicial action has catalyzed … [much] legislative change."[546] Judicial discretion is a hallmark of our legal system, endowed upon judges from the filing of pleadings through the appeal of their judgments.[547] They have the opportunity to hear the different evidence and weigh the idiosyncrasies of each unique case. The courts, in their experience and wisdom, making these decisions are much better than the alternative of permitting potentially egregious

discrimination to go unchecked. Congress essentially voiced this pro-judiciary position with its intentional silence regarding the precise definition of business necessity, thereby purposely relegating to the courts the responsibility for Title VII's proper interpretation and implementation.[548] In applying the totality of the circumstances standard, the courts will find themselves in familiar territory. The courts already apply **TOC** to a variety of cases, which include the determination of probable cause,[549] proper police force,[550] defamation,[551] and the waiver of Miranda rights of children.[552] But even more pertinent, important, and validating, is that the courts also use the totality of the circumstances in discrimination cases involving jury selection,[553] voting rights,[554] EP in employment,[555] and even sexual harassment under Title VII.[556]

A related and major concern voiced by most is that of "essentialism" resulting from the courts determination of what traits deserve protection based on their close association with the identity of a protected group. By recognizing certain traits as essential to group identity, the process may have the unintended effect of categorizing the protected class in a way that is inaccurate or worse yet, in a manner that perpetuates hurtful and debilitating stereotypes. "Legally enshrining existing group-identified traits" may do more harm by deepening the "hierarchy, oppression, and social subordination" resulting from these traits, which traits "may themselves be the result of social subordination."[557] In short, drawing attention to the stereotype may in fact reinforce the very biases the law wants to eradicate.

Although some concern is warranted in placing the courts in the awkward position of deciding what traits are considered essential to the identity of a group, the reality is that the courts are clearly positioned better than anyone to determine the propriety of these types of employment policies. It also seems better to address the employment harm caused by said stereotype rather than ignore it, hoping that said prohibition will curtail at least some misuse of trait discrimination. More persuasively, the **TOC** partially avoids this problem because the group identity trait is only one factor among many in the analytical process, and not determinative in itself. Furthermore, the High Court recognized that diversity (at least in higher education) is a "compelling government interest because it promotes "cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."[558] The same logic seems to hold doubly true for the classroom we call the workplace, and thus, employers should not prohibit that diversity through rigid and homogeneous dress codes. Even cases that have struck down diversity programs, have affirmed the value of diversity.[559] The freedom to signal membership in a certain group or personal identity promotes the dignity and diversity that will assist the above attributes and others. Clearly in the current global economy, diversity has been recognized as a valuable commodity in various venues, including employment, that need to be nurtured – not stifled.

Expanding Title VII anti-discrimination coverage through a TOC framework would directly safeguard that individual freedom, while also protecting them from suffering the professional and social barriers inherent in appearance discrimination, especially where there has been very little legal recourse in the past. This includes the trait discrimination more closely associated with the already protected groups (like race and gender), as well as the more subtle forms of appearance discrimination (imposed via height, accent, weight, and attractiveness) that can be just as debilitating. Furthermore, it would help displace the cultural stereotypes that perpetuate much of the discriminatory behavior, a behavior that does not just hinder individuals, but overall social and economic development based on ability, capacity and resources.[560]

VII. CONCLUSION

Title VII was part of the landmark Civil Rights Act of 1964, passed with the purpose of transforming society through the prohibition of discrimination and the promotion of equal opportunities inside and outside the workplace. The world and workplace have changed significantly in the 45 years since the Acts passage and the 25 years since its last amendment. These changes include new forms of discrimination, greater understanding of cognitive bias, and greater awareness of the flawed application and understanding of Title VII. These imperfections combine to make it a perfect time to revisit and revise Title VII. The **TOC** analytical framework is one small attempt at such revision.

Business occupies a very integral and influential role in society, which provides it with the unique opportunity to not just reflect, but to actually shape society's values, including those towards discrimination. Business provides comprehensible paradigms and metaphors for a variety of life issues and experiences, giving these concerns an accessibility and meaningfulness much greater than their underlying intellectual theories ever could. Businesses and employers should use their position to influence society, rejecting rather than reinforcing its prejudices, biases, and discrimination. Accordingly, appearance rules and grooming policies provide employers with a perfect vehicle for valuing this society's cultural diversity and a perfect opportunity to integrate and balance the cultural expressions of clothing and appearance with the traditional professionalism of workplace dress codes.

Congress and the courts have expressed the "grandest vision of antidiscrimination law… to transform society by eradicating discrimination based on [prohibited classifications or protected characteristics]…and to promote facially-neutral decision-making…and status blind employment practices."[561] Let us heed the warnings of past prejudices and be enlightened by the knowledge from current studies so that Title VII is not rendered antiquated or impotent, but rather a force of pertinent power and the "tool of transformative social policy" that it was intended to be.[562] The totality of the circumstances (**TOC**) analytical framework presented here tries to assist Title VII in prohibiting discrimination and in promoting equal opportunities through a legal lens that respects and honors the human person in all its diversity and beauty, in all its various colors and shades, shapes and sizes, races and religions, genders and identities, and especially in all its goodness and grandeur inside the workplace and in the world.

