Mutable Characteristics and the Definition of Discrimination Under Title VII

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Title VII of the Civil Rights Act of 1964 prohibits racial, religious, gender, ethnic, and color discrimination in employment. In most instances the courts interpret the statute very broadly. However, a line of cases holds that discrimination predicated on a forbidden criterion coupled with a "mutable" — easily altered — characteristic does not constitute a violation of Title VII. This Article attempts to debunk the "mutable" characteristic doctrine by discerning a general definition of discrimination under Title VII and applying that definition to demonstrate that mutability analysis contradicts the letter and spirit of the law.

INTRODUCTION

The Fair Employment Act,[1] in strong and seemingly unambiguous language, proscribes discrimination in the labor market "against any individual" with respect to race, color, religion, sex, or national origin.[2]

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[1] Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982).

[2] Specifically, 42 U.S.C. § 2000e-2(a) (1982) 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 employ-

Aside from carefully constrained exceptions, the Fair Employment Act appears to ban any and all discrimination arising under these forbidden categories.[3] While Title VII does not prohibit discrimination based on other considerations, the statute's clear language is designed to end these specific forms of discrimination in employment decisions.

To this end, the courts have held that Title VII must be interpreted as broadly as possible to give full effect to its remedial purposes.[4] Indeed, the Supreme Court has repeatedly recognized the fundamental importance of an employment market free from racial and sexual discrimination.[5] Thus, the courts have ruled that Title VII must be accorded the fullest scope to ban all unlawful discrimination, including eradicating racial and sexual stereotyping[6] and uncovering sophisticated as well as overt discriminatory conduct.[7]

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ment 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.

[3] Such prohibitions are common among civil rights laws. *See, e.g.*, The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1982) (generally forbidding discrimination on basis of race, religion, color, national origin, and gender with regard to purchase or leasing of dwellings); The Public Accommodations Act, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-6 (1982) (making racial or ethnic discrimination limiting access to public accommodations unlawful).

[4] *See, e.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2404 (1986) (Title VII proscribes sexual harassment); Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1089-90 & n.23 (1983) (Marshall, J., with four Justices, concurring in holding that employer violates Title VII by adopting pension annuities plan paying sexually disparate amounts to otherwise similarly situated retirees).

[5] For example, the Court stated in Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976), "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 . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority.' " (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)) (other citations omitted). As a general matter, the Court has recognized that civil rights statutes constitute social legislation of "the highest priority." *See, e.g.*, Newman v. Piggy Park Enters., 390 U.S. 400, 402 (1968) (per curiam) (Public Accommodations Act represents national legislation of utmost importance). Indeed, the Court cited *Newman* with approval in the *Franks* and *Alexander* opinions.

[6] *See, e.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2404 (1986); City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707, 709 (1978) (city violated Title VII by mandating pension annuities plan requiring female employees to contribute more money than similarly situated males).

[7] *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n.8 (1976) (holding generally that Title VII protects white as well as nonwhite individuals against racial discrimination).

The moral imperative of Title VII is based on the argument that the proscribed discriminatory practices have little, if anything, to do with genuine or useful business considerations. Rather, racial and sexual discrimination perpetuate stereotypical presumptions that have resulted not in greater efficiency or safety, but in demeaning and debasing individuals because of their racial or sexual affiliations.[8] Thus, discriminatees are deprived of employment opportunities and concomitant benefits on the basis of arbitrary and irrational prejudice, rather than on individual qualifications and merit.

Despite the many instances in which they have discerned and remedied unlawful employment discrimination, the courts have yet to fulfill the statute's mandate. In apparent contradiction of the statute's plain language, the courts have defined certain policies as nondiscriminatory despite the fact that the policies make blatant distinctions on the basis of sex, race, and national origin. By ruling that such employment policies are nondiscriminatory, the courts define the practices as outside the purview of the statute. Thus, for example, the Fifth Circuit held that a southern Texas hardware business' rule forbidding the speaking of Spanish in the presence of an English-speaking customer raises no question of unlawful national origin discrimination if the offending employee is bilingual.[9] Recently, the Eighth Circuit held that a television station's policy requiring a news anchorwoman to alter her appearance does not constitute sexual discrimination under Title VII.[10] More remarkably, not one federal circuit court addressing the issue has found that an employer's policy forbidding male employees from wearing long hair constitutes sex-based discrimination.[11]

