

**Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent, and Kantian Dignity Theory**

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**DEBUNKING UNEQUAL BURDENS, TRIVIAL VIOLATIONS, HARMLESS STEREOTYPES, AND SIMILAR JUDICIAL MYTHS: THE CONVERGENCE OF TITLE VII LITERALISM, CONGRESSIONAL INTENT, AND KANTIAN DIGNITY THEORY**

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I dedicate this article to three persons. First, this Article is dedicated to my father, Stephen Robert Bayer, whom we lost a year ago. He was everything a father should be.

Second, most students have at least one teacher whose wisdom and inspiration made a particularly profound difference, often inspiring them not only in their choice of careers but also in their conduct of life. For me, in high school it was Steve Shmurak, in law school it was Burt Neuborne, and, most of all, in college it was sociology professor Alphonse Sallett. With his Prince Valiant haircut, aviator glasses, and bright velour shirts, Alphonse was an early inspiration for this Article’s appreciation of the link between grooming, dressing, and personhood.

I often thought of reconnecting with Alphonse but never felt too compelled until about a year and a half ago. I searched the Internet and found his obituary. I was a month too late. I dedicate this Article to the teachers who made me think, with Alphonse Sallett first among them.

Third and foremost, I dedicate this Article to my wonderful Joan who was and remains my strongest support and most perceptive critic.

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## INTRODUCTION

During the signing ceremony authorizing the Civil Rights Act of 1964 ("Title VII" or "Act"), President Lyndon B. Johnson thoughtfully remarked, "The purpose of the law is simple. . . . [T]he only limit to a man's hope for happiness . . . shall be his own ability."<sup>1</sup> Consistent with that

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<sup>1</sup> President Lyndon B. Johnson, Remarks upon Signing the Civil Rights Bill (July 2, 1964) [hereinafter Johnson's Remarks], *available at* <http://millercenter.org/president/speeches/detail/3525>. The entire relevant portion of the President's remarks reads:

perceptive encapsulation, the Act's fair employment component<sup>2</sup> prohibits workplace discrimination predicated on race, sex, color, national origin, and religion.<sup>3</sup> To mark Title VII's fiftieth anniversary, this Article reasserts, in light of greatly developed antidiscrimination law, the thesis that this author urged nearly thirty years ago.<sup>4</sup> President Johnson's sentiment aptly elucidates what was and remains Congress's overarching principle, the Act's *first principle*, if you will: To assure that a person indeed is "limit[ed]" *only* by his or her "own ability," *any* use of the five forbidden criteria as terms or conditions of employment defies Title VII unless it satisfies a *textual* exemption or defense.<sup>5</sup>

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The purpose of the law is simple. It does not restrict the freedom of any American, so long as he respects the rights of others. It does not give special treatment to any citizen. It does say the only limit to a man's hope for happiness, and for the future of his children, shall be his own ability.

*Id.* Perhaps, needless to say, President Johnson spoke in the idiom of his time, using male nouns and pronouns as shorthand to denote things that apply to all persons. Indeed, even provisions of the Civil Rights Act of 1964 ("Act") proscribing sex discrimination in employment use the male third person singular pronoun. *See infra* note 3 (quoting 42 U.S.C. § 2000e-2(a) (2012)). Accordingly, President Johnson's signing statement certainly should not be construed as gender-specific.

<sup>2</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2012).

<sup>3</sup> Most prominently, 42 U.S.C. § 2000e-2(a) states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Act contains additional proscriptions; the most significant for this Article is a nearly twenty-five-year-old amendment clarifying that to prevail, a plaintiff need not prove that animus was the "but-for" cause of the defendant's discriminatory employment action. Rather, a plaintiff may obtain nonmonetary relief, including injunctions and attorney fees, upon proving that discrimination based on one of the five forbidden classes was a "motivating factor" of the defendant's behavior. *See* 42 U.S.C. § 2000e-2(m). The profound importance of § 2000e-2(m) to the very definition of unlawful discrimination under Title VII is discussed *infra* at notes 213–44 and accompanying text.

<sup>4</sup> *See generally* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987).

<sup>5</sup> Strictly speaking, Title VII does not assure that individuals' employment opportunities will be "limit[ed]" *only* by their "own abilit[ies]." Johnson's Remarks, *supra* note 1. By its express text, the Act's "[p]rotection is limited to individuals who are discriminated on the basis of 'race, color, religion, sex, or national origin.'" *Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 F. App'x 107, 109 (2d Cir.

Indeed, from the standpoint of its statutory text, the Act's "first principle" permitting only such discrimination as specifically authorized therein appears both explicit and obvious.<sup>6</sup> Yet, reaffirmation of that first principle is necessary to debunk the judicially prominent "unequal burden" doctrine. Specious when introduced roughly forty years ago,<sup>7</sup> "unequal burden" continues to flourish notwithstanding United States Supreme Court rulings plainly invalidating its underpinnings, although admittedly without mentioning that doctrine by name.<sup>8</sup> Applied particularly to grooming and appearance, such as male-only

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2008). Therefore, Title VII permits invidious discrimination based on unenumerated classes, as well as other extraneous considerations such as nepotism. *See, e.g., id.* (holding that Title VII does not forbid discrimination based on "sexual orientation" per se); *Thomas v. Wash. Cnty. Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) ("Nepotism is not per se violative of Title VII."). Nonetheless, for the purposes of this Article, President Johnson's understanding essentially is correct: Persons' ability to work and their actual work product should be judged on their individual merit, not on the irrelevant bases of their race, sex, color, ethnicity, or religious inclination.

<sup>6</sup> *Kiley*, 296 F. App'x at 109.

<sup>7</sup> *See Bayer*, *supra* note 4, at 843–80 (discussing primarily unequal burden's initial incarnation as "mutable characteristics" theory). While this Article offers a detailed and multilayered structure to refute unequal burden theory, a simple but extraordinarily telling scenario suggested by Professor B. Glenn George debunks the doctrine. "Consider an employer who pays his black employees one cent less than similarly situated white employees. Trivial? Certainly. A violation of Title VII? Absolutely." B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 21 (1993). Professor George offers other examples, such as an employer who provides individual coffee pots to all male employees but requires female employees to use a women's-only communal coffee pot. *See id.*; *cf. Picou v. City of Jackson, Miss.*, 91 F. App'x 340 (5th Cir. 2004) (per curiam) (holding that the district court did not abuse its discretion by awarding \$10,000 in attorney fees to a Title VII plaintiff who obtained only \$1.00 in nominal damages); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1227–28 (10th Cir. 2001) (holding that an award of \$1.00 in nominal damages in a Title VII sexual harassment case does not evince that, in actuality, the plaintiff suffered no harm and that no legally prohibited harassment occurred); *Cabrera v. Jakobovitz*, 24 F.3d 372, 393 (2d Cir. 1994). Through such examples, Professor George illustrates the core statutory theme: The very act of differentiating pursuant to one of the five proscribed classifications insults and demeans the personhood—the humanity—of the discriminatees. Such is harm even if unaccompanied by attendant injuries such as loss of income, of advancement, or of training.

<sup>8</sup> *See infra* notes 165–86 and accompanying text. Many of these decisions postdate this author's 1987 article in the *University of California at Davis Law Review*. *See generally Bayer*, *supra* note 4. Moreover, four years after that publication, Congress enacted a significant amendment reaffirming Title VII's "first principle." *See* 42 U.S.C. § 2000e-2(m), discussed *infra* notes 214–45 and accompanying text. Therefore, the Act's half-century mark offers an apt opportunity both to augment and to expand that earlier argument with contemporary materials.

short hair rules,<sup>9</sup> the theory purports that certain per se discriminatory employment practices *do not statutorily constitute “discrimination”* if those practices are “reasonable” and impose no unequal burden.<sup>10</sup> Because these supposed reasonable employment terms and conditions are factually *but not legally* discrimination, defendants need not justify their facially biased standards under the Act’s exacting, textually explicit exceptions.<sup>11</sup>

Typically summarizing the unequal burden theory, the en banc United States Court of Appeals for the Ninth Circuit asserted a mere decade ago that under Title VII, “the touch-stone is reasonableness.”<sup>12</sup> The Ninth Circuit’s crucial phrasing is an apparent reworking of, but in fact misrepresents the pivotal explication of, statutorily permissible discrimination that the Supreme Court declared soon after Title VII’s enactment: “The touchstone is business necessity.”<sup>13</sup> Thus, from the beginning, our highest court recognized that nothing short of “necessity” excuses discrimination under Title VII.<sup>14</sup> “Necessity” is quite distant from the unequal burden doctrine’s dilution of the Act’s “touchstone” to mere “reasonableness.”<sup>15</sup> This Article explains how the courts strayed so far afield and why their deviation is so erroneous.

Simply put, courts have no authority to create extrastatutory varieties of lawful discrimination under a banner of “reasonableness,” especially varieties thoroughly dissimilar from Congress’s legislated exclusions. Contrary to fundamental

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<sup>9</sup> See, e.g., *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (holding that an employer’s rule requiring men but not women to wear short hair does not constitute sex discrimination under Title VII); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc) (same).

<sup>10</sup> *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016) (finding that the FBI’s “gender-normed [physical fitness tests]” do not impose unlawful unequal burdens); *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108–11 (9th Cir. 2006) (en banc); cf. *Willingham*, 507 F.2d at 1088.

<sup>11</sup> See *infra* notes 133–50 and accompanying text discussing Title VII’s defenses.

<sup>12</sup> *Jespersen*, 444 F.3d at 1113 (holding that an employer’s rule requiring only female bartenders to wear prescribed facial makeup is lawful because plaintiff failed to prove an “unequal burden”); see discussion *infra* notes 75–89 and accompanying text.

<sup>13</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (describing the “disparate impact” cause of action under Title VII, including the “business necessity” defense); see also *infra* notes 147–50 and accompanying text.

<sup>14</sup> *Griggs*, 401 U.S. at 431.

<sup>15</sup> Compare *Jespersen*, 444 F.3d at 1113, with *Griggs*, 401 U.S. at 431.

“separation of powers,”<sup>16</sup> unequal burden theory elevates to supremacy judicial determinations that certain forms of discrimination are lawful due simply to their seemingly widespread acceptance, which acceptance the courts feel is reasonable.<sup>17</sup> But, the rightful definition of *reasonable* prejudice, which I take to mean *lawful* prejudice, is found solely in Title VII's subsections specifically permitting consideration of race, sex, and other otherwise unlawful criteria.<sup>18</sup> Consequently, by creating within Title VII a classification of lawful extratextual discrimination titled “reasonable,” unequal burden theory illegitimately permits employers to impose the very class-based

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<sup>16</sup> Separation of powers concerns the proper authority exercised by each branch of the federal level of government. “Our Constitution divided the ‘powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.’” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

<sup>17</sup> Certainly, the judiciary's duty to discern how given legislation applies to discrete situations is thorny because often, “with many . . . narrow issues of statutory construction, the general language chosen by Congress does not clearly resolve the precise question.” *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1107–08 (1983) (O'Connor, J., concurring) (Title VII decision). Equally vexing is the interpretive quandary that even seemingly straightforward applications of unambiguous statutory commands may engender results confounding the very policies underlying the given legislation. *See, e.g.*, *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 11 (2008); *see also infra* notes 247–52 and accompanying text. Accordingly, as their title denotes, judges should, indeed must, exercise *judgment* in their attempts to enforce statutory provisions consistent with legislative will. As Judge—later Justice—Cardozo instructed nearly a century ago, “The question is in every case [how] the legislature, if [the given issue] had been foreseen, would have wished the statute to be enforced . . . . The answer must be reached pragmatically, *by the exercise of good sense and sound judgment*, by considering how the statutory rule will function . . . .” *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920) (Cardozo, J.) (plurality opinion) (emphasis added) (quote editing extrapolates on observations specifically regarding whether invalidation of a portion of a statute requires invalidation of the entire act). Cognizant that the latitude accorded to the courts is and should be generous, this Article urges nonetheless that despite its widespread acceptance, the unequal burden doctrine is an abuse—indeed, a particularly subtle and inappropriate abuse—of the discretion attendant to the exercise of discerning statutory meaning through judicial review.

<sup>18</sup> *See infra* notes 132–62 and accompanying text. As Dean Van Detta observed, “But what prerogative does Title VII leave to employers to discriminate because of race, color, religion, sex, or national origin? None, of course, except as expressly defined in such narrow statutory exceptions as the bona fide occupational qualification defense . . . .” Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive Le Roi!*”: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After *Desert Palace, Inc. v. Costa* into a “Mixed-Motives” Case, 52 *DRAKE L. REV.* 71, 123 (2003).

stereotypes, suppositions, and biases that Congress sensibly and legitimately outlawed.<sup>19</sup> For example, unequal burden theory would uphold regulations requiring female judges to emphasize their femininity by wearing black robes adorned with white lace.<sup>20</sup> One might have thought that such a ridiculous outcome offends Title VII *per se*. Yet, given its dominance, explaining the wrongfulness of the unequal burden doctrine remains necessary at the Act's half-century mark.

This is hardly the first work to despair over judicially created Title VII doctrine that undeniably legitimizes race- and sex-specific grooming, clothing, and appearance rules in apparent disregard of express statutory protections.<sup>21</sup> Perhaps

<sup>19</sup> See *infra* notes 170–208 and accompanying text. Even when the explicit text of civil rights laws does not expressly or impliedly exempt discriminatory practices, too frequently, judges mistake their personal preferences for legislative meaning simply because these judges find their view to be proper, or at least unobjectionable. See, e.g., Mark R. Bandsuch, *Dressing up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 290 (2009); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2556 (1994). Such offends elementary American separation of powers often learned during the first semester of law school, if not before: Courts are obliged to enforce what Congress actually enacted, not what the courts suppose Congress should have enacted. Indeed, the Supreme Court recently reiterated, “The role of this Court is to apply the statute as it is written—even if we think some other approach might ‘accor[d] with good policy.’” *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (alteration in original) (quoting *Comm'r v. Lundy*, 516 U.S. 235, 252 (1996)) (internal quotation marks omitted); see also *infra* notes 107–14 and accompanying text (reviewing the proper mode of statutory construction under Title VII).

<sup>20</sup> See *infra* notes 308–10 and accompanying text. Arguably, “unequal burden” could validate as well *facially neutral* criteria. For example, applying unequal burden precedents, the court in *Finnie v. Lee County, Mississippi* upheld the Lee County Juvenile Detention Center’s (“JC”) requirement that all detention officers wear pants issued by the sheriff’s department. 907 F. Supp. 2d 750, 772–75 (N.D. Miss. 2012). Discerning no discriminatory animus, *Finnie* concluded that the JC’s policy reasonably assures uniformity among officers. Additionally, the court rejected Ms. Finnie’s Title VII argument that the JC’s pants-only policy unlawfully denied her the option of “wearing traditional female apparel.” *Id.* at 774. While *Finnie*’s holding may be correct, its reliance on unequal burden theory is problematic. Regardless, given space considerations, this Article limits its critique of unequal burden theory to facially discriminatory employment standards and, thus, leaves for another article whether, as one might suppose, the same or similar arguments would invalidate the use of that theory in Title VII litigation where discriminatory animus is not obvious.

<sup>21</sup> See, e.g., Bartlett, *supra* note 19, at 2541; D. Wendy Greene, *Black Women Can’t Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405 (2011); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); Deborah L. Rhode, *The Injustice*



understandably deeming Title VII a promise yet unfulfilled, scholars such as Gowri Ramachandran conclude that “[a]ntidiscrimination law is not the best law for protecting identity performance such as dress.”<sup>22</sup> Instead, Professor Ramachandran proposes a singular and separate “freedom of dress” legal standard because “[t]he fact that identity performance is so contextual and complex makes it hard, if not impossible, to formulate legal rules for protecting identity performance under the traditional equality-based rubrics of antidiscrimination law.”<sup>23</sup>

Provocative entreaties such as Professor Ramachandran’s certainly inform, inspire, and enlighten. Still, it is unlikely that either Congress or the courts soon will discard the egalitarianism underlying American civil rights laws—although as their membership changes they may be amenable to appreciating traditional concepts in new ways. Therefore, while the likelihood of success remains uncertain, it may be easier to sway the judiciary, particularly newer judges, to reverse unfortunate rulings by way of established civil rights milieus than to convince courts to undergo the particularly uncomfortable process of overturning precedent by first requiring them to endure the

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of Appearance, 61 STAN. L. REV. 1033 (2009); Yofi Tirosh, *Adjudicating Appearance: From Identity to Personhood*, 19 YALE J.L. & FEMINISM 49 (2007).

<sup>22</sup> Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 21 (2006).

<sup>23</sup> See *id.* at 23. Doubtless, Title VII and similarly designed civil rights statutes are too constrained because, to borrow Professor Ramachandran’s phrasing, “the traditional equality-based rubrics of antidiscrimination law” omit bigoted conduct no less offensive, arbitrary, and destructive to a given individual than are racial, sexual, and other commonly outlawed animus. Indeed, nearly three decades ago, this author identified a constitutional doctrine remedying such urgent criticisms. See generally Peter Brandon Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1 (1988) (explaining why due process of law under the U.S. Constitution requires that statutes first identify areas of endeavor, such as employment and voting, and then proscribe *all* discrimination of any kind that *unreasonably* obstructs successfully achieving those endeavors). Accordingly, to be constitutional, legislation such as Title VII must proscribe all arbitrary employment discrimination including but not limited to that act’s five forbidden classes. Given, however, that the proposition set forth in this author’s *Rationality* article has not, and likely will not, be judicially adopted, the notion that legislatures reasonably may limit civil rights protections to chosen classes remains good constitutional law.

comparably disagreeable process of adopting essentially new, unaccustomed, and likely unwelcome frameworks of legal analysis.<sup>24</sup>

Moreover, as mentioned previously, over the last three decades, both Congress and the Supreme Court have enriched familiar discrimination theory,<sup>25</sup> particularly regarding what constitutes unlawful stereotyping. Although not fully appreciated by many lower courts, these happy clarifications amply discredit those courts' rationales allowing employers to indulge unnecessary racial and sexual categorizing through grooming and appearance rules.<sup>26</sup> Therefore, despite the thoughtful conclusions of critics such as Professor Ramachandran, this Article need not, and does not, go afield from the considerable body of jurisprudence enforcing Title VII's "first principle," sounding in traditional antidiscrimination theory, that any form of discrimination based on the Act's five forbidden criteria is unlawful unless expressly textually exempted.

The line of argument is not complex. Part I explicates the unequal burden doctrine and its link to the predecessor theory of "mutable characteristics."<sup>27</sup> Part II offers the aforementioned statutorily formal argument, disproving unequal burden theory through an examination of Title VII's plain language and structure<sup>28</sup> in light of modern Supreme Court precedents addressing Title VII's ban against stereotyping.<sup>29</sup> This analysis places special emphasis on 42 U.S.C. § 2000e-2(m),<sup>30</sup> in which

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<sup>24</sup> Cf. *Hill v. Kemp*, 478 F.3d 1236, 1251 (10th Cir. 2007) ("Just how complex and difficult the new argument plaintiffs ask us to address, and thus the reason for our particular reluctance to decide it with finality, is worth pausing to underscore."); Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1218 n.281 (1996) ("[I]t [often is] more difficult for doctrinally-minded judges to craft new theories . . . to deal with new problems because they lack the doctrinal tools to confront novel problems.").

<sup>25</sup> See *infra* notes 162–240 and accompanying text.

<sup>26</sup> See *infra* notes 57–58, 62 and accompanying text.

<sup>27</sup> See *infra* notes 45–79 and accompanying text.

<sup>28</sup> See *infra* notes 107–31 and accompanying text.

<sup>29</sup> See *infra* notes 165–86 and accompanying text.

<sup>30</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 [hereinafter "the CRA of 1991"].

Congress clarified that plaintiffs prevail when discriminatory *animus* merely is a “motivating factor” rather than the “but-for cause” of the defendants’ conduct.<sup>31</sup>

Although not the lengthiest discussion herein by any means, Part III presents what may be this Article’s most substantial enhancement to relevant scholarship by applying abstract moral philosophy, specifically modern dignity theory, to assure that the doctrinal arguments presented in Part II do not constitute unduly literal—absurd—applications of the Act’s text.<sup>32</sup> Eschewing as patently mistaken the “consequentialist” approach adopted by most commentators criticizing unequal burden theory,<sup>33</sup> this Article argues in favor of deontology, the belief that “morality is transcendent, a set of *a priori* principles discernable through reason. [Contrary to consequentialism, m]orality . . . does not care what the possible outcomes of a particular moral problem may be.”<sup>34</sup> Pursuant to deontological theory, the concern in grooming code cases is not whether the given race- or sex-based appearance rule—say, forbidding male employees from wearing long hair—engenders good or bad outcomes.<sup>35</sup> Rather, rejecting the “balancing” approach that characterizes determining the aggregate “good,”<sup>36</sup> the issue is whether the employer’s rule *objectively* is immoral, thereby a violation of Title VII, or is *objectively* moral, in which case it comports with Title VII. Indeed, this Article shows that although ostensibly logical, the morality of civil rights is not discerned by balancing tests because such protocols inevitably endorse as the meaning of “morality” the personal preferences, predilections, and biases of the judge, administrator, commentator, or indeed any person performing the “balance.” Instead, morality must be

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<sup>31</sup> See *infra* notes 214–45 and accompanying text.

<sup>32</sup> See *infra* notes 246–307 and accompanying text.

<sup>33</sup> See, e.g., Bandsuch, *supra* note 19, at 305–06; Ramachandran, *supra* note 22, at 50–51. Often aligned with utilitarianism, consequentialism avers that in any given situation, the morally correct resolution is that which produces the best outcome in terms of some sort of societal good, often measured as the greatest aggregate happiness. See, e.g., Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution Is a “Suicide Pact,”* 20 WM. & MARY BILL RTS. J. 287, 294–96 (2011).

<sup>34</sup> See Bayer, *supra* note 33, at 292.

<sup>35</sup> See *id.* at 295–96.

<sup>36</sup> See, e.g., Bandsuch, *supra* note 19, at 305–06; Ramachandran, *supra* note 22, at 50–51.

understood as independent in its own right, not as the culmination of reviewers' private, albeit deeply held and sincere, inclinations.<sup>37</sup>

It is worth emphasizing at the outset that placing Title VII analysis within a deontological milieu—where it squarely belongs—renders a particularly unique benefit to critical analysis: explaining in a disinterested, thus unprejudiced, fashion why Title VII's protection of individual dignity cannot depend on the personal preferences and predilections of employers, employees, job applicants, or the judges who review the allegedly discriminatory employment policies. Deontology forestalls what many commentators inappropriately embrace: defining and applying moral precepts based on what makes either the given commentator or those whom that commentator respects—possibly the employer, possibly the employee—happy. Deontology compels the disentangling of private preferences from moral argument. Accordingly, one can prove that unequal burden theory truly is immoral, thus unlawful, only if the reviewer accepts unequal burden theory's immorality even if the reviewer deems resulting outcomes distasteful, such as compelling employers to tolerate male employees' long hair. That the moral analysis offered herein to invalidate the unequal burden doctrine may please this author—as indeed it does—is a fortuitous happenstance, and surely no *independent* proof that this Article discerned the correct moral and legal result.

This Article explains Title VII's applicable moral principles using “Kantian ethics,” that is, the concepts of human dignity and moral comportment expounded in broad terms by the noted Enlightenment philosopher Immanuel Kant.<sup>38</sup> As detailed in Part III, albeit implicitly and perhaps instinctively rather than knowingly, Congress embraced Kantian deontology through enacting Title VII—and indeed any of its civil rights laws.<sup>39</sup> Title

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<sup>37</sup> Thus, for instance, it is irrelevant whether in the aggregate male employees do or do not feel more deeply offended by a male-only hair rule than the employer would feel offended if that rule were invalidated under Title VII. Likewise, whatever the data reveals, it is irrelevant that the given reviewer, judge, or scholar personally believes that the interests of one of the parties—employer or male employees—outweighs the interests of the other. Instead, the answer derives from what *a priori*, objective reason establishes as the morally correct resolution.

<sup>38</sup> See generally IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (James W. Ellington trans., Hackett Publ'g Co., 3d ed. 1996).

<sup>39</sup> See *infra* notes 266–307 and accompanying text.

VII declares that by imposing *unnecessary* racial, sex-based, religious, color, and ethnic criteria, employers and unions offend the innate, intrinsic human *dignity* of employees and employment applicants, which first and foremost is a moral offense although it likely offends victims' economic, professional, and social statuses as well.<sup>40</sup> While these latter offenses are hugely significant, it is the moral offense that explains—indeed justifies—Congress's intrusion by way of Title VII into traditional management prerogative.<sup>41</sup>

Accordingly, this conclusion confirms that unless truly necessary to the conduct of the given business, Title VII prohibits employers from imposing their racial, sex-based, ethnic, or religiously inspired grooming and appearance standards, even if, in light of widely accepted social conventions, the vast majority would feel exceptionally uncomfortable in the presence of employees who refuse to comport with their employers' discriminatory rules.<sup>42</sup> Indeed, nearly four decades ago, with

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<sup>40</sup> See 42 U.S.C. § 2000e-2(a) (2012).

<sup>41</sup> Certainly, even a modicum of proof that employment discrimination *affects* interstate commerce technically is sufficient to sustain Title VII's constitutionality. Much theory supports the argument that discrimination obstructs rather than enhances commerce. Cf. Jessica Leigh Rosenthal, Comment, *The Interactive Process Disabled: Improving the ADA and Strengthening the EEOC Through the Adoption of the Interactive Process*, 57 EMORY L.J. 247, 268 n.162 (2007) (citing Russell Powell, *Beyond Lane: Who is Protected by the Americans with Disabilities Act, Who Should Be?*, 82 DENV. U. L. REV. 25, 50 (2004)). It is equally well-established that Congress need not be motivated by purely economic considerations when exercising its commerce authority. Rather, the legislature's authority to implement the Commerce Clause and its other constitutionally enumerated powers to prevent immoral governmental and private conduct is well-established. *E.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (addressing the Public Accommodations Act, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000a-6); see also *United States v. Clark*, 435 F.3d 1100, 1118-19 (9th Cir. 2006) (same). Pursuant to such moral authority, Congress almost certainly would not rescind Title VII even if presented with compelling evidence that discrimination does not disrupt or even enhances interstate commerce. That hiring criteria and employment standards *affect* interstate commerce, favorably or not, is constitutionally sufficient, therefore, Congress may address what apparently is its primary concern: the immorality of imposing employment conditions predicated on racial, ethnic, sex-based, and religious stereotypes. Cf. Andrew Brenton, Comment, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Be Replaced with a System for Accrediting Employers for Their Antidiscriminatory Employment Practices*, 26 WIS. J.L. GENDER & SOC'Y 349, 372-75 (2011) (discussing how arguably efficient employment discrimination "practices are not permissible under the inexorable sex-blind logic of the [Equal Pay] Act and Title VII").

<sup>42</sup> See *infra* notes 308-19 and accompanying text.

correct simplicity and directness the Supreme Court recognized Title VII's first principle: "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."<sup>43</sup> Therefore, contrary to the harsh dismay expressed by Judge Richard Posner, Title VII's enlightened prohibition against discrimination indeed and quite rightly recognizes "a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, [and] for female ditchdiggers to strip to the waist in hot weather,"<sup>44</sup> *if* such prohibitions are predicated on unnecessary sex-based bias, as almost certainly they would be.

## I. THE HISTORY OF THE UNEQUAL BURDEN DOCTRINE

### A. *Unequal Burden Doctrine's Precursor: Mutability Theory*

Normally, it would seem unremarkable to conclude that distinctly sex-specific terms of employment, such as rules forbidding only male employees from wearing long hair, are *per se* gender discriminatory.<sup>45</sup> After all, based manifestly on the affected workers' sex, such patently gender-specific work rules apparently violate Title VII's express and unequivocal antidiscrimination prohibition. Indeed, reviewing the plain

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<sup>43</sup> *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)); *accord, e.g.*, *Cnty. of Washington v. Gunther*, 452 U.S. 161, 180 (1981); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992).

<sup>44</sup> *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring).

<sup>45</sup> Because most of the applicable precedents concern sex discrimination, it is worth noting that although sometimes differentiated in other disciplines, as a matter of antidiscrimination law, courts treat the terms "gender" and "sex" synonymously and so will this Article. *E.g.*, *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 220 (9th Cir. 2013); *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 116 n.1 (3d Cir. 2013); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). See Mark E. Berghausen, Comment, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U. L. REV. 1281, 1286–92 (2011), for an interesting, accessible discussion explaining why the concepts gender and sex are and should be distinct, although certainly related. *Id.* at 1286 ("It has become an academic norm to use the term 'sex' to refer to gonadal, chromosomal, or genital anatomy and to use the term 'gender' to refer to the socially expected behaviors and preferences commonly ascribed to each sex.").

language and underlying policy of the Fair Employment Act, the first decisions addressing hair length and similar grooming rules simply but sensibly concluded, "It is clear, therefore, that [Title VII's] term 'discrimination' in this context contains no qualifications. Every difference in treatment is discrimination."<sup>46</sup>

These holdings were short lived, quickly replaced by appellate decisions asserting that, as a general matter, Title VII's prohibition against discrimination covers only terms and conditions of employment premised on "immutable characteristics"—essentially irreversible attributes *associated with* the Act's five forbidden criteria—rather than "mutable" characteristics meaning easily alterable traits.<sup>47</sup> Mutability theory posits that because the protected classes themselves are immutable,<sup>48</sup> Congress intended Title VII to apply only when

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<sup>46</sup> *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 665 (C.D. Cal. 1972). Early opinions rightly understood that sex-specific grooming rules confound not only the Act's unambiguous text, but also the Act's pivotal humanitarian and empathetic principles. As the *Aros* court frankly and firmly reasoned forty years ago, "The issue of long hair on men tends to arouse the passions of many in our society today. In that regard the issue is no different from the issues of race, color, religion, national origin and equal employment rights for women, all of which are raised in Title VII." *Id.* at 666. Initially, several courts agreed with the *Aros* court. *See Willingham v. Macon Tel. Publ'g Co.*, 482 F.2d 535, 538 (5th Cir. 1973) (divided panel), *vacated on reh'g*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972); *Roberts v. Gen. Mills, Inc.*, 337 F. Supp. 1055, 1057 (N.D. Ohio 1971). Identically, the Equal Employment Opportunity Commission ("EEOC"), the agency that enforces Title VII, consistently has determined that Title VII proscribes employers' male-only hair policies. *See* E.E.O.C. Dec. No. 71-1529, 3 Fair Empl. Prac. Cas. (BNA) 952 (Apr. 2, 1971); E.E.O.C. Dec. No. 71-2343, 3 Fair Empl. Prac. Cas. (BNA) 1253 (June 3, 1970); EEOC Compl. Man. (CCH) § 15-VII(B)(5), 2006 WL 4673430 (2006). *But see* EEOC Compl. Man. (CCH) § 619.2(a)(4), 2006 WL 4672749 (2006) (noting that federal courts have not adopted the EEOC's position).