Footnotes/Endnotes

[1] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).
[2] Kimberly Yuracko, *Trait Discrimination as Race Discrimination: An Argument about Assimilation*, 74 GEO. WASH. L. REV. 365, 366 (2006).
[3] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
[4] Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).
[5] Maris A. Vinovskis, *How Social Historians Lost the Civil War: Some Preliminary Demographic Speculations, in* TOWARD A SOCIAL HISTORY OF THE CIVIL WAR: EXPLORATORY ESSAYS 1, 4 (Maris Vinovskis ed., Cambridge Univ. Press 2003) (1990) (noting that more Americans died in the Civil War (@620,000) than in any other war and almost as many as all other wars combined).
[6] 42 U.S.C. § 1983 (2000).
[7] U.S. Const. amend. XIV; s*ee* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (Greenwood Publishing Group, Inc. 1998) (noting that the amendment was designed in part as a set of guidelines for the "reconstruction" of the Southern states, which required implementation in order to be readmitted to the Union).
[8] 42 U.S.C. 21 § 1981 (2000).
[9] 42 U.S.C. 21 § 1983 (2000).
[10] U.S. Const. amend. XV; U.S. Const. amend. XIX.
[11] *See* Deborah A. Ballam, *Employment at Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000).
[12] *Id.*
[13] Michael J. Yelnosky, *What Do Unions Do About Appearance Codes?*, 14 DUKE J. GENDER L. & POL'Y 521, 522 (2007) (reminding readers that in addition to her federal discrimination case, Darlene Jespersen brought a state action against Harrah's for breach of an implied covenant of good faith).
[14] Charles J. Muhl, *The Employment-at-will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW, Jan. 2001 at 3, 5 (quoting *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 184, 188 (1959)).
[15] Civil Rights Act, 42 U.S.C. §§ 1981-2000 (2000).
[16] Bruce J. Dierenfield, *Conservative Outrage: the Defeat in 1966 of Representative Howard W. Smith of Virginia*, 89 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY at 194 (1981) (recalling that Senator Howard Smith, Democrat of Virginia, tried to delay (through the Rules Committee) then derail (via the addition of sex) the Act).
[17] Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243, 250 n.47 (2007).
[18] 42 U.S.C. § 2000e (k) (2000).
[19] 29 U.S.C. §§ 621-634 (2000).
[20] 29 U.S.C. §§ 791-794e (2000).
[21] 42 U.S.C. §§ 12101-12213 (2000).
[22] William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 164 n.69 (2007) ("There are now seventeen (17) states and the District of Columbia that have laws prohibiting employment discrimination based on sexual orientation.").
[23] Lynn T. Vo, *A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance-Based Anti-Discrimination Law*, 26 S. ILL. U. L. J. 339, 352-53 (2002).
[24] 42 U.S.C. § 1981 note, Sec. 3 (2000).
[25] MARY LISA GAVENAS, COLOR STORIES: BEHIND THE SCENES OF AMERICA'S BILLION-DOLLAR BEAUTY INDUSTRY 10 (Simon & Schuster 2002) (estimating the U.S. cosmetic industry at 30 billion dollars, without surgical and related procedures, focused on altering one's appearance).
[26] Civil Rights Act, 42 U.S.C. §§ 1981-2000 (2000).
[27] 42 U.S.C. § 2000e-2(a)(1)-(2) (2000).
[28] Ken Nakasu Davison, *Note and Comment: The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals under Title VII*, 12 ASIAN L. J. 161 (2005); s*ee also* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 771 (1987).
[29] *See* San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).
[30] Gutzwiller v. Fenik, 805 F. 2d 1317, 1325 (6th Cir. 1988) ("The showing a plaintiff must make to recover under Title VII mirrors that which must be made to recover on an equal protection claim under §1983.").
[31] Union Steelworkers of Am. v. Weber, 443 U.S. 193, 206 (1979) (commenting on the intent behind Section 706 (g) of the Act, which protects the authority of employers and limits the reach of Title VII); s*ee also* Yuracko, *supra* note 2, at 374 n.32.
[32] Yelnosky, *supra* note 13, at 523 n.15 (citing *Crittenton Hospital*., 342 N.L.R.B. No. 67 (2004) (uniform and fingernail policies regulating the appearance of nurses are mandatory subjects of bargaining)).
[33] 42 U.S.C. § 2000e-2(a)-(n) (2000).
[34] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); s*ee also*, Desert Palace v. Costa, 539 U.S. 90 (2003).
[35] *McDonnell Douglas*, 411 U.S. 792.
[36] *Costa*, 539 U.S. 90.
[37] 42 U.S.C. § 2000e-2 (e) (2000).
[38] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
[39] 42 U.S.C. § 2000e-5 (g)(2)(B) (2000).
[40] *McDonnell Douglas*, 411 U.S. 792. However, the proof of a pretext no longer binds the jury or judge to an ultimate finding of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).
[41] *Burdine*, 450 U.S. 248.
[42] 42 U.S.C. § 2000e-2 (a) (2000).
[43] 42 U.S.C. § 2000e-2 (a) (2000).
[44] *See* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM AND MARY L. REV. 911 (2005).
[45] *Id.* at 914 (2005). This confusion over intentionality will eventually lead the Supreme Court to distinguish between single-intent (or pretext) cases and mixed-motive cases under disparate treatment. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[46] Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).
[47] 42 U.S.C. § 2000e-2 (a)(1) (2000); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[48] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006).
[49] 42 U.S.C. § 2000e-2(e)(1) (2005).
[50] Dothard v. Rawlinson, 433 U.S. 321 (1977).
[51] Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination* Law, 112 YALE L. J. 1257 (2003)

[52] 42 U.S.C. § 2000e-2(e)(1) (2005).
[53] Dothard v. Rawlinson, 433 U.S. 321 (1977).
[54] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[55] Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77 (2003).
[56] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
[57] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
[58] *McDonnell Douglas*, 411 U.S. 792. Direct evidence of the pretext was generally required to overcome this second form of affirmative defense. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). However, the Court subsequently explained that a jury may infer a pretext and thus intentional discrimination from the falsity of the alternative explanation provided by the business (as well as from the already established prima facie case against it). Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).
[59] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[60] *Id.*
[61] *Id.*
[62] 42 U.S.C 2000e-2(m) (2000).
[63] *See* 42 U.S.C 2000e-2(m) (2000) (reading in pertinent part: "an unlawful employment practice is established when the complaining part demonstrates that race, religion, color, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice*.").
[64] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See also* Desert Palace v. Costa, 539 U.S. 90 (2003).
[65] *Price Waterhouse*, 490 U.S. 228; 42 U.S.C 2000e-2 (m).
[66] 42 U.S.C. §2000e-5(g)(2)(B) (2000).
[67] *Price Waterhouse*, 490 U.S. 228 (1989) (emphasis added).
[68] *Id.* (emphasis added). *Price Waterhouse* had allowed the company to escape liability despite the prejudicial motive, if it could ***prove*** that it still "***would have"*** fired the worker anyway or made the same decision based on the non-discriminatory reasons. *Id.*
[69] 42 U.S.C. §2000e-5(g)(2)(B) (2000).
[70] 42 U.S.C. §2000e-5(g)(2)(B) (2000).
[71] 42 U.S.C. §2000e-5(g)(2)(B)(i) (2000) (allowing defendant to escape rehiring or paying damages to the plaintiff when presenting a ***legitimate other reason***, but allowing the court in its discretion to award declaratory relief, limited injunctive relief, and attorney's fees and costs).
[72] 42 U.S.C. §2000e-5(g)(2)(B) (2000).
[73] Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147 (2000).
[74] St. Mary's Honor Center v. Hicks, 509 US 802 (1993).
[75] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[76] *Id.* at 430 n.6 (1971) ("In North Carolina, 12% of black and 34% of whites had high school diplomas at the time of the Griggs policy. Furthermore, nationally, only 6% of blacks passed the standardized test compared to 58% of whites.").
[77] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000) (emphasis added).
[78] 42 U.S.C. § 2000e–2(k)(1)(B)(i) (changing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)).
[79] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[80] 29 C.F.R. § 1607.4(d) (2000); *see also* DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 96 (McGraw Hill/Irwin 5th ed. 2007) (1994) (explaining that the Uniform Guidelines on Employee Selection Procedures instituted the 4/5th or 80% rule, which states that "disparate impact is statistically demonstrated when the selection rate for groups protected by Title VII is less than 80% or four-fifths that of the higher scoring majority group." If the protected group is adversely affected to this degree by a business policy, then it is presumed to be material and discriminatory.) *Id.*
[81] Hazelwood School District v. U.S., 433 U.S. 299 (1977) (explaining that an application test that results in greater than a 20% difference in eligible employees between men and women, blacks and whites, or other protected groups raises a presumption of unequal treatment).
[82] Watson v. Fort Worth Bank and Trust, 487 U.S. 997 (1988).
[83] *See* DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 96 (McGraw Hill/Irwin 5th ed. 2007) (1994).
[84] 42 U.S.C. § 2000e-2 (k)(1)(A)(i) (2000).
[85] 42 U.S.C. § 2000e (m) (2000) ("The term 'demonstrates'' means meets the burdens of production and persuasion.").
[86] 42 U.S.C. § 2000e-2 (k)(1)(A)(ii) (2000).
[87] 42 U.S.C. § 2000e-2 (k)(1)(C) (2000).
[88] 42 U.S.C. § 2000e-2 (k)(1)(C)(3) (2000).
[89] *See* San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).
[90] *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last visited March 1, 2008).
[91] *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last visited March 1, 2008).
[92] *See* Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L. J. 2279 (2001).
[93] Barker v. Taft Broad Co., 549 F.2d 400 (6th Cir. 1977).
[94] *See* Michael W. Fox, *Piercings, Makeup, and Appearance: The Changing Face of Discrimination Law*, 69 TEX. B. J. 564 (2006).
[95] Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) (In a Title VII context, "'sex' (referring to an individual's anatomical and biological characteristics)…'gender' (referring to socially-constructed norms associated with a person's sex)").
[96] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
[97] *Id.* Phillips argued that its criteria of pre-school children was neutral (thus not because of sex) and in fact distinguished only between categories of women, not between men and women. *Id.*
[98] *Id.*
[99] *Id.*
[100] Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205 (2007).
[101] *See* David B. Cruz, *Pursuing Equal Justice in the West: Making up Women: Casinos, Cosmetics and Title VII*, 5 NEV. L.J. 240, 244 (Fall 2004) (citing Knott v. Mo. Pac. R.R., 527 F.2d. 1249 (8th Cir. 1975)).
[102] Friedman, *supra* note 101.
[103] Sprogis v. United Airlines, 444 F.2d 1194 (1971), *cert. denied*, 404 U.S. 991 (1971).
[104] Gen. Elec. v. Gilbert, 429 U.S. 125 (1976).
[105] 29 U.S.C. §§ 621-634 (2000).
[106] UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).
[107] Carroll v. Talman Federal Savings & Loan Ass'n, 604 F.2d 1028, 1029 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