These opinions exemplify a line of reasoning that divides employment standards into two types: (1) those involving immutable characteristics — characteristics that one cannot alter without great difficulty, and (2) those involving easily altered, or mutable, characteristics. In many instances, courts have held that Title VII simply does not prohibit discrimination linked to a mutable characteristic.[12]

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[8] *Cf.* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1082-84 (1983) (Marshall, J., with four Justices, concurring in part); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[9] *See* Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[10] Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986).

[11] *See, e.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); *see also* cases cited *infra* note 254.

[12] *See, e.g.*, Fagan v. National Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir.

This Article asserts that decisions predicated on the distinctions between mutable and immutable characteristics misconstrue Title VII's plain language and purposes. Moreover, such rulings fail to identify legislative intent unexpressed in the text of the law but discernable through careful scrutiny of relevant legislative history. Furthermore, these decisions cannot rightfully point to prevailing Supreme Court precedents as guidance. Rather, while acknowledging that certain policies, such as hair length rules applicable only to men, make sex-based distinctions,[13] the courts hold that such policies are too insignificant to raise statutory violations.[14]

This Article responds that by definition, *any* policy that makes sex, race, ethnic, or religion based distinctions of *any* nature raises a substantial question of discrimination. Any employment condition or criterion compelling individuals, because of their sex, race, or ethnicity, either to alter behavior or lose an employment opportunity, suffer an employment penalty, or forfeit an employment benefit, presents a court with a justiciable Title VII question deserving serious analysis.[15]

This Article proposes that all employment decisions, criteria, terms, conditions, and opportunities that are premised on or implicate race, color, religion, sex or national origin are discriminatory. Under this Article's approach, courts may uphold discrimination in employment only if the defendant satisfies one of the recognized defenses or statutory exemptions.[16] This more closely meets the statute's overall goal of

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1973) (upholding defendant-employer's policy proscribing long hair for males on the rationale that Congress, when passing Title VII, was solely concerned with discrimination predicated on immutable characteristics).

[13] *See, e.g.*, Dodge v. Giant Food, Inc., 488 F.2d 1333, 1335 (D.C. Cir. 1973) (per curiam).

[14] *See, e.g., id.* at 1336-37 & n.17.

[15] This is not to say that courts may never evaluate the relative importance of discriminatory employment policies or standards. To the contrary, as discussed *infra* in text accompanying notes 199-227, courts must often decide whether a proven discriminatory policy is nonetheless so vital to the business' operation that it is justifiable pursuant to an express statutory exemption or defense. Deciding that a discriminatory policy is defensible in a particular employment context is far different from absolutely excluding categories of discriminatory conduct from the statute's coverage.

[16] Under Title VII, certain discriminatory conduct is not unlawful if it constitutes a "bona fide occupational qualification." *See* 42 U.S.C. § 2000e-2(e) (1982), discussed *infra* notes 200-210. As discussed therein, judicial discretion to determine when a policy is sufficiently important to override Title VII's prohibitions is constrained by a fairly complete framework for evaluation. Additionally, this Article will distinguish the legitimate and unique concerns underlying properly designed affirmative action programs. Such programs, although race or gender conscious, serve important interests, including promoting Title VII's goal of achieving a labor regime in which unlawful

evaluating individuals based on their qualifications rather than upon group stereotypes.[17]

To support the proposed definition of discrimination, this Article reviews congressional debates, numerous Supreme Court decisions, and lower court embellishments from a variety of perspectives. First, a brief discussion of Title VII's plain language and legislative history establishes that Congress defined discrimination to have the broadest possible reach. Next, the Article offers a framework for analysis consisting of the major policy considerations in applying Title VII to particular situations.[18] The Article then examines the varied ways that a plaintiff may make a prima facie demonstration of discrimination under Title VII. Under prevailing Supreme Court analysis, courts must be open to all cogent presentations of facts, logic, and policy that uncover discrimination.[19] Finally, this Article applies its definition of discrimination to mutable characteristics analysis. The Article places particular emphasis on policies dealing with grooming and language to show that the mutability-immutability dichotomy is contrary to general Title VII jurisprudence.