<sup>47</sup> *See generally* *Barker v. Taft Broad. Co.*, 549 F.2d 400 (6th Cir. 1977) (divided panel); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976) (divided panel); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (per curiam); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973) (per curiam); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973) (divided panel). An en banc opinion overruled the sole court of appeals decision holding that male-only hair rules constitute per se sex-based discrimination. *See Willingham*, 507 F.2d at 1092. With rare exceptions, state precedent likewise finds that local anti-discrimination statutes do not per se forbid sex-specific hair standards. *See* 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 45.02[2] (2d ed. 2015) (collecting cases).

<sup>48</sup> Specifically, one cannot transform one's *race* or *national origin*. Similarly, there is no serious dispute that based on today's science, changing one's *skin color* or *sex*, although not impossible, is difficult and extraordinarily costly in time, effort,

discriminatory employment policies relate to the affected class's very immutability, such as refusing to hire women because of their gender.<sup>49</sup> By contrast, because hair is mutable—with arguable ease, one can cut and style one's hair and recut and restyle hair as it grows back—rules forbidding only male employees from wearing long hair and similar grooming requirements fall outside the Act's sphere of protection.<sup>50</sup> Although acknowledging, as they must, that male-only hair rules regulate employees due to their immutable gender,<sup>51</sup> courts accented that such rules apply not only to the entire protected class but also to a subset of a sex: men who wish to wear long hair.<sup>52</sup> *Courts maintained that because the “plus” or modifying*

and trauma, thus rendering those attributes effectively immutable. By contrast, deciding to either adopt or to change one's religion is hardly immutable. “Religion is, of course, a forbidden criterion [under Title VII], even though a matter of individual choice.” *Garcia v. Gloor*, 618 F.2d 264, 269 n.6 (5th Cir. 1980) (applying mutability analysis to uphold employers' English-only rules). Possibly, changing religious affiliation may be sufficiently psychologically arduous to fall into a special category: mutable but difficult to alter. *See* discussion *infra* note 65 and accompanying text.

Recognizing that religion is not immutable, opinions assert that religion is among Title VII's protected groups due to its time-honored elevated status as evinced by the religion clauses of the First Amendment. *Fagan*, 481 F.2d at 1125 n.22. This attempt to salvage mutability theory, however, is infirm because it contradicts the Supreme Court's admonition that the definition of discrimination under Title VII is not predicated on either the concept of or the law explicating fundamental rights under the Constitution. *See, e.g., Barker*, 549 F.2d at 404 (McCree, J., dissenting) (citing *Washington v. Davis*, 426 U.S. 229, 245 (1976)). *See* Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure To Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453 (2010), for a thoughtful critique of mutability analysis as courts apply it to religious discrimination in employment.

<sup>49</sup> *E.g., Baker*, 507 F.2d at 897 (“Since race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects.”); *see also, e.g., Gloor*, 618 F.2d at 269; *Earwood*, 539 F.2d at 1351; *Fagan*, 481 F.2d at 1125.

<sup>50</sup> *Barrett v. Am. Med. Response, N.W., Inc.*, 230 F. Supp. 2d 1160, 1166 (D. Or. 2001) (citing *Earwood*, 539 F.2d at 1351).

<sup>51</sup> *See, e.g., Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1032 (7th Cir. 1979).

<sup>52</sup> Rules affecting portions rather than the totality of a protected class are known as “plus” rules, as in “race-plus” or “sex-plus.” For instance, the Sixth Circuit recently noted, “[A] plaintiff can maintain a claim for discrimination on the basis of a protected classification considered in combination with another factor. In many of these so-called ‘sex-plus’ cases, the plaintiff's subclass combines a characteristic protected by Title VII with one that is not.” *Shazor v. Profl Transit Mgmt., Ltd.*, 744 F.3d 948, 957–58 (6th Cir. 2014) (citation omitted) (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam)).



aspect concerns a mutable characteristic such as hair, the employment rule is not statutorily sex discrimination despite the rule's application solely to one gender.<sup>53</sup> Consequently, mutability theory does not aver that flagrant sex- and race-based employment standards are prima facie illegal pursuant to 42 U.S.C. § 2000e-2(a)<sup>54</sup> but are legal nonetheless under a textual exception such as the Act's express *bona fide occupational qualification* ("BFOQ") defense.<sup>55</sup> Rather, although no statutory provision so suggests, the courts propounded that when involving mutable characteristics, employment terms and conditions tangibly predicated on race or sex are not per se statutorily predicated on race or sex.<sup>56</sup>

Predictably, courts expanded mutability-immutability theory, hewing a substantial safe harbor of legal sex discrimination.<sup>57</sup> Lamentably consistent with its basic premise,

<sup>53</sup> *E.g.*, *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1335–36 (D.C. Cir. 1973); *Bartlett*, *supra* note 19, at 2559–65; *see Bayer*, *supra* note 4, at 842.

<sup>54</sup> *See supra* note 3 for the text of 42 U.S.C. § 2000e-2(a) (2012).

<sup>55</sup> Title VII provides that employment classifications may be based on certain usually forbidden criteria when "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1); *see also infra* notes 133–46 and accompanying text.

<sup>56</sup> As explicated *infra* at notes 68–91 and accompanying text, the judiciary's core rationale is that such indisputably sex-based policies are not statutorily problematic because they promote customary, "reasonable" management prerogatives. *See, e.g.*, *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973). The Seventh Circuit expressed tidily the general presumption, "So long as [sex-specific attire and grooming rules] find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women." *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1032 (7th Cir. 1979) (emphasis added).

<sup>57</sup> *See, e.g.*, *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215–16 (8th Cir. 1985) (finding that sexually based dress and appearance code to enhance company's image is proper exercise of management prerogative); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d. Cir. 1985), *abrogated on other grounds* by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (same); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (upholding an employer's policy requiring male employees to wear ties); *Devine v. Lonschein*, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) (analogizing to Title VII precedent and holding that judges may require male attorneys to wear neck ties to preserve courtroom decorum). Not surprisingly, courts have been equally loath to strike governmental employers' grooming rules as violations of Fifth or Fourteenth Amendment liberty interests. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) (holding that the police department's male-only hair length rules were lawful under rational basis analysis if they helped make officers recognizable to the public or promoted internal "esprit de corps"); *Weaver v.*

mutability theory applies as well to racial-ethnic grooming standards, including facially neutral employment rules that disproportionately hinder racial and ethnic groups.<sup>58</sup> Indeed,

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Henderson, 984 F.2d 11, 13–14 (1st Cir. 1993) (finding that the police department’s “no mustache” rule was at least constitutionally rational to help induce departmental cohesion); Rathert v. Village of Peotone, 903 F.2d 510, 515 (7th Cir. 1990) (holding that the police department may ban male officers from wearing ear studs when both on and off duty). Importantly, these representative decisions are not premised on the necessity of police or other administrative departments to promote the safety of either the general public or of fellow law enforcement officers, although such would likely be legitimate reasons to uphold grooming and appearance codes. Rather, the rationales are grounded in traditional employers’ prerogatives regarding worker comportment and workplace ambiance. Thus, the constitutional law cases are analogous to the Title VII cases discussed herein.

<sup>58</sup> See, e.g., Smith v. Delta Air Lines, Inc., 486 F.2d 512, 514 (5th Cir. 1973) (finding that the discharge of a black male because his sideburns did not conform to employer’s grooming requirements did not result from racial discrimination); Carswell v. Peachford Hosp., No. C80-222A, 1981 WL 224, at \*2 (N.D. Ga. May 26, 1981) (holding that 42 U.S.C. § 1981’s ban against racial discrimination in contracts does not forbid an employer from banning the cornrows hairstyle that at the time was particularly popular among African Americans).

A much cited telling instance is worth a bit of detail. In *Rogers v. American Airlines, Inc.*, the district court rejected Renee Rogers’s challenge that her employer’s policy forbidding the cornrow hairstyle unlawfully discriminated against her on the basis of African Americanism. 527 F. Supp. 229, 233 (S.D.N.Y. 1981). *Rogers* rebuffed plaintiff’s contention that cornrows, then prevalent among African Americans of both sexes, represent a cultural and historical expression of racial identity. Dismissing the popular hairstyle as a mere fad, the court reasoned that Ms. Rogers’s claim failed because she could not demonstrate that “an all-braided hair style is worn exclusively or even predominantly by black people.” *Id.* at 232. The court might have ended its analysis there, but, significantly, felt compelled to reject entirely *any* argument that a particular grooming or appearance style’s *proven* racial or ethnic significance is relevant under Title VII. See Rhode, *supra* note 21, at 1058–59 (discussing *Rogers* in detail). Specifically, the court ended its analysis by reaffirming the legal preeminence of mutability analysis as virtually an absolute trump: “An all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.” *Rogers*, 527 F. Supp. at 232.

Although its reasoning arguably has been supplanted by contemporary “unequal burden” theory, the thirty-five-year-old *Rogers* is no relic. *E.g.*, Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at \*5–6 (M.D. Ga. Apr. 25, 2008) (applying the *Rogers* mutability theory to uphold employer’s ban on cornrows hairstyle); McBride v. Lawstaf, Inc., No. 1:96-cv-0196-cc, 1996 WL 755779, at \*2–3 (N.D. Ga. Sept. 19, 1996) (upholding employer’s ban on braided hair styles under the *Rogers* court’s mutability theory).

courts enlarged the doctrine to validate intrusions into core indicia of ethnic personhood, such as rules forbidding the use of languages other than English.<sup>59</sup>

Despite significant amending of Title VII and the profound maturation of federal court judgments recognizing employers' unlawful use of sexual, racial, and other forms of "stereotyping,"<sup>60</sup> the nearly thirty years since the publication of this author's *Mutable Characteristics and the Definition of Discrimination Under Title VII*<sup>61</sup> have seen no surcease of the judicial dogma, in both federal and state courts, that explicitly sex-based appearance and grooming codes are not per se discrimination under Title VII.<sup>62</sup> Indeed, the impact likely is especially

<sup>59</sup> See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (finding that a meat and poultry producer's rule forbidding the use of any language other than English on the job did not violate the Title VII rights of predominately Spanish-speaking employees and, thus, need not be validated as a BFOQ); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (holding that an employer's rule forbidding the use of Spanish in the presence of an English-speaking customer was not discrimination and, thus, need not be defended under BFOQ); cf. *Church v. Kare Distribution, Inc.*, 211 F. App'x 278 (5th Cir. 2006) (per curiam) (citing *Gloor*, 618 F.2d at 266–69) (holding that firing sales representatives who could not speak Spanish did not violate Texas Labor Code § 21.051).

<sup>60</sup> See *infra* notes 214–45 and accompanying text (discussing 42 U.S.C. § 2000e-2(m)); see also *infra* notes 165–200 and accompanying text (discussing unlawful stereotyping under the Act).

<sup>61</sup> See Bayer, *supra* note 4, at 772.

<sup>62</sup> See, e.g., *Kare Distribution, Inc.*, 211 F. App'x at 281 (holding that firing sales representatives who could not speak Spanish does not violate section 21.051 of the Texas Labor Code); *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc) (finding that the employer gambling casino's requirement that female bartenders must wear makeup was not unlawful); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) (holding that unlawful harassment may occur if a male employee suffers discrimination for acting in a too-feminine manner, but noting that reasonable sex-based dress and grooming standards are not necessarily per se unlawful under Title VII); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (finding that a male-only hair length policy did not violate Title VII); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908–09 (2d Cir. 1996) (per curiam) (upholding a male-only hair-length rule); *Spun Steak Co.*, 998 F.2d at 1490 (upholding rule forbidding use of any language other than English on the job); *Bellissimo*, 764 F.2d at 181; *Pitts*, 2008 WL 1899306, at \*5–6 (applying mutability theory to uphold employer's ban on cornrows hairstyle); *Dodd v. SEPTA*, No. 06-4213, 2007 WL 1866754, at \*6 (E.D. Pa. June 28, 2007) (upholding employer's ban against male employees wearing ponytails); *Wiseley v. Harrah's Entm't, Inc.*, No. 03-1540 (JBS), 2004 WL 1739724, at \*4–6 (D.N.J. Aug. 4, 2004) (finding that a male employee who wanted to wear his ponytail set in a neat bun stated no claim under Title VII); *Boyce v. Gen. Ry. Signal Co.*, No. 99-CV-6225T, 2004 WL 1574023, at \*2–3 (W.D.N.Y. June 10, 2004) (upholding a male-only hair-length rule); *Kleinsorge v. Eyeland Corp.*, No. 99-5025, 2000 WL

widespread because one reasonably might assume that numerous potential plaintiffs now are chilled from challenging patently discriminatory grooming policies.<sup>63</sup>

*B. “Unequal Burden” Doctrine Essentially Replaces Mutability Theory*

The judiciary realized that mutability theory qua mutability theory is facially problematic. First, courts properly have invalidated employment rules premised on sex traits that technically are mutable but nonetheless difficult to alter, such as disparate weight standards for male and female airline stewards.<sup>64</sup> Such policies impose greater difficulties on women than men because, although mutable, weight control often is arduous.<sup>65</sup>

Additionally, despite the then-prevailing mutability theory, courts invalidated employment policies they considered excessively humiliating, demeaning, and disrespectful to

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124559, at \*2 (E.D. Pa. Jan. 31, 2000) (upholding rule forbidding male employees from wearing earrings); *McBride*, 1996 WL 755779, at \*2–3 (upholding a employer’s ban on braided hair styles under mutability theory); *Seitz v. O’Connor*, No. 95 CV 0122 (SJ), 1995 WL 745012, at \*2 (E.D.N.Y. Nov. 30, 1995) (upholding a male-only hair-length rule); *Miller v. Safeway, Inc.*, 170 P.3d 655, 658–59 (Alaska 2007) (holding that sex-based hair-length policies do not violate state contract law’s “implied covenant of good faith and fair dealing”); *Matthews v. Inter-Con Sec. Sys., Inc.*, No. B206764, 2009 WL 117406, at \*1 (Cal. Ct. App. Jan. 20, 2009) (noting that an employer’s male-only hair-length rule is not unlawful unless it imposes an unequal burden); *Schiavo v. Marina Dist. Dev. Co.*, 2013 WL 4105183 (N.J. Super. Ct. July 18, 2013) (finding Borgata Casino’s sex-based grooming and appearance policies reasonable, thus, lawful); *Lockhart v. La.-Pac. Corp.*, 795 P.2d 602, 603–04 (Or. Ct. App. 1990) (finding that employer’s rule forbidding men from wearing facial jewelry does not violate OR. REV. STAT. § 659.030(1)(b)); *Rohaly v. Rainbow Playground Depot, Inc.*, No. 56478-1-1, 2006 WL 2469143, at \*4–5 (Wash. Ct. App. Aug. 28, 2006) (addressing employer’s gender-neutral requirement that all employees wear specified red blazers, the court noted that employer’s sexually disparate dress and grooming codes are lawful under state and federal law absent an unequal burden).

<sup>63</sup> Likewise, legal counsel may feel obliged to dissuade potential plaintiffs from suing due to the improbability of a successful outcome or, worse, lest such claims be adjudged frivolous, vexatious, or otherwise worthy of sanctions pursuant to, among other things, FED. R. CIV. P. 11(c).

<sup>64</sup> See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854–55 (9th Cir. 2000).

<sup>65</sup> *Gerdome v. Cont’l Airlines, Inc.*, 692 F.2d 602, 608–09 (9th Cir. 1982) (en banc) (striking the weight requirement that applied exclusively to female stewards); see also, e.g., *Frank*, 216 F.3d at 854–55 (holding that the airline unlawfully required female flight attendants to be proportionally slimmer than their male counterparts).

women.<sup>66</sup> For example, deeming the situation different from male-only hair-length rules, the United States Court of Appeals for the Seventh Circuit, in *Carroll v. Talman Federal Savings & Loan Ass'n of Chicago*,<sup>67</sup> invalidated a bank's policy instructing male employees to use good judgment when choosing business attire but requiring female employees to choose their work outfits from a limited, preset wardrobe euphemistically called a "career ensemble."<sup>68</sup> The court rejected the bank's rationale that, unlike men, women are apt to engage in "dress competition" and otherwise cannot be trusted to dress appropriately.<sup>69</sup> Similarly, the United States Court of Appeals for the Sixth Circuit, in *Allen v. Lovejoy*,<sup>70</sup> invalidated, as an offense to the individual personhood of women, the Health Department of Shelby County, Tennessee's rule requiring married female employees to assume their husbands' surnames.<sup>71</sup> Such holdings correctly acknowledge that discriminatory animus often arises in response to what Professor Ramachandran elegantly denotes "performative" aspects of behavior, facets that well may concern mutable characteristics either predominately or through some interplay of mutable and immutable attributes.<sup>72</sup> Nonetheless, preserving the fundamental failing of mutability analysis, *Carroll's* and *Lovejoy's* rationales permit courts to uphold purportedly "reasonable" facially discriminatory grooming and

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<sup>66</sup> See, e.g., *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1032–33 (7th Cir. 1979).

<sup>67</sup> 604 F.2d 1028.

<sup>68</sup> *Id.* at 1032–33; see also *infra* notes 288–91 and accompanying text.

<sup>69</sup> *Carroll*, 604 F.2d at 1033.

<sup>70</sup> 553 F.2d 522 (6th Cir. 1977).

<sup>71</sup> *Id.* at 523–24.

<sup>72</sup> Ramachandran, *supra* note 22, at 20–21 (footnote omitted). Professor Ramachandran noted:

[O]ur identities are either wholly or partially 'performative,' meaning that they are constituted not just by immutable, biological traits but also by our actions, such as the sexual acts we engage in, the way we wear our hair, the way we speak, our clothing, and even the magazines we like to read. Thus, when an African-American woman wears her hair in braids, this act is usually part of what constitutes her status as an African-American woman. . . . It is, after all, largely her outward appearance and behavior—certainly not the shape of her genitals—that signals to most people who interact with her that she is a woman, and that at least partially signals her identity as an African American.

*Id.* See generally Bandsuch, *supra* note 19, at 291–97 (critiquing immutability theory).

comportment policies.<sup>73</sup> In that regard, their jurisprudence remains infirm, for Title VII's text and structure define as unlawful all discrimination based on the five forbidden classes unless proven necessary, and not simply useful, to the given defendant-business.<sup>74</sup>

Courts substantially have replaced mutability analysis with unequal burden theory,<sup>75</sup> although the embers of the former continually warm the latter.<sup>76</sup> Indeed, if only implicitly, courts continue to rely on concepts of mutability—particularly ease of conformance with employers' grooming demands—to discern unequal burden.<sup>77</sup> The “reasonableness” vel non of employers' facially discriminatory appearance and grooming rules may well depend upon how purportedly easily discriminatees can comply. Logically, the more ostensibly mutable the affected trait, the more likely the courts are to conclude the challenged discrimination is legal. Therefore, mutable characteristics theory surely remains a silent yet inappropriately influential partner in grooming case analysis.

The archetypal modern opinion espousing “reasonableness” as the definition of Title VII discrimination, thus enabling the “unequal burden” approach, is *Jespersen v. Harrah's Operating*

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<sup>73</sup> See, e.g., *Carroll*, 604 F.2d at 1032.

<sup>74</sup> See *infra* notes 132–50 and accompanying text (discussing Title VII's textual exceptions).

<sup>75</sup> For example, *Rohaly v. Rainbow Playground Depot, Inc.* held that requiring only female employees to purchase and to wear specified navy blazers is not facially discriminatory but might be unlawful if imposed for discriminatory purposes. No. 56478-1-I, 2006 WL 2469143, at \*5–6 (Wash. Ct. App. Aug. 28, 2006). Therein, the court noted that mutability analysis is “outdated.” *Id.* at \*4 n.10.

<sup>76</sup> Modern opinions espousing the unequal burden doctrine often cite mutable characteristics decisions. *E.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc). However, such opinions tend not to discuss, much less expressly endorse, mutability analysis per se, indicating that perhaps courts cite mutable characteristics decisions not to reprise that theory but to demonstrate the historical persistence of upholding facially discriminatory grooming rules. *But see Church v. Kare Distribution, Inc.*, 211 F. App'x 278, 281 (5th Cir. 2006) (per curiam) (using mutability theory to uphold under the Texas Commission on Human Rights Act, the firing of a sales employee who could not speak Spanish); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at \*5–6 (M.D. Ga. Apr. 25, 2008) (applying mutability theory to uphold employer's ban on the cornrows hairstyle); *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at \*2–3 (N.D. Ga. Sept. 19, 1996) (upholding employer's ban on braided hairstyles under mutability theory).

<sup>77</sup> Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939, 964 (2008).

Co.<sup>78</sup> Therein, the en banc United States Court of Appeals for the Ninth Circuit rebuffed Darleen Jespersen's Title VII challenge to that aspect of Harrah's "Personal Best" grooming and appearance policy requiring female, but not male, bartenders to wear makeup or lose their jobs.<sup>79</sup> Ms. Jespersen argued that her long-standing and deeply felt disdain for facial cosmetics exemplified why Harrah's sex-based makeup standards unlawfully inflict the common stereotype that genuine women wear cosmetics to enhance their femininity but real men do not lest they appear ladylike and weak.<sup>80</sup>

In a ploy derived from mutability analysis, *Jespersen* held that Harrah's policy is not statutorily sex-based because it strives to enhance the productivity and attractiveness of all bartenders, both male and female.<sup>81</sup> Acknowledging that certain rules are unequivocally gender specific, *Jespersen* pronounced such sex differentiation to be merely judicious nods to reasonable prevailing social conventions.<sup>82</sup> Indeed, *Jespersen* reiterated the familiar bizarre canon of mutability analysis: "Grooming standards that *appropriately differentiate* between the genders

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<sup>78</sup> 444 F.3d 1104.

<sup>79</sup> *Id.* at 1110–13. Regarding *Jespersen's* specific facts, Harrah's Corporation owns and manages resorts combining hotels, restaurants, bars, and gambling casinos. *Id.* at 1105. Harrah's Reno, Nevada, facility set grooming standards containing sex-neutral rules as well as both male- and female-specific rubrics. *Id.* at 1107. Men may not wear hair extending below the top of their shirt collars, may not wear ponytails, and must keep their hands and fingernails clean and their fingernails neatly trimmed at all times. *Id.* Similarly, male employees cannot wear colored nail polish or use facial or eye makeup. *Id.* Female employees are required, among other things, to keep their hair teased, curled, or styled and always worn down. *Id.* Nail polish can be only clear, white, pink, or red, and nails may not be unduly long or sport "exotic nail art." *Id.* In addition, "[m]akeup (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times." *Id.* (emphasis omitted).

<sup>80</sup> *Id.* at 1107–08. She testified that wearing makeup both slighted her personal dignity and "took away [her] credibility as an individual." *Id.* at 1108 (alteration in original). Professor Tirosch, accenting the physical as well as emotional effects of Harrah's grooming code, stated, "Jespersen's earlier attempts to wear makeup made her feel emotionally distressed, 'sick, degraded, exposed, and violated.' Still, when makeup became mandatory in her workplace, she tried wearing it in order to conform to the new regulations, but again felt extremely uncomformable [sic] and ill." See Tirosch, *supra* note 21, at 70 (footnotes omitted) (quoting *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077 (9th Cir. 2004), *aff'd* 444 F.3d 1104 (9th Cir. 2006) (en banc)) (citing *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1194 (D. Nev. 2002)).

<sup>81</sup> *Jespersen*, 444 F.3d at 1109–10.

<sup>82</sup> *Id.* at 1107, 1112.

are not facially discriminatory.”<sup>83</sup> Declaring that Title VII’s “touch-stone is reasonableness,”<sup>84</sup> the Ninth Circuit essentially embraced mutability theory’s principle conceit: “So long as they find some justification in commonly accepted social norms and are *reasonably related* to the employer’s business needs, such regulations are not necessarily violations of Title VII”<sup>85</sup> regardless whether such sex- or race-specific regulating of employees meets any of the express exemptions or defenses Congress chose to include within Title VII.

The issue then became whether Harrah’s sex-based standards impose an “unequal” and thus inappropriate or unequal burden, a requisite Ms. Jespersen failed to meet.<sup>86</sup> Specifically, nothing in the record suggested to the Ninth Circuit that Harrah’s sex-based grooming requisites would “objectively inhibit a woman’s ability to do the job.”<sup>87</sup> The court similarly opined that Harrah’s female-specific requirements “are not more onerous” either in theory or practice than are its male-only

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<sup>83</sup> *Id.* at 1109–10 (emphasis added). Such reasoning is obstinate. That courts think it appropriate to carve a “reasonableness” exception to Title VII regarding employers’ grooming rules cannot alter the actuality that, borrowing *Jespersen’s* prose, “standards . . . differentiat[ing] between the genders” is exactly what “facially discriminatory” means. *Id.*; see *Ameritech Benefit Plan Comm. v. Foster-Hall*, No. 97 C 1441, 97 C 2209, 1998 WL 419483, at \*5 (N.D. Ill. July 21, 1998) (“[The employer’s] policy was facially discriminatory because by its own terms it dictated . . . disparities along racial lines. That is what it means for a policy to be ‘facially discriminatory.’” (emphasis omitted)).

<sup>84</sup> *Jespersen*, 444 F.3d at 1113; see also *supra* notes 12–20 and accompanying text.

<sup>85</sup> *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028, 1032 (7th Cir. 1979) (emphasis added). Similarly, one of the pivotal mutable characteristics rulings asserted uncritically:

We may take judicial notice that reasonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination “because of sex.”

*Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973).

<sup>86</sup> The court averred, “Our settled law in this circuit, however, does not support *Jespersen’s* position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a *prima facie* case.” *Jespersen*, 444 F.3d at 1109 (citing *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); *Gerdorn v. Cont’l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982)); see also *supra* note 65 and accompanying text.

<sup>87</sup> *Jespersen*, 444 F.3d at 1112.



requisites.<sup>88</sup> Absent evidence of an unequal or unequal burden, the court refused to find even a prima facie case of discrimination.<sup>89</sup>

In brief, the now prevailing standard holds that employment grooming, attire, or appearance requisites—and their like—facially premised on any of the five forbidden criteria are not discriminatory under Title VII if (1) they are *reasonable*, likely because they mirror purportedly innocuous, socially prevalent sexual statuses or otherwise are judicially deemed inoffensive and (2) they impose no burden judicially determined to be “unequal” or otherwise undue.

This author avers today no less adamantly than he did nearly thirty years ago<sup>90</sup>: Courts know or should know that the principles this writing assembles as “undue burden” theory—a modest variation of the older mutability standard—defiantly thwarts the letter, structure, purpose, and spirit of Title VII.

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<sup>88</sup> *Id.* at 1109. Indeed, the majority declined to “take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short.” *Id.* at 1110. The dissenting judges strongly disagreed, urging that while perhaps it would have been helpful had Ms. Jespersen supplemented the district court record, common knowledge and experience debunks the majority’s rash and willful disregard of commonly known facts:

[I]s there any doubt that putting on makeup costs money and takes time? Harrah’s policy requires women to apply face powder, blush, mascara and lipstick. You don’t need an expert witness to figure out that such items don’t grow on trees. Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. . . . Makeup, moreover, must be applied and removed every day; [Harrah’s] policy burdens men with no such daily ritual. While a man could jog to the casino, slip into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.

*Id.* at 1117 (Kozinski, J., dissenting). Pursuant to *Jespersen*, plaintiffs now must engage in extensive fact-specific, discrete proofs when the social reality, worthy of judicial notice, informs that the costs in time, money, and stress of most women’s grooming exceeds that borne by most men. See Onwuachi-Willig, *supra* note 21, at 1096.

<sup>89</sup> *Jespersen*, 444 F.3d at 1110–11. This Article accepts but does not concede that without unequal burden, individuals may change to employers’ satisfaction the traits, characteristics, and behaviors encompassed in “unequal burden” cases. The thesis, herein, is that the moral imperatives of Title VII do not allow employers to impose such intrusions absent BFOQs. However, many commentators strongly and cogently dispute judges’ usually rough assertions that changing reviewed mannerisms and appearances incurs no burden worthy of judicial notice. See *infra* note 182 and accompanying text.

<sup>90</sup> See generally Bayer, *supra* note 4.

Inferring a “reasonableness” exception, the judiciary devised its own regime of professed wisdom to supplant imagined inadequacies of Title VII’s unadorned, uncomplicated, unambiguous structure prohibiting five classifications of discrimination unless justified by textual exceptions.<sup>91</sup> This Article offers below arguments supporting its author’s admittedly vehement contention.