[108] O'Donnell v. Burlington Coat Factory Warehouse, Inc, 656 F. Supp. 263 (S.D. Ohio 1987).
[109] Willingham v. Macon Tel. Publ. Co. 507 F.2d 1084, 1092 (5th Cir. 1975).
[110] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (en banc).
[111] *Willingham*, 507 F.2d at 1092.
[112] *Id*.; *see also* Hollins v. Atlantic Co., Inc., 188 F.3d 652 (6th Cir. 1999) (grooming policy prohibiting ponytails potentially applied in discriminatory manner where only African-American worker was reprimanded).
[113] Gerdom v. Cont'l Airlines, Inc., 692 F. 2d 602 (9th Cir. 1982).
[114] Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000).
[115] *See* Mary-Kathryn Zachary, religion, race and dress codes, Supervision, March 2006, v. 67, Iss. 3, p.23.
[116] *Id at* 24.
[117] Cruz, *supra* note 102, at 244 (arguing that the BFOQ should apply only to the decision to hire someone, but not to the terms or conditions of employment, yet acknowledges this narrow reading is not utilized by the courts).
[118] *See* Fagan v. National Cash Register Co., 481 F.2d 1115, 1126 (D.C. Cir. 1973) (different hair length requirements validated as a BFOQ).
[119] Dothard v. Rawlinson, 433 U.S. 321 (1977).
[120] Healy v. Southwood Psychiatric Hosp.78 F.3d 128 (3d Cir. 1996); Fesel v. Masonic Home of Del., Inc. 447 F. Supp. 1346 (D. Del. 1978).
[121] McGowan, *supra* note 55.
[122] 29 C.F.R. 1604.2 (a)(1)(iii) (2007) (emphasis added).
[123] Olson v. Marriott Int'l, Inc., 75 F. Supp.2d 1052 (D. Ariz 1999).
[124] *Id*.
[125] *See* Cruz, *supra* note 102, *at* 244.
[126] Frank v. United Airlines, Inc., 216 F.3d 845, 854-55 (9th Cir. 2000) (no-marriage and no-pregnancy rules for women were also found to violate Title VII); *see also* Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971).
[127] *See* Alexis Conway, *Leaving Employers in the Dark: What Constitutes a Lawful Appearance Standard after Jespersen v. Harrah's Operating Co.?*, 18 GEO. MASON U. CIV. RTS. L.J. 107 (2007) (citing Carroll v. Talman Federal Savings & Loan Ass'n of Chicago, 604 F.2d 1028, 1029 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980)).
[128] O'Donnell v. Burlington Coat factor Warehouse, Inc., 656 F. Supp. 263 (S.D. Ohio 1987).
[129] EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).
[130] Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981).
[131] 42 U.S.C. § 2000e-2(e)(1) (2000).
[132] *Id*. at 1275.
[133] *Id*. at 1273.
[134] Yuracko, *supra* note 2, at 873.; *see also* Wilson v. Southwest Airlines, 517 F. Supp 292 (N.D. Tex. 1981).
[135] 29 C.F.R. 1604.2 (a)(1)(iii) (2007) (emphasis added).
[136] Dothard v. Rawlinson, 433 U.S. 321 (1977).
[137] Weber v. Playboy Club, Case No. CSF 22619-70, Appeal No. 774 (N.Y. State Div. of Human Rights 1971). The EEOC sued Hooters under this finding, but settled the case for $3.7 Million before the court ruled. *Id.*
[138] Conway, *supra* note 13, at 107(citing Marks v. Nat'l Commc'ns Ass'n, 72 F. Supp. 2d 322,330 (S.D.N.Y. 1999)).
[139] Vo, *supra* note 23, at 343.
[140] Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985) (Appearance standards for a female newscaster supported by viewer surveys were ruled validly based on neutral professional criteria and not stereotypical gender classifications).
[141] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[142] *Id*.
[143] *Id*.
[144] *Id*. at 256.
[145] Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) (In a Title VII context, "'sex' (referring to an individual's anatomical and biological characteristics)…'gender' (referring to socially-constructed norms associated with a person's sex)").
[146] *Price Waterhouse*, 490 U.S. at 244 n.9.
[147] *Price Waterhouse*, 490 U.S. at 234.
[148] *Id.* (quoting Plaintiff's Exhibit 15).
[149] *Id.* at 235 (quoting the trial opinion, 618 F. Supp. at 1117).
[150] *See* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
[151] *Id*.
[152] *See Price Waterhouse*, 490 U.S. 228.
[153] 42 U.S.C. § 2000e (m) ("The term ``demonstrates" means meets the burdens of production and persuasion.").
[154] 42 U.S.C. § 2000e-2 (k)(1)(A)(i).
[155] *See* St. Mary's Honor Center v. Hicks, 509 U.S. 802 (1993); *See also* Desert Palace v. Costa, 539 U.S. 90 (2003).
[156] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (en banc).
[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Id*. at 1106.
[161] *Id.* at 1109.
[162] *Id.* at 104.
[163] *Id*.
[164] *Id.* at 1110.
[165] *Id.* at 1117.
[166] *Id.* at 1114.
[167] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[168] Frank v. United Airlines, Inc., 216 F.3d 845, 854-55 (9th Cir. 2000); Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006); *see also* Megan Kelly, *Making–up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in Jespersen v. Harrah's Operating Co*., 36 GOLDEN GATE U.L. REV. 45, 52 (Spring 2006).
[169] Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998) (policy prohibited men, but not women from having long hair).