One additional note of introduction is appropriate. Employment policies affecting hair length, grooming, wardrobe, and language may seem relatively unimportant. Such first impressions pale, however, upon closer examination of the problems addressed by Title VII and, indeed, by all civil rights codes. Title VII is concerned, certainly, with maximizing economic efficiency and promoting commerce.[20] However, the premise of civil rights enactments is that discriminatory practices offend basic notions of individual dignity and fair treatment.[21] By predicating

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discrimination is significantly reduced. *See infra* notes 230-53 and accompanying text.

[17] As the Supreme Court noted, "The broad, overriding interest, shared by employer, employee and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[18] For instance, certain overriding perspectives include Title VII's unequivocal protection of every individual from the effects of discrimination and the statute's purpose of expunging virtually all sexual and racial stereotypes from the job market.

[19] The thesis is fortified by a brief review of defenses and exemptions under Title VII, which demonstrate that Congress constrained its definition of discrimination only under very limited circumstances. It follows that courts may limit the statute's coverage no more narrowly than does Congress.

[20] *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973); *see also supra* note 17.

[21] *See, e.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2406 (1986) (Title VII

employment criteria on conduct unrelated to qualifications or merit, employers wrongly restrict individuals' ability to pursue a livelihood.

Certainly, concerns addressing individuality, dignity, and economic integrity transcend employment practices linked solely to immutable characteristics. Mutable characteristics associated with race and gender also implicate notions of basic human worth and dignity. Individuals define themselves not only by skin color and gender, but also by related characteristics, including grooming styles, attire, and language. Therefore, it is unclear why an employer is statutorily estopped from imposing discriminatory employment policies based on immutable characteristics, but may demean, humiliate, and economically disadvantage the same individuals by focusing discriminatory policies on mutable characteristics. To simply respond that a mutable characteristic is one that the individual may, by definition, easily change, wrongly presumes that there is little or no harm to the individual who is compelled either to make such a change or forego an employment opportunity. This Article argues that unless the employer can demonstrate that the policy is necessary to maintain a safe and efficient work environment, she should not have the authority to compel a worker to make such a choice.

I. Defining Discrimination

A. *The Statute's Plain Language*

Title VII's proscriptions are straightforward. The statute prohibits employment practices discriminating on the basis of race, color, sex, religion, or national origin.[22] Title VII covers private employers, public employers,[23] labor unions,[24] and employment agencies.[25]

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proscribes sexual harassment because, *inter alia*, it is "demeaning and disconcerting").

[22] *See supra* note 2 (complete text of 42 U.S.C. § 2000e-2(a) (1982)).

[23] *See* 42 U.S.C. § 2000e-16 (1982).

[24] 42 U.S.C. § 2000e-2(c) (1982) states:

> It shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[25] 42 U.S.C. § 2000e-2(b) (1982) reads:

> It shall be an unlawful employment practice for an employment agency to

Title VII contains a designated "Definitions" section.[26] However, "discrimination" is not included in that section because section 2000e-2(a), describing prohibited activities,[27] explains what is and is not discriminatory under the statute.[28] Similarly, the Supreme Court has rec-

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fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

[26] *See* 42 U.S.C. § 2000e (1982), which defines such terms as "employer" at § 2000e(b), and "person" at § 2000e(a).

[27] *See supra* note 2.

[28] For example, Senators Clark and Case, the bipartisan Senate floor managers for the employment discrimination portion of the Civil Rights Act of 1964, drafted an interpretive memorandum explaining H.R. 7152, the version of Title VII passed by the House of Representatives which, in relevant part, was subsequently enacted into law. Identifying sections 704 and 705 (enacted as 42 U.S.C. § 2000e-2(a)) as definitional sections, the memorandum explained:

> Discrimination
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> Sections 704 and 705 *defined the employment practices prohibited by the title*. It would be an unlawful employment practice for an employer to refuse to hire or to discharge any individual or otherwise to discriminate against him with respect to compensation or terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, *or to segregate or classify employees in any way* on the basis of race, color, religion, sex, or national origin *in such a way as to deprive them of employment opportunities or otherwise affect adversely their employment status*. Employment agencies would be forbidden to classify, to refer for employment or to refuse to refer for employment, *or otherwise to discriminate* against any individual because of race, color, religion, sex, or national origin. Labor organizations would be forbidden to deny membership to any individual on the basis of his race, color, religion, sex, or national origin, *or to segregate or classify its membership in any way which would deprive any individual of employment opportunities or adversely affect his status as an employee or an applicant for employment* on the basis of that individual's race, color, religion, sex, or national origin. In addition, labor organizations would be forbidden to cause or to attempt to cause an employer to violate the section. Finally, it would be an unlawful employment practice for employers, labor organizations, or joint labor-management committees controlling apprenticeships or other training programs to discriminate against any individual in connection with admission to apprenticeship or other training on the basis of that individual's race, color, religion, sex, or national origin.

110 CONG. REC. 7212-13 (1964) (emphasis added). As the foregoing excerpt demonstrates, 42 U.S.C. § 2000e-2(a) is itself a definitional section of the statute.

ognized that the formal definitional provision does not contain all of Title VII's relevant definitions. For instance, section 2000e-2(h) exempts "*bona fide* seniority systems" from Title VII coverage.[29] The Court has consistently referred to that provision as definitional in nature.[30] One may cogently assert, therefore, that section 2000e-2(a), setting forth the basic parameters of unlawful discrimination, is likewise a definitional provision.

Nevertheless, Supreme Court decisions assert that Congress has not defined the meaning of "discrimination" within Title VII.[31] Title VII's plain language, however, counsels the opposite conclusion. Indeed, early decisions opined that Congress drafted Title VII's language to allow the broadest possible definition of discrimination.[32]

The Supreme Court has continually relied on the Clark-Case Memorandum to clarify legislative intent. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 454 (1982); International 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). For a general discussion of Title VII's interesting, complex, and sometimes ironic legislative history, see Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

[29] 42 U.S.C. § 2000e-2(h) (1982) states in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.

[30] *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 69 (1982); Franks v. Bowman Transp. Co., 424 U.S. 747, 758 (1976).

[31] General Elec. Co. v. Gilbert, 429 U.S. 125, 133, *reh'g denied*, 429 U.S. 1079 (1976); *see also id.* at 145; Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983).

[32] As noted by Judge Goldberg in an early Fifth Circuit opinion, the language of 42 U.S.C. § 2000e-2(a)(1):

> *[E]vinces a Congressional intention to define discrimination in the broadest possible terms.* Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing de-

Although not retreating from its contention that "discrimination" is an undefined term, the Supreme Court recently revised its methodology for defining discrimination. *General Electric Co. v. Gilbert*[33] held that absent congressional intent to the contrary, questions regarding the meaning of "discrimination" were resolved through analogy to the fourteenth amendment. *Gilbert* upheld General Electric's sick leave plan compensating employees' absences from work due to nonoccupational disabilities except for pregnancy or pregnancy-related conditions.[34] Justice (now Chief Justice) Rehnquist, speaking for the majority, argued that the Act does not define discrimination. He posited that Congress intended courts to apply precedents under the Equal Protection Clause of the fourteenth amendment[35] to discern if Title VII's ban against sex discrimination proscribed General Electric's pregnancy exclusion. Two years earlier, *Geduldig v. Aiello*[36] had sustained a substantially similar health benefits plan against an equal protection challenge. The Court noted that the plan excluded only one physical condition — pregnancy. While acknowledging that only women become pregnant, the Court held that the plan was not sexually discriminatory because men and women were equally protected under all categories of illness *included* within the health care plan.[37]

The *Gilbert* Court adopted *Geduldig*'s holding and rationale, stating

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> mands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.

Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (segregating customers on basis of national origin may create working environment tainted by unlawful discrimination), *cert. denied*, 406 U.S. 957 (1972) (emphasis added). The Fifth Circuit's observations in *Rogers* have supplied the basis for a number of far reaching decisions. In fact, the Supreme Court cited *Rogers* in holding that continual sexual harassment may result in a workplace environment polluted by unlawful sexual discrimination. *See* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2405 (1986).