## II. THE MANY INFIRMITIES OF MUTABLE CHARACTERISTICS CUM UNEQUAL BURDEN THEORY

### A. *Title VII Is Not Limited to Policies Directly Affecting Work Product*

Unequal burden doctrine is premised on a flurry of doubtful ancillary propositions borrowed from “mutable characteristics” theory to defend the brusque declaration that Title VII’s text implicitly excludes “reasonable” discrimination from statutory coverage.<sup>92</sup> Notably, *Jespersen* accented that Harrah’s policy is detailed, explicitly covering both male and female employees, with some provisions applying identically to both genders, some setting gender disparate rules, and some addressing only one sex.<sup>93</sup> But, while interesting, those facts have neither logical nor legal significance because by definition, *all* grooming and appearance codes pertain to both sexes either explicitly or implicitly. No less than *exclusively* single-sex grooming codes, dual-gender grooming codes instruct what both sexes may or may not do. Thus, *any* dress or grooming code—or any discrete

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<sup>91</sup> This Article notes for thoroughness that one respected commentator would adopt a reasonableness standard but modified as a balancing test, comparing the employer’s need to impose the grooming standard with the extent the standard inappropriately invades individuals’ choices of how to define themselves. LEX K. LARSON, 3 EMPLOYMENT DISCRIMINATION § 45.02 (2d ed. 2015). Consequently, Mr. Larson strongly criticizes court rulings that find grooming issues trivial pursuant to mutable characteristics theory. Certainly, Larson’s balancing test would more closely approximate the commands of Title VII; however, as urged herein, Congress nowhere so much as hinted that discrimination purportedly imposing no unequal burden is a special, lesser subcategory of discrimination nor did Congress establish a “reasonableness” standard to discern if per se sex- or race-based employment policies are sufficiently unreasonable to premise a triable cause of action.

<sup>92</sup> See *supra* Part I.B.

<sup>93</sup> See *supra* notes 79, 88–89 and accompanying text.

provisions therein—applying to only one gender deliberately frees the other from coverage, thereby permitting the other to do what the covered sex may not.<sup>94</sup>

Hence, contrary to *Jespersen*, that Harrah's took the time to draft a detailed set of rules makes the gender-exclusive aspects thereof no more nor less sexually discriminatory than any other employer's appearance rules, thorough or sparse, new or longstanding, written or unwritten.

On a different tack, accenting a remnant of mutability theory, *Jespersen* highlighted that grooming rules do not affect the actual ability of individuals to work.<sup>95</sup> That practical fact, however, has no legal meaning because Congress appropriately extended Title VII's protection beyond blanket refusals to hire members of a protected class and similar discriminatory policies directly denying or limiting opportunities for employment.<sup>96</sup> To offer a prominent example, employers cannot impose pension plans that discriminate on the basis of sex.<sup>97</sup> Not surprisingly, courts routinely invalidate similar discrimination regarding

<sup>94</sup> Certainly, a female-specific makeup standard is no less gender-specific whether part of a larger grooming policy or standing as the sole appearance-requisite demanded by a given employer.

<sup>95</sup> See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006). Reiterating the premises of mutability theory, the Eleventh Circuit likewise offered the following farcical conclusion regarding a sex-based rule setting a sine qua non for obtaining or retaining employment: "[T]he [male-only short hair] grooming policy at issue in *Willingham* 'related more closely to the employer's choice of how to run his business than to equality of employment opportunity.'" *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (quoting *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc)).

<sup>96</sup> 42 U.S.C. § 2000e-2(a) (2012). In fact, a consistent principle of Title VII jurisprudence affirms, "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (emphasis added) (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978), superseded in part by statute, 42 U.S.C. § 2000e-5(g)(2) (2012), as recognized in *Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291, 1303 (N.D. Ala. 2013)); see also *infra* note 114 and accompanying text.

<sup>97</sup> Perhaps most notably, the Supreme Court invalidated an employer's pension program that, based on empirically reliable actuarial tables, charged female employees more than similarly situated male employees. *Manhart*, 435 U.S. at 711. The Supreme Court confirmed and expanded *Manhart's* rationale when it held that employers may not so much as offer pension annuity plans that charge employees equally but pay less in benefits to female retirees than to similarly situated male retirees. *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1074–75 (1983) (per curiam).

other beneficial perquisites that are unrelated to either discrete work duties or the actual quality of employees' work.<sup>98</sup> For instance, the Act prohibits discriminatory vacation pay.<sup>99</sup>

While certainly an inducement to work proficiently, employees can perform perfectly well even if employers' pension funds, vacation policies, or other perquisites are discriminatory, or indeed, if employers offer any benefits at all. Thus, Title VII proscribes discriminatory employment policies that do not directly inhibit employees from successfully performing their jobs.<sup>100</sup> Nonetheless, under the unequal burden model, Darleen Jespersen had to accept the female-only aspects of Harrah's grooming policy or be fired lawfully.<sup>101</sup> Paradoxically, Ms. Jespersen would not have to endure gender distinct pension plans, vacation pay, or similar discrimination as conditions of her continued employment if Harrah's imposed such terms. It makes no sense that extant Title VII doctrine prohibits employers from indulging discriminatory preference regarding perquisites, but permits employers to enforce discriminatory grooming codes as conditions for employment itself with no regard for whether such grooming codes are essential to performing the particular work.

The pension rulings strongly explicate the logical fallacy of unequal burden theory in a separate but related regard.<sup>102</sup> Remarkably, the Supreme Court unequivocally ruled that Title VII prohibits employers from offering perquisites predicated on

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<sup>98</sup> EEOC Compl. Man. (CCH) ¶ 7230, 2009 WL 3608272 (2009).

<sup>99</sup> *E.g.*, *Craig-Wood v. Time Warner N.Y. Cable LLC*, 549 F. App'x 505, 509 (6th Cir. 2014); *Atkinson v. N. Jersey Developmental*, 453 F. App'x 262, 263–66 (3d Cir. 2011).

<sup>100</sup> One might respond that a disparate pension fund or similar employment perquisite is a monetarily significant "term" of employment under 42 U.S.C. § 2000e-2(a)(1) (2012). Therefore, any sex-based employment practice adversely affecting pensions imposes an unequal burden. However, failing to obtain work or being fired are more costly employment outcomes in terms of money, lost opportunities, and other manifest harms for the obvious reason that the employee is no longer employed. Indeed, § 2000e-2(a)(1) begins, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . ." *Id.* Section 2000e-2(a)(1)'s inaugural language evinces Congress's deep concern that discrimination's first significant adverse effect is to cause discriminatees either to lose or to be denied gainful employment. In that regard, the "burden" judicially validated in the grooming cases—loss of employment for failure to conform—is much greater than the burdens courts actually forbid in the cases addressing pensions and other work perquisites.

<sup>101</sup> *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

<sup>102</sup> *See Norris*, 463 U.S. at 1074–75; *Manhart*, 435 U.S. at 711, 716–17.

the scientifically accurate “stereotype[]” that the average female will outlive the average male even if unfortunate economic consequences result.<sup>103</sup> The Court so ruled despite an incredulous rejoinder by Chief Justice Warren Burger:

[T]o operate economically workable group pension programs, it is only rational to permit [employers] to rely on statistically sound and proved disparities in longevity between men and women. Indeed, it seems to me irrational to assume Congress intended to outlaw use of the fact that . . . women as a class outlive men.<sup>104</sup>

If employers cannot take into account such *relevant* actualities as economic disparities revealed by empirically reliable sex-based actuarial data, certainly they may not require that, as a condition of obtaining pensions and other perquisites, employees conform with sex-based policies that are *completely irrelevant* to such economic realities. For instance, surely courts would not uphold an employer's rule allowing longhaired men to work but prohibiting them from earning vacation days, accumulating sick leave, and participating in the pension and insurance plans available to shorthaired male employees and female employees of any hair length. Absent untoward political

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<sup>103</sup> *Manhart*, 435 U.S. at 708; see also *Norris*, 463 U.S. at 1080. Title VII's ban against stereotyping is explicated *infra* at notes 167–79 and accompanying text.

<sup>104</sup> *Manhart*, 435 U.S. at 726 (Burger, C.J., dissenting). Five years later, four dissenting Justices similarly worried that the Court's strict, indeed literal, application of Title VII's prohibition against sex discrimination would result in harm to employers and employees alike with no apparent countervailing benefit:

Employers may be forced to discontinue offering life annuities, or potentially disruptive changes may be required in long-established methods of calculating insurance and pensions. . . . If the cost to employers of offering unisex annuities is prohibitive or if insurance carriers choose not to write such annuities, employees will be denied the opportunity to purchase life annuities—concededly the most advantageous pension plan—at lower cost. If, alternatively, insurance carriers and employers choose to offer these annuities, the heavy cost burden of equalizing benefits probably will be passed on to current employees.

*Norris*, 463 U.S. at 1095, 1098–99 (Powell, J., joined by Burger, C.J., and Blackmun & Rehnquist, JJ., dissenting) (footnotes omitted). As explicated *infra* at notes 165–200 and accompanying text, the *Norris* majority elegantly articulated the core infirmity of the dissenters' analysis: “[The] underlying assumption—that sex may properly be used to predict longevity—is flatly inconsistent with the basic teaching . . . that Title VII requires employers to treat their employees as *individuals*, not ‘as simply components of a racial, religious, sexual, or national class.’” *Norris*, 463 U.S. at 1083 (Marshall, J., concurring) (quoting *Manhart*, 435 U.S. at 708).

motives, courts should find such rules unlawful under Title VII, either as unequal burdens or as utterly irrational, for there is no logical reason why longhaired men may be deemed employable but unworthy of valuable employment perquisites.<sup>105</sup>

Nonetheless, if its precepts are to be believed, unequal burden theory sustains such ridiculous employment standards; because the employer could have refused in the first instance to hire longhaired males, any employment-related discrimination imposed on such employees is permissible. Yet, hiring men with long hair but refusing them benefits seems as untoward as the unlawful practice of hiring but limiting benefits to women. The answer must be that, like discriminating against women, prejudice against longhaired men is arbitrary, humiliating, and otherwise harmful. Such discrimination is unlawful and thus burdensome per se, which means any arguable lack of economic or other sex-specific adverse effects is irrelevant, although such harm would be pertinent to a court's determination of appropriate remedy. Accordingly, employers must have valid reasons to impose male-only hair-length rules or, indeed, any discriminatory grooming rules, as requirements for either employment itself or any term or condition thereof.<sup>106</sup>

### B. *The Statutory Definition of Discrimination Eschews Judicially Created Exceptions*

Unequal burden theory defies the respected canon that “[w]e discover a statute’s plain meaning ‘by looking at the language and design of the statute as a whole.’”<sup>107</sup> Appreciating that these

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<sup>105</sup> It would be perverse to argue that the very irrelevance of the sex-based requirement insulates that discriminatory condition from Title VII’s purview. When a bigoted employer believes that her discriminatory policy enhances productivity, we can at least ascribe some modicum of legitimate motivation to her discrimination. For instance, an employer who supposes, rightly or not, that some customers will refuse to be served by longhaired men evinces a rational—but, this Article argues, insufficient—basis to impose a male-only hair-length rule. That employer’s motive is not wholly malevolent. By contrast, mandating a discriminatory policy unrelated to efficiency or safety simply is vindictive and, as such, is all the more offensive and illegal under Title VII than would be discrimination fostering a less malicious motive.

<sup>106</sup> See *infra* notes 132–50 and accompanying text (Congress enacted the meaning of “valid reasons” through express Title VII defenses and exemptions).

<sup>107</sup> *Perez v. Postal Police Officers Ass’n*, 736 F.3d 736, 741 (6th Cir. 2013) (emphasis added) (quoting *Metro. Hosp. v. U.S. Dep’t of Health & Human Servs.*, 712 F.3d 248, 259 (6th Cir. 2013)). Identically, very recently the Supreme Court

tenets expound nothing less than the Constitution's equilibrium of legislative and judicial authority, the Court explained, "Our charge is to give effect to the law Congress enacted."<sup>108</sup> A reliable legal compendium expressed superbly the enduring norm in terms that undermine the jurisprudence of *Jespersen*:

[A]n omission or failure to provide for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the courts to interpret a statute as they find it, without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived.<sup>109</sup>

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reiterated, "Our duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

Indeed, three years ago, noting Title VII's detailed and thorough design, the Court reaffirmed, "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) (Title VII case). These admonitions, of course, derive from the venerated axiom, "Absent ambiguity, our analysis also ends with the statutory language. . . . '[W]e must presume that the statute says what it means.'" *Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013) (citations omitted) (quoting *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000)); *see also supra* note 16 and accompanying text.

<sup>108</sup> *Lewis v. City of Chi., Ill.*, 560 U.S. 205, 217 (2010) (Title VII case); *see, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (Title VII case). The Eighth Circuit nicely linked that esteemed axiom to the Constitution's structure of government, stating, "Our role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch." *Doe v. Dep't of Veterans Affairs*, 519 F.3d 456, 461 (8th Cir. 2008).

<sup>109</sup> 73 AM. JUR. 2D *Statutes* § 164 (2015) (footnotes omitted). Nearly a century ago, albeit in the context of criminal law, Justice Brandeis speaking for the Court likewise scolded, "What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function.*" *Iselin v. United States*, 270 U.S. 245, 251 (1926) (emphasis added). Eight decades later, immediately after quoting *Iselin*, the Court expounded, "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (internal quotation marks omitted).

Indeed, the United States Court of Appeals for the Federal Circuit employs a fortuitously appropriate apparel metaphor encapsulating the proper judicial function: “When a statute is as clear as a glass slipper and fits without strain, courts should not approve an interpretation that requires a shoehorn.”<sup>110</sup>

Applying the constitutionally predicated framework of statutory interpretation, Title VII’s text, organizational structure, and national objectives reveal the true meaning of *discrimination*.<sup>111</sup> Indeed, federal courts recognize that 42 U.S.C. § 2000e-2 itself—the Act’s central guarantee of “fair employment”—*defines* unlawful discrimination.<sup>112</sup> Moreover,

<sup>110</sup> *Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000). Eight years prior, somewhat overplaying the reference, that court wrote, “The language of this statute is as clear as a glass slipper, there is no shoehorn in the legislative history, and the government, just as surely as Cinderella’s step-mother, cannot make the fit.” *Brush v. Office of Pers. Mgmt.*, 982 F.2d 1554, 1559 (Fed. Cir. 1992). Shortly before *Brush*, the Federal Circuit offered a more extended image, “When the law has been crafted with the clarity of crystal, it also has the qualities of a glass slipper: it cannot be shoe-horned onto facts it does not fit, no matter how appealing they might appear.” *Person’s Co. v. Christman*, 900 F.2d 1565, 1570 (Fed. Cir. 1990).

<sup>111</sup> Indeed, the Supreme Court freshly reiterated that because Title VII is a detailed statutory scheme, a textual approach is essential to discern the meaning of both the Act as a whole and its constituent parts. “‘Congress’ special care in drawing so precise a statutory scheme’ as Title VII ‘makes it incorrect to infer that Congress meant anything other than what the text does say.’” *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 174 (7th Cir. 2013) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013)), *vacated*, 135 S. Ct. 1645 (2015). Likewise, as the highly regarded legislator Senator Edmund Muskie pleaded during legislative debates, “I submit that, read in their entirety, these provisions provide a clear and definitive indication of the type of practice which this title seeks to eliminate.” 110 CONG. REC. 12,618 (1964) (statement of Sen. Edmund Muskie); *see also infra* note 120 and accompanying text for additional remarks confirming Congress’s intention that the text of Title VII speaks for itself.

<sup>112</sup> *E.g.*, *Palesch v. Mo. Comm’n on Human Rights*, 233 F.3d 560, 566 (8th Cir. 2000); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *quoted in* *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir. 1977); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) (citing *Rogers*, 454 F.2d at 238; *Weise v. Syracuse Univ.*, 522 F.2d 397, 409–10 (2d Cir. 1975); *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973); *Puntolillo v. N.H. Racing Comm’n*, 375 F. Supp. 1089, 1091–92 (D.N.H. 1974)). *See generally* Bayer, *supra* note 4, at 774–80.

Of utmost importance, the Supreme Court agrees with the above-cited circuit and district courts. Regarding that portion of § 2000e-2 providing special status to *bona fide* seniority systems, the Court explained:

On its face, § 703(h) [42 U.S.C. § 2000e-2(h)] appears to be only a *definitional provision*; as with the other provisions of § 703 [§ 2000e-2], subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. . . . [I]t is apparent that the thrust of



discerning Title VII's definition of discrimination must conform with the sensible canon, "When faced with a remedial statute, our interpretive charge is simple: Employ a 'standard of liberal construction [to] accomplish [Congress's] objects.'" <sup>113</sup> That tenet applies with exceptional rigor because Title VII's "policy of outlawing such discrimination should have the 'highest priority.'" <sup>114</sup>

## 1. The Extraordinarily Expansive Breadth of Protection Under Title VII

Cognizant of these norms, the Supreme Court definitively and with uncomplicated elegance stated the applicable, overarching definition which this Article deems to be Title VII's first principle: "Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . ." <sup>115</sup> A decade later, the Court

the section is directed toward *defining* what is and what is not an illegal discriminatory practice . . . .

*Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758, 761 (1976) (emphasis added); *see also* *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69 (1982); *accord* *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1051 n.5 (9th Cir. 1999) (citing *Franks*, 424 U.S. at 761). Clearly then, not all definitions are found in 42 U.S.C. § 2000e(a)–(n), the Act's provision specifically entitled "Definitions." Thus, the Seventh Circuit perhaps obdurately opined, "Title VII does not define 'discrimination,' the key term . . . for § 2000e-2(a) . . ." *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 660 (7th Cir. 2005). It is true that the actual term "discrimination" is not specifically defined but the nature of the unlawful conduct—discrimination or to discriminate—is clear from the Act's words and configuration. In that regard, the idea of "*to discriminate*" is self-evident as next discussed in this Article's text.

<sup>113</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434, 444 (4th Cir. 2013) (alteration in original) (quoting *Urie v. Thompson*, 337 U.S. 163, 180 (1949)); *see also, e.g.*, *Marais v. Chase Home Fin. LLC*, 736 F.3d 711, 719 (6th Cir. 2013); *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 375 (3d Cir. 2012).

<sup>114</sup> *Franks*, 424 U.S. at 763 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)); *see also, e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994); *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 516 (4th Cir. 2012); *cf.* *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2213 (2011) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam)) (noting generally that statutes vindicating civil rights protect national interests of the "highest priority").

<sup>115</sup> *Franks*, 424 U.S. at 763 (emphasis added) (citing *Alexander*, 415 U.S. at 44; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)); *accord, e.g.*, *Cnty. of Washington v. Gunther*, 452 U.S. 161, 180 (1981). Expectedly, that definition still controls Title VII analysis. *E.g.*, *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992). Interpreting *Franks*, the EEOC exclaimed, "Today, the national policy of nondiscrimination is firmly

reasserted the comprehensive scope Congress explicitly enacted. “[T]he language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ *evinces a congressional intent* ‘“to strike at the entire spectrum of disparate treatment of men and women”’ in employment.”<sup>116</sup>

The Supreme Court’s definition explicitly and unswervingly demands the elimination of workplace bigotry. Consistent with its duty not to alter Congress’s express construct,<sup>117</sup> the Court’s explication of unlawful discrimination neither suggests nor invites judicially conceived exceptions such as “unequal burden” theory, which would thwart Congress’s goal that, to borrow from desegregation cases, “discrimination would be eliminated root and branch.”<sup>118</sup> Rather, courts emphasize that Congress demarcated discrimination expansively by, among other things, not including many examples of discrete discriminatory conduct which courts might mistakenly interpret to connote narrow, particularized coverage. Thus, the Eighth Circuit rightly clarified that Title VII’s text “evinces a Congressional intention to define discrimination in the broadest possible terms. Congress

rooted in the law.” EEOC Compl. Man. (CCH) ¶ 8700 n.3, 2009 WL 3608301 (2009) (quoting *Franks*, 424 U.S. at 763).

<sup>116</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (emphasis added). The Court consistently has reaffirmed that understanding of Title VII. *E.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009) (“[O]ur decision[s] must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.”); *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (holding that Title VII recognizes claims of “constructive discharge”); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–16 (2002); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998).

<sup>117</sup> See *supra* notes 107–11 and accompanying text.

<sup>118</sup> *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) (quoting *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968)) (internal quotation mark omitted); see also *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 601 (5th Cir. 2015) (holding that once complete desegregation is accomplished, control of the particular school district should return to local hands); *Everett v. Pitt Cnty. Bd. of Educ.*, 788 F.3d 132, 140 (4th Cir. 2015). Courts rightly have applied that objective in employment discrimination cases. For example, as the United States District Court for the District of Massachusetts noted, “[T]he duty of a court once racial discrimination is established is clear and undoubted—to extirpate racial discrimination root and branch, adequately compensate its victims, and creatively invoke its equitable powers to provide equal opportunity to all citizens free of the blight of racial animus.” *Cotter v. City of Bos.*, 193 F. Supp. 2d 323, 327 (D. Mass. 2002), *aff’d in part, rev’d in part*, 323 F.3d 160 (1st Cir. 2003).

chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities."<sup>119</sup>

Properly then, the Act's uncomplicated but thoroughgoing ban against discrimination may be considered Title VII's first principle.<sup>120</sup>

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<sup>119</sup> Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (quoting Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 514 (8th Cir. 1977)) (discussing 42 U.S.C. § 2000e-2(a)). See generally Bayer, *supra* note 4, at 774–80. A decade ago, the United States District Court for the District of New Mexico summarized the idea superbly: “Congress could well have believed that protecting everyone involved in a protected activity was so important to the remedial structure that it was better to be overbroad rather than leave any gaps or distinctions that might narrow Title VII’s protections.” Kelley v. City of Albuquerque, 375 F. Supp. 2d 1183, 1224 (D.N.M. 2004) (finding that 42 U.S.C. § 2000e-3 (2012) covered a retaliation claim brought by a former city attorney averring she was fired by the mayor for participating in the defense of a mediated Title VII claim).

<sup>120</sup> Title VII’s legislative history accents the remarkable and deliberate breadth of coverage properly recognized by the courts. See Bayer, *supra* note 4, at 780–82. For example, in their authoritative memorandum to their colleagues, Senators Clark and Case, the bipartisan floor managers of the fair employment portion of the proposed Civil Rights Act, stated Title VII’s purpose succinctly, unequivocally, and lucidly with no hint that facially discriminatory employment rules would be excluded from coverage due to purported reasonableness:

It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [enacted as § 2000e-2(a)] are those which are based on any five of the forbidden criteria . . . .

110 CONG. REC. 7213 (1964). Courts cite the Clark-Case Memorandum to clarify legislative intent under Title VII. See, e.g., Connecticut v. Teal, 457 U.S. 440, 454 (1982); Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 350–52 & n.35 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 434–36 (1971); Ferrill v. Parker Grp., Inc., 168 F.3d 468, 474 n.10 (11th Cir. 1999); Thornley v. Penton Publ’g, Inc., 104 F.3d 26, 29 n.2 (2d Cir. 1997). Similarly, Senator Clark asserted in response to a question from the skeptical minority leader, Senator Everett Dirksen, “To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex, or national origin); any other criteria or qualification is untouched by this bill.” 110 CONG. REC. 7218 (1964) (statement of Sen. Joseph S. Clark). Identically and in seeming anticipation of judicial aversion to the Act’s deliberately expansive breadth, an exasperated Senator Edmund Muskie pleaded:

What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation? . . . I submit that, read in their entirety, these provisions provide a clear and definitive indication of the type of practice which this title seeks to eliminate. Any serious doubts concerning its application would, it seems to

## 2. The Act Protects Every Covered Person Regarding the Full Panoply of Employment

While the foregoing should suffice to establish that Congress brooked no extratextual weakening of Title VII's proscriptions, care and thoroughness require this Article to note that, of equal significance and entirely consistent with its first principle, the Act vindicates the individual over the collective. That is, the text does not protect groups but rather "individuals" from discrimination based on their affiliation with the Act's five covered classes.<sup>121</sup> Reviewing § 2000e-2(a)'s wording,<sup>122</sup> the Supreme Court has long recognized, "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class."<sup>123</sup> Accordingly, a class of but one person enjoys the full

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*me, stem at least partially from the predisposition of the person expressing such doubt.*

*Id.* at 12,618 (statement of Sen. Edmund Muskie) (emphasis added).

<sup>121</sup> *E.g.*, *Teal*, 457 U.S. at 453–54; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708–09 (1978). The Eighth Circuit recently reaffirmed that "[t]he principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole." *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010) (alteration in original) (quoting *Teal*, 457 U.S. at 453–54) (internal quotation marks omitted); *see also, e.g.*, *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 42 n.4 (1st Cir. 2009) (quoting *Teal*, 457 U.S. at 453–54). In fact, the reliable legal encyclopedia *American Jurisprudence* determined this principle to be so fundamental that it included in the brief opening section of its extensive exposition of Title VII, "It has also been said that the principal focus of Title VII is the protection of the individual employee rather than the minority group as a whole." 45A AM. JUR. 2D *Job Discrimination* § 1 (2015) (footnoting *Lewis*, 591 F.3d 1033 and *Chadwick*, 561 F.3d 58).

<sup>122</sup> *See supra* note 3.

<sup>123</sup> *Manhart*, 435 U.S. at 708. *Manhart* concluded that "[e]ven if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709; *see also* *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1080 (1983) (Marshall, J., with four Justices, concurring in part); *id.* at 1108 (O'Connor, J., concurring); *Wood v. City of San Diego*, 678 F.3d 1075, 1085 (9th Cir. 2012) (quoting *Manhart*, 435 U.S. at 708); *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 587–88 (7th Cir. 2011) ("Discrimination against one Hispanic employee violates the statute, no matter how well another Hispanic employee is treated."); *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001) ("[T]he courts have consistently emphasized that the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace."); *Bayer, supra* note 4, at 784–85.

protection of the Act.<sup>124</sup> It does not matter if the employer neutrally treats every member of a protected class except one;<sup>125</sup> the person singled out for discrimination enjoys full statutory protection.<sup>126</sup>

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<sup>124</sup> *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding that discrimination directed to a particular individual is unlawful); *Diaz*, 653 F.3d at 588.

<sup>125</sup> *Furnco*, 438 U.S. at 579 (“It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant’s race are already proportionally represented in the work force.”). Therefore, “discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group.” *Chadwick*, 561 F.3d at 42 n.4; *see also, e.g., Diaz*, 653 F.3d at 587–88; *Henderson*, 257 F.3d at 252; *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 646 (3d Cir. 1998).

<sup>126</sup> To accent using a prominent example, over thirty years ago the Supreme Court invalidated the “bottom line” theory. Specifically, the Court ruled that employment criteria, standards, or tests that disqualify a disparate number of applicants within a protected class may be unlawful even if the employer hired enough such applicants from among the few who satisfied the disparate criteria to match their percentage within the “applicant flow,” that is, among those who applied for work. *Teal*, 457 U.S. at 454–55 (holding that individual discriminatees may challenge the portion of their employer’s hiring process that disqualified them, even if final hiring statistics reveal no unlawful discrimination); *see also, e.g., Furnco*, 438 U.S. at 580 n.9 (finding that an employer’s policy of hiring only bricklayers previously known to the employer may result in discriminatory denial of employment opportunity to “at the gate” minority applicants even if the minority group happens to be well represented in the bricklayer workforce); *Lewis*, 591 F.3d at 1039–40 (discussing *Teal*, 457 U.S. at 453–54); *Bayer*, *supra* note 4, at 815–18. For example, suppose for ten vacant positions, fifty persons apply of which twenty-five are African American and twenty-five are white. Hence, the “applicant flow” reveals that half the applicants are minority and half are majority. Suppose further that the employer’s application process includes requirement X, which immediately disqualifies twenty African-American but only five white applicants. Under Title VII’s “disparate impact” cause of action, *see infra* note 147 and accompanying text, unless justified as a “business necessity,” requirement X might well be unlawful because it eliminated fully eighty percent of the minority applicants but only twenty percent of the nonminority job seekers. That requirement X excluded four times as many African Americans as whites is sufficient to establish a statutory violation. However, suppose the employer fills the ten vacant slots with five white applicants and the five African-American individuals who satisfied requirement X. In that case, the employer might aver that the “bottom line”—ultimate hiring outcome—reveals no unlawful discrimination because the hiring percentages and the applicant flow are identical at fifty percent minority and fifty percent nonminority. The Supreme Court’s *Teal* ruling clarified that because Title VII protects “individuals,” “bottom line” data cannot insulate the employer from colorable claims brought by minority applicants who but for failing to meet requirement X might have been among those hired. *Teal*, 457 U.S. at 442 (“We hold that the ‘bottom line’ does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case.”).

Congruently, the judiciary applies Title VII's coverage of "terms, conditions, or privileges of employment"<sup>127</sup> as generously as those words allow. Capturing the manifest expanse of Title VII's first principle, as earlier quoted, the Supreme Court enthused, "We have held that this not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the *entire spectrum of disparate treatment* of men and women in employment.'"<sup>128</sup>

The Courts' rationale is no mystery. Congress understood that discrimination causes harm that in many ways is shared among discriminatees yet is unique to each victim.<sup>129</sup> Congress sought to preserve nothing less than the dignity of *every* person from the degradation of discrimination.<sup>130</sup> Therefore, as next explained, an employer must have a compelling reason and not simply, as in unequal burden theory, a plausible purpose, to inflict the financial and career harm plus humiliation attendant to discrimination.<sup>131</sup>

### 3. The Limited Impact of Title VII's Express Exceptions

Fittingly and of equal importance, Congress carefully curbed its otherwise expansive definition of discrimination through express but narrow exceptions.<sup>132</sup> Most notably, Congress

<sup>127</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>128</sup> *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 78 (1998) (emphasis added) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

<sup>129</sup> See Bayer, *supra* note 4, at 785–86.

<sup>130</sup> See, e.g., Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143, 149 (1999); Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 SO. CAL. L. REV. 1, 52–68 (2009). As Justice Souter observed, the Act "vindicates an interest in dignity as a human being entitled to be judged on individual merit." *United States v. Burke*, 504 U.S. 229, 247 (1992) (Souter, J., concurring), *modified on other grounds*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755. See *infra* Section C for a detailed account of the meaning and extent of *dignity* as applied to Title VII.

<sup>131</sup> "Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purposes of Congress to eliminate the inconvenience, unfairness and *humiliation of . . . discrimination.*" *Sandoval v. Am. Bldg. Maint. Indust., Inc.*, 578 F.3d 787, 792–93 (8th Cir. 2009) (ellipsis in original) (emphasis added) (quoting *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391 (8th Cir. 1977)) (internal quotation marks omitted).