[170] *See* Jennifer L. Levi, *The Interplay Between Disability and Sexuality: Clothes don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 93 (2006).
[171] *See* Conway, *supra* note 131, at 125 (citing Carroll v. Talman Federal Savings & Loan Ass'n of Chicago, 604 F.2d 1028, 1029 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980)).
[172] Elizabeth M. Admantis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination*, 75 WASH. L. REV. 195, 208 (2000) (citing Harper v. Blockbuster Entertainment Corp, 139 F.3d 1385, 1387-90 (11th Cir. 1998) and Lanigan v. Bartlett & Co. Grain, 466 F. Supp 1388, 1392 (W.D. Mo. 1979)).
[173] *See* Conway, *supra* note 131.
[174] Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000). The weight restrictions in this case were ruled discriminatory because they were in fact different for men and women, but the court acknowledged their potential legitimacy if the same. *Id.*
[175] *Id*.
[176] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
[177] Friedman, *supra* note 101, at 217.
[178] Friedman, *supra* note 101, at 217.
[179] *Smith*, 378 F.3d 566 (6th Cir. 2004).
[180] *Id*.
[181] Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).
[182] *Id*.
[183] Smith v. Liberty Mutual Co., 569 F.2d 325 (5th Cir. 1978). The protection of transsexuals under Title VII is further complicated by the fact that they are explicitly excluded from coverage under the ADA. 42 U.S.C. § 12211 (b)(1) (2000).
[184] Friedman, *supra* note 101, at 222 (*see also* n.100 for a few summary judgment cases).
[185] *See* Levi, *supra* note 175, at 102-103.
[186] Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243 (2007).
[187] 42 U.S.C. § 2000e (j) (2000). The Court has decided that Section 1981also covers people of the Jewish religion and of Arab origin because they were both classified as distinct races at the time the act was promulgated. Whether this translates into broader coverage under Title VII is hard to know, but possible. *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); s*ee also* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987).
[188] 42 U.S.C. § 2000e (j) (2000).
[189] 42 U.S.C. § 2000e (j) (2000).
[190] Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 70 (1986) (reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices"); *see also* Cooper v. Oak Rubber Co., 15 F.3d 1375(6th Cir. 1994).
[191] 42 U.S.C. § 2000e (j) (2000). *See* Barbara l. Jones, *Keeping up Appearance: How to Advise Your Employer Clients on Addressing Issues of Dress*, ST. CHARLES COUNTY BUSINESS RECORD, August 20, 2005, at. 1.
[192] *See* Barbara L. Jones, *Keeping up Appearance: How to Advise Your Employer Clients on Addressing Issues of Dress*, ST. CHARLES COUNTY BUSINESS RECORD, August 20, 2005, at. 1.
[193] Wilson v. U.S. W. Comm., 860 F. Supp 665 (D.C. Neb. 1994) (the woman's vow did not require the button to be displayed visibly, just worn continuously).
[194] 42 U.S.C. § 2000e (j) (2000).
[195] Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 67 (1986).
[196] *See* Trans World Airlines v. Hardison , 432 U.S. 63 (1977).
[197] Alison Stein Wellner, *Costco Piercing Case Puts a New Face on The Issue of Wearing Religious Garb at Work*, 84 WORKFORCE MANAGEMENT 77 (2005).
[198] *What Not To Wear (Part Two)*, 12 HUMAN RESOURCE MANAGEMENT INTERNATIONAL DIGEST 39 (2004).
[199] *Id*.
[200] Jonathan Maude, W*orkplace Dress Codes*, PERSONNEL TODAY, Feb 14, 2006, at 20.
[201] *See* Jones, *supra* note 200, at 1; *See also* Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004).
[202] *See* Jones, *supra* note 200, at 1; *See also Cloutier*, 390 F.3d 12.
[203] *See* Jones, *supra* note 200, at 1.
[204] *Cloutier*, 390 F.3d 126.
[205] *See* Wellner, *supra* note *205*, at 77.
[206] See Zachary, *supra* note 119, at 26 (quoting Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004)).
[207] *Id*.
[208] *Id*.
[209] *See* Jones, *supra* note 200, at 1.
[210] *See* Jones, *supra* note 200, at 1.
[211] Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004).
[212] 29 C.F.R. 1604.2 (a)(1)(iii); *see also* Rucker v. Higher Ed. Aid Bd., 669 F.2d 1179 (7th Cir. 1982).
[213] EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291 JLR (W.D. Wash. Sept. 7, 2005).
[214] *See* Fox, *supra* note 94.
[215] *See* Fox, *supra* note 94; *see also* EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291 JLR (W.D. Wash. Sept. 7, 2005).
[216] *See* Stephenson v. Davenport Community School District, 110 F.3d 1303 (8th Cir. 1997); *See* Lucille M. Ponte & Jennifer L. Gillian, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319 (2007).
[217] Mark McGraw, *Limiting Looks*, HUMAN RESOURCE EXECUTIVE ONLINE, Oct. 2, 2005, http://www.hreonline.com/HRE/story.jsp?storyId=4269043.
[218] 42 U.S.C. §§ 12101-12213 (2000).
[219] 42 U.S.C. § 12102 (2) (A)-(C) (2000).
[220] 29 C.F.R. § 1630.16 (2001).
[221] *See* Fox, *supra* note 94, at 564 (referencing Erin Weber v WYCD-FM (D. Mi., 23 May 2005)).
[222] 29 C.F.R. § 1630.2 (o) (2000).
[223] *See* Fox, *supra* note 94.
[224] *See* Fox, *supra* note 94, at 564; *see also* 42 U.S.C. § 12101-12213 (2000).
[225] *See* Vo, *supra*, note 23, at 350 (citing 29 C.F.R. § 1630.2(1) (2001)). The ADA even "protects those individuals perceived [to have a disability]… even if they are not actually impaired" *Id.*
[226] *See* Fox, *supra* note 94, at 566.
[227] *See* Vo, *supra*, note 23, at 350 (citing School Bd. of Nassau County v. Airline, 480 U.S. 273, 284 (1987)).