<sup>132</sup> Courts acknowledge that Congress drafted Title VII's defenses and exemptions narrowly, expecting the judiciary to "read [them] narrowly." *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (discussing specifically the

enacted the statutory defense popularly known as BFOQ, short for bona fide occupational qualification: Employment standards may be based on otherwise forbidden criteria when “religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>133</sup>

BFOQ is based on one sound, crucial principle: Because usually unnecessary to the sustainability of the particular business, discrimination is an illegitimate impediment to inflict on employees and job applicants.<sup>134</sup> By contrast, when truly necessary to fulfill the given lawful employment’s *minima*, discrimination becomes reasonable because it is essential. Consequently, BFOQs are not measured purely by employers’ subjective preferences,<sup>135</sup> *nor is it enough that discriminatory policies may enhance business efficiency, promote convenience, or otherwise seem “reasonable.”* Indeed, because the “test [is] one of business necessity, not business convenience,” BFOQs do not concern business practices that may be lawful, even rational in a business sense, such as maximizing profits or enhancing efficiency.<sup>136</sup> Were it otherwise, Title VII’s first principle would

BFOQ defense); *see also, e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122–25 (1985); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *Teamsters Local Union No. 117 v. Wash. Dept. of Corr.*, 789 F.3d 979, 986–87 (9th Cir. 2015).

<sup>133</sup> 42 U.S.C. § 2000e-2(e)(1) (2012).

<sup>134</sup> *See Maraschiello v. City of Buffalo Police Dep’t*, 709 F.3d 87, 93 (2d Cir. 2013) (impermissible criteria under Title VII means that such considerations are “illegitimate”); *United States v. McMillon*, 14 F.3d 948, 951 (4th Cir. 1994) (Title VII prohibits, among other things, “an action by an otherwise unfettered actor . . . animated by an illegitimate discriminatory bias”); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 298 (N.D. Tex. 1981).

<sup>135</sup> *Johnson Controls, Inc.*, 499 U.S. at 201.

<sup>136</sup> *Wilson*, 517 F. Supp. at 303 (discussing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971)). The Fifth Circuit’s reasoning nearly a half-century ago still aptly defines the meaning of BFOQ: “We begin with the proposition that the use of the word ‘necessary’ in section 703(e) [42 U.S.C. § 2000e-2(e)(1)] requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.” *Diaz*, 442 F.2d at 388; *see also, e.g.*, *Henry v. Milwaukee Cty.*, 539 F.3d 573, 579–80 (7th Cir. 2008) (discussing *Diaz*); *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 748 (6th Cir. 2004) (citing *Diaz*, 442 F.2d at 388); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (BFOQ under the Age Discrimination in Employment Act); *Chambers v. Omaha Girls Club, Inc.*, 834 F.3d 697, 704 (8th Cir. 1987).

be devoured by the BFOQ defense for employers commonly can demonstrate that blatant discrimination enhances profits by catering to customers' bigoted preferences.

Consequently, the employer objectively must show that the discriminatory criterion is essential to the safe and effective operation of the business.<sup>137</sup> As explicated at Part III,<sup>138</sup> in such cases the individual's dignity remains intact—she is not humiliated, that is, treated as inherently inferior due to her race, gender, national origin, color, or religion. Rather, she is denied employment that she has no reasonable expectation of obtaining because she cannot perform the required tasks. There is nothing untoward in requiring that individuals be capable of accomplishing the jobs for which they seek employment.<sup>139</sup>

Hence, absent extraordinary instances such as patients' bodily privacy interests at medical and retirement facilities,<sup>140</sup> to construe the BFOQ defense as narrowly as possible,<sup>141</sup> *customers' preferences cannot constitute BFOQs.*<sup>142</sup> Otherwise, even

<sup>137</sup> *Johnson Controls, Inc.*, 499 U.S. at 204 (“[T]he BFOQ provision itself . . . suggests that permissible distinctions based on sex must relate to *ability to perform* the duties of the job.” (emphasis added)).

<sup>138</sup> See *infra* notes 246–307 and accompanying text.

<sup>139</sup> Correspondingly, any law forcing employers to hire incapable individuals is not only ridiculous but also a probable violation of Fifth or Fourteenth Amendment due process as thoroughly irrational.

<sup>140</sup> As the United States Court of Appeals for the Third Circuit explained, “In the non-prison context, other courts have held that privacy concerns may justify a discriminatory employment policy.” *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133–34 (3d Cir. 1996); see also *AFSCME v. Mich. Council* 25, 635 F. Supp. 1010, 1014 (E.D. Mich. 1986) (noting that privacy rights of mental health patients can justify a BFOQ to provide for same-sex personal hygiene care); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195–96 (E.D. Ark. 1981) (noting that the essence of an obstetrics nurse's business is to provide sensitive care for a patient's intimate and private concerns), *vacating as moot* 671 F.2d 1100 (8th Cir.1982); *Fesel v. Masonic Home of Del., Inc.* 447 F. Supp. 1346, 1353 (D. Del. 1978) (retirement home patients), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979); see also, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (citing cases involving medical patients' privacy interests).

<sup>141</sup> See *supra* note 132 and accompanying text.

<sup>142</sup> E.g., Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 257–58 & n.5 (2007); see also *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (holding that stereotyped customer preferences do not justify sexually discriminatory practices); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding that the airline violated Title VII by refusing to hire male flight attendants even though customers preferred women for the job); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1069 (D. Ariz. 1999) (holding that the employer could not refuse to hire male massage therapists even though women customers preferred women).



disinclined employers would discriminate to enhance profits by satisfying customers' prejudices.<sup>143</sup> As the United States Court of Appeals for the Fifth Circuit's pivotal decision in *Diaz v. Pan American World Airways, Inc.*<sup>144</sup> aptly explained forty-five years ago, "[I]t would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."<sup>145</sup>

In sum, pursuant to Title VII's first principle, unless justified by a bona fide occupational qualification, employment discrimination predicated on any of the five protected classes is illegal. In the direct words of the Supreme Court, "The only

<sup>143</sup> See, e.g., *Chaney*, 612 F.3d at 913 ("It is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race."); *Gerdomb v. Cont'l Airlines, Inc.*, 692 F.2d 602, 606-08 (9th Cir. 1982) (en banc); *Fernandez*, 653 F.2d at 1276-77.

<sup>144</sup> 442 F.2d 385.

<sup>145</sup> *Diaz*, 442 F.2d at 389; accord *Gerdomb*, 692 F.2d at 609; *EEOC v. St. Anne's Hosp. of Chi., Inc.*, 664 F.2d 128, 133 (7th Cir. 1981). This Article has no quarrel with the proposition that in exacting instances, sex-specific grooming and appearance rules might be BFOQs if marketing sex appeal truly is the core function of the particular company:

If worker freedom of dress is truly interfering with core job functions and the core goals of the enterprise in question, then I believe we should not protect employee dress. To do so might eliminate or heavily burden certain sectors of the market, such as the entertainment and clothing industries. . . . Protecting the freedom of dress might also pose safety problems in certain industries.

Ramachandran, *supra* note 22, at 62. However, a mere preference for unisex uniforms or similar seeming sex-neutral rules could infringe on individuals' "freedom of dress." *Id.* at 62-63. Therefore, employers' requirements that male employees wear short hair or that female employees groom themselves with makeup are legal *if* the given business actually meets the rigorous requisites of the BFOQ defense. However, to be *lawful*, the appearance policy cannot simply be "reasonable" as unequal burden theory would have it. Rather, sex or race must be the core function of the given enterprise, not an adjunct or enhancement. *E.g.*, *Diaz*, 442 F.2d at 389 (finding that an airline may not hire only women as flight attendants even though customers prefer to be waited on by women); *Wilson v. Sw. Airlines, Inc.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) (holding that even though hiring only women as flight attendants and advertising itself as the "love airline" may have helped the newly incorporated airline to emerge from bankruptcy, sex was not a BFOQ for the job because Southwest's primary purpose is safe, efficient, punctual air transportation, which indeed was that airline's primary reputation). On this aspect of BFOQ, Professor McGinley's thoughtful exegesis, *supra* note 142, at 267-75 (detailed, provocative discussion of this point as it relates to casinos), is particularly compelling. See also, e.g., Bartlett, *supra* note 19, at 2541.

plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her."<sup>146</sup>

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<sup>146</sup> *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (evidencing a plurality opinion accepted by lower courts as controlling law); *see infra* note 167 and accompanying text; *see also, e.g.*, *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1080 (1983); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708–09 (1978). As noted, the text of 42 U.S.C. § 2000e-2(e)(1) accords the BFOQ defense to but three of Title VII's five covered classes: sex, national origin, and religious discrimination. *See supra* note 133 and accompanying text. This has led some courts and commentators to conclude that there can be no BFOQ for race or color discrimination. *Chaney*, 612 F.3d at 913; *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 (11th Cir. 1999) (citing *Knight v. Nassau Cnty. Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981); 110 CONG. REC. 2550–63 (1964) (expressly rejecting race as a BFOQ under Title VII during house discussion). *See generally* Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473 (2001). However, judgment informs that Title VII includes an implied BFOQ for race and color in the rare instances where race- or color-based determinations are essential to the legitimate conduct of lawful businesses. *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (noting in dicta that race may be an appropriate consideration in law enforcement undercover operations); *see also* 110 CONG. REC. 7213, 7217 (1964) (memorandum of Sens. Clark and Case, the bipartisan floor managers of the fair employment provision of the proposed civil rights act) (“Although there is no exemption in Title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro.”). *Baker*'s dictum is not simply sensible, it is indispensable to Title VII's design. As discussed in the text, the legitimacy of the BFOQ defense is not that the discrimination under review is simply efficient, or that it enhances profits. Rather, to be lawful, discrimination must be essentially indispensable to the successful completion of valid business goals. *See supra* notes 133–45 and accompanying text. For example, it seems clear and uncontroversial that, as opined in *Baker*, a police department might assign only a Caucasian male officer to infiltrate a violent “white supremacist” organization reasonably believed to be planning unlawful activities. In that example, the very race of the undercover agent is crucial to his successful infiltration of the suspected unlawful group. In the foregoing critical regard, inferring a race or color BFOQ although Title VII's text includes none is utterly unlike the judicially contrived mutability and unequal burden theories inventing an extratextual form of non-BFOQ yet lawful discrimination. The former addresses situations where individuals are not hired because they actually cannot complete the given work successfully. Unqualified persons suffer no legally cognizable harm because they have no legitimate claim to be hired. *See supra* notes 246–307 and accompanying text. The latter substitutes court-made social and legal dogma for explicit statutory antidiscrimination directives in situations where discrimination is not essential to the successful conduct of business.

While perhaps BFOQ is the most renowned, Title VII contains other provisions limiting its coverage. For instance, “disparate impact”<sup>147</sup> is lawful only if the offending employment device meets the BFOQ-like “business necessity” test.<sup>148</sup> Like BFOQ, “business necessity,” is exacting. Culling precedents, the Fifth Circuit explained, to be related to employment, “[T]he employer must demonstrate that the qualification standard is necessary and related to ‘the specific skills and physical requirements of the sought-after position.’”<sup>149</sup> That court added, “Similarly, . . . to be ‘consistent with business necessity,’ the employer must show that it ‘substantially promote[s]’ the business’s needs.”<sup>150</sup>

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<sup>147</sup> Title VII recognizes four overarching types of discriminatory conduct: (1) per se discrimination, that is, employment terms, conditions and actions that are facially discriminatory such as expressly refusing to hire African Americans or, yes, requiring that female employees wear makeup; (2) “individual disparate treatment” wherein through direct or circumstantial evidence plaintiffs seek to prove that a seemingly neutral employment decision directed at one or a small number of individuals actually was motivated by unlawful animus; (3) “systemic disparate treatment” wherein through direct or circumstantial evidence, particularly statistical data, plaintiffs seek to prove that the given employer’s widespread and broad-based seemingly neutral employment practices were motivated by unlawful animus; and (4) “disparate impact” wherein through statistical evidence, plaintiffs seek to prove that a facially neutral employment standard, test or criterion, such as use of a standardized intelligence test or refusing to hire persons with arrest records, disproportionately adversely affects members of a protected class. Unlike the first three causes of action, plaintiffs do not have to prove under disparate impact that the employer intended to discriminate against the protected class. See generally Bayer, *supra* note 4, at 795–818.

<sup>148</sup> 42 U.S.C. § 2000e-2(k) (2012).

<sup>149</sup> *Atkins v. Salazar*, 677 F.3d 667, 682 (5th Cir. 2011) (per curiam) (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001)) (internal quotation marks omitted).

<sup>150</sup> *Id.* (alteration in original) (quoting *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc)). Very recently, the Court answered *yes* to the issue of “whether disparate-impact claims are cognizable under the Fair Housing Act.” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc. (ICP)*, 135 S. Ct. 2507, 2513 (2015). As part of its overall review of disparate-impact precedent and how that cause of action under Title VII informs its application in FHA suits, the *ICP* Court stated, “These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.” *Id.* at 2518. Read in inappropriate isolation, *ICP*’s florid prose might be taken to substitute practicality, such as enhanced efficiency or increased profitability, for true business necessity as a defense to disparate-impact claims. However, shortly thereafter, the Court clarified its meaning by reaffirming the long-established explication of *business necessity* that has animated disparate-impact theory since its inception nearly half a century ago:

Congress provided limited immunity to seniority systems to safeguard the legitimate vested interests of innocent workers who likely were not responsible for discrimination that *indirectly* affected the operation of the given seniority plan.<sup>151</sup> Specifically, Title VII does not permit a disparate impact claim against a bona fide seniority system.<sup>152</sup> However, seniority systems *purposefully* designed or operated to effect discrimination are unlawful.<sup>153</sup>

Furthermore, the Act only applies to employers engaged in interstate commerce who employ fifteen or more employees.<sup>154</sup> Those limitations may be understood to assure the constitutionality of Title VII,<sup>155</sup> although policy motives likewise influenced limiting the Act's coverage to larger employers.<sup>156</sup>

Nothing about the above-described provisions even obliquely invites the judiciary to circumvent Title VII's first principle by devising new exclusions. Indeed, the inclusion of exceptions in

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As the Court explained in *Ricci*, an entity “could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity.” Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a “reasonable measure[ment] of job performance,” so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is *necessary* to achieve a valid interest.

*Id.* at 2522–23 (alterations in original) (emphasis added) (citations omitted) (citing *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009), and *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)). Importantly, the Court augmented its rationale by accenting that policy considerations informing housing, particularly public housing projects, may differ markedly from the economic dynamics of employment. “To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.” *Id.* at 2523. In light of the *ICP* Court's precise quoting of both *Griggs* and that decision's reaffirmation in *Ricci*, coupled with the admonition that application of the defense in housing cases may differ from employment cases, there is no reason to suppose that within *ICP*, an FHA decision, the Court suddenly decided to dilute the stringent standards of the business necessity defense under Title VII.

<sup>151</sup> 42 U.S.C. § 2000e-2(h).

<sup>152</sup> *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75–76 (1982).

<sup>153</sup> *AT&T Corp. v. Hulteen*, 556 U.S. 701, 709–10 (2009); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353–54 (1977).

<sup>154</sup> 42 U.S.C. § 2000e(b).

<sup>155</sup> *E.g.*, *EEOC v. Ass'n of Cmty. Orgs. for Reform Now*, No. 95-30347, 1996 WL 197411, at \*3 (5th Cir. Mar. 20, 1996).

<sup>156</sup> “Congress [among other things] did not want to burden small entities with the costs associated with litigating discrimination claims. . . . Congress decided to protect small entities with limited resources from liability . . . .” *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *quoted in Fantini v. Salem State Coll.*, 557 F.3d 22, 29 (1st Cir. 2009).

the very text of the Act demonstrates exactly what the judiciary frequently admonishes: "Congress knows how to limit a court's discretion . . . when it so desires."<sup>157</sup>

Moreover, even if the above-discussed subprovisions impliedly invite the judiciary to enhance Title VII, such augmentation must be reasonable, that is, must comport with, not defiantly confound, the Act's framework and objectives.<sup>158</sup> In that regard, unequal burden theory falls outside the meaning and spirit of Congress's allowance of discrimination. By definition, unequal burden is not a defense, unlike BFOQ and business necessity, nor does it protect the vested seniority and similar perquisites of blameless employees, nor is it necessary to premise Congress's authority under the Constitution to enact civil rights laws. *Rather, unequal burden is a judicial policy legitimizing discriminatory employer and customer preferences that courts believe should be legal although not integral to job responsibilities, thus not BFOQs.*

In sum, Title VII's precise, uncomplicated, explicit structure establishes its first principle: Employment discrimination based on any of the forbidden categories is unlawful absent satisfying an *express* exception. Adapting apposite Supreme Court language nearly a century old, contriving "lawful" but not textually excepted discrimination is "not a construction of a statute, but, in effect, an enlargement of it, . . . [and] [t]o supply omissions transcends the judicial function."<sup>159</sup> Thus, the "unequal burden" doctrine encroaches into authority that is exclusively left to Congress by creating an entirely new species of

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<sup>157</sup> Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1177 (2013); *see also, e.g.*, Elgin v. Dep't of the Treasury, 132 S. Ct. 2126, 2134–35 (2012); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 n.8 (2010) (Title VII case).

<sup>158</sup> Compare, for instance, the discussion at note 146 *supra* explaining why Title VII impliedly recognizes a BFOQ for race and color discrimination even though Congress deliberately did not include those among the classes explicitly covered by the BFOQ defense.

<sup>159</sup> Iselin v. United States, 270 U.S. 245, 251 (1926) (interpreting a criminal statute); *see also supra* notes 107–11 for citations to similar precedent.

*statutorily* lawful discrimination.<sup>160</sup> Under the Constitution, Congress alone has discretion to create such a new exception by amending the Act.<sup>161</sup>

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<sup>160</sup> It is worth noting that, even assuming Congress is acutely aware of the judicially contrived unequal burden theory, failure to statutorily reverse such precedent does not evince legislative approval. “As a general matter, we are ‘reluctant to draw inferences from Congress’ failure to act.’” *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988)). *But see Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 629 n.7 (1987) (noting that Congress may have approved Supreme Court rulings that established when non-BFOQ, race-based voluntary affirmative action plans are lawful under Title VII by not statutorily overturning those cases). Research has disclosed no evidence that congressional inaction infers legislative approval of unequal burden theory. To the contrary, Congress’s response to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–41 (1989), evinces the opposite. *Hopkins* reaffirmed Title VII’s comprehensive ban against employers’ use of non-BFOQ stereotypes predicated on any of the Act’s five forbidden classes. *See infra* notes 165–86 and accompanying text. Indeed, as presently emphasized, *Hopkins* and analogous precedents implicitly abrogate mutability and unequal burden theory, although not mentioning those doctrines by name. While leaving the Court’s analysis of unlawful stereotyping intact, in 1991, Congress statutorily reversed an entirely different portion of the holding in *Hopkins* that discriminatory animus must be the “but-for” motivation of the defendant-employer’s offending conduct, not simply a motivating cause. *See infra* notes 214–45 and accompanying text discussing 42 U.S.C. § 2000e-2(m). Aware of the various legal propositions in *Hopkins*, had Congress wished to reverse that opinion’s implicit rejection of unequal burden theory, it could have and likely would have done so, just as it overturned the *Hopkins* Court’s evidentiary standard under Title VII. Congressional silence, then, may well evince that the legislature endorses the utter rejection of non-BFOQ discriminatory stereotyping in *Hopkins*. Alternatively, at the very least, referencing its silence yields no reliable conclusions of legislative intent because we cannot know whether Congress’s present-day inaction is based on approving unequal burden theory, approving the *Hopkins* Court’s implicit overruling of that theory, lack of interest, or simple inertia.

<sup>161</sup> This is an appropriate juncture to mention briefly a singular prominent instance wherein courts properly declined to apply Title VII’s text literally. Readers may ask: If non-BFOQ race- and sex-based grooming codes are per se unlawful even when employers reasonably believe that they are beneficial for business, how can race- or sex-based voluntary affirmative actions plans (“AAPs”) be legal? Courts recognize the legality of carefully delineated, limited race- and sex-based affirmative action programs “designed not to demean or debase downtrodden groups, but to remedy the effects of discrimination.” Bayer, *supra* note 4, at 827. Thirty-five years ago, the Supreme Court famously upheld a voluntary recruitment and training AAP negotiated by the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation to rectify persistent racial imbalances in certain workforces. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979) (five-two opinion). Among other reasons, union and management entered into the AAP to forestall costly agency proceedings and litigation by *voluntarily* reforming certain employment practices that could premise nonfrivolous, although very possibly unsuccessful, court challenges. Thus, Kaiser and the union recognized that even if not technically unlawful, extant tenacious employment disparities both generated

the serious prospect of litigation and affronted Title VII's general goal "to eliminate traditional patterns of racial segregation." *Id.* at 201. On its face, the Kaiser-Steelworkers' AAP apparently violated per se 42 U.S.C. § 2000e-2(a)(2) and (d), which prohibits racial discrimination in terms and conditions of employment, including training programs. Moreover, the Act neither then nor now contains an express provision exempting voluntary race-based affirmative action programs except those authorized by a competent court under § 2000e-5(g)(1) as part of ongoing litigation to remedy proven statutory violations. Nonetheless, *Weber*, 443 U.S. at 201, noted longstanding precedent holding that sometimes challenged conduct may offend a statute's "letter" but safeguard its "spirit." In such instance, particularly regarding remedial, humanitarian enactments, such as civil rights statutes, the *spirit* prevails as the true index of the legislature's intent. Accordingly:

[T]he Court recognized two Title VII's: a long-range enactment that foresees the day when employment discrimination will be eliminated, and a short-range statute that permits occasional and duly limited race or gender conscious measures to achieve restructuring of the labor market. Thus, to reach the day when the long-term Title VII becomes a reality, the short-term Title VII permits limited race-conscious, voluntary affirmative action even absent pending litigation. The interesting irony is that the very measures used to help reach that day of transformation will themselves become unlawful when that day arrives.

See Bayer, *supra* note 4, at 834–35 (discussing *Weber*, 443 U.S. at 201–04). In sum, although employers and unions understandably need not admit that pre-AAP employment conditions constitute actual Title VII violations, *Weber* coherently concluded that it would be absurd to require Kaiser and the Steelworkers Union to wait until they were sued before they could take effective measures to cure what appeared to be labor conditions contrary to the essence, if not the letter, of the Act. Under such conditions, AAPs may be lawful so long as their remedial provisions are duly limited in both duration and scope and do not "unnecessarily trammel" the interests of other employees. *Weber*, 443 U.S. at 208. The courts repeatedly have reaffirmed, indeed enlarged, the law and theory of *Weber*. *E.g.*, *Johnson*, 480 U.S. at 631, 641–42 (voluntary sex-based AAP instituted by a public employer); *Sharkey v. Dixie Elec. Membership Corp.*, 262 F. App'x 598, 603–04 (5th Cir. 2008); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 496–97 (3d Cir. 1999). The pivotal difference between AAPs and the unequal burden doctrine is uncomplicated. Properly constrained AAPs carry out Title VII by eliminating pockets of apparent discrimination through voluntary compliance. By contrast, mutability and unequal burden theory frustrate Title VII's letter and spirit by validating the very type of discrimination that the Act's express language proscribes and that none of its exceptions excuses. It is as simple as that. For thoroughness, this Article notes the Court's recent decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), holding that an employer violates Title VII by refusing to apply the racially disparate results of its own facially neutral employment test unless a "strong-basis-in-evidence" evinces that utilizing the test's scores actually would result in unlawful disparate impact. *Id.* at 582–84. While its full effect has yet to be determined, arguably *Ricci* does not apply to a classic AAP, that is, when "an employer has undertaken a race- or gender-conscious affirmative action plan designed to benefit *all* members of a racial or gender class in a forward-looking manner only." *United States v. Brennan*, 650 F.3d 65, 72 (2d Cir. 2011); see also *Shea v. Kerry*, 796 F.3d 42, 54–55 (D.C. Cir. 2015) (noting that *Ricci* does not displace the classic *Weber-Johnson* framework), *petition for cert. filed*, (U.S. Dec. 9, 2015) (No. 15-742). Therefore, *Ricci* does not seem to have undermined *Weber* at its core. Roberto L. Corrada, *Ricci's Dicta: Signaling a New*

#### 4. Three Key Directives Enforcing Title VII

Pursuant to its explicit text, thoroughgoing structure, and humanitarian purpose, the Supreme Court fittingly has identified three systemic directives augmenting Title VII's ban against discrimination:<sup>162</sup> (1) Title VII's definition of unlawful discrimination forbids employment actions based on racial, sexual, ethnic, and religious stereotyping; (2) Title VII's proscriptions may invalidate, and indeed have invalidated, practices that the enacting and amending congresses might have considered neither problematic nor illegitimate; and (3) Title VII's protections are not limited to discrimination traditionally or popularly considered wrongful.<sup>163</sup> Indeed, as next explained, pivotal decisions establishing these directives invalidated discriminatory policies with which the discriminatees might have conformed without "unequal burden." *Thus, although not mentioning such theories expressly, the Court effectively has overturned the mutability and unequal burden doctrines.*<sup>164</sup>

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*Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 242 (2011) ("Ricci, while having dealt a blow to disparate impact theory, has not necessarily dealt a fatal blow to affirmative action in the process."); Charles A. Sullivan, Ricci v. DeStefano: *End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 411, 426 (2010). *But see* Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 73 (2011) ("Ricci calls the Weber-Johnson rationale into question . . .").

<sup>162</sup> Although strongly hinted in earlier decisions, the Court elucidated and enriched these directives in rulings postdating this author's 1987 *Mutable Characteristics* article, cited *supra* note 4. It is gratifying to have the opportunity to update that work, this author's debut law review article, in recognition of Title VII's golden anniversary.

<sup>163</sup> In these important regards, one might conclude that Congress intended Title VII to lead rather than lag common social sentiments regarding what is or is not acceptable race and sex discrimination. Within the realm of dignity and fairness in society, such is the authority and, one might go so far as say, the duty of the national legislature empowered to shape conduct if not attitudes. This, of course, is in stark contrast to things over which law has little, sometimes no, actual or legitimate control. For instance, a popular legal maxim—perhaps more a cliché—holds, "Law lags science; it does not lead it." *Hendrix ex rel. G.P. v. Evenflo Co., Inc.*, 609 F.3d 1183, 1194 (11th Cir. 2010) (quoting *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (internal quotation mark omitted)).

<sup>164</sup> See *supra* note 161 and accompanying text.



a. *Title VII Prohibits Discrimination Based on Stereotyping*

Turning to the first directive, discriminatory stereotyping, *Price Waterhouse v. Hopkins*<sup>165</sup> expounded expansively upon the Court's earlier judgment:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>166</sup>

The Court's breadth of language evinces appropriate fervor for Congress's intended coverage of the Act,<sup>167</sup> particularly so when

<sup>165</sup> 490 U.S. 228 (plurality opinion with concurring and dissenting opinions).

<sup>166</sup> *Id.* at 251 (emphasis added) (quoting L.A. Dep't of Water & Power v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)).

<sup>167</sup> Lower courts appropriately have accepted as controlling Title VII law the *Hopkins* plurality's explication of unlawful stereotyping. *E.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 479 (5th Cir. 2013) (Jones, C.J., dissenting); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). Indeed, that explication arguably represents the unanimous sentiment of the *Hopkins* Court. Concurring in the judgment, Justices White and O'Connor explained their particular positions regarding a separate and distinct procedural issue: whether plaintiffs' evidence of "direct discrimination"—noncircumstantial proof that agents of the defendant considered sex when rendering their employment decisions—shifted the burden of persuasion to the defendant. *Hopkins*, 490 U.S. at 258–61 (White, J., concurring in the judgment); *id.* at 261–79 (O'Connor, J., concurring in the judgment). Both Justices agreed, however, that Ms. Hopkins should prevail and expressed no criticism of the plurality's interpretation that sexual stereotyping poisons the workforce environment and taints a given employment decision in violation of Title VII. In fact, Justice O'Connor expressly stated that Ann Hopkins had made a sufficient case of discriminatory animus based on sexual stereotyping to shift the burden of proof to defendant Price Waterhouse. *Id.* at 272–74. Therefore, at the very least, Justices White and O'Connor impliedly joined the plurality's analysis of unlawful stereotyping for, having taken the effort to write separately on other matters, surely they would not have relinquished the opportunity to dissent had they disagreed on such a profound and manifestly far-reaching understanding of Title VII. Similarly, although vigorously dissenting regarding the issue of causation and burden shifting, Chief Justice Rehnquist and Justices Kennedy and Scalia embraced the substantive rule that evidence of unlawful stereotyping can demonstrate a claim of unlawful discrimination under Title VII. *Id.* at 279–95 (Kennedy, J., with Rehnquist, C.J. and Scalia, J., dissenting). "Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm." *Id.* at 294. The dissenters explicated, "In this case, Hopkins plainly presented a strong case both of her own professional qualifications

considered in combination with the *Hopkins* Court's accompanying unambiguous edict that § 2000e-2(a)'s "words . . . mean that gender must be irrelevant to employment decisions."<sup>168</sup> In that light, it is worth recalling that even a scientifically or empirically true race or gender stereotype cannot support an employer's decision to treat each covered individual as though he or she shared the given group's stereotypical characteristic.<sup>169</sup> *Therefore, the Court's definition and understanding of unlawful stereotyping seems to be as broad as that term allows: Absent BFOQ, if considerations of sex played any part in the employer's actions, the plaintiff states an actionable claim.*<sup>170</sup>

True, some thoughtful critics view stereotypes as empty vessels used by advocates to sort and to stow distinctions they consider appropriate from distinctions they perceive as wrongful, thus stereotyping.<sup>171</sup> Especially in the realm of civil rights, one

and of the presence of discrimination in Price Waterhouse's partnership process. Had the District Court found on this record that sex discrimination caused the adverse decision, [we] doubt it would have been reversible error." *Id.* at 294–95 (Kennedy, J., with Rehnquist, C.J. and Scalia, J., dissenting).

<sup>168</sup> *Hopkins*, 490 U.S. at 240; *see also, e.g., Miller v. Cigna Corp.*, 47 F.3d 586, 592 (3d Cir. 1995) (quoting *Hopkins*, 490 U.S. at 240–41). Presumably, *Hopkins* mentioned only "gender" because Plaintiff-Respondent Ann Hopkin's Title VII claim sounded in sex discrimination. Certainly, one could augment the Court's statement to read, the Act's "words . . . mean that [discrimination based on any of the five proscribed classes] must be irrelevant to employment decisions." *Miller*, 47 F.3d at 592.

<sup>169</sup> *Manhart*, 435 U.S. at 708; *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 (1983) (opinion of Marshall, J., with Brennan, White, Stevens, and O'Connor, JJ.) (per curiam); *see supra* notes 97–104 and accompanying text discussing pension benefits. Consistent with earlier discussion in this Article, *see supra* notes 121–31 and accompanying text, the Court accented that because "Title VII's 'focus on the individual is unambiguous,'" employers cannot offer employees sexually disparate retirement annuity plans. *Norris*, 463 U.S. at 1080 (quoting *Manhart*, 435 U.S. at 708).

<sup>170</sup> *Hopkins*, 490 U.S. at 239–51. The Court unambiguously ruled:

Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a "bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise." 42 U.S.C. § 2000e-2(e). *The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her.*

*Id.* at 242 (alterations in original) (emphasis added).

<sup>171</sup> It surely is germane to note Professor Bernstein's lament that professionals and laypersons alike tend to use the term "stereotype" frequently but somewhat offhandedly. *See Anita Bernstein, What's Wrong With Stereotyping?*, 55 ARIZ. L. REV.

could conclude that *stereotype* is simply a synonym for *discrimination* because both concern treating individuals or a group pursuant to some generalized notion, accurate or inaccurate, about the particular group.<sup>172</sup> Nonetheless, judicial

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655, 658 (2013) (quoting 16 OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989)). In particular, legal application tends to imbue stereotyping with negative connotations. However, as Professor Bernstein explained:

[T]hese definitions of stereotypes are agnostic on the question of whether the associations asserted or implied are true or false or somewhere in between.

... [Certainly,] not all stereotypes are wrong in the sense of doing harm that is severe enough to warrant sanction from the law, a costly response. Some stereotypes might be false or unreliable but do not offend the groups of people they reference. Some might offend but have the virtue of being reliable, or true enough.

... [Still,] many—probably most—messages in stereotypes are reductive and demeaning[, commonly inspiring significant, extensive, and numerous kinds of devastating harms to individuals, groups, and communities].

*Id.* at 659 (footnote omitted). Similarly, Professor Render believes that emphasis on stereotyping is distracting because “stereotype” is an heuristic—“empty”—construct; that is, too often commentators label beliefs or practices as “stereotypes” and, having done so, conclude tautologically that the particular beliefs or practices must be unfair:

This is because the idea of a stereotype carries with it a connotation of unfairness or injustice, but it does not delimit or offer specific guidance about the type of unfairness that transforms a garden-variety nonuniversal generalization into a stereotype. Thus, to determine whether a generalization is a stereotype, an analyst or adjudicator must first be committed to a principle of justice by which the “fairness” of the application of the generalization can be measured.

Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133, 144 (2010) (footnote omitted). In that way, such commentators deliberately or negligently avoid critical analysis while essentially daring readers to disagree with their unproven but intimidating application of the damning label. *See id.* at 134–40. In light of Professors Bernstein’s and Render’s astute concerns, although the use of the term “stereotype” remains familiar, even comfortable, this Article proposes a moral framework, *see infra* notes 246–307 and accompanying text, for Professor Render rightly insists that such is needed to prove any assertion that a given stereotype indeed is untoward.

<sup>172</sup> Of course, while conceptually connected, stereotyping and discrimination surely need not become indistinguishable. Stereotyping could be defined dispassionately as the act of *describing* groups according to rightly or wrongly perceived shared characteristics. *See, e.g.*, Bernstein, *supra* note 171, at 657–59 (defining “stereotype”). Discriminating, by contrast, is *actually imposing terms and conditions* differentiating persons or things based on stereotypical characteristics. *Cf. Hopkins*, 490 U.S. at 306–07 (Kennedy, J., with two Justices dissenting) (noting that sexual stereotyping is not necessarily discrimination under Title VII). Therefore, one can stereotype without discriminating although the obverse might be impossible. Nonetheless, one of Professor Render’s overarching excellent projects is alleviating any confusion that legal stereotyping analysis unintentionally imposes to

emphasis on stereotyping seems notably useful at least pragmatically. *Hopkins* reaffirms that civil rights theory views *uncritical* stereotyping as hugely problematic.<sup>173</sup> Thus, even if not synonymous, perhaps more than *discrimination* itself, the *idea* of stereotyping evokes with singular intensity impressions depicting why discrimination typically is unreasonable.<sup>174</sup> Understanding stereotyping prompts the concurrent understanding that discrimination tends to be the injurious and unjust supposition that a given individual possesses attributes accurately or otherwise rendered to particular classes. The concept of stereotypes, then, helpfully reminds us that (1) any given stereotype may be mistaken thus reliance—discrimination—thereon is arbitrary and (2) even if accurate, not all individuals necessarily share the stereotypical characteristic, thus, reliance on the stereotype *in the context of individual rights* portends arbitrariness.

The foregoing prelude leads to a particularly important point: The *Hopkins* Court did not moderate its comprehensive condemnation of sexual stereotyping as a proxy for individual merit even though the discrimination Ann Hopkins endured concerned predominately grooming and appearance characteristics that she could control at will.<sup>175</sup> The theory of unlawful stereotyping in *Hopkins*, then, evinces a scrupulous commitment to enforce fully Title VII's broad proscriptions, including, contrary to unequal burden theory, abrogating non-BFOQ gender-based conceptions of beauty and comportment.<sup>176</sup>

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discern what should be considered unlawful sex discrimination vel non. See generally *Render, supra* note 171.

<sup>173</sup> See also, e.g., Bernstein, *supra* note 171, at 659.

<sup>174</sup> E.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 67 n.173 (1995) (discussing how the term "lipstick lesbian" arouses certain images); Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1456–57 (1995) (discussing how descriptive labels about individuals and groups induce stereotypical impressions); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1229 n.153 (1974) ("Like race and alienage, mental illness evokes a stereotype which carries a stigma of inferiority . . .").

<sup>175</sup> *Hopkins*, 490 U.S. at 235.

<sup>176</sup> Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 672 (2010); Allison T. Steinle, Comment, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U. L. REV. 261, 287–95 (2006)

Specifically, Ms. Hopkins, an accountant with the then-thriving Price Waterhouse firm, alleged she was denied promotion to partnership due to both conscious and unwitting discriminatory attitudes of voting partners.<sup>177</sup> Throughout the promotion process, several partners, including some of Ms. Hopkins's supporters, described her appearance and demeanor in uncomplimentary, gender-explicit terms evincing the sex-based stereotype that women should act in a demure, ladylike manner:

Supervisors described her as "macho," "somewhat masculine," "a lady using foul language" who "overcompensated for being a woman," as well as someone in need of "a course at charm school." One evaluator suggested that Hopkins could improve her partnership chances if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>178</sup>

Paradoxically, many of the pejoratives leveled against Ms. Hopkins, such as purportedly being overaggressive, would have been compliments if directed to male accountants, thus evincing further the sexually stereotypical nature of Price Waterhouse's decision not to promote her.<sup>179</sup>

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(contrasting and analyzing, in depth, the facts of *Hopkins*, 490 U.S. 228 and *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc)).

<sup>177</sup> Among its many significant rulings, *Hopkins* explained that officers, managers, and other business decision makers may be unconsciously prejudiced, that is, unaware that they are acting out sexual biases. Unconscious though it may be, such bias can taint the decision making of corporate agents as readily as willful discriminatory action. Indeed, because actors are unaware of, and therefore cannot recognize and purge, their prejudice, unwitting discrimination can be more insidious than deliberate bias. Rightly then, obliviousness is neither an excuse nor a justification for acts stemming from actors' discriminatory attitudes. *Hopkins*, 490 U.S. at 251, 255–56.

<sup>178</sup> See Bernstein *supra* note 171, at 682 (footnotes omitted) (quoting *Hopkins*, 490 U.S. at 235).

<sup>179</sup> Indeed, the Court recognized, "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Hopkins*, 490 U.S. at 251; see also, e.g., *Jespersen*, 444 F.3d at 1111–12; *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*10 (6th Cir. Jan. 15, 1992). Similarly, Professor Yuracko noted what has been termed the "double-bind" effect:

Hopkins was required to be feminine, while the successful performance of her job required her to adopt more traditionally masculine traits and behaviors. As the Court explained, given the demands placed on her, Hopkins would be out of a job if she behaved aggressively, and out of a job if she did not.

Significantly, virtually all of the sex-based condemnations against Ann Hopkins involved mutable characteristics adaptable without unequal burden.<sup>180</sup> Ms. Hopkins could have taken “a course at charm school,” dressed and walked as her critics preferred, adjusted her attire, wore some jewelry, and adopted a less aggressive, more demure, ladylike attitude.<sup>181</sup> Aside from charm school, assuaging the partners’ predilections would have engendered costs in time and money comparable to getting haircuts roughly every month, buying and applying makeup, and other activities required to satisfy lawful gender-distinct grooming rules.<sup>182</sup>

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Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 762 (2013). Importantly for the thesis of this Article, stressing Title VII’s “first principle” that all discrimination based on the five forbidden classes is unlawful unless justified by a BFOQ, both the *Hopkins* opinion itself, 490 U.S. at 242, 252, and subsequent Supreme Court precedent, confirm that even if Ms. Hopkins had not been caught in the “double-bind,” the discrimination she suffered is unlawful. Thus, plaintiffs need not prove that they have been subject to the “double-bind” or “Catch-22” to state an actionable claim based on unlawful stereotyping; although certainly the “double-bind” is an aggravating factor emphasizing the illegality of particular sexual stereotyping. See *infra* notes 183–86 and accompanying text.

<sup>180</sup> See Jones, *supra* note 176 (“[T]he Court placed reduced reliance upon immutability, a quality the Court has used often to justify protection for certain classifications, including gender. Although the attributes for which Ann Hopkins was penalized were arguably mutable, the Court nonetheless recognized sex stereotyping as a form of sex discrimination.”); McCarthy, *supra* note 77, at 962–63 (discussing the implied mutability analysis in *Jespersen*); Steinle, *supra* note 176, at 277–83.

<sup>181</sup> This list of Price Waterhouse partners’ criticisms of Ms. Hopkins is found at *Hopkins*, 490 U.S. at 256.

<sup>182</sup> Some commentators compellingly dispute from an empirical perspective—physical and psychological—the very idea of an “unequal burden,” arguing that persons in Ms. Hopkins’s predicament cannot comport either easily or readily with their superiors’ race- and sex-based criticisms. For instance, Professor Yoshino insightfully explained:

This comment reveals that while being too masculine is not valued, being too feminine is not valued either. To succeed as a woman, one must have the correctly titrated balance of masculine and feminine traits. One must be “authoritative” and “formidable,” but remain an “appealing lady.” . . . If a woman covers too much, then the reverse covering demand will be made to bring her back into the zone of appropriate behavior.

Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 910 (2002). Professor Yoshino’s conclusions not only make eminent good sense, but they also underscore that conforming with the types of grooming rules the Ninth Circuit in *Jespersen* and virtually every other circuit deem reasonable may be much more demanding and intrusive than judges realize. Yes, cutting one’s hair and applying makeup may seem to be, and perhaps are not, difficult endeavors. But when, as in *Hopkins* and *Jespersen*, discrete sex-based grooming requirements are both numerous and part of

Given the verve of the Court's denunciation of sex discrimination by way of sex stereotyping in *Hopkins*, the Court surely would not alter its stance on the contention that Ms. Hopkins could have kowtowed with ease.<sup>183</sup> Under the *Hopkins* Court's statutory analysis, any non-BFOQ sex-based grooming code violates Title VII's first principle that "gender must be irrelevant to employment decisions."<sup>184</sup> Indeed, it is worth recalling that after reviewing § 2000e-2 in its entirety, the Court ruled, "The only plausible inference to draw from [§ 2000e-2(e)(1), the BFOQ] provision is that, *in all other circumstances*, a person's gender may not be considered in making decisions that affect her."<sup>185</sup> The term "in all other circumstances" manifestly instructs that courts may not concoct extratextual forms of legal employment discrimination, of which "unequal burden" certainly is one.<sup>186</sup>

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a larger, complex schema of appearance standards, successful fulfillment of these tasks may be elusive. *E.g.*, *Jespersen*, 444 F.3d at 1117 (Kozinski, J., with Graber and Fletcher, JJ., dissenting). This is particularly true where, as Professor Yoshino accents, grooming and appearance rules—express or implied—are so integrally linked to employers' stereotypical conceptions of gender comportment that to retain employment, or to earn promotions, raises, transfers, and similar advantages, females must maneuver the precarious path of being neither too male nor excessively female. The foregoing, of course, does not consider the burden grooming and appearance discrimination inflicts on employees' psyches—a burden that, contrary to the dismissive attitudes of the courts, is substantial. *See infra* notes 286–307 and accompanying text. If Professor Yoshino is correct, as likely he is, then grooming rules such as those in *Jespersen* should be considered unequal burdens per se and, thus, unlawful under Title VII. But, even if compliance with the employment standards discussed in *Hopkins* and *Jespersen* would not be difficult, this Article pursues its contention that the Supreme Court implicitly and appropriately has invalidated unequal burden theory.

<sup>183</sup> *See* Steinle, *supra* note 176, at 293–95. As the Court accented, "By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision . . ." *Hopkins*, 490 U.S. at 251–52. Possibly, had Ms. Hopkins assuaged her critics, she would have been promoted to partnership. Of course, she would have had a valid Title VII claim if she were trapped in the "double-bind," that is, losing her promotion because she was considered too meek and submissive to be an effective partner after having altered her comportment to conform with some Price Waterhouse partners' stereotypical perceptions of femininity. *See supra* note 179 and accompanying text.

<sup>184</sup> *Hopkins*, 490 U.S. at 240, *quoted in* Miller v. Cigna Corp., 47 F.3d 586, 592 (3d Cir. 1995).

<sup>185</sup> *Id.* at 242 (emphasis added).

<sup>186</sup> *E.g.*, Patrick S. Shin, *Vive La Différence? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming*, 14 DUKE J. GENDER L. & POL'Y 491, 493 (2007) (symposium issue on grooming and Title

Although among the most significant, the Court's analysis of discriminatory stereotyping in *Hopkins* is not the first instance of Supreme Court implicit disapproval of unequal burden theory.<sup>187</sup> The analogous context of sexual harassment, of which there are two kinds,<sup>188</sup> certainly springs to mind. First, "quid pro quo" harassment in which employers demand sexual favors as preconditions either to receive employment benefits or to avoid employment detriments is per se unlawful.<sup>189</sup> Moreover, the courts have repeatedly held that "hostile work environment" harassment is illegal if "the work environment was so pervaded by discrimination that the terms and conditions of employment were altered."<sup>190</sup> The employer is liable for unlawful quid pro quo

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VII). At least two circuits properly understand *Hopkins* in that regard. Albeit in dictum, the Sixth Circuit stated as a clear and obvious legal fact, "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004). The Eighth Circuit agreed, finding that the plaintiff stated an actionable sex discrimination claim that her employer, a motel, dismissed her because she appeared too mannish and lacked the "Midwestern girl look." *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041–42 (8th Cir. 2010); *see also* *Finnie v. Lee Cnty., Miss.*, 907 F. Supp. 2d 750, 775 (N.D. Miss. 2012) (quoting and distinguishing *Smith*, 378 F.3d at 574, the court held that the county's policy requiring all detention officers to wear identical uniforms, including pants, was gender-neutral, reasonably implemented to assure uniformity among officers, and was not a pretext for discrimination). Thus, perhaps Professor Yuracko is not wholly correct in her lament that "the broad language used . . . by the Supreme Court in *Price Waterhouse*, is more accurately viewed as judicial rhetoric than legal reality." *See Yuracko, supra* note 179, at 779 n.90.

<sup>187</sup> *See supra* text accompanying note 182.

<sup>188</sup> *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (citing *Burlington Indus., Inc. v. Ellerth*, 542 U.S. 742, 765 (1998)).

<sup>189</sup> *E.g.*, *Stevens v. Saint Elizabeth Med. Ctr., Inc.*, 533 F. App'x 624, 628 (6th Cir. 2013); *Rader v. Napolitano*, 552 F. App'x 617, 617 (9th Cir. 2013). A typical instance is, "Have sex with me and I will give you a raise; but if you refuse, I will fire you." By definition, quid pro quo harassment explicitly fulfills Title VII's definition of discrimination because the employee understands that submitting to her employer's sexual demands is necessary either to attain or to maintain a job, a raise, a promotion, or similar "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>190</sup> *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013); *see also, e.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (determining that hostile environment harassment is unlawful if it is so severe, pervasive, or both, that enduring harassment becomes a term or condition of the victim's employment). Specifically, an employer is "strictly liable" if harassment emanates from the victim's "supervisors"—those who are authorized to "take tangible employment actions against the victim"—and the harassment results in a "tangible" employment action, that is some decision, usually adverse, affecting the victim's compensation,



or hostile environment harassment because Title VII secures for employees a work environment free from the psychological, economic, social, and employment-related damage harassment inflicts.<sup>191</sup> Accordingly, Title VII prohibits harassment because of Title VII's first principle: workers' intrinsic right to "workplace equality."<sup>192</sup>

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promotions, work assignments, or similar employment terms and conditions. *See Vance*, 133 S. Ct. at 2439, 2443. If the supervisor's harassment does not affect a "tangible" term of employment or if the hostile environment is caused by the victim's nonsupervisory co-workers, the employer may nonetheless be liable if it knew of but negligently failed to take appropriate steps to stop the harassment or if the employer was unaware of the harassment because properly notifying the employer likely would have been a futile or possibly detrimental act on the victim's part. *Id.* at 2439.

<sup>191</sup> *Harris*, 510 U.S. at 21, *quoted in Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). As the *Harris* Court explained:

A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality.

*Id.* at 22, *quoted in Suders*, 542 U.S. at 133–34.

<sup>192</sup> As the *Suders* Court stated, "[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality." *Suders*, 542 U.S. at 133–34 (alterations in original) (quoting *Harris*, 510 U.S. at 22). Accordingly, an employer may engage in discriminatory harassment that is insufficiently "severe or pervasive" to create an unlawfully "abusive" work milieu. Importantly, *Suders* and similar decisions do not tacitly support unequal burden theory by implying that the courts may contrive non-BFOQ yet lawful discrimination *in situations where Title VII's coverage lawfully is invoked*. This distinction, explicated below, is a bit tricky but fundamental. Absent quid pro quo harassment, plaintiffs must find another link to § 2000e-2(a)(1)'s explicit text to prove that the particular non-quid pro quo harassment is unlawful. *See supra* note 189 and accompanying text. In this regard, the theory of "hostile environment harassment" holds that although an employee is neither explicitly promised an employment benefit nor is directly threatened with an employment detriment, the employer violates the Act if that employee is subjected to discriminatory harassing treatment such as insults, ridicule, or taunting "so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81. This makes sense because even if non-quid pro quo harassment is predicated on a forbidden criterion such as sex, unless it is either severe or pervasive enough to comprise an actual § 2000e-2(a)(1) "term" or "condition" of employment, the harassment does not meet those *textual requisites* under Title VII. *E.g.*, *Harris*, 510 U.S. at 21; *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 176 (2d Cir. 2012). To prove hostile environment harassment, courts require severity or pervasiveness as a matter of statutory compliance, that is, to satisfy Title VII's express text, not as a matter of policy that less serious harassment is lawful because it is "reasonable" to humiliate and demean employees so long as the torment is not excessive. *Therefore, courts and*

Crucially, but not surprisingly, courts do not excuse the employer if the victim could have prevented the harassment by changing her behavior.<sup>193</sup> The victim is not required to prove that the harassment would have continued even if, for instance, she wore less attractive clothes, applied less makeup, or otherwise attempted to make herself unappealing to her harasser.<sup>194</sup> Because the victim is innocent, it would be perverse if to prevail, the victim first had to change her lawful behavior, comportment, or appearance and thereafter prove that, nonetheless, the harassment continued. Yet, unequal burden theory implicitly mandates such proof if the inducement to harass stems in whole or part from the victim's mutable characteristics such as dress, makeup, hair style, and other aspects of demeanor.<sup>195</sup>

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*commentators cannot use hostile environment harassment as an example to show that Title VII permits courts to contrive lawful substantive, non-BFOQ discrimination.* There is yet another reason why the doctrine of hostile environment harassment provides no analogy supporting unequal burden theory. Pursuant to the applicable legal definitions, grooming rules reviewed under unequal burden theory are not comparable to hostile environment harassment at all because the affected employee or employment applicant does not seek to prove that the totality of discrete events demonstrates an unwritten but manifest discriminatory term or condition of employment. Rather, as male-only hair-length and female-only makeup rules exemplify, there is no debate that the particular grooming or appearance requirement is a "term of employment"—an explicit requisite—to obtain or to retain a job. Rather, unequal burden really is analogous to quid pro quo harassment, where employers require employees to accept explicitly discriminatory terms or conditions. Like the classic harassment scenario, "Have sex with me if you want a raise, otherwise I will fire you," compliance with facially discriminatory grooming and appearance policies is a quid pro quo either to secure an employment benefit, such as keeping one's job, or to avoid an employment penalty, such as losing one's job. Thus, both quid pro quo harassment and unequal burden situations are per se discriminatory. The author's colleague Professor Angela Morrison greatly assisted in the understanding of this significant point.

<sup>193</sup> See *supra* notes 175–86 and accompanying text.

<sup>194</sup> Similarly, distressed victims often try to stop or at least lessen the harassment's impact through coping tactics, such as seeking counseling or acting the "good sport" by taking part in the taunting. That the victim could have but did not get psychological therapy and that she occasionally joined voluntarily in the "horseplay"—arguably mutable behaviors—do not per se refute that she was harassed, as courts correctly understand. See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001).

<sup>195</sup> It is no answer, of course, to claim that harassment is different because a victim should not be made to suffer the indignity of harassment even when the harasser is motivated by the victim's mutable characteristics. The foregoing moral and legal truth must counsel as well that the same work-qualified victim should not suffer the indignity of losing or being denied employment due to her refusal to change her mutable characteristics to conform with her employer's non-BFOQ sex-

*Oncale v. Sundowner Offshore Services, Inc.*<sup>196</sup> offers an exceptional, compelling example. Joseph Oncale, an oil worker on an eight-person *all-male* work crew, was harassed because he acted in a manner his coworkers considered “homosexual.”<sup>197</sup> In a remarkably brief opinion authored by the late Justice Antonin Scalia, the Court unanimously agreed:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. . . . Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.<sup>198</sup>

As in *Hopkins* and earlier harassment cases, the Court apparently was unconcerned that Mr. Oncale perhaps could have easily modified his mannerisms, speech phrasings, and other behaviors evincing an unmanly or homosexual demeanor in the minds of his coworkers.<sup>199</sup> Indeed, possibly such adjustments would have ended his mistreatment; *but the Court neither expressly nor impliedly required Mr. Oncale to prove that he was caught in the “double-bind.”*<sup>200</sup> Of course, the Court foisted no

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based standards. This Article can discern no apparent substantive difference between harassing a woman for refusing to wear makeup and firing her for so refusing. *In fact, one might easily believe that such firing is the deepest form of harassment.* As discussed *supra*, the *Hopkins* Court apparently would agree. *See supra* notes 175–86 and accompanying text.

<sup>196</sup> 523 U.S. 75.

<sup>197</sup> *Id.* at 77.

<sup>198</sup> *Id.* at 79–80 (alteration in original).

<sup>199</sup> *See generally Oncale*, 523 U.S. 75.

<sup>200</sup> In this very significant regard, *Oncale* and similar harassment cases demonstrate that *Hopkins* cannot be limited to instances involving “double-bind” or, as the Supreme Court said, a “Catch 22.” *See generally Oncale*, 523 U.S. 75. *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). As earlier discussed, considering Ann Hopkins to be an unsuitably mannish female, her employer, accounting firm Price Waterhouse, denied her promotion to partnership; but had Ms. Hopkins adopted the female behaviors favored by Price Waterhouse, she likely would have been considered too weak to be a partner. Thus, no matter what attitude Ann Hopkins struck, due to her employer’s sexual bias, she could not attain partnership. *See supra* notes 165–79 and accompanying text. Although noting Ms. Hopkins’s distressing dilemma, the Court’s broad and emphatic rationale evinces that *Hopkins* applies to *any* non-BFOQ use of discriminatory stereotypes, not simply when employees are subjected to the “double-bind.” *See supra* notes 179–86 and accompanying text. Indeed, given the vital importance of the point, it is useful to reiterate that *Hopkins* specifically and tellingly instructed, “By focusing on [Ann] Hopkins’ specific proof, however, we do not suggest a limitation on the possible ways

such requirement because discriminatees are not required to surrender to the demands of their discriminators.<sup>201</sup> Thus,

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of proving that stereotyping played a motivating role in an employment decision . . .” 490 U.S. at 251–52. Correspondingly, as stressed earlier, after reviewing 42 U.S.C § 2000e-2, the Court ruled, “The only plausible inference to draw from [§ 2000e-2(e)(1), the BFOQ] provision is that, *in all other circumstances*, a person’s gender may not be considered in making decisions that affect her.” *Id.* at 242 (emphasis added). In light of the above, it is distressing that in *Jespersen v. Harrah’s Operating Co.*, the en banc Ninth Circuit erroneously implied that *Hopkins* is limited to “Catch-22” situations where, “the very traits that [Ms. Hopkins] was asked to hide were the same traits considered praiseworthy in men.” 444 F.3d 1104, 1111 (9th Cir. 2006) (en banc). But, as shown, the Supreme Court unequivocally reaffirmed Title VII’s blanket ban against *any* sex discrimination absent a proven BFOQ. *See supra* notes 179–86 and accompanying text; *accord Jespersen*, 444 F.3d at 1114 & n.2 (Pregerson, J., dissenting). *Oncale* precludes any lurking doubts to that effect. As in many harassment scenarios, had Mr. Oncale adjusted his behavior to assuage his harassers, the harassment might well have stopped or, at least, diminished considerably. *In other words, to forestall further harassment Joseph Oncale could have changed his behavior without losing either his job or attendant benefits such as raises and promotions.* Nonetheless, his Title VII claim remained viable although he was not trapped in the Catch 22 or double-bind. Inexplicably, the *Jespersen* majority did not discuss *Oncale*, which is disappointing yet hardly surprising given that the unanimous *Oncale* Court’s holding and rationale did not depend on Mr. Oncale being caught in the double bind. Identically and oddly, neither of the two *Jespersen* dissents noted *Oncale*, a decision that would have bolstered substantially the dissenters’ otherwise sound rejection of the majority’s holding and rationale.

<sup>201</sup> Proponents of unequal burden theory can find no solace in *Oncale*’s admonition:

In same-sex . . . harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.

*Oncale*, 523 U.S. at 81–82. Plainly, the Court limited its invocation of “context” to the unique proof essential to hostile environment lawsuits, specifically whether the victim demonstrates that the irksome behavior has crossed the somewhat elusive line from irritating but acceptable hazing to illegal discrimination. As explained *supra* at notes 189–95 and accompanying text, that requirement is necessitated by Title VII’s language because for a claim to be cognizable, the hostile environment must have become effectively a “term” or “condition” of the victim’s employment, otherwise it does not satisfy the textual requisites of 42 U.S.C. § 2000e-2(a)(1)

*Oncale*, especially understood with *Hopkins*, confirms that employers may predicate employment terms and conditions on discriminatory stereotypes only if doing so is a BFOQ. This Title VII standard apparently applies to all stereotyping, such as whether real men wear short hair or whether genuine women such as Ms. Hopkins and Ms. Jespersen wear makeup.

*b. Title VII's Protection Is Not Limited to Discriminatory Conduct That the Enacting Congress Believed To Be Wrongful*

The pivotal *Oncale* decision nicely segues into the Supreme Court's second Title VII directive. The Justices neither denied nor limited Mr. Oncale's recovery based on the arguably unusual nature of his statutory claim: male-on-male harassment *in a unisex workforce*.<sup>202</sup> Indeed, the Court accented that while the enacting Congress apparently never considered, and possibly would have been unconcerned with, prejudice against purportedly womanly men, "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 legislators by which we are governed."<sup>203</sup> That a remedial statute ultimately might condemn practices the enacting legislators found acceptable, even appropriate, is a well-established and honorable tenet of statutory construction.<sup>204</sup>

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(2012). But the subjects of unequal burden theory, such as grooming codes, are per se "terms" of employment and, thus, are comparable not to hostile environment harassment but to quid pro quo harassment. *See supra* note 192.

<sup>202</sup> *Oncale*, 523 U.S. at 79–80.

<sup>203</sup> *Id.* at 79. *Oncale's* sound rationale that the impact of statutory texts often transcend the original concerns of the enactors is not an odd occurrence but rather has been emphasized repeatedly by the Supreme Court. *E.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167–68 (2004); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989). Indeed, *Oncale's* jurisprudence is embraced by Justices who otherwise often disagree regarding legal philosophy and statutory analysis. *E.g.*, *Irizarry v. United States*, 553 U.S. 708, 719 (2008); *Gonzales v. Oregon*, 546 U.S. 243, 288 (2006).