[228] 42 U.S.C. §§ 6101-07 (2000).
[229] *See* Smith v. City of Jackson Mississippi, 544 U.S. 228 (2005).
[230] *Id*.
[231] *Id*. (explaining that "unlike Title VII, however, § 4(f)(1) of the ADEA contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).")
[232] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).
[233] *See* Barber v. CSX Distrib. Servs., 68 F. 3d 694 (3rd Cir. 1995); *see also* Devine v. Stone, Leyton &Gersham, P.C., 100 F. 3d. (8th Cir. 1996).
[234] 42 U.S.C 2000e-2 (e)(1) (2000).
[235] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[236] *Id*.
[237] *See* NBA Media Ventures, LLC, *NBA Player Dress Code*, http://www.nba.com/news/player_dress_code_051017.html (last visited Apr. 1, 2008).
[238] Admantis, *supra* note 177, at 204-205.
[239] Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795 (8th Cir. 1993); s*ee also* Admantis, *supra* note 177, at 204-205.
[240] Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993); Bradley v. Pizzaco, Inc., 7 F.3d 795 (8th Cir. 1993).
[241] Woods v. Safeway Stores, Inc. 420 F. Supp. 35 (E.D. Va. 1976).
[242] EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971).
[243] *See also* Hollins v. Atlantic Co., Inc., 188 F.3d 652 (6th Cir. 1999) (grooming policy prohibiting ponytails potentially applied in discriminatory manner where only African-American worker was reprimanded).
[244] *Id*.
[245] Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (2000).
[246] *See* Vo, *supra* note 23, at 348 (citing Craig v. County of Los Angeles, 626 F.2d 659, 668 (9th Cir. 1980)).
[247] Dodd v. Septa, No. 064213, 2007 U.S. Dist. Lexis 46878, *16 (E.D. Pa. 2007) (citing Adakai v. Front Row Seat, No. 96-2249, 1997 U.S. App. LEXIS 27014, (10th Cir., Oct. 1, 1997) (unpublished opinion)).
[248] Avigliano v. Sumitomo Shoji America, Inc. 638 F.2d 552 (2nd Cir. 1981).
[249] Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113 (1981)..
[250] Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989).
[251] Odima v. Westin Tucson Hotel, 53 F.3d 1484 (9th Cir. 1995).
[252] *Garcia*, 618 F.2d at 270.
[253] Paula Burke Erickson, *More People Benefiting From Discrimination Laws*, KNIGHT RIDDER TRIBUNE BUSINESS NEWS, May 1, 2005, at 1.
[254] *See* Fox, *supra* note 94.
[255] 29 C.F.R. 1604.2 (a)(1)(iii); *see also* Rucker v. Higher Educ. Aid Bd., 669 F.2d 1179 (7th Cir. 1982).
[256] Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369 (2007).
[257] *Id*.
[258] *Id*.
[259] *See* Levi, *supra* note 175, at 104.
[260] Jefferies v. Harris Cty. Comm. Action Assoc., 615 F.2d 1025, 1033-34 (5th Cir. 1980).
[261] *See* Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment and the Law* (Note and Comment), 14 ASIAN AM. L. J. 165 (2007).
[262] Brown v. General Servs. Admin., 425 U.S. 820 (1976) (restricting federal employment discrimination actions to Title VII); Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985).
[263] 42 U.S.C. § 1983 (2000) (Civil Rights Act of 1871) (which authorizes private actions for violations of Constitutional and statutory rights).
[264] *See* Johnson v. City of Fort Lauderdale, 148 F.3d 1228 (11th Cir. 1998) (holding that Title VII does not preempt constitutional claims under 42 U.S.C. § 1983*); but see* Waid v. Merrill Area Pub Sch. 91 F.3d 857 (7th Cir. 1996) (holding Title VII preempts claims under both Title IX and 42 U.S.C. § 1983).
[265] Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005) (explaining that a private cause of action under Title IX for intentional sex discrimination is not precluded by Title VII); *but see* Smith v. Robinson, 468 U.S. 992 (1984) (Education of the Handicapped Act preempts Section 1983 action); *see also* Middlesex County Sewage Association v. National Sea Clammers Association, 453 U.S. 1 (1981) (Federal Water Pollution Control Act preempt Section 1983 action).
[266] United Steelworkers v. Weber, 443 U.S. 193 (1979).
[267] *See* Barber v. CSX Distrib. Servs., 68 F.3d 694 (3rd Cir. 1995); *see also* Devine v. Stone, Leyton & Gersham, P.C., 100 F.3d. (8th Cir. 1996).
[268] *See* RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE CONSTITUTION 29 (Praeger Publishers 2004). In addition to government at all levels, "state actor" status and scrutiny might apply to traditionally private organizations that "public function," "state compulsion," "nexus," "joint participation," "intertwined." *Id*.; *see also* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).
[269] 42 U.S.C. § 1983 (2000).
[270] Williams v. Bitner, 455 F.3d 186 (3d Cir. 2006).
[271] Smith v. City of Salem, Ohio, 229. F.3d 559, 575-6 (6th Cir. 2004).
[272] *Id*. (quoting *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988)); *see also Smith*, 229 F.3d 559, 575-6 ("To prove a violation of equal protection under sec. 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment case under Title VII.") (quoting Lautermilch v. Findlay City Schs., 314 F.3d 271, 275 (6th Cir. 2003).
[273] U.S. CONST. amend. XIV, § 1 (which reads in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.")
[274] *See* RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE CONSTITUTION 29 (Praeger Publishers 2004); *see also* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).
[275] United Public Workers v. Mitchell, 330 U.S. 75 (1947).
[276]Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).
[277] *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny,* 144 U. PENN. L. REV. 2417, 2418 (1997).
[278] *Id*.
[279] *Id*.
[280] Griswold v. Connecticut, 381 U.S. 479 (1965).
[281] *See* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006).
[282] CAL. CONST. art I, § 1 (1872).
[283] *See* Fisk, *supra* note 293, at 1111.

[284] *Id*.
[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] U.S. CONST. amend. XIV, § 1.
[289] Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2195 (2003).
[290] Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, n.1(2003) (citing Declaration of the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/RES/47/135 (1993)).
[291] *What Not To Wear (Part Two*), HUM. RESOURCE MGMT INT'L DIG., vol. 12, iss. 7, 2004, at 39.
[292] *Id*.
[293] *Legal Q&A…Workplace Dress Codes*, PERSONNEL TODAY, Feb 14, 2006, at 20.
[294] *What Not To Wear (Part One*), HUM. RESOURCE MGMT INT'L DIG., vol. 12, iss. 6, 2004, at 38.
[295] *Id*. at 37.
[296] *Id*.
[297] Muslim Woman Wins Case vs. Dutch School (March 28, 2006), http://www.highbeam.com/doc/1P1-120722461.html.
[298] Sarah Lyall, *Britain Upholds School Ban on Muslim Gown*, N.Y. TIMES, Mar. 23, 2006.
[299] Muslim Woman Wins Case vs. Dutch School (March 28, 2006), http://www.highbeam.com/doc/1P1-120722461.html.
[300] *Id*.
[301] Sarah Lyall, *Britain Upholds School Ban on Muslim Gown*, N.Y. TIMES, Mar. 23, 2006.
[302] *Id*.
[303] *See* Umitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 178 (1982).
[304] *See* Yelnosky, *supra* note 13.
[305] 29 U.S.C. § 158 (a)(5) (2000).
[306] Yelnosky, *supra* note 13, at 523 n.15 (quoting *Crittenton Hospital*., 342 N.L.R.B. No. 67 (2004) ("uniform and fingernail policies regulating the appearance of nurses are mandatory subjects of bargaining").
[307] *Id*. at 523 n.17 (citing *Public Serv. Co*., 337 N.L.R.B. 193, 198 (2001)).
[308] *Id*. at 524 (citing *Public Serv. Co*., 337 N.L.R.B. 193, 198 (2000) and *Crittenton Hospital*., 342 N.L.R.B. No. 67 (2004)).
[309] *Id*. at 523 (citing Public Serv. Co., 337 N.L.R.B. 193, 198 (2001)).
[310] *Id*. at 525.
[311] Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).
[312] NLRB v. Magnavox Co, 415 U.S. 322 (1974).
[313] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[314] *Id*. at 52 (citing Wilko v. Swan, 346 U.S. 427 (1953)) (emphasis added).
[315] *Alexander*, 415 U.S. 36.
[316] *Id*.
[317] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[318] *Id*.
[319] *Id*.
[320] *Alexander*, 415 U.S. 36 (1974).
[321] *See* San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).
[322] *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last visited March 1, 2008).
[323] Delgado, *supra* note 92.
[324] Mahajan, *supra* note 273, at 167-68.
[325] *Id*.
[326] Roberts & Roberts, *supra* note 267.
[327] *See* Yuracko, *supra* note 2.
[328] Roberts & Roberts, *supra* note 267.
[329] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).
[330] *See* Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994).
[331] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[332] 42 U.S.C. § 2000e-2 (a)(2) (2000).
[333] Gonzalez, *supra* note 316, at 2217; *see also* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006).
[334] *See* Gonzalez, *supra* note 316, at 2217; *see also* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006).
[335] Gonzalez, *supra* note 316, at 2195.
[336] Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).
[337] *Id*.
[338] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[339] *See* Yuracko, *supra* note 2.
[340] *Id*.
[341] *See* Gonzalez, *supra* note 316, at 2195.; *see also* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006).
[342] Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989).
[343] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).
[344] *See* San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).
[345] High Tech Gays v. Defense Industrial Security Clearance Office, 909 F.2d 375, 376 (1990).
[346] Graham v. Richardson, 403 U.S. 365 (1971).
[347] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).
[348] *Id*. at 441 (indicating that immutability appears to be a description for characteristics that are "beyond the individuals' control").