<sup>204</sup> For instance, citing numerous precedents particularly *Oncale*, the prevailing trend is that while homosexuality and transgenderism are not per se protected classes, discrimination against transgender persons due to their gender-nonconformity is sex discrimination in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 & n.5 (11th Cir. 2011); *Kasti v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493–94 (9th Cir. 2009); *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222–24 (10th Cir. 2007) (discrimination based on a person's status as transsexual is not cognizable under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1198–203

(9th Cir. 2000) (addressing a claim under both Title VII and the Gender Motivated Violence Act, 42 U.S.C. § 13981(c)). See generally Jason Lee, Note, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423 (2012); Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007). Significantly from the administrative perspective, as recently noted by the Second Circuit, the EEOC likewise has changed its original legal position in light of *Oncale* and similar modern precedent:

[T]he EEOC had developed a consistent body of decisions that did not recognize Title VII claims based on the complainant's transgender status. See, e.g., *Kowalczyk v. Dep't of Veterans Affairs*, No. 01942053, 1994 WL 744529, at \*2 (E.E.O.C. Dec. 27, 1994) (concluding that an “appellant's allegation of discrimination based on her acquired sex (transsexualism) is not a basis protected under Title VII”); *Campbell v. Dep't of Agriculture*, No. 01931730, 1994 WL 652840, at \*1 n.3 (E.E.O.C. July 21, 1994) (recognizing precedent holding that “gender dysphoria or transsexualism is not protected under Title VII under the aegis of sex discrimination”); *Casoni v. U.S. Postal Serv.*, No. 01840104, 1984 WL 485399, at \*3 (E.E.O.C. Sept. 28, 1984) (“[A]ppellant's allegation of sex discrimination on account of being a male to female preoperative transsexual . . . [is] not cognizable . . . under the provisions of Title VII.”). It was not until *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), . . . that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII.

*Id.* at \*11 & n.16 (alterations in original); see also *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015).

Addressing a different legal matter, the en banc Eleventh Circuit wrote: Given prevailing attitudes at the time [42 U.S.C.] § 1985(3) [conspiracy to deprive one or a class of persons of “the equal protection of the laws, or of equal privileges and immunities under the laws”] was enacted, it is certainly possible, if not probable, that many legislators who voted for the statute were not concerned about affording legal protection to women as a class. Nonetheless, we follow the plain meaning of the statute, because “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 legislators by which we are governed.”

*Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1338 (11th Cir. 1999) (en banc) (quoting *Oncale*, 523 U.S. at 79). Similarly, the United States Circuit Court of Appeals for the District of Columbia Circuit recently noted:

[W]hile the specificity of section 628's [Communications Act of 1934, § 628(b), 47 U.S.C. § 548(b)] references to satellite cable and satellite broadcast programming may reveal the primary evil that Congress had in mind, nothing in the statute unambiguously limits the Commission to regulating anticompetitive practices in the delivery of those kinds of programming by methods addressed to that narrow concern alone.

*Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (citing *Oncale*, 523 U.S. at 79).

We often analogize those who drafted our basic, or earliest, or most important laws as parents.<sup>205</sup> Like good parents, these lawmakers expected, or should have expected, that subsequent generations—their progenies—would build on their knowledge, learn greater lessons, and see more clearly, deeply, and broadly than the original legislators themselves were either capable or willing. These subsequent generations may discern rightfully fresh applications of earlier enactments—enlargements duly comporting with the letter and dominant spirit of the original law—in ways that the original enactors might not have appreciated, or would even have resisted.<sup>206</sup> Courts enforcing non-BFOQ, discriminatory grooming codes as “reasonable” employment bigotry reject the actuality that law, particularly civil rights, may, indeed should, mature.

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<sup>205</sup> *E.g.*, *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012) (referring to “the Founding Fathers” who drafted the Constitution and the Bill of Rights); *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2003) (same).

<sup>206</sup> A compelling instance is *Patterson v. McLean Credit Union*, 491 U.S. 164, 176–77 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101(2), 1981(b), 105 Stat. 1071, 1071–72. Thirteen years earlier, the Court held in *Runyon v. McCrary*, 427 U.S. 160, 168–69 (1976), that a provision of the Civil Rights Act of 1866, 42 U.S.C. § 1981, banning racial discrimination in contracts, regulates private as well as governmental contracts. *Patterson* determined that even if the Court had misapprehended the actual intent of the 1866 Congress, *Runyon* ought not be reversed because, among other things, it rightly enforces the “prevailing sense of justice” emanating from Congress’s choice of words and overarching theory of fairness under § 1981. *Patterson*, 491 U.S. at 174. Equally persuasively, writings of James Madison evince a pivotal Founding Father attempting to reach not only his fellows, but also more urgently his metaphorical children with an entreaty this Article paraphrases as: If I and my contemporaries have done well, do not rest complacently on our laurels, but rather learn from what we have done and do better. Specifically, in a remarkably little quoted essay, Madison stated that proposition with regard to the proposed Constitution itself, “[T]he leaders of the [r]evolution . . . pursued a new and . . . noble course. . . . They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.” THE FEDERALIST NO. 14, at 88–89 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (emphasis added). Nearly forty years after the Constitution’s ratification, Madison expressed a similar hope. “And I indulge a confidence that sufficient evidence will find its way to another generation, to ensure, after we are gone, whatever of justice may be withheld whilst we are here.” John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL’Y 195, 321 n.906 (quoting Letter from James Madison to Thomas Jefferson (Feb. 24, 1826)) (internal quotation marks omitted).

c. *Title VII Leads Rather Than Lags*

The foregoing further teaches that Title VII does not merely codify contemporary societal concepts of legitimate versus illegitimate discrimination. Rather, Title VII leads and transforms, compelling persons and groups either to change their bigoted attitudes or, at the very least, learn to abide by a legal order that will no longer tolerate acting out such prejudices. In this regard, Title VII leads; it does not lag.<sup>207</sup> That is, the Act cuts the greatest path possible, allowing all who are victims a route to relief. The Act does not simply languish, waiting for a more progressive legislature or a more tolerant society to declare: Now, at last, is the time you no longer must endure the discrimination considered acceptable by the traditionalist general population, conformist social groups, chauvinistic employers, or even a fundamentalist Congress.

In that regard, worth emphasizing again, the *Oncale* Court recognized that Title VII prohibits sex discrimination in the form of male-on-male harassment directed against a man considered not conventionally masculine due to his purportedly womanly, possibly homosexual manner.<sup>208</sup> It was hardly clear that all, most, or many Americans just before the turn of the present century would have agreed with the unanimous Court that federal law does *and should* protect purportedly effeminate or homosexual males, especially given that homosexuals are not a statutorily protected class.<sup>209</sup> Such reality did not influence the

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<sup>207</sup> Researchers understand the actuality of this point by contrasting areas wherein the judiciary is not expert. For instance, “courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. ‘The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.’” *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996)).

<sup>208</sup> Similarly, several courts have held that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.” *Glenn*, 663 F.3d at 1317 (Fourteenth Amendment Equal Protection Clause decision, citing other cases); see *supra* note 204 and accompanying text reviewing similar precedent.

<sup>209</sup> While individuals may aver colorable unlawful sexual stereotyping based on employers’ sex-based perceptions regarding such individuals’ actual or seeming homosexuality, it remains true that under Title VII, homosexuals are not an expressly protected class. Thus, “[a] claim premised on sexual-orientation discrimination . . . does not state a claim upon which relief may be granted.” *Gilbert v. Country Music Ass’n*, 432 F. App’x 516, 519 (6th Cir. 2011) (discussing *Vickers v.*



Justices to suppress Title VII's plain text and first principle—discrimination is unlawful unless justified under the BFOQ defense or some other textually explicit exemption—until, if ever, empirical research evinced extensive or at least considerable popular support for Joseph Oncale's claim or until Congress decided to add a provision specifically addressing the *Oncale* context.

The foregoing discussion of the Supreme Court's three directives disproves the mutability and unequal burden doctrines and, indeed, any similar principle based on a theory of trivial violations. *Hopkins* and *Oncale* underscore that, pursuant to Congress's explicit and deliberate definition of discrimination, practices no longer lawful may nonetheless remain the prevailing preferences of one or more groups, businesses, industries, organizations, or communities. For some, perhaps many or even most, a particular opinion—such as the opinion that women should wear makeup—may be long and deeply held, steeped in the sincere belief that such is the natural or better order of things. Yet, no less than generally reviled prejudices, discrimination cloaked by homely wisdom and conventional prudence is exactly what Title VII abrogates.<sup>210</sup> In bleak contrast, unequal burden theory vindicates blatant sex and race stereotyping simply on the premise that the reviewing judges accept such sentiment as at least “reasonable” and discern no ensuing “unequal” or “unequal” burdens.

Acknowledging, as it must, the foregoing principles, one noted legal encyclopedia offered a prudent caution:

A statute should not be extended by construction beyond the correction of evils sought by it. There is a peril in interpreting statutes in accordance with presumed legislative purpose,

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Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006)); *see also, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005).

<sup>210</sup> As the Fifth Circuit noted nearly a half-century ago, “[I]t would be totally anomalous . . . to allow the preferences and prejudices of the customers [—the public—] to determine whether the [challenged] sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.” *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *accord* *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1039 n.12 (10th Cir. 2011) (quoting *Diaz*, 442 F.2d at 389); *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (same); *EEOC v. St. Anne's Hosp. of Chi., Inc.*, 664 F.2d 128, 133 (7th Cir. 1981) (same).

particularly given that most statutes represent a compromise of purposes advanced by competing interest groups, not an unmitigated attempt to stamp out a particular evil.<sup>211</sup>

Surely aware of the above admonition, the Supreme Court's applicable law, especially *Oncale*, evinces a core point: Whatever political history and pragmatic compromises might inform Title VII's enacting,<sup>212</sup> Congress intended that, to the fullest extent its language and structure permit, the Act truly comprises "an unmitigated attempt to stamp out a particular evil [specifically, employment discrimination based on the five statutorily

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<sup>211</sup> 73 AM. JUR. 2D *Statutes* § 71 (2015) (footnotes omitted).

<sup>212</sup> Although scrupulously debated on its merits prior to enactment, see *supra* note 111, the origin of Title VII was not without political drama. *E.g.*, Michael Z. Green, *Proposing A New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 312 n.14, 323 n.51-52, 325 n.59 (2001) (history and political considerations attendant to Title VII) (cited in Lamont E. Stallworth & Daniel J. Kaspar, *Employing the Presidential Executive Order and the Law to Provide Integrated Conflict Management Systems and ADR Processes: The Proposed National Employment Dispute Resolution Act (NEDRA)*, 28 OHIO ST. J. ON DISP. RESOL. 171, 187 n.69 (2013)); John G. Stewart, *When Democracy Worked: Reflections on the Passage of The Civil Rights Act of 1964*, 59 N.Y.L. SCH. L. REV. 145 (2014–15). For instance, the inclusion of "sex" as a prohibited employment criterion notoriously occurred not through careful drafting by either congressional proponents or expert committees, but rather as a floor amendment proposed by Representative Howard Smith as a last ditch, and clearly failed, effort to defeat passage. *E.g.*, Bayer, *supra* note 4 at 848–52 (noting, among other things, that contrary to the views of some courts and commentators, the legislative history of the "Smith Amendment" reveals serious and thoughtful arguments that likely influenced Congress to take the extraordinary step of adding "sex" as an additional protected class without first holding full investigatory hearings); Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1338–41 (2014) (same).

To cite another prominent example, to secure passage, the Act's proponents acceded to demands that, unlike many expert agencies authorized to enforce specialized laws, the EEOC lacks full enforcement powers. While the agency can bring lawsuits under its auspices, it cannot administratively resolve private claims. Rather, somewhat like mediators, the EEOC may attempt to conciliate disputes, but cannot perform quasi-judicial fact-finding leading to enforceable rulings as can, for instance, the National Labor Relations Board and the Social Security Administration. *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 955–56 (7th Cir. 1981) (noting political compromises that enabled the passage of Title VII). Similarly, while it can issue guidelines worthy of deference, unlike many agencies the EEOC cannot promulgate regulations with the force of statutory law. *Nat. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6, (2002) ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference."); *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 114 (3d Cir. 2003).

prohibited criteria].”<sup>213</sup> Accordingly, given the foregoing Supreme Court explications illuminating the Act’s text, purpose, and policy, judges have no competence to uphold non-BFOQ discriminatory employment rules as inoffensive and unobtrusive.

##### 5. The Meaning of 42 U.S.C. § 2000e-2(m)—Congress Reiterates Title VII’s “First Principle”

Reversing perhaps an unprecedented number of Supreme Court decisions,<sup>214</sup> Congress enacted the Civil Rights Act of 1991.<sup>215</sup> Of particular significance herein, section 107, codified as 42 U.S.C. § 2000e-2(m), reads, “Except as otherwise provided in

<sup>213</sup> 73 AM. JUR. 2D *Statutes* § 71 (2015); see also *Olsen v. Eagle Mountain City*, 248 F.3d 465, 473 n.6 (10th Cir. 2011).

<sup>214</sup> Congress overturned eight separate opinions issued in 1989, evincing that Congress was so disappointed in then-recent Supreme Court rulings that it enacted major statutory reformation within the rather short span of two years. As one federal district court recounted:

The Act overturns or modifies eight recent Supreme Court decisions: (1) Section 101 overturns the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989), as regards the scope of 42 U.S.C. § 1981 [limiting § 1981’s ban against racial discrimination in contracting solely to the formation of contracts]; (2) Sections 104 and 105 overturn the decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L.Ed.2d 733 (1989), regarding the legal standards controlling disparate impact cases; (3) Section 107 overturns the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) [regarding its holding that a defendant states a complete defense in a mixed-motive action if it can prove it would have made the same adverse employment decision absent discriminatory animus]; (4) Section 108 overturns the decision in *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), as regards the permissibility of collateral challenges to affirmative action plans in consent decrees and court orders; (5) Section 109 overturns the decision in *EEOC v. Aramco*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), as regards the applicability of Title VII in overseas workplaces; (6) Section 112 overturns the decision in *Lorance v. AT & T*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) [Title VII’s statute of limitations to challenge a seniority system begins to run when the system initially was adopted]; (7) Section 113 overturns the decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) [no recovery of experts’ fees as part of recovery of attorneys’ fees]; and (8) Section 114 overturns the decision in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) [Congress did not waive under Title VII Federal Government’s traditional immunity from interest]. The general effect of the CRA was to restore the law to the state at which it existed prior to these decisions.

*Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 419 n.3 (E.D.N.Y. 1992) (emphasis added).

<sup>215</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991).

this subchapter, *an unlawful employment practice is established* when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>216</sup>

This Article urges that, as elucidated by its legislative history, § 2000e-2(m)’s fairly clear language is Congress’s reaffirmation of Title VII’s first principle: Unless justified by an express textual exception, the Act proscribes all employment discrimination predicated on any of the five forbidden classifications, regardless of whether with purported ease the affected employees can comply with the employer’s discriminatory standard.<sup>217</sup> While, with some aptness, courts have stated, “we certainly do not pretend that the text of Section 107(a) [§ 2000e-2(m)] speaks with unmistakable clarity,”<sup>218</sup> and there is some disagreement regarding § 2000e-2(m)’s coverage,<sup>219</sup> § 2000e-2(m)’s purpose was and remains unmistakable: The very introduction into an employment transaction of race, sex, color, national origin, or religion comprises a discrete, remediable violation of the Act.<sup>220</sup> Congress put the proposition straightforwardly: The Civil Rights Act of 1991 reaffirms that *discrimination is itself an unequal burden*.<sup>221</sup>

Doubtless Congress adopted § 2000e-2(m) to overturn the portion of *Price Waterhouse v. Hopkins* that accorded a complete statutory defense in mixed-motive cases.<sup>222</sup> In a mixed-motive case, the given record proves that the employer imposed the particular adverse employment action, both to further one or

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<sup>216</sup> 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

<sup>217</sup> Indeed, the amendment’s history specifically references Congress’s intent to return to the status quo ante of 1964. As the 1991 Congress accented, “When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions.” H.R. REP. NO. 102-40(II), at 17, *reprinted in* 1991 U.S.C.C.A.N. 694, 710 (emphasis added). Accordingly, Congress passed § 2000e-2(m) to restore Title VII’s original purpose banning non-BFOQ discrimination.

<sup>218</sup> *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 217 (3d. Cir. 2000).

<sup>219</sup> *See infra* notes 230–32 and accompanying text.

<sup>220</sup> 42 U.S.C. § 2000e-2(m) (2012).

<sup>221</sup> H.R. REP. NO. 102-40(II), at 16–17, *reprinted in* 1991 U.S.C.C.A.N. 694, 709–10.

<sup>222</sup> 490 U.S. 228, 242 (1989); *see supra* notes 165–86 and accompanying text (discussing the *Hopkins* Court’s analysis of sexual stereotyping under Title VII and other aspects untouched by the Civil Rights Act of 1991).

more discriminatory purposes *and* to foster one or more lawful ends.<sup>223</sup> *Hopkins* ruled that to prevail, a plaintiff does not have to prove that unlawful discrimination was the sole motive underlying the challenged adverse employment decision.<sup>224</sup> However, the Court erroneously declared that employers enjoy complete exoneration—a full statutory rebuttal—if the record shows that they would have taken the same adverse employment actions absent their discriminatory motives.<sup>225</sup>

42 U.S.C. § 2000e-2(m) reversed that portion of *Hopkins*. As the Supreme Court succinctly but tellingly held, “Section 2000e-2(m) unambiguously states that a plaintiff need only ‘demonstrat[e]’ that an employer used a forbidden consideration with respect to ‘any employment practice.’”<sup>226</sup> Naturally, lower

<sup>223</sup> As the Sixth Circuit explained, “[C]laims brought pursuant to Title VII . . . are often categorized as either single-motive claims, i.e., when an illegitimate reason motivated an employment decision, or mixed-motive claims, when ‘both legitimate and illegitimate reasons motivated the decision.’” *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 711 (6th Cir. 2006) (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003)).

<sup>224</sup> As the Court in *Hopkins* noted:

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

490 U.S. at 241–42. Indeed, in 1964 the enacting Congress rejected a proposed amendment that would have limited Title VII’s coverage to discrimination based solely on any of the forbidden classifications. *See Bayer, supra* note 4, at 781.

<sup>225</sup> The *Hopkins* Court held:

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer’s remaining freedom of choice. We conclude that the preservation of this freedom means that *an employer shall not be liable if* it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.

490 U.S. at 242 (emphasis added).

<sup>226</sup> *Costa*, 539 U.S. at 98 (alteration in original) (quoting portions of § 2000e-2(m)). A decade later, the Court reiterated that plaintiffs establish Title VII claims “*based solely* on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526 (2013) (emphasis added) (ruling that § 2000e-2(m) does not apply to retaliation cases brought pursuant to § 2000e-3(a)). Consistent with the extensive breadth of Title VII, the *Costa* Court further ruled that plaintiffs may prove mixed-motive cases through circumstantial evidence, direct evidence, or both. Regarding these two forms of proof, “The term ‘direct evidence,’ . . . is simply

courts echoed the Supreme Court's crucial determination of § 2000e-2(m)'s comprehensive meaning.<sup>227</sup> For instance, the Fourth Circuit aptly declared, "Pursuant to the 1991 Act, the impermissible factor need not have been the sole factor. As long as it motivated the adverse action, the plaintiff can establish an unlawful employment practice."<sup>228</sup>

True, Congress markedly limited recovery under § 2000e-2(m) if the defendant proves that it would have taken the same employment action even absent discriminatory intent, thus demonstrating that the discriminatory intent was not the "but-for" cause of the employer's unlawful conduct.<sup>229</sup> Moreover, some courts believe that § 2000e-2(m) covers only mixed-motive claims while others believe it has a broader application.<sup>230</sup>

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evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Bakhtiari v. Lutz*, 507 F.3d 1132, 1135 n.3 (8th Cir. 2007) (citing *Rowan v. Lockheed Martin Energy Sys. Inc.*, 360 F.3d 544, 548 (6th Cir. 2004)); BLACK'S LAW DICTIONARY 596 (8th ed. 2004)). Such direct proof often derives from defendant's outright admission of unlawful bias, although not necessarily directed against the particular plaintiff. "The term 'circumstantial evidence,' on the other hand, is 'proof of a chain of facts and circumstances' indicating the existence of a fact, *United States v. Curry*, 187 F.3d 762, 767 (7th Cir. 1999) (quotation omitted), or '[e]vidence based on inference and not on personal knowledge or observation.' BLACK'S LAW DICTIONARY 595 (8th ed. 2004)." *Id.*

<sup>227</sup> See, e.g., *Chavez v. Credit Nation Auto Sales, LLC*, No. 14-14596, 2016 WL 158820128, at \*4-5, (11th Cir. Jan. 14, 2016); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

<sup>228</sup> *Id.* at 318. The Ninth Circuit identically explained, "Indeed, the language of Title VII and well-settled case law establish that an employer will be held to have committed an unlawful employment practice when the plaintiff 'demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.'" *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1041 (9th Cir. 2005) (alteration in original) (emphasis omitted) (quoting 42 U.S.C. § 2000e-2(m)). Three years later, the Second Circuit echoed, "An employment decision, then, violates Title VII when it is 'based in whole or in part on discrimination.'" *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (emphasis omitted) (quoting *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004)). The Third Circuit likewise noted that "[s]ection 107(a) [codified at 42 U.S.C. § 2000e-2(m)] mandates a finding of liability whenever an illegitimate factor motivates an adverse employment action." *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000).

<sup>229</sup> 42 U.S.C. § 2000e-5(g)(2)(B) (2012). Accordingly, when limited solely to § 2000e-2(m) proof, plaintiffs may recover "declaratory relief, attorney's fees and costs, and some forms of injunctive relief . . . but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order." *Nassar*, 133 S. Ct. at 2526.

<sup>230</sup> In 2003, the Supreme Court noted, "This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context." *Costa*, 539 U.S. at 94 n.1. The Court has yet to address that matter. Regarding the split in authority,

Courts have also disagreed over which evidentiary or “burden-shifting” standards to apply under summary judgment.<sup>231</sup> And, it still may be an open question whether § 2000e-2(m) comprises a separate statutory cause of action or purely elucidates the meaning—the coverage—of § 2000e-2, although the Supreme Court has suggested the latter.<sup>232</sup>

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the Ninth Circuit held, “Following the 1991 amendments, characterizing the evidence as mixed-motive instead of single-motive results only in the availability of a different defense, a difference which derives directly from the statutory text. . . .” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856 (9th Cir. 2002) (en banc), *aff’d on other grounds*, 539 U.S. 90; *see also, e.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009); *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003); *Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, 285 F. Supp. 2d 1180, 1195 (N.D. Iowa 2003); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 992 (D. Minn. 2003). Some courts, by contrast, have held that § 2000e-2(m) applies only to mixed-motive cases. *E.g.*, *Makky v. Chertoff*, 541 F.3d 205, 215–16 (3d Cir. 2008) (holding that a plaintiff who is not minimally qualified for the job is not entitled to mixed-motive instruction); *Ginger v. Dist. of Columbia*, 527 F.3d 1340, 1345 (D.C. Cir. 2008); *Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C. Cir. 2007); *Watson*, 207 F.3d at 218–20; *Fuller v. Phipps*, 67 F.3d 1137, 1141–42 (4th Cir. 1995); *cf. Davis v. City of Clarksville*, 492 F. App’x 572, 578 n.7 (6th Cir. 2012) (inferring that § 2000e-2(m) only applies to mixed-motive cases). Interestingly and convincingly, after careful review of applicable precedents, one noted scholar determined that this circuit split is more conceptual than practical:

It has been true virtually from the beginning that [Title VII] does not actually require a showing that discrimination is the “single motive” of the employer in order to establish liability. . . . So, the plaintiff never needs to prove that discrimination was the only motive or cause of the employer’s challenged action. That means that liability can be established in all Title VII cases with a showing that is less than sole cause.

Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1923 (2004). For what it is worth, this Article agrees with Professor Zimmer and adds only that even assuming there is an actual, sensible difference among plaintiffs’ Title VII claims, decisions limiting § 2000e-2(m)’s application to mixed-motive cases unduly restrain the reach Congress unequivocally intended that subsection to exercise.

<sup>231</sup> *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 397–401 (6th Cir. 2008) (detailing different federal circuit court’s respective rulings).

<sup>232</sup> In 2003, the Supreme Court inferred the existence of a discrete claim stating that § 2000e-2(m), “first establishes an alternative for proving that an ‘unlawful employment practice’ has occurred.” *Costa*, 539 U.S. at 94. Although possibly dictum, the Court more recently concluded that “§ 2000e-2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII.” *Nassar*, 133 S. Ct. at 2530; *see also Chavez v. Credit Nation Auto Sales, LLC*, No. 14-14596, 2016 WL 158820, at \*5, (11th Cir. Jan. 14, 2016) (accepting *Nassar’s* statement as a legal ruling). Professor Sperino sensibly denoted that portion of *Nassar* as “clarify[ing] the relationship between different portions of Title VII.” Sandra F. Sperino, *Beyond McDonnell Douglas*, 34 BERKELEY J. EMP. & LAB. L. 257, 261 n.34 (2013). Accordingly, § 2000e-2(m) may not be a separate cause of action, but rather a clarification that

This flurry of interpretive dilemmas, however, is irrelevant to the manifest significance of § 2000e-2(m) with regard to unequal burden theory.<sup>233</sup> The congressional report accompanying the legislation explicitly affirms that if enacted, § 2000e-2(m) would “restore the rule applied in many federal circuits prior to the *Hopkins* decision that *an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.*”<sup>234</sup> In that regard, § 2000e-2(m)’s legislative history is unequivocal and consistent: “[A]ny reliance on prejudice in making employment decisions is illegal.”<sup>235</sup>

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plaintiffs can prevail under § 2000e-2 without proving that animus was the but-for cause of defendants’ actions; although absent but-for causation, the plaintiff’s recovery is limited to noncompensatory relief. *See supra* note 229 and accompanying text.

<sup>233</sup> This Article agrees with Dean Van Detta that § 2000e-2(m) was born of Congress’s frustration with the problematic judicial tendency to limit, through unnecessarily complex interpretations, Title VII’s language explicitly outlawing nonexcepted employment discrimination. His cogent lament is worth fully quoting:

[E]ven if there could have been some debate about the full reach of Title VII, the Civil Rights Act of 1991 put an end to such debate. The legislative purpose of the law that gave us section 703(m) was clearly stated, although little recognized by many amici appearing before the Supreme Court in *Costa*. The Act’s purpose is “to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace” in response to the congressional finding that “legislation is necessary to provide additional protections against unlawful discrimination in employment.” This is the congressional equivalent of hitting the bench and bar about the head with a two-by-four. The haggling and nit-picking that the courts and commentators have engaged in, trying to maintain the iconic position of the 1973-1989 Supreme Court decisions, is most misplaced in the face of language of such sweeping breadth and expansive purpose. The legislative purpose laid out by Congress is quite obvious: to clear the litigation path for Title VII plaintiffs of the underbrush that the Supreme Court had planted and tended like some tangled, insular English garden.

Van Detta, *supra* note 18, at 124 (emphasis added) (footnotes omitted) (quoting Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2(3), 3(1), 105 Stat. 1071). Dean Van Detta’s rebuke likewise might be applied to the courts’ disagreement regarding the reach of § 2000e-2(m). Certainly, Congress intended the furthest possible range of application to realize Title VII’s first principle.

<sup>234</sup> H.R. REP. NO. 102-40(I), at 48 (1991) (emphasis added), *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (Committee on Education and Labor); *see also* Zimmer, *supra* note 230, at 1946 (quoting legislative history); *supra* notes 222–35 and accompanying text (quoting Supreme Court and lower court rulings that, pursuant to § 2000e-2(m), Title VII prohibits any nonexcepted discrimination motivated by animus against the any of the five protected classes).

<sup>235</sup> H.R. REP. No. 102-40 (II), at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, (emphasis added). Identically, the debate comments of one of Congress’s most respected members regarding civil rights, Massachusetts Senator Edward Kennedy,



Indeed, § 2000e-2(m)'s legislative history reaffirms Title VII's core point, "If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions."<sup>236</sup> Likewise, accenting the amendment's breadth, Congressman Fish assured his colleagues, "This legislation gives expression to our recognition that discriminatory practices must be discouraged regardless of whether they turn out to be outcome determinative."<sup>237</sup> Consistent with the history informing the original 1964 enactment,<sup>238</sup> nothing in these legislative statements evince in the slightest that Congress wished to allow the judiciary either to dilute or to limit § 2000e-2's ban against discrimination by excepting facially discriminatory policies under

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underscore Congress's intent to return Title VII to its first principle: "[A]ny reliance on prejudice in making employment decisions is illegal. . . ." 136 CONG. REC. 1655 (Feb. 7, 1990) (Sen. Kennedy's memorandum section entitled *Making Clear That Job Bias is Always Illegal*, introducing the Civil Rights Act of 1990). Five months later, Senator Kennedy accented, "As one of our legal experts testified, the [*Hopkins*] decision sent a message to employers that 'a little discrimination is OK.' The Civil Rights Act repairs that hole by affirming that the law is violated whenever discrimination contributes to an employment decision." *Id.* at 16,705 (statement of Sen. Kennedy). Many other legislators robustly endorsed Senator Kennedy's understanding. *See, e.g.*, 136 CONG. REC. 21,984 (statement of Rep. Traficant) ("If the *Price Waterhouse* decision is not overturned, then we send the message that there is nothing wrong with a little overt racism or sexism. . . . We must reaffirm the principle that title VII tolerates no discrimination."); *id.* at 21,993 (statement of Rep. Collins) ("[The bill] makes it clear that intentional discrimination is never acceptable, whether as a primary factor or otherwise."); 137 CONG. REC. 20,026 (Nov. 7, 1991) (statement of Sen. Dodd) ("[The bill] overturns the *Price Waterhouse* decision thus making any reliance on prejudice illegal."); *Id.* at 13,541 (statement of Rep. Cardin) ("The civil rights bill specifies that it is illegal for intentional discrimination to be any factor in the employment process."); *see also* Heather K. Gerken, Note, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824, 1843 n.104 (1993).

<sup>236</sup> H.R. REP. NO. 102-40 (II), at 18, reprinted in 1991 U.S.C.C.A.N. 694, at 711; H.R. REP. NO. 102-40 (I), at 47, reprinted in 1991 U.S.C.C.A.N. 549, 585-86 (Committee on Education and Labor).