[349] Davison, *supra* note 28.; s*ee also* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 771 (1987).
[350] Davison, *supra* note 28, at 168; s*ee also* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 771 (1987).
[351] Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C.L. REV. 379, 380 (2008).
[352] *Id.*
[353] Kenji Yoshino, *Covering*, 111 YALE L. J. 769 (2002).
[354] Green, *supra* note 379, at 414.
[355] Mahajan, *supra* note 273, at 181 (quoting Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG., Jan 15, 2006, at 632).
[356] EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971).
[357] Yoshino, *supra* note 381.
[358] Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1898 (2008).
[359] *See* Kenji Yoshino, *Covering*, 111 YALE L. J. 769 (2002); *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (1991).
[360] Roberts & Roberts, *supra* note 267.
[361] *Id.*
[362] *See* Yoshino, *supra* note 381; *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (1991).
[363] *See* Onwuachi-Willig, *supra* note 386, at 1924.
[364] *See* Yuracko, *supra* note 2 (quoting Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics, in* LEFT LEGALISM/LEFT CRITIQUE 38, 55 (Wendy Brown & Janet Halley eds., 2002)).
[365] *Id.*
[366] *See* Green, *supra* note 379, at 391 n.41.
[367] Loriann Roberson & Carol T. Kulik, *Stereotype Threat at Work*, 21 ACAD. OF MGMT. PERSP. 24 (May 2007).
[368] Roberts & Roberts, *supra* note 267.
[369] *See infra* Recommendations.
[370] *See* Green, *supra* note 379, at 386.
[371] Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (dissenting opinion).
[372] 42 U.S.C. § 2000e-5 (g)(2)(B) (2000).
[373] 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000).
[374] 42 U.S.C. § 2000e-5 (g)(2)(B) (2000). The statute, however, seems to allow for the defendant to escape liability completely by proving that no improper factor was a motivating factor to any degree (i.e., employer proves the legitimate business reason was the sole motivating factor for the decision). 42 U.S.C. § 2000e-2(m) (2000).
[375] Loeb v. Textron, Inc. 600 F.2d 1003, 1016 (1979).
[376] *See* Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 58-59 (1st Cir. 2005).
[377] 42 U.S.C. § 2000e (m) (2000) ("The term 'demonstrates'' means meets the burdens of production and persuasion.").
[378] 42 U.S.C § 2000e-2 (m) (2000) (emphasis added).
[379] *See* Desert Palace v. Costa, 539 U.S. 90 (2003).
[380] St. Mary's Honor Center v. Hicks, 509 US 802 (1993).
[381] *Id.*
[382] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000); *see also* C. Elizabeth Belmont, *Imperative of Instructing on Pretext: A Comment on William J. Vollmer's Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 WASH. & LEE L. REV. 445 (Winter 2004) (citing St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 510-11 (1983) in support of the view that the tripartite approach to disparate treatment in *McDonnell Douglas is* no longer relevant to some theoretical degree, but quite central and utilized in another more practical manner).
[383] Desert Palace v. Costa, 539 U.S. 90 (2003).
[384] *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992).
[385] *See* Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424 (1st Cir. 2000).
[386] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
[387] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).
[388] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
[389] *See* C. Elizabeth Belmont, *Imperative of Instructing on Pretext: A Comment on William J. Vollmer's Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 WASH. & LEE L. REV. 445 (Winter 2004).
[390] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000); *see also* Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424 (1st Cir. 2000). The courts would now apply a totality of the circumstances approach within the three-prong framework, in practice if not in name, and a somewhat unclear and imprecise version at that. *Id. see also* C. Elizabeth Belmont, *Imperative of Instructing on Pretext: A Comment on William J. Vollmer's Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 WASH. & LEE L. REV. 445 (Winter 2004).
[391] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).
[392] *Id.*
[393] 42 U.S.C. § 2000e-2 (a)(2)(2000).
[394] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc). In all fairness to the *Jespersen* court, this is arguably what the Supreme Court intended to do with its finding of discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). But instead of creating a test to help prove the necessary motive or intent (or an inference or implication thereof), *Griggs* read into Title VII an unintentional theory of disparate impact – judicial activism at its best or worst, which Congress explicitly validated with the 1991 Amendment. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).
[395] 42 U.S.C. 2000e-2(k)(1)(A)(i) (2000).
[396] Levi, *supra* note 17.
[397] *See* San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).
[398] *See* Friedman, *supra* note 101, at 215 (citing City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)).
[399] Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).
[400] *Id.* at 659.
[401] Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113 (1981); *but see* Rogers v. Am. Airlines, Inc., 527 F. Supp 229 (S.D.N.Y. 1981) (using mutability of cornrow hairstyle to determine that the employee was not "adversely affected.").

[402] These cases most likely were: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), *Patterson v. McLean Credit Union*, 491 U.S. 161 (1989), and *Lorance v. AT&T Technologies*, Inc. 490 U.S. 900 (1989) among others.
[403] 42 U.S.C. § 2000e (m) (2000) ("The term 'demonstrates'' means meets the burdens of production and persuasion.").
[404] 42 U.S.C. § 2000e-2 (k)(1)(A)(i) (2000).
[405] *See* Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); *see* William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529 (2007).
[406] *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992).
[407] *See* Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424 (1st Cir. 2000).
[408] *See* William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529 (2007).
[409] *See* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).
[410] *Id.* at 1118.
[411] 29 C.F.R. § 1607.16 (2000).
[412] *See* Gordon, *supra* note 437 (noting that in debating the 1991 Amendments, Congress purposely chose to leave the business necessity undefined in order to allow the court's the freedom to apply the principle as the various cases demanded).
[413] 42 U.S.C. § 1981a (2000).
[414] 42 U.S.C. § 1981a (b)(3) (2000). Title VII's anti-retaliation provision provides another cause of action in certain circumstances where the employee or co-worker suffered an adverse employment action for opposing activity that they reasonably believed was illegal. 42 U.S.C. 2000e-3 (a) (2000).
[415] 42 U.S.C. § 1981 (2000).
[416] 42 U.S.C. § 2000e-5 (g)(2)(B)(I) (2000).
[417] 42 U.S.C. § 2000e-5(g)(1)- (k)(1) (2000).
[418] 42 U.S.C. § 2000e-5(g)(2)(B)(I) (2000).
[419] David Sherwyn, et al., *The Mixed Motive Instruction: Did the Supreme Court Make Discrimination Cases Unwinnable for Employers?*, 45 CORNELL HOTEL & RESTAURANT ADMIN. Q. 186 (May 2004).
[420] *Id.*
[421] Conway, *supra* note 131; *see also* Mahajan, *supra* note 273.
[422] *See* Illinois v. Gates, 462 U.S. 213 (1983).
[423] *See* Graham v. Connor, 490 U.S. 386 (1989).
[424] *See* Milkovich V. Lorain Journal, 497 U.S. 1 (1990).
[425] *See* Fare v. Michael C., 442 US 707 (1979).
[426] *See* Castaneda v. Partida, 430 U.S. 482 (1977).
[427] *See* 42 U.S.C. § 1973 (b) (2000); *see also* Thornburg v. Gingles, 478 U.S. 30 (1986).
[428] *See* Washington v. Davis, 426 U.S. 229 (1976).
[429] *See* Harris v. Forklift Sys., Inc. 510 U.S. 17 (1993).
[430] Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429-30 (1st Cir. 2000).
[431] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part) (1985) ("Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic.").
[432] *See* Gordon, *supra* note 437.
[433] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[434] McDonnell Douglas Corp. v. Green, 411U.S. 792 (1973).
[435] *See* Gonzalez, *supra* note 316.
[436] 42 U.S.C. § 2000e-2 (a)-(n) (2000).
[437] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[438] *Id.* at 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).
[439] Smith v. City of Salem, Ohio, 229. F.3d 559, 575-6 (6th Cir. 2004) (quoting *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988); *see also* Smith v. City of Salem, Ohio, 229 F.3d 559, 575-6 (6th Cir. 2004) ("To prove a violation of equal protection under sec. 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment case under Title VII (quotation and citation omitted)"). Although the Equal Protection Clause only applies to disparate treatment cases (not unintentional discrimination), it's analysis still provides some guidance since "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section 1983." Thus, the three constitutional standards (strict, intermediate, and rational) and their respective levels of objectives (compelling, important, or legitimate) and fit (necessary, substantial, or rational) can be helpful for Title VII analysis since Title VII was modeled in part after the Equal Protection Clause. *Id.*
[440] *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); *see also* Saint Francis College v.Al-Khazraji, 481 U.S. 604 (1987). Religion actually receives its greater protection as a fundamental right instead of a suspect class, except that the Court has decided that Section 1981 also covers people of the Jewish religion and of Arab origin because they were both classified as distinct races at the time the act was promulgated. Whether this translates into broader coverage under Title VII is hard to know, but possible. *Id.*
[441] *See* Corbett, *supra* note 22.
[442] *See* Corbett, *supra* note 22, at 169.
[443] Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).
[444] *See* Corbett, *supra* note 22, at 169.
[445] *Id.*
[446] *See* Yuracko, *supra* note 2.
[447] 42 U.S.C. § 1981(c) (2000).
[448] Mary Corcoran & Jordan Matsudaira, *Is It Getting Harder to Get Ahead?*, NETWORK ON TRANSITIONS TO ADULTHOOD POLICY BRIEF, Issue 11 (October 2004), *available at* http://www.transad.pop.upenn.edu/downloads/chap%2011-formatted.pdf.
[449] Jefferies v. Harris Cty. Comm. Action Assoc., 615 F.2d 1025, 1033-34 (5th Cir. 1980).
[450] See Levi, *supra* note 175, at 104.
[451] *See* Mahajan, *supra* note 273.
[452] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).
[453] *See* Hollins v. Atlantic Co., 188 F.3d 652 (6th Cir. 1999).
[454] *Id.*
[455] 42 U.S.C. § 2000e-2 (a)(2) and § 2000e-2 (k)(1)(A)(i) (2000).

[456] *See* Smith v. City of Salem, Ohio, 229. F.3d 559, 568 (6th Cir. 2004) (quoting Kocsis v. Multi-Care Mgmt Inc., 97 F.3d 876, 886 (6th Cir. 1999)).
[457] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
[458] Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113 (1981).
[459] *Garcia*, 618 F.2d at 270.
[460] *Id.*
[461] Yuracko, *supra* note 2, at 410-13.
[462] Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L. J. 237 (2005)
[463] Roberts & Roberts, *supra* note 267.
[464] *See* Yuracko, *supra* note 2, at 378.
[465] *See* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1112 (9th Cir. 2006) (stating that the grooming policy "must be viewed in the context of the overall policy," elaborating that it is "improper to divide a grooming policy into separate categories, and then …focus exclusively on [one] requirement to conclude that the policy constitutes sex stereotyping.").
[466] Although clear and convincing evidence is required for affirmative defenses against claims of retaliation under Sarbanes-Oxley, both the Supreme Court and Congress have clearly rejected the standard for Title VII cases. Furthermore, a major purpose behind **TOC** is to simplify the analytical process, something less likely with the use of clear and convincing evidence or a shifting of burdens. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); 42 U.S.C § 2000e (m) (2000).
[467] *See* Nakul Krishnakumar and Heath Lynch, *Note and Comment: Tenth Annual National Moot Court Winning Brief*, 5 WHITTIER J. CHILD & FAM. ADVOC. 277, 296 (citing Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 881-882 (1990), which said that hybrid claims deserve strict scrutiny).
[468] *See* Fisk, *supra* note 293, at 1111.
[469] *Id.*
[470] *Id.*
[471] *Id. at* 1126.
[472] *Id. at* 1137.
[473] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[474] *See* Yuracko, *supra* note 2, at 376.
[475] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
[476] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[477] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).
[478] *See* Larry Alexander, *What Makes Discrimination Wrong? Biases, Preferences, and Stereotypes*, 141 U. PA. L. REV. 149 (1992).
[479] The order of the cognitive bias continuum is: 1) neutral or unintentional (association with protected class non-existent), 2) benign intent toward proxy or bias, 3) proxy/stereotype (P/S) (unconscious=unaware and rational=rooted in some facts or history however tenuous), 4) (P/S) (unconscious and irrational), 5) (P/S) (conscious and rational), 6) (P/S) (conscious and irrational, 4) bias/prejudice (B/P) (unconscious and rational), (B/P) (unconscious and irrational), (B/P) (conscious and rational), (B/P) (conscious and irrational), 6) animus proxy or bias (technically conscious is worse than unconscious here too).
[480] Desert Palace v. Costa, 530 U.S. 90 (2003).
[481] *See* Krieger, *supra* note 513.
[482] *See* 42 U.S.C. Sec. 2000e–2 (k)(1)(A) (2000).
[483] *See* Mahajan, *supra* note 273; *see also* Vo, *supra* note 2, at 352-53.
[484] *See* Stacey S. Baron, *Note, (Un)lawfully Beautiful: The Legal (De)Construction of Female Beauty*, 46 B. C. L. REV. 359 (2005).
[485] Schroer v. Billington, 424 F. Supp.2d 203, 208 (D.C. Cir. 2006).
[486] *Id.*
[487] *See* Conway, *supra* note 131.
[488] *See* Conway, *supra* note 131, at 127.
[489] *See* Fox, *supra* note 94.
[490] *See* Bartlett, *supra* note 352.
[491] 42 U.S.C. § 2000e-2 (k) – (n) (2000).
[492] *See* Gordon, *supra* note 437.
[493] *Id.*
[494] 29.C.F.R. § 1630.2 (o) (2000) (reasonable accommodations for disabilities address the "application process," performance of "essential functions," and "equal benefits and privileges," or "providing accommodations beyond those required by this part.").
[495] *See* Mary Jo Feldstein, *Piercing, Tattoos Create Workplace Issues*, REUTERS, June 22, 2001, *available at* http://www.rense.com/general11/plac.htm (last visited Mar. 23, 2008).
[496] *See* Kelly, *supra* note 173, at 63-64.
[497] *See* Roberts & Roberts, *supra* note 267.
[498] Mahajan, *supra* note 273, at 175-76.
[499] *See* Roberts & Roberts, *supra* note 267.
[500] *Id.*
[501] *See* Conway, *supra* note 131.
[502] *See* Corbett, supra note 22, at 163-69 (2007).
[503] 29 C.F.R. § 1607 (2000).
[504] Smith v. City of Salem, Ohio, 229. F.3d 559, 575-6 (6th Cir. 2004) (quoting *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988).
[505] United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 (1979) (commenting on the intent behind Section 706 (g) of the Act, which protects the authority of employers and limits the reach of Title VII); s*ee also* Yuracko, *supra* note 2 at 365, n.32.
[506] Price Waterhouse v. Hopkins, 490 U.S. 228, 242-43 (1989).
[507] Pickering v. Board of Education, 391 U.S. 563, 568 (1968) (emphasis added).
[508] Mahajan, *supra* note 273, at 180.
[509] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1077-78, n.1-2 (9th Cir 2006). Pertinent aspects of the policy read:

> All Beverage Service Personnel…must be well groomed, appealing to the eye, be firm and body toned….hair styles, overall body contour, and degree of comfort employee projects while wearing the uniform…Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets….No faddish hairstyles or unnatural colors are

permitted….Males [Females]:…Hair must not extend below top of shirt collar. Ponytails are prohibited [Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times.]. Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted. [Nail polish can be clear, white, pink or red color only. No exotic nail art or length.] Eye and facial makeup is not permitted. [Make up (foundation/concealer and/or face powder as well as blush and mascara must be worn and applied neatly in complimentary colors…lip color must be worn at all times.] *Id.*

[510] EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).
[511] Yuracko, *supra* note 2, at 873; *see also* Wilson v. Southwest Airlines, 517 F. Supp 292 (N.D. Tex. 1981).
[512] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir 2006).
[513] *See* Fisk, *supra* note 293.
[514] *See* Platone v. Atlantic Coast Airlines, 2003-SOX-27, 28 (ALJ Apr. 30, 2004).
[515] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[516] 42 U.S.C. § 2000e (m) (2000) ("The term 'demonstrates'' means meets the burdens of production and persuasion.").
[517] 42 U.S.C. § 2000e-2 (a) (1) ("an unlawful employment practice…because of *such individual's* race, color…") (emphasis added).
[518] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir 2006).
[519] 42 U.S.C. § 1983. Section 1983, which secured a private cause of action against state actors for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" has proved most powerful and enduring as a combatant against discrimination, in part because it does not limit damages like Title VII. 42 U.S.C. 21 § 1983 (2005). Similarly, the 1866 Civil Rights Act, one of the earliest antidiscrimination in employment laws, finds itself under a bit of a revival since it allows for compensatory damages in contract discrimination cases involving race. 42 U.S.C. § 1981 (2000).
[520] 42 U.S.C. § 1981a (a)(1) (2000).
[521] 42 U.S.C. § 2000e-5(g)(2)(B)(i).
[522] 42 U.S.C. § 2000e-5(g)(2)(B)(i).
[523] Odima v. Westin Tucson Hotel, 53 F.3d 1484 (9th Cir. 1995).
[524] *See* Yuracko, *supra* note 2, at 376 (suggesting that training include co-workers to help develop their skills of listening to accents).
[525] *See* Vo, supra note 23, at 352-53. One solution, and hope, may be that state and local legislatures will fill-in the gaps left by current federal law. In fact, the state of Michigan, the District of Columbia, and the City of Santa Cruz have enacted statutes that prohibit employment discrimination based on "height and weight" (Michigan), "personal appearance" (D.C.) and "sexual orientation" (Santa Cruz). But the real hope here is that the federal courts will nuance their approach to Title VII, using it to preclude the more subtle forms of trait discrimination. *Id.*
[526] *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last visited March 1, 2008).
[527] Roberson & Kulik, *supra* note 395.
[528] *See* R.F. Martell, *Sex Bias at Work: The Effects of Attention and Memory Demands on Performance Ratings for Men and Women*, 21 J. APPL'D SOC. PSYC. 1939 (1991).
[529] Green, *supra* note 379, at 380.
[530] *Id.*
[531] *Id.*
[532] 29 C.F.R. § 1607.3 (2000).
[533] 29 C.F.R. § 1607.5 (2000).
[534] Mark McGraw, *Limiting Looks*, HUMAN RESOURCE EXECUTIVE ONLINE, October 2, 2005, http://www.hreonline.com/HRE/story.jsp?storyId=4269043.
[535] *See* Conway, *supra* note 131, at 133.
[536] *Id.*
[537] Green, *supra* note 379, at 380.
[538] *Id.*
[539] John Fetto, *Dress Code – US Corporations Reinstitution Business Dress Policies*, BNET, May 1, 2002, http://findarticles.com/p/articles/mi_m4021/is_2002_May_1/ai_88679443/print.
[540] Roberts & Roberts, *supra* note 267.
[541] *Id.*
[542] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); *see also* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).
[543] *Id.* at 79 (1998).
[544] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[545] *Id.* at 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).
[546] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).
[547] *See* Hensley v. Eckerhart, 461 U.S. 424 (1983); *cf.* U.S. v. Booker, 543 U.S. 220 (2005).
[548] *See* Gordon, *supra* note 437
[549] *See* Illinois v. Gates, 462 U.S. 213 (1983).
[550] *See* Graham v. Connor, 490 U.S. 386 (1989).
[551] *See* Milkovich V. Lorain Journal, 497 U.S. 1 (1990).
[552] *See* Fare v. Michael C., 442 US 707 (1979).
[553] *See* Castaneda v. Partida, 430 U.S. 482 (1977).
[554] *See* 42 U.S.C. 20 § 1973 (b) (2000); *see also* Thornburg v. Gingles, 478 U.S. 30 (1986).
[555] *See* Washington v. Davis, 426 U.S. 229 (1976).
[556] *See* Harris v. Forklift Sys., Inc. 510 U.S. 17 (1993).
[557] *See* Yuracko, *supra* note 2 (quoting Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics, in* LEFT LEGALISM/LEFT CRITIQUE 38, 55 (Wendy Brown & Janet Halley eds., 2002)).
[558] Green, *supra* note 379, at 391 (quoting Grutter v. Bollinger 539 U.S. 306, 330 (2003)).
[559] *See* Regents of the University of California v. Bakke, 438 U.S. 265 (1978); The Court has implicitly affirmed the compelling interest of diversity by purposely not reviewing that issue, instead rejecting diversity programs for their failure to tailor the program narrowly enough to survive strict scrutiny analysis. *See* Meredith v. Jefferson County Board of Education, 551 U.S. ___ (2007); *see also* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. ___ (2007).
[560] *See* Delgado, *supra* note 92.
[561] Corbett, supra note 22, at 169.
[562] *See* Robert C. Post, *Prejudicial Appearances: The Logic of American Anti-Discrimination Law*, 88 CAL. L. REV. 1, 16 (2000).