<sup>237</sup> 137 CONG. REC. 30,667 (remarks of Rep. Fish). Representative Fish expressed the principle as a matter of justice, certainly one of Title VII's pivotal considerations: "The *Price Waterhouse* problem must be rectified because it is unjust for our courts to ignore reliance on discriminatory employment criteria simply because an employer can show that 'its legitimate reason, standing alone, would have induced it to make the same decision.'" *Id.* (emphasis added). *See generally* Gerken, *supra* note 235, at 1840-45 (discussing § 2000e-2(m)'s legislative history).

<sup>238</sup> *See supra* notes 111, 120 and accompanying text.

an unequal burden regime nowhere found within the Act. Rather, Congress reasserted in 1991 what it had directed in 1964: Because “discriminatory practices must be discouraged,”<sup>239</sup> any prejudice is unlawful except if it is allowed by a textual exception.<sup>240</sup>

Section 2000e-2(m), then, reasserts Title VII’s first principle that discrimination itself is redressable injury.<sup>241</sup> Neither

<sup>239</sup> See *supra* note 237 and accompanying text.

<sup>240</sup> Interestingly, “Both the Senate and the House rejected amendments [particularly one proposed by Senator Nancy Kassebaum (R. Kan.)] that would have strengthened the standard by requiring a showing that discrimination was a ‘major contributing factor’ for the hiring decision.” See Gerken, *supra* note 235, at 1844 (discussing the text of the Kassebaum Amendment, which expired on the floor without a vote); 136 CONG. REC. H6,784–85 (daily ed. Aug. 2, 1990) (rejecting the LaFalce-Michel-Goodling substitute). *But see id.* at S15,366 (daily ed. Oct. 16, 1990) (statement of Sen. Jeffords) (arguing that there is little difference between the terms “major contributing fact” and “motivating factor”). Technically, adoption of the Kassebaum Amendment would not diminish § 2000e-2(m)’s implicit repudiation of unequal burden theory because applicable grooming codes and their ilk are per se discriminatory, thereby more than satisfying the amendment’s proposed “major contributing factor” language. Nonetheless, rejection of that amendment evinces Congress’s refusal to see its statutory definition of discrimination either weakened or narrowed. Therefore, the Kassebaum Amendment’s demise bolsters the argument that through § 2000e-2(m), Congress reaffirmed Title VII’s “first principle” prohibiting all discrimination not expressly excepted by the Act’s text itself.

<sup>241</sup> Worth accenting in this regard is the forceful Supreme Court constitutional corollary, elucidated contemporaneously with the enactment of the Civil Rights Act of 1964 and completely consistent with the meaning of the subsequently enacted § 2000e-2(m), that discrimination itself—discrimination *qua* discrimination—is injurious per se. In a remarkably brief four pages, *Anderson v. Martin* invalidated Louisiana’s requirement identifying the race of candidates on election ballots, pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 375 U.S. 399, 401–02 (1964). Arguably, Louisiana’s law engendered an unconventional form of discrimination because all voters regardless of race were informed of the race of all candidates. *Id.* at 402. Thus, outwardly, neither candidates nor voters were disparately affected due to their respective races. Nonetheless, the Court stated:

[B]y placing at [sic] racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen’s attention to the single consideration of race or color, the State indicates that a candidate’s race or color is an important—perhaps paramount—consideration in the citizen’s choice, which may decisively influence the citizen to cast his ballot along racial lines. . . . *The vice lies . . . in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.*

*Id.* (emphasis added). The Court discerned no legitimate reason to offset the State’s discriminatory contrivance. *Id.* at 403 (“We see no relevance in the State’s pointing up the race of the candidate as bearing upon his qualifications for office. Indeed, this

§ 2000e-2(m)'s language nor its emphatic legislative history allows courts to construct within the Act realms of lawful discriminatory conduct that fails to satisfy an express textual defense or exemption.<sup>242</sup> Reestablishing what Congress understood to be Title VII's meaning when originally passed in 1964, § 2000e-2(m) tells us without hesitation or equivocation that because discrimination is itself an injury, the offending employer is obligated to remedy that injury even if indulging discriminatory animus was neither that employer's primary or but-for motive—indeed, even if discriminatory intent was the

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factor in itself 'underscores the purely racial character and purpose' of the statute."). Of great significance, the challengers did not have to prove that Louisiana's law actually influenced voters in any fashion. Rather, the State's introduction of race into the electoral process comprised the constitutional violation. *See Oregon v. Mitchell*, 400 U.S. 112, 252 (1970) (Brennan, J., dissenting) (noting that *Anderson* clarified that states cannot "encourage citizens to cast their votes solely on the basis of race"); *Rosen v. Brown*, No. 1:88CV2973, 1990 WL 384957, at \*3 (N.D. Ohio Nov. 7, 1990) (understanding *Anderson* to mean that states cannot turn official forms such as ballots into "a state-furnished vehicle through which prejudice may be aroused"). Likewise, in 1964, the Supreme Court substantively affirmed a three-judge district court ruling invalidating Virginia statutes that mandated, as a clerical matter, separating voter lists and property tax assessments by race. *Hamm v. Va. State Bd. of Elections*, 230 F. Supp. 156, 157 (E.D. Va.) (three-judge panel), *aff'd sub nom. Tancil v. Woolls*, 379 U.S. 19 (1964) (per curiam). Even assuming such existed, the *Hamm* court would not have been impressed by data showing no ill effects from the simple racially-based separation of inventories. Citing, among other things, *Anderson*, the judges reasoned:

[I]t [is] axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color. *To be within the condemnation, the governmental action need not effectuate segregation of facilities directly.* The result of the statute or policy must not tend to separate individuals by reason of difference in race or color.

*Id.* at 157 (emphasis added) (citation omitted). Although infrequently cited, recent Justices of arguably dissimilar legal philosophies have extolled *Anderson's* expansive understanding of official invidious discrimination as inherently injurious. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring); *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring in the judgment); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 186 (1977) (Burger, C.J., dissenting); *Beer v. United States*, 425 U.S. 130, 159 n.20 (1976) (Marshall, J., dissenting). When it enacted the Civil Rights Act in 1964, the very year that the Court delivered *Anderson*, Congress understood that discrimination in the private context, as in the governmental milieu, is injurious by definition. *Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). *See generally supra* note 41. The Civil Rights Act of 1991 generally and the portion encoded as 42 U.S.C. § 2000e-2(m) specifically simply but resolutely maintain the legacy of the 1964 Congress and Supreme Court. *See supra* notes 234–40 and accompanying text (discussing the legislative histories of Title VII, in general, and 42 U.S.C. § 2000e-2(m), in particular).

<sup>242</sup> 42 U.S.C. § 2000e-2(m) (2012).

least of its motivations.<sup>243</sup> This congressional principle of decency is at odds with any judicial doctrine that Title VII permits purportedly “reasonable,” non remedial discriminatory conduct.<sup>244</sup> Especially considering the breadth of coverage afforded under § 2000e-2(m), had Congress wished to constrain the Act’s comprehensive definition of unlawful discrimination by excluding non-BFOQ conduct that reviewing judges consider “reasonable,” it would have so stated explicitly.<sup>245</sup>

### C. *Dignity Theory Explains Why Disparate Grooming Policies Are Significantly Injurious*

The foregoing has presented essentially a text-based approach challenging the legitimacy of unequal burden theory. Still, while constitutionally required to respect explicit statutory texts and manifest legislative intent,<sup>246</sup> doubtless judges are duty bound as well to *judge*,<sup>247</sup> which includes eschewing “unthinking

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<sup>243</sup> *Id.*

<sup>244</sup> When necessary to alleviate *proven* discrimination, the Act expressly allows remedial measures based on otherwise forbidden criteria. § 2000e-5(g)(1); *see, e.g.*, *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421 (1986) (court ordered race-based affirmative action plans); *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 504 (1986) (holding that Title VII does not preclude “entry of a consent decree which provides relief that may benefit individuals who were not victims of the defendant’s discriminatory practices”); *United States v. Brennan*, 650 F.3d 65, 100–01 (2d Cir. 2011). Moreover, due to its remedial purposes, the judiciary properly has recognized a limited, albeit extratextual regime, of “voluntary affirmative action” without requiring employers and unions first to risk liability by declaring that the conditions to which an affirmative action plan is addressed constitute extant violations of Title VII. *See supra* note 161 and accompanying text.

<sup>245</sup> In that regard, it surely is significant that the only portion of the *Hopkins* decision Congress thought worth overturning was the holding that to be remediable, proven discrimination must have been the “but-for” cause of the defendant’s challenged conduct. Congress left untouched the *Hopkins* Court’s recognition that enforcing sex-based stereotypes can be unlawful even when the stereotyping concerns plaintiffs’ demeanor, appearance, dress, and comportment, which are apparently mutable characteristics—although the Court did not use that particular term. *See supra* notes 165–86 and accompanying text. Given that when enacting the Civil Rights Act of 1991, of which § 2000e-2(m) was a part, Congress took the extraordinary action of statutorily reversing in whole or part eight Supreme Court cases, *see supra* note 214, had it thought claims such as Ms. Hopkins were unreasonable and had it disagreed with the Court’s explicit reaffirmation that only BFOQs can justify discrimination, Congress would have so clarified in its amendments.

<sup>246</sup> *See supra* notes 107–11 and accompanying text.

<sup>247</sup> *See supra* note 17 and accompanying text.

obedience to literalism”<sup>248</sup> that would render an “absurd result.”<sup>249</sup> Such determinations, however, are not matters of either judicial discretion or judges’ policy preferences but rather questions of nice discernment tempered by the judiciary’s constitutional function to enforce the given statute as thoroughly as its meaning allows.<sup>250</sup> Consequently, courts understand that an absurd outcome is an “extraordinary consideration”<sup>251</sup> arising only when applications of the given text would seriously compromise that text’s underlying purposes, not when courts consider such applications to be poor policy. Therefore, as earlier accented, “It is well established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’”<sup>252</sup>

Pursuant to these rules of statutory interpretation, invalidating non-BFOQ sex- and race-based appearance rules is fully consistent with, indeed mandated by, Title VII’s antidiscrimination principle. Courts, then, cannot refuse to so enforce the Act even if they consider the resulting outcomes to be curious, silly, or even unnerving.<sup>253</sup> Rather, courts may only uphold non-BFOQ discriminatory grooming and comportment

<sup>248</sup> *United States v. Ivey*, 294 F.2d 799, 803 (5th Cir. 1961).

<sup>249</sup> *E.g.*, *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 411 (D.C. Cir. 2013); *United States v. Fernandez*, 722 F.3d 1, 10 (1st Cir. 2013).

<sup>250</sup> The Supreme Court recently had occasion to reinforce these standards of statutory interpretation in the contentious area of the Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010), legislation lacking the clarity of Title VII. Indeed, the Court referred to the ACA as “far from a chef d’oeuvre of legislative draftsmanship.” *King v. Burwell*, 135 S. Ct. 2480, 2493 n. 3 (2015) (quoting *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441–42 (2014)). *King* accented that reviewers must not construe statutory provisions in isolation but rather, while the discrete language of each portion is informative, the statute must be understood as a statute, meaning, to the extent feasible, as an integrated whole. *Id.* at 2489. Reference to “context” is essential whether to salvage clarity from ambiguous text or to confirm the apparent clarity of the reviewed text. *Id.* at 2489, 2494. Avoiding absurd results certainly is a contextual aspect of statutory enforcement.

<sup>251</sup> *Fernandez*, 722 F.3d at 10.

<sup>252</sup> *Tista v. Holder*, 722 F.3d 1122, 1126 (9th Cir. 2013) (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)) (internal quotation marks omitted); *see also, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *supra* notes 107–11 and accompanying text (discussing courts’ duties to enforce statutes as written).

<sup>253</sup> *See Doe v. Dep’t of Veterans Affairs of U.S.*, 519 F.3d 456, 461 (8th Cir. 2008).

directives to preclude an absurd outcome. Accordingly, this writing now turns from the compelling textual arguments against the unequal burden doctrine to proof that applying the Act's first principle to invalidate discriminatory dress and appearance rules is not absurd.

As a threshold point, contrary to the en banc Ninth Circuit's patently misplaced concern, abrogating grooming rules, or *any* employment policy for that matter, would not, indeed *could not*, be based on a Title VII standard "that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image . . . create[s] a triable issue of sex discrimination."<sup>254</sup> Rather, *plaintiffs must plead and prove disparate treatment based on a statutorily prohibited criterion* not only to win, but also at the initial pleading stage to state a colorable claim sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Likely plaintiffs often are motivated to sue pursuant to, and in vindication of, their own "self-image." But it is immaterial whether they sue to obtain justice under Title VII, to attain personal satisfaction, out of pure orneriness, on a dare, to indulge the most conceited and eccentric of "self-images," or for some other reason no matter how evidently sensible or seemingly peculiar. So long as they plausibly can aver and subsequently prove that the challenged appearance policy is race or sex-based, plaintiffs have good-faith causes of action that, if procedurally sound, should succeed unless defendants establish a BFOQ.

Therefore, complaints must suitably allege that the employer's offending policies discriminate based on one or more of Title VII's forbidden criteria.<sup>255</sup> Plaintiffs cannot simply claim that the challenged employment rules abstractly are "personally offensive."<sup>256</sup>

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<sup>254</sup> *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

<sup>255</sup> *Id.* at 1112–13.

<sup>256</sup> *Id.* at 1112. While sympathetic to the concept, this Article does not herein advocate for a "freedom of dress" as does Professor Ramachandran, wherein individuals might have viable claims based on the assertion that employers have no presumed authority to compel employees to comport with the employers' grooming preferences regardless of whether those grooming preferences discriminate against any statutorily protected class. See Ramachandran, *supra* note 22, at 23; see also *supra* notes 22–23 and accompanying text. Title VII's text, design and policy provides sufficient bases to disprove the grooming cases reliance on an unequal burden theory. However, as a general matter, this author supports the argument

More importantly, again contrary to prevailing judicial perceptions, individuals' choice of dress, grooming, and other indicia of appearance are not trivial decisions, but rather are worthy of respect. As earlier explained, although discrimination commonly adversely affects victims' economic and professional statuses, the Act prohibits as well criteria, standards, or practices that insult, demean, stigmatize, humiliate, or similarly harm employees and employment applicants.<sup>257</sup> The theory is straightforward: Absent BFOQ, employers may not use their status and power to impose the harm of discrimination, not because the harm injures a protected class, but because the harm injures discrete individuals due to their membership in the particular protected class. Ownership or management of an enterprise no longer entails authority to deny the unique personhoods—the “self-images,” to borrow the Ninth Circuit's term<sup>258</sup>—of each worker insofar as that unique “self-image” is linked to race, sex, color, national origin, and religion.<sup>259</sup>

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that Congress may proscribe employment discrimination but may not limit protection from such discrimination to a handful of special classes even if those classes endure the most persistent and most common forms of discrimination. *See*, Bayer, *supra* note 33. In that regard, employees and applicants would enjoy “freedom to dress” when employers' regulations arbitrarily limit such freedom.

<sup>257</sup> As illustrated *supra* in notes 190–92, 201 and accompanying text, a prominent example is hostile environment harassment based on the proposition that, even absent “tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a [hostile] work environment . . . offends Title VII's broad rule of workplace equality.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). Indeed, the first such Supreme Court decision explained that Title VII proscribes sexual harassment because, among other things, it is “demeaning and disconcerting.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), *quoted in* *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 757 (8th Cir. 2003).

<sup>258</sup> *See supra* note 254 and accompanying text.

<sup>259</sup> Thus, for example, Price Waterhouse could not deny Ann Hopkins promotion to partnership based on her singular combination of personal traits that led some partners to consider her to be mannish and unfeminine. *See supra* notes 165–86 and accompanying text. Equally, Sundowner Offshore Services, Inc. violated Title VII by allowing Joseph Oncale's coworkers, an entirely male work force, to harass him due to their perception that the particular amalgam of behaviors comprising his comportment rendered Mr. Oncale inappropriately womanly and seemingly homosexual. *See supra* notes 196–200 and accompanying text.

Thus, applying the established moral philosophy particularly widespread in contemporary civil rights judicial opinions,<sup>260</sup> Title VII protects the personal *dignity* of employees and employment applicants.<sup>261</sup> Indeed, an early decision striking a male-only hair-length policy expressed the idea with appropriate passion:

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<sup>260</sup> See Bayer *supra* note 33, at 370–403 (discussing the moral underpinnings of constitutional civil rights).

<sup>261</sup> As the Federal Circuit properly explained, “The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.” King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994), *quoted in* Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir.), *abrogated on other grounds by* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), and Torres v. Pisano, 116 F.3d 625, 632, n.7 (2d Cir. 1997). Similarly, Justice Souter recognized, “There are definite parallels between, say, a defamation action, which vindicates the plaintiff’s interest in good name, and a Title VII suit, which arguably vindicates an interest in dignity as a human being entitled to be judged on individual merit.” United States v. Burke, 504 U.S. 229, 247 (1992) (Souter, J., concurring) (implicitly overturned by the Civil Rights Act of 1991). Recently, the EEOC accented the link between Title VII and human dignity in an EEOC decision invalidating a Department of the Army decision forbidding a transgendered female from using the womens’ restrooms and requiring, instead, that she use a unisex washroom that accommodates only one person at a time. Lusardi v. McHugh, E.E.O.C. Dec. 0120133395 (E.E.O.C.), 2015 WL 1607756 (Apr. 1, 2015). The EEOC concluded:

But the harm to the Complainant goes beyond simply denying her access to a resource open to others. The decision to restrict Complainant to a “single shot” restroom isolated and segregated her from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect ... The Agency’s actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant’s very identity. Treatment of this kind by one’s employer is most certainly adverse.

*Id.* at \*10 (footnote omitted) (citations omitted).

*Dignity*, identically, has become the overarching concept informing constitutional due process of law, both generally and as manifested in specifically enumerated rights. *E.g.*, Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (noting that the Eighth Amendment’s protection is understood in terms of “the Constitution’s protection of human dignity”); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (holding that section 3 of the Defense of Marriage Act is unconstitutional because it “interfere[s] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power”); Kitchen v. Herbert, 755 F.3d 1193, 1213 (10th Cir. 2014) (invalidating Utah’s ban on same-sex marriage and accenting the connection between substantive due process and the dignity of marital relationships). See generally Bayer, *supra* note 33, at 391–96.



When this Nation was settled it was hoped that there [would] be established a society where every individual would be judged according to his ability rather than who his father was, or what foreign land his family came from, or which part of town he happened to live in, or what the color of his skin was. . . . The Civil Rights Act of 1964 was born of that hope. Although the legal technicalities are many, the message of the Act is clear: every person is to be treated as an individual, with respect and dignity.<sup>262</sup>

Accordingly, Title VII confounds “import[ing] into the workplace the prejudices of the community”<sup>263</sup> for “an employee’s dignity might require standards higher than those of the street.”<sup>264</sup> Surely these astute and prudent observations are consistent with, indeed integral to, Title VII’s first principle proscribing all but textually excepted discrimination. Borrowing the Federal Circuit’s phrasing, although Title VII’s words accord no such exemption, unequal burden theory permits employers to “import into the workplace the prejudices of the community,”<sup>265</sup> thus affronting the dignity of workers and job applicants who wish nothing other than to earn an honest living without betraying their personhoods to assuage the class-based prejudices of their employers.

### 1. Dignity Requires Treating Persons as “Ends,” Not “Simply as a Means”

The question becomes: What is “dignity?” Although subject to varying definitions, this Article urges that *dignity* is best exemplified by the moral theory of the noted Enlightenment philosopher Immanuel Kant. Specifically, this Article joins the many that embrace “Kantian ethics,” meaning understanding and applying the overarching moral philosophy espoused by Kant rather than implementing “Kant’s ethics;” that is, the outcomes Kant himself likely would claim emanate from using his general

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<sup>262</sup> *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 666 (C.D. Cal. 1972) (holding that employer’s male-only hair-length rule violated Title VII); *see also* MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION LAW AND LITIGATION* § 2:44 (“Denial of job opportunities also results in a denial of dignity and political and economic empowerment.”).

<sup>263</sup> *Hillen*, 21 F.3d at 1582.

<sup>264</sup> *McCowan v. Software Spectrum, Inc.*, No. 08-00-00077-CV, 2002 WL 505138, at \*10 (Tex. App. Apr. 4, 2002). *See generally supra* notes 135–45, 261 and accompanying text.

<sup>265</sup> *Hillen*, 21 F.3d at 1582.

moral schema to resolve discrete scenarios.<sup>266</sup> While worthy of fuller explication,<sup>267</sup> his ideas may be summarized acceptably. Kant argued that all persons possess innate, immutable “dignity” derived from humankind’s unique, perhaps divinely bestowed, capacity to seek and to discern moral truth *through reason*.<sup>268</sup> Because morality is comprised of immutable, transcendent truth, the correct moral answer is not a matter of, to use the prevailing term, “striking a balance” to attain some perceived best available outcome.<sup>269</sup> Rather, as noted, the correct moral answer must be discerned from reason regardless of the resulting outcome for any answer based on either choosing a preferred outcome or avoiding a disfavored result merely reveals the personal preferences of either the commentator or some person or group discussed in the commentator’s analysis.<sup>270</sup>

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<sup>266</sup> See Bayer, *supra* note 33, at 347–48 (explaining the difference between “Kantian ethics” and “Kant’s ethics”).

<sup>267</sup> See *id.* at 346–58. See also Peter Brandon Bayer, *The Individual Mandate’s Due Process Legality: A Kantian Explanation, and Why It Matters*, 44 LOY. U. CHI. L.J. 865, 896–912 (2013), for a more complete elaboration of Kant’s theory of morality and dignity.

<sup>268</sup> Kant was a deontologist; that is, he believed that moral principles are *a priori*, thus preceding the existence of humankind. Consequently, morality and its applications to discrete situations are not humanly created but rather derive from reason. See Bayer, *supra* note 267, at 888–96; see also Bayer, *supra* note 33, at 293–321 (defining terms and explaining why deontology rather than utilitarianism—also known as consequentialism—correctly explicates morality). As explained in the above-cited works, morality must be deontological rather than based on utilitarian or consequentialist theories that the morally correct resolution of a problem is the one that yields the greatest aggregate happiness or satisfaction. The very short but compelling reason is that a philosophy of morality predicated on what engenders the greatest happiness can only prove what all, most, or some people want. Such philosophy cannot prove that what people want in fact is moral except by the fiat of *defining* morality as some measure of aggregate happiness. Empirically establishing popular preferences alone is not enough to prove *why* those popular preferences are moral. For example, no matter how purportedly sophisticated, any system of morals dependent on collective happiness renders slavery, rape, and concentration camps moral *if* the happiness they engender either generally, or for certain designated individuals or groups, exceeds the misery they cause either generally, or for certain designated individuals or groups. Unless one believes those abhorrent practices are made moral through popular acclamation, proving the immorality of slavery, rape, and concentration camps must stem from the only possible alternative: deontology’s precept that morality is transcendent, apolitical, universally applicable, and not a human invention.

<sup>269</sup> See Bayer, *supra* note 33, at 321.

<sup>270</sup> See *supra* note 268 and accompanying text. Therefore, although their conclusions regarding the rightness vel non of regulating dress, grooming and comportment may be correct, critics who espouse the balancing inherent in consequentialism fail to provide an objective, impartial basis to debunk the unequal

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burden theory. For instance, in support of her theory of "freedom of dress," Professor Ramachandran stated:

[T]he exercise of certain fundamental rights by workers must at least be balanced against market forces and employer preferences, given that we spend such a great deal of time at work and given that, after all, we are balancing one right against another, such as property versus speech, contract versus speech, or property versus privacy. When weighing property and contract rights against other rights, a balance must be struck.

Ramachandran *supra* note 22, at 50–51 (footnote omitted). Professor Ramachandran's statement *sounds* reasonable until one notices that she does not sufficiently explain how to perform the purported balancing of rights. Professor Ramachandran argues eloquently about the link between personal appearance and the individual's core sense of self. *Id.* at 30–61. Upon that analysis, she urges a familiar position that employers ought not have the authority through grooming rules to require employees to betray their individual selves unless those rules are necessary to maintain "core job functions and the core goals of the enterprise in question" which, interestingly, she refers to as "unduly burden[ing] the industry as a whole." *Id.* at 62. She posits, therefore, that while restaurateurs *rationality* might want waitstaff to wear prescribed uniforms, absent proof of "core job functions," rationality alone is insufficient to justify imposing such uniforms that could well impinge on employees' self-definitions. Professor Ramachandran supposes, perhaps not illogically, that over time customers would not find it odd that waitstaff provide their services while wearing clothing of their choice. *Id.* at 63. Her suppositions may be empirically correct, but, her "balancing" approach does not really explain why the employers' sense-of-self enforced by requiring waitstaff to wear uniforms is less important than the waitstaff's sense-of-self except that the employer's livelihood is not truly dependent on waitstaff wearing uniforms, and possibly the argument that the preferences of the many should surpass the preferences of few. The purported right of employees to demand that the employer change her employment preferences to preserve the employees' self definitions is not self-evident as contrasted with the purported right of the employer to fulfill *her* self-definition by directing every aspect of her business.

In support of her position that rights compete and must be balanced, Professor Ramachandran analogizes a right to housing that implies a corresponding right of, say, an African-American individual to move into a neighborhood even if the present homeowners do not want African-American neighbors. *See id.* at 51–52. Yet, it is unclear why the accumulated preferences of the bigoted white residents ought not trump the desire of the African-American would-be purchaser. To highlight this point, it is worth noting that meaningful enjoyment of a home often concerns becoming part of the social life of the neighborhood. Therefore, suppose bigoted white homeowners refuse to invite their new African-American neighbor to their parties, barbecues, and similar gatherings. It is unclear how Professor Ramachandran's balancing approach can tell us whether and why the African-American resident's annoyed white neighbors may or may not ostracize her from participation in community social gatherings. Balancing cannot resolve whether the "right" to live in a community trumps or falls to the privacy-based "right" to socialize with whom we please because the only things that can be "balanced" are the degrees to which the balancer likes or dislikes various outcomes. We might claim that we are balancing the intensity of the respective interests of the various parties; but, performing the balance means that we have to do one of two things. First, we can discern the intensity of each party's preferences without judging those preferences and perform a simple mathematical calculation. If the total intensity of the bigoted

Of course, persons are imperfect; therefore, their capacities to fully comprehend morality are imperfect. However, it is the capacity, not the actuality, of either striving for or attaining correct moral judgment that renders persons dignified.<sup>271</sup>

Because human dignity arises from the facility to be moral, rather than actual moral comportment itself, persons are entitled to respect, meaning they must be treated in ways that do not

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neighbors is greater than the intensity of the African-American resident, the neighbors win; if not, the resident wins. Thus, the moral answer according to the foregoing process is, as consequentialism supposes, a function of empiricism. That does not seem like a worthy moral basis for, as noted, such balancing would justify *anything*. Alternatively, the balancer can decide whose preferences *she thinks* are more laudable, thus worthy of enforcement, which, of course, is a subjective judgment on the balancer's part. To illustrate, let us presume, as may be likely, that among the numerous alternatives, the balancer adopts two propositions: (1) The right of the African-American individual to move into the white neighborhood outweighs all the bigoted white homeowners' preferences for racial exclusivity; but, (2) those homeowners' personal privacy interests in choosing friends and lovers allow them to exclude the African-American resident from their private social functions, such as backyard parties. When asked, the balancer says that she believes those two propositions together comprise the right balance, but we must then inquire, "Why?" She might state that the first proposition involves the homeowners' *property* rights while the second proposition concerns something more substantial, their *personal* right to choose friends. However, such labeling is not highly informative because it is hardly clear that *property* rights are less momentous than *personal* rights, or that indeed property interests do not involve personal concerns and *vice versa*, as the issue of community social interaction demonstrates. The white homeowners may aver that their personal interests, preferences and identity are served by neither living near nor having to associate with minority individuals. The African American may say that her self identity is demeaned if, due to her race, she is excluded from both neighborhoods and local, private social events held within those neighborhoods. It is not clear why a commentator would conclude that the African American may not be demeaned through the denial of housing but may be demeaned through exclusion from social events. The labeling of the former as sounding in a property right and the latter as sounding in a privacy right provides no explication. Accordingly, if the commentator responds, "Based on my life's experience and study, this is the balance that makes me feel best," we must demand a more *objective* analysis—her impartial, detached, objective bases underlying her chosen balance. We insist that she *justify* her feelings with something other than her feelings themselves. We need to understand the logic that led her to conclude that the bigoted neighbors have no moral authority to prevent minority individuals from purchasing homes but have the moral authority to demean those individuals by excluding them from parties and similar social functions linked in whole or part to neighborhood residency. Thus, a meaningful answer cannot be found in a balancing of personal preferences masked as an impartial study of conflicting rights. Rather, the solution must lie in some proposition of moral human behavior that is absolute, that, as Kant rightly taught, stems from reason completely unmoored from the sum of subjective predilections vindicated by the balancing process.

<sup>271</sup> See Bayer, *supra* note 33, at 348–53.

compromise their intrinsic dignity regardless of how they actually behave.<sup>272</sup> Accordingly, every individual has an affirmative, immutable duty to treat all others in a dignified fashion plus a corresponding immutable right to be so treated by all others.<sup>273</sup>

The next matter is: How does one person respect the dignity of another? Kant notably espoused two applicable, essential formulae he called categorical imperatives.<sup>274</sup> The first holds, "Act only on that maxim through which you can at the same time will that it should become a universal law."<sup>275</sup> Put perhaps too simply, the first categorical imperative echoes the Golden Rule; that is, your behavior towards others should be based on standards applicable to all similarly situated persons. Accordingly, if in response to Smith's action, Jones takes another action, then equally Smith, or any person, should be able to take the action Jones took if Jones, or any similarly situated person, performs the action Smith took.<sup>276</sup>

The first categorical imperative is necessary but insufficient because while it eliminates hypocrisy, it does not assure that any given "maxim" is a *moral* "universal law."<sup>277</sup> Thus, we need more;

<sup>272</sup> See *id.* at 350–51.

<sup>273</sup> See *id.* at 353–56. Indeed, such is the primary philosophical basis for the U.S. Constitution's Bill of Rights, particularly its general guarantee of due process of law. See *id.* at 358–69 (discussing Kant's third categorical imperative that to assure moral order, persons must form societies controlled by overarching governments predicated on preserving human dignity); *id.* at 370–403 (discussing American constitutional law as an example of Kant's third categorical imperative). In fact, the revered American jurist and legal theorist Benjamin Cardozo "may have been correct to say: 'Our jurisprudence has held fast to Kant's categorical imperative . . . . We look beyond the particular to the universal, and shape our judgment in obedience to the fundamental interest of society that contracts shall be fulfilled.'" Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1615 (2013) (alteration in original) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 139–40 (1921)).

<sup>274</sup> See Bayer, *supra* note 33, at 353–54.

<sup>275</sup> See *id.* at 354.

<sup>276</sup> For example, if Smith hits Jones because Jones insulted Smith, then Smith can have no moral objections if Jones hits Smith should Smith comparably insult Jones.

<sup>277</sup> "The first formulation lacks a common neutral basis to judge whether the proposed universal maxim *is* moral." Bayer, *supra* note 33, at 355. For instance, referring to the situation in note 276, Smith meets the first categorical imperative if she believes not only that she may hit persons who insult her but also that she rightly may be hit by anyone she similarly insults. See *supra* note 270. In that way, Smith has not carved out a special moral rule for her own benefit that others may not use against her. Smith's commendable rejection of duplicity, however, does not

indeed, the essence of Kantian morality is found in the acclaimed second categorical imperative, “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”<sup>278</sup> As that somewhat esoteric quote logically informs, it is not per se immoral to treat persons as “means.” Indeed, human exchanges are predicated on individuals and groups giving and receiving benefits. Rather, persons cannot treat others “simply”—only—as “means.” Persons must respect the dignity of those with whom they interact by treating others as “end[s]” in themselves.<sup>279</sup> “As Professor Kutz compellingly invoked, ‘[Using] a person [solely] [for another’s gain] does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.’”<sup>280</sup>

Accordingly, during our interactions, we respect the dignity of others—treat them as ends—by not *objectifying* them, meaning we do not regard them as though they were inanimate objects existing only for the use and pleasure of whoever controls them.<sup>281</sup> The application to Title VII is evident: When discrimination is based on BFOQs, employers respect the dignity of employees.<sup>282</sup> The clear reason is that no person reasonably may expect to be hired if she is incapable of performing the given work. Rejecting unqualified applicants, then, is not using them inappropriately, as though they were inanimate.<sup>283</sup> Similarly,

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prove that her principle—insults may be met with battery—is morally correct. All that Smith has shown is that she willingly allows her “maxim” regarding insults to be applied as a “universal law” applicable to all similarly situated others.

<sup>278</sup> See KANT, *supra* note 38, at 96.

<sup>279</sup> Bayer, *supra* note 272, at 899–903; see Bayer *supra* note 33, at 354–55.

<sup>280</sup> Bayer, *supra* note 33, at 355–56 (alterations in original) (quoting Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235, 256 (2007) (quoting ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974)).

<sup>281</sup> See *id.* at 354–58. We morally may use, even abuse, equipment and similar impassive objects for they have no soul, no dignity, and no sense of self. Logically, the immorality of abusing without permission somebody else’s object—property—is not that we have affronted the object, but that the abuse affronts the other person whose legitimate interest in the object should be respected.

<sup>282</sup> See *supra* notes 133, 261 and accompanying text.

<sup>283</sup> A classic example is a police undercover operation in which the race or sex of the infiltrating officer is essential to success. *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (dictum). For instance, law enforcement might use a Caucasian agent to infiltrate a “White supremacist” organization. Under that circumstance, a non-Caucasian officer’s dignity has not been demeaned because, due

refusing to hire or to promote someone solely because she is not the most qualified available applicant may aggravate and sadden her. However, because maximizing efficiency is a legitimate business concern, she has no principled expectation to be preferred over a better job candidate. Choosing the better applicant is classically, under Title VII, a "legitimate, nondiscriminatory reason" evincing that, in fact, the given employer's decision was not based on an impermissible criterion.<sup>284</sup>

In sum, absent BFOQs, employers have no moral justification to discriminate, which is exactly as Congress intended.<sup>285</sup> Therefore, employers indulging non-BFOQ personal or customer *discriminatory preferences* treat employees no better than objects that exist uniquely for the gratification of those employers and their patrons. By imposing bigoted predilections—stereotypes—that are not essential to business

to her race or color, that officer simply could not perform the presumably legal and legitimate job of infiltrating the racist group. Accordingly, the non-Caucasian officer has no moral expectation—could not rationally agree—that race is an illegitimate consideration regarding such undercover work. Thus, refusing to consider the non-Caucasian officer to be the infiltrator does not render her an implicit object to be used for the gratification of her employer.

<sup>284</sup> *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Of course, efficiency is not a sufficient basis to justify *actual* employment discrimination, such as refusing to hire men who wear long hair. *See supra* notes 133–46, 261 and accompanying text (discussing the BFOQ defense).

<sup>285</sup> Left for another article is the compelling question whether in the first instance, civil rights laws are immoral, and thereby unlawful. One might argue that the government treats persons, even corporate individuals, as objects—as mere means—by depriving them of the opportunity to use their own property to gratify personal prejudices. After all, we allow persons to discriminate on virtually any arguably arbitrary basis in other instances of intimate human interaction, such as the selection of friends and lovers. Indeed, it may be a violation of the Due Process Clauses and the First Amendment for government to compel personal interrelationships. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) (holding that the use of a state public accommodations law to require participation in a privately sponsored parade on public thoroughfare of an unwelcome group advocating for rights of homosexual and bisexual individuals violated the First Amendment). Therefore, one might wonder whether moral arguments demonstrate that, even with good intentions, government may not outlaw employment discrimination. For now, this Article presumes what likely is the correct conclusion: Civil rights acts, such as Title VII, are moral statutes that do not treat violators only as means, not as ends in themselves. *Cf. Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 537 (1987) (finding that California's public accommodations civil rights law did not violate the First Amendment by requiring a private organization of businessmen, the Rotary Club, to admit women as full members).

operations, businesses demean and humiliate individuals by forcing them to accept the indignity of discrimination as the price of employment. If there is no BFOQ, the employer cannot treat employees merely as means—tools or objects—to gratify unnecessary discriminatory predilections. *By logical extension, because it legalizes such non-BFOQ discrimination, unequal burden theory defies the moral philosophy of Title VII by allowing employers to treat employees and applicants merely as conduits through which employers exercise their discriminatory preferences.*

## 2. The Indignity of Non-BFOQ Grooming and Comportment Rules

Because they offend the dignity of workers and employment applicants, non-BFOQ appearance standards predicated on any of the Act's five forbidden criteria are unlawful per se. Nonetheless, to underscore that such literal applications of Title VII's text are not absurd,<sup>286</sup> this Article briefly explains the link between human dignity and grooming. Indeed, even courts embracing the unequal burden doctrine recognize that, in some instances, dress and appearance rules can be unduly, thereby unlawfully humiliating.<sup>287</sup> A particularly strong example is *Carroll v. Talman Federal Savings & Loan Ass'n of Chicago*,<sup>288</sup> which struck the defendant-bank's rule allowing male employees to choose their own work-appropriate attire but requiring "female employees . . . to wear [clothing] . . . selected from what the employer euphemistically referred to as a 'career ensemble.'"<sup>289</sup> Because Talman presumed that women are too untrustworthy and immature to select their own businesslike attire, the Seventh Circuit concluded, "[T]he disparate treatment is demeaning to women."<sup>290</sup> Several courts have followed *Carroll's* rationale,

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<sup>286</sup> As noted, the unequal burden doctrine would be lawful if it averted "absurd" applications of Title VII. See *supra* notes 247–52 and accompanying text.

<sup>287</sup> See *supra* notes 76–90 and accompanying text.

<sup>288</sup> 604 F.2d 1028 (7th Cir. 1979).

<sup>289</sup> See Bayer, *supra* note 4, at 867 n.359 (discussing *Carroll*, 604 F.2d at 1033).

<sup>290</sup> *Carroll*, 604 F.2d at 1032–33. The court explained, "While there is nothing offensive about uniforms per se, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes." *Id.* at 1033. Indeed, the deeply incensed Seventh Circuit avowed that it would have struck the "career ensemble" scheme had only one of Talman's female employees



particularly when the prescribed grooming or appearance standard is sexually demeaning, provocative, or invites sexual harassment.<sup>291</sup>

Consistent with Title VII's antidiscrimination principle is the substantial link between individual appearance and individual identity.<sup>292</sup> Specifically, "Our appearances are a symbolic representation of our self-concepts and convey messages

found the policy offensive enough to warrant a lawsuit. *Id.* Perhaps predictably, seeking to salvage precedents such as the male-only hair-length decisions, the Seventh Circuit accented that the sex-based humiliation in *Carroll* is not acceptable in current society, thus it is more than Title VII allows employers to impose. By contrast, "[s]o long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women." *Id.* at 1032. The *Carroll* court's attempted distinguishing is, as the judiciary often says, a "distinction without a difference." *E.g.*, *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). Indeed, *Carroll* does not demonstrate that Talman Bank's "career ensemble" for women actually offends "commonly accepted social norms." It would not be surprising if sentiments *circa* 1979 found such sex discrimination acceptable or no more than mildly intrusive. One can easily imagine the prevailing opinion to be that the issue is only about clothes during work, and the women should "lighten up." Furthermore, this Article has debunked the idea that Title VII does not forbid discriminatory standards, even those evoking "commonly accepted social norms . . . reasonably related to the employer's business needs." Rather, such commonly are precisely the stereotypes that Title VII proscribes.

<sup>291</sup> *See, e.g.*, *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1038 (8th Cir. 2010) (finding that a female employee who was deemed not pretty enough in a "Midwestern girl" sense stated a claim under Title VII); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 & n.7 (9th Cir. 2001) (noting that male-on-male harassment based on sexual stereotyping was unlawful but that generally reasonable sex-based dress and grooming standards were not necessarily unlawful under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (reasoning that the refusal of a bank to provide a cross-dressing male with a loan application unless he wore male-appropriate attire could be a violation of the Consumer Credit Protection Act, 15 U.S.C. § 1691(a)); *Knox v. Donahoe*, No. C-11-2596 EMC, 2012 WL 949030, at \*6 (N.D. Cal. Mar. 20, 2012) (holding that local postal service office's attire-rule directed solely at plaintiff did not result in unlawful sex-based humiliation); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609 n.15 (S.D.N.Y. 1981) (finding that sexually provocative uniform for females humiliating and caused harassment).

<sup>292</sup> Because dignity herein is a function of personal identity, a brief definition of "identity" is useful. "[I]dentity . . . can [be] define[d] as the particular values, beliefs, and aspects of our selves that we deem so important we consider them self-defining. Our aversions, desires, beliefs, and choices all make up our identity, but our identity in turn then affects our aversions, desires, beliefs, and choices." Ramachandran, *supra* note 22, at 32 (emphasis omitted) (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, 195–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977)). Of course, any individual's choice of identity comes from some combination of genetic and societal influences.

to others about how we would like to be perceived.”<sup>293</sup> The significance of pride and self-respect attained through preferred modes of appearance is difficult to exaggerate.<sup>294</sup> Professor Tirosh offered charmingly, “Like the meaning of a poem, I suggest, appearance is not a reflection of identity, but a part of finding, making, and maintaining an identity.”<sup>295</sup> Professor Tirosh’s invocation of poetry is superbly apt for the idea of *poetic* depicts things sentimental yet pragmatic, lyrical but stark, romantic still possibly banal, whimsical if nonetheless profound—all the consistency and contradictions that, through choice or happenstance, render each of us unique.<sup>296</sup>

As much as our taste in friends and lovers, politics and partialities, careers and diversions, choice of personal appearance expresses our discrete distinctiveness. Thus, there is a particularly acute bond between our conceptions of our true personae and the outward manifestation we create for ourselves. Even if seemingly careless and random, our clothing, grooming,

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<sup>293</sup> May Ling Halim et al., *Pink Frilly Dresses and the Avoidance of All Things “Girly”: Children’s Appearance Rigidity and Cognitive Theories of Gender Development*, 50 DEVELOPMENTAL PSYCHOL. 1091, 1091 (2014). Similarly, nearly thirty-five years ago, commentators concluded, “A hair style . . . is one of the most visual examples of personality. To prevent the individual’s expression of preference would be to offend a widely shared concept of dignity.” John D. Ingram & Ellen R. Dumph, *The Right To Govern One’s Personal Appearance*, 6 OKLA. CITY U. L. REV. 339, 354 (1981). Justice William O. Douglas, a revered champion of individual liberty, likewise captured the importance of grooming and individuality:

I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtailed. But the ideas of ‘life, liberty, and the pursuit of happiness,’ expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncrasies to flourish, especially when they concern the image of one’s personality and his philosophy toward government and his fellow men.

*Ferrell v. Dall. Indep. Sch. Dist.*, 393 U.S. 856, 856 (1968) (Douglas, J., dissenting) (disagreeing with the denial of certiorari to review the Fifth Circuit’s upholding of a public school’s policy disciplining male students who wear long hair); *accord* *Bishop v. Colaw*, 450 F.2d 1069, 1074 (8th Cir. 1971) (striking public high school’s hair-length restrictions applicable only to male students).

<sup>294</sup> See, e.g., Halim, *supra* note 293; Ramachandran, *supra* note 22, at 41–42.

<sup>295</sup> Tirosh, *supra* note 21, at 60.

<sup>296</sup> See *id.* at 57 (“The analogy to poetic language is helpful here because it enables us to recognize that appearance is never just appearance; it is never a matter of form and not content, an external and insubstantial issue. The language of poetry functions not merely to deliver information or develop an argument. Rather, it is a language that calls attention to itself. In poetry, the medium is inseparable from the meaning.”).

makeup, bearing, stance, intonations, and other modes of appearance evince intensely personal choices alerting the world how we deem ourselves to be distinctive, conforming, or, more likely, a blend of both:

Clothes, and other aspects of personal appearance, help us negotiate the need to conform to the group and the need to express ourselves as individuals . . . As such, [appearance, particularly clothing,] is the place where we form and reform an identity that is both individual and part of a community or subculture.<sup>297</sup>

Similarly, scholars note the inexorable link between personal grooming and *group* identity.<sup>298</sup> It is hardly revelatory that groups of various kinds—racial, religious, ethnic, political, social, or other types—indoctrinate new members and maintain established loyalties through often intricate frameworks of norms, principles, customs, and practices including appearance and comportment rules.<sup>299</sup> Indeed, such indoctrination begins very early in life.<sup>300</sup>

It is hardly surprising, then, that individuals judge themselves and are judged by others based on varying concepts of how group members should or should not comport themselves, particularly regarding dress, grooming, and other displays of appearance. This predominant propensity is particularly acute

<sup>297</sup> Ramachandran, *supra* note 22, at 41–42 (emphasis omitted).

<sup>298</sup> “Sociologists, psychologists, anthropologists, and cultural theorists have long recognized that fashion and other forms of manipulating appearance play a unique role in the development of the individual as a member of society—the negotiation and formation of the public self.” Ramachandran, *supra* note 22, at 15; *see also, e.g.*, Scott A. Hunt & Kimberly A. Miller, *The Discourse of Dress and Appearance: Identity Talk and a Rhetoric of Review*, 20 SYMBOLIC INTERACTION 69 (1997); Tirosh, *supra* note 21, at 57.

<sup>299</sup> *See, e.g.*, SHARON R. KRAUSE, LIBERALISM WITH HONOR 4, 28 (2002); FRANK HENDERSON STEWART, HONOR 47 (1994); Bayer, *supra* note 33, at 332–33. Classically, for example, military uniforms “foster military discipline, promote uniformity, encourage *esprit de corps*, increase the readiness of the military forces for early deployment and enhance identification of [a particular unit] as a military organization.” *Am. Fed’n of Gov’t Emps. v. Fed. Labor Relations Auth.*, 864 F.2d 178, 186 (D.C. Cir. 1988) (internal quotation marks omitted) (quoting *Div. of Military & Naval Affairs, State of N.Y.*, 15 F.L.R.A. 288, 293 (1984)).

<sup>300</sup> *See* Rhode, *supra* note 21, at 1037–38. Professor Ramachandran observed, “Children begin to have a visible interest in clothing around the age of two, one that is deeply influenced by parents ‘who confer their ideas of masculinity and femininity on young children,’ and therefore encourage girls to develop a stronger and more detailed interest.” Ramachandran, *supra* note 22, at 40 (quoting KARLYNE ANSPACH, *THE WHY OF FASHION* 290 (1967)).

regarding race, sex, ethnicity, and religion—the criteria prohibited by Title VII. For instance, Professor Onwuachi-Willig noted:

Curiously, the hair was considered the most telling feature of Negro status, more than the color of the skin. Even though some slaves . . . had skin as light as many Whites, the rule of thumb was that if the hair showed just a little bit of kinkiness, a person would be unable to pass as White. Essentially, the hair acted as the true test of blackness, which is why some slaves opted to shave their heads to try to get rid of the genetic evidence of their ancestry when attempting to escape to freedom.<sup>301</sup>

Enforcing discriminatory appearance rules, therefore, causes significant and palpable harm by requiring individuals, as the price of employment, to subvert their personhoods by complying with chauvinistic employers' stereotypical conceptions of how group members should appear and comport themselves.<sup>302</sup> Thus, "[w]ithout protection from Title VII, 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).'"<sup>303</sup>

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<sup>301</sup> See Onwuachi-Willig, *supra* note 21, at 1100 (alteration in original) (quoting AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 17–18 (2001)). Thus, "[f]or minority women in general, and Black women in particular, hairstyle choices are subject to pressures to conform to mainstream norms of attractiveness and professionalism." Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 411 (2007). "Indeed, a recent study concluded that presenting an image that was both conventionally attractive as well as professional was easier to attain for white women than for Black women." *Id.* at 410 (citing Rose Weitz, *Women and Their Hair: Seeking Power Through Resistance and Accommodation*, 15 GENDER & SOC'Y 667, 682 (2001)).

<sup>302</sup> Professor Bandsuch denotes this practice as "trait discrimination":

Employers . . . use physical traits that are largely irrelevant to job criteria as a proxy for job-pertinent attributes. For example, employers may relate grooming, hairstyle, jewelry, glasses, and attire (color, style, and material of clothing) with characteristics like intelligence, honesty, loyalty, and discipline. 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. Employers use these traits as signals to assess the abilities and attitudes of individuals as well as their compatibility with the organization and its values.

Bandsuch, *supra* note 19, at 289–90 (footnotes omitted).

<sup>303</sup> *Id.* at 293–94 (quoting Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 380 (2008)).

Indeed, the harm is exponential because, by way of unequal burden theory, court enforcement evinces that not only the particular employer, but also greater society, speaking through the judiciary, believes that those who do not conform to accepted group stereotypes may be unworthy of employment because their appearance preferences are strange, if not actually deviant and possibly evil.<sup>304</sup> Unequal burden doctrine thus perpetuates popular or elitist criteria describing a given group's purportedly natural or normal characteristics as a basis to judge conforming or nonconforming individuals' worth, merit, and goodness.<sup>305</sup>

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<sup>304</sup> See, e.g., Tirosh, *supra* note 21, at 55–56 (arguing that law's emphasis on identity—group traits accepted as normal by society or government—inflicts on the liberty of minorities, including minorities of one, a societal expectation of purported normalcy). As Professor Onwuachi-Willig profoundly explained in the sex discrimination context:

Even in the face of changing gender norms in our society, antidiscrimination law continues to reinforce traditional expectations about appearance. . . . In upholding these codes, courts give legitimacy to the gendered beauty expectations for men and women, essentially proclaiming that desirable men and women adhere to such gender norms.

See Onwuachi-Willig, *supra* note 21, at 1094–95.

<sup>305</sup> See Rosette & Dumas, *supra* note 301, at 413–14 (explaining that black women may conform their hairstyles, among other things, to forestall being judged according to Caucasians' stereotypical beliefs about African Americans as less worthy than whites). As Professor Rhode explained, such cultural indoctrination begins virtually at birth and continues throughout adulthood with devastating consequences:

A wide array of research documents a phenomenon that psychologists describe as “what is beautiful is good.” Less attractive individuals are less likely to be viewed as smart, happy, interesting, likeable, successful, and well-adjusted. They are less likely to marry and to marry someone well off; and surveyed college students would prefer a spouse who is an embezzler, drug user, or shoplifter than someone who is obese. Unattractive litigants receive higher sentences and lower damage awards in simulated legal proceedings, while attractive litigants have an advantage. Not only are the less attractive treated worse, their unfavorable treatment can erode self-esteem, self-confidence, and social skills, which compounds their disadvantages.

See Rhode, *supra* note 21, at 1037–38 (footnotes omitted). Professor Onwuachi-Willig similarly reported about race:

In a society where straight, long, fine hair (compared to black hair) is viewed not only as the norm[,] but as the ideal for women, tightly coiled black hair easily becomes categorized as unacceptable, unprofessional, deviant, and too political. Image consultants routinely advise black women to remove hairstyles such as braids and locks.

See Onwuachi-Willig, *supra* note 21, at 1107.

Even assuming there is broad, possibly instinctive, consensus on what is or is not attractive,<sup>306</sup> the sound Kantian morality of Title VII recoils from validating that consensus as legally enforceable yet non-BFOQ employment standards. As earlier noted, by imposing grooming and appearance rules that are not necessary to performing legitimate work assignments, employers use their workers *purely as means* to gratify such employers', or their customers', untoward prejudices. Employers certainly may use employees as means to perform particular work through which the employers attain economic benefits, status within the given field, and other tangible and intangible advantages. But, by degrading employees' dress, appearance, and similar modes of comportment, employers fail to treat employees as ends in themselves worthy of dignity.

In sum, unless constituting a BFOQ, employers, in particular, and society, in general, simply have no legitimate basis to mandate by law workers' conformity of appearance—a betrayal of personal identity—as the cost to obtain employment.<sup>307</sup>

#### CONCLUSION—HOW FAR CAN THIS GO?

Pursuant to unequal burden theory, a court could promulgate a local rule requiring female judges to wear robes adorned with white lace. After all, no less than male-only hair-length standards and female-only makeup directives, the hypothetical rule comports with familiar concepts of masculinity

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<sup>306</sup> Research confirms what astuteness suggests: Collectives generate a fairly strong communal sense of beauty contrasted with ugliness. That communal sense can be measured within specific groups or even across societies:

To be sure, some preferences, particularly those regarding grooming and body shape, have varied across time and culture. But the globalization of mass media and information technology has brought an increasing convergence in standards of attractiveness.

... [Research] yield[s] a strikingly high degree of consensus even among individuals of different sex, race, age, socioeconomic status, and cultural backgrounds.

See Rhode, *supra* note 21, at 1035–36.

<sup>307</sup> See Tirosh, *supra* note 21, at 52 (“First, unlike jars of jam, which should be correctly labeled in order to protect consumers, there is no compelling interest that people be ‘marked’ correctly. Second, even if the idea that social actors’ identities should be easily and securely decipherable seems at first appealing, this vision of the social world is oppressive, unresponsive to the dynamic interplay between identity and appearance, and inapplicable given the complex nature of appearance.”).

and femininity.<sup>308</sup> Moreover, compliance is easy, inexpensive, and does not impair the ability of female judges to perform their assigned duties—all factors premising unequal burden analysis.<sup>309</sup> Yet, surely a reviewing court would invalidate any such rule as demeaning, insulting, and certainly unlawful sexual stereotyping under Title VII.<sup>310</sup>

Some might contend that the foregoing hypothetical is different from the female-only makeup rules, upheld by the Ninth Circuit in *Jespersen*, that Harrah's Reno, Nevada, casino imposed on its bartenders.<sup>311</sup> Specifically the argument would be that requiring female judges to wear *feminine* robes insults their esteemed societal rank as members of the judiciary by implying that female judges must conform with a perceived societal concept of womanly appearance while publicly performing their

<sup>308</sup> Legal scholarship has benefited from articles exploring and explaining the nature of “masculinities” from the intersection of legal, cultural, scientific, and other relevant perspectives. See, e.g., Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 720 (2010) (“Masculinities researchers consider how societal norms shape behavior of individual men and women, how masculinities [“masculine identities”] are imbedded in the structure of institutions, and how individuals and groups perform masculinities within those institutions.”); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 364 (2004).

<sup>309</sup> Nor is the rule unlawful due to animus based on the belief that female judges cannot be trusted to dress appropriately. See *Carroll v. Talman Savings & Loan, Ass'n*, 604 F.2d 1028 (7th Cir. 1979), discussed *supra* at notes 289–92 and accompanying text. Rather, the rule seeks to beautify the work environment through adding a touch of female flourish that may be lost if female judges wear the same types of somber dark robes as their male colleagues.

<sup>310</sup> Arguing that such rules actually are burdensome, Judge Kozinski similarly opined:

Imagine, for example, a rule that all judges wear face powder, blush, mascara[,] and lipstick while on the bench. Like *Jespersen*, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics.

*Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., with two judges, dissenting).

<sup>311</sup> See Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467, 488 n.83 (2007); Jane M. Siegel, *Thank You, Sarah Palin, for Reminding Us: It's Not About the Clothes*, 17 VA. J. SOC. POL'Y & L. 144, 170 (2009).

duties. By contrast, female bartenders enjoy no similar status and, therefore, may be treated as sexual objects or as inherently different from men by compelling them to wear makeup although doing so is not necessary to serve drinks. That argument works only if one believes that due to the nature of their respective work, a female judge's dignity is greater than that of a female bartender or that the former's humanity is more worthy of respect than the latter's, which is a supposition thoroughly incompatible with Kantian morality. The differences between bartenders and judges may justify employment variances concerning tenure, salaries, and even social status. But, a bartender is no less of a dignified person than is a judge because both are human beings whose capacities to act in a moral fashion are not products of their professions. Accordingly, no less than female judges, female bartenders cannot be made to conform to employers' stereotypical concepts that women, but not men, should conform with purported standards of femininity, such as wearing facial makeup. The moral philosophy that informs Title VII's letter and spirit, then, forbids imposing discriminatory employment terms that treat judges, bartenders, or any persons as purely *means*—treatment that disdains their dignity.

One frustrated judge bemoaned:

Apparently, the majority would hold that an employer violates Title VII if it declines to hire a female cheerleader because she is not pretty enough, or a male fashion model because he is not handsome enough, unless the employer proves the affirmative defense that physical appearance is a bona fide occupational qualification.<sup>312</sup>

Chief Judge Loken correctly understood, but mistakenly decried, that the morality of dignity requires nothing less than a BFOQ to justify the imposition of discriminatory terms and conditions of employment.<sup>313</sup> His lament perhaps is understandable as coerced conformance with stereotypes provides boundaries, standards, and rules for those who value the dependability and constancy of what they like and who have

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<sup>312</sup> *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1043 (8th Cir. 2010) (Loken, C.J., dissenting) (dissenting from majority's ruling that plaintiff stated an actionable sex discrimination claim against her employer, a motel, that dismissed her because she appeared too mannish and lacked the "Midwestern girl look").

<sup>313</sup> Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 207–08 (2009).



the power and the selfishness to impose their preferences on unwilling others. But, morality does not exist to assuage the sensitivities of any individual or group, even personages as elevated as federal judges.

Perhaps there is some truth to this hyperbole: “[M]akeup for a woman is the way of the world; it keeps navigation in the convoluted social jungle of sexual identities relatively safe. If women did not wear makeup, we would find ourselves in a dreadfully vague social environment, an endless game of fluid identities.”<sup>314</sup> More generally, Professor Yuracko worries:

Yet even as a normative ideal, the libertarian reading of the prohibition is impractical and unappealing. At its most expansive, gender libertarianism requires protection for all forms of gender expression—those that are stereotypical, atypical, and idiosyncratic; those that are persistent; and those that are transient. Under this view, gender becomes whatever people say it is. As gender becomes solely a matter of self-identification, the distinction between gender and personal idiosyncrasy becomes one of mere nominalism, and all conduct becomes potentially entitled to protection.

... Herein lies the core tension within the libertarian interpretation of Title VII's prohibition on sex stereotyping: complete gender freedom is incompatible with any kind of stable and workable definition of gender, but Title VII requires such a definition.<sup>315</sup>

The world Professor Yuracko describes recalls the untoward fears mentioned at the outset of this Article<sup>316</sup> of a fretting Judge Richard Posner who bemoaned “a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather.”<sup>317</sup> Put generally, it would be a world where people could define their own peaceful existences that others would be compelled to respect.<sup>318</sup> In light of such

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<sup>314</sup> Tirosh, *supra* note 21, at 72. As Professor Tirosh notes, “The courts are happy to help prevent this from happening.” *Id.*

<sup>315</sup> Yuracko, *supra* note 179, at 770–71.

<sup>316</sup> See *supra* note 44 and accompanying text.

<sup>317</sup> *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring).

<sup>318</sup> In that regard, under Title VII's doctrine—its first principle—the simple idea of stereotyping should be sufficient to evince the “stable and workable definition of gender” that Professor Yuracko reasonably seeks. See Yuracko, *supra* note 179, at 771. For each case, the particular employer's conception of how men are different

upheavals, abridging other persons' dignity may seem to some a small price, especially when the other persons are paying. That is the core theory of the unequal burden doctrine.

But, whatever the upheaval, the unacceptable alternative is Title VII enforced immorality through the lawful denigration of individuals based on non-BFOQ stereotypes approved by the reviewing courts.<sup>319</sup> Unequal burden theory cannot stand because as Title VII rightly administers, selling one's labor should not require betraying one's soul.

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from women would provide the discrete, applicable basis to discern Title VII's two requisites: (1) Did the employer discriminate on the basis of sex—or one of the other four forbidden criteria—and, if so, (2) can the employer establish a BFOQ? *See also supra* notes 254–56 and accompanying text.

<sup>319</sup> Accordingly, Title VII requires employers to respect the dignity of all persons whether it is men wearing long hair, woman eschewing makeup, or even men wearing skirts and women wearing neckties.