[33] 429 U.S. 125, *reh'g denied*, 429 U.S. 1079 (1976).

[34] *Id.* at 128-29.

[35] That amendment states in part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST. art. 14, § 1 (emphasis added).

[36] 417 U.S. 484 (1974).

[37] *Id.* at 496-97 & n.20.

that under both Title VII and the fourteenth amendment, excluding pregnancy benefits does not constitute per se gender discrimination.[38] The General Electric plan divided recipients into two classifications: (1) pregnant persons, an all female grouping, and (2) "non-pregnant persons." However, the plan was not unlawfully discriminatory because it equally protected women and men for all *covered* disabilities.[39]

In response to *Gilbert*, Congress enacted the Pregnancy Discrimination Act,[40] which reads in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 U.S.C. §2000e-2(h)] shall be interpreted to permit otherwise.

By its clear terms, the Pregnancy Discrimination Act, read in conjunction with section 2000e-2(a),[41] requires an employer to cover an employee's pregnancy to the same extent that the employer's health care plan compensates other disabilities. However, it took a Supreme Court opinion, *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,[42] to clarify that an employer violates Title VII by failing to

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[38] *Gilbert*, 429 U.S. at 136.

[39] *Id.* at 136-38. Justice Rehnquist additionally asserted that the plan was not intentionally designed to discriminate against women, *id.* at 136, and that, as an economic matter, the plan did not result in an unlawful disparate impact against women, *id.* at 137. (Disparate impact is discussed *infra* notes 164-98 and accompanying text.) Thus, Justice Rehnquist concluded, the plan did not violate Title VII.

The dissenting opinions rejected Justice Rehnquist's use of the fourteenth amendment as a definitional tool under Title VII. Justice Brennan, joined by Justice Marshall, argued that recourse to the fourteenth amendment contradicted previous Supreme Court opinions, including Washington v. Davis, which concerned a racially based employment discrimination claim brought under the fourteenth amendment. Therein, the Court rejected the argument that the definitions of discrimination under Title VII and the Constitution are coterminous. *Id.* at 154-55 n.6 (Brennan, J., dissenting) (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).

Similarly, Justice Stevens, viewing the issue as purely one of statutory construction, questioned how Congress, in enacting a statute in 1964, could have linked its definition of discrimination to the fourteenth amendment because the first opinion to recognize a connection between unlawful sexual discrimination and equal protection was Reed v. Reed, issued in 1971. *Id.* at 161 (Stevens, J., dissenting) (citing Reed v. Reed, 404 U.S. 71 (1971)).

[40] 42 U.S.C. § 2000e(k) (1978).

[41] *See supra* note 2 for text of 42 U.S.C. § 2000e-2(a).

[42] 462 U.S. 669 (1983).

cover male employees' spouses' pregnancy expenses to the same extent that a health care plan covers other spousal medical costs. Writing for the majority, Justice Stevens reaffirmed the position that neither Title VII nor the Pregnancy Discrimination Act defines discrimination. He stated, however, that the courts must carefully scrutinize legislative history to discern what Congress intended "discrimination" to mean.[43] Justice Stevens' review of the relevant legislative history revealed that by redefining sex discrimination to include "pregnancy, childbirth, and related conditions," Congress disapproved of *Gilbert*'s rationale.[44]

While the bulk of the legislative history addressed the deleterious effects of pregnancy discrimination on women, the Court discerned no inference to remove the Pregnancy Discrimination Act from the general protection of section 2000e-2(a) inuring to both males and females.[45] Health care plans are clearly terms and conditions of employment under Title VII. The challenged plan excluded pregnant spouses of employees — an all-male employee classification — while covering other illnesses of employees' spouses. Therefore, the health plan was per se discriminatory.[46]

The *Newport News* decision clarified that, in defining discrimination under Title VII, courts should refer to legislative history, applicable court opinions, and other scholarly sources that disclose Congress' intent. Constitutional provisions, such as the Equal Protection Clause, are inappropriate references when an act of Congress was designed to

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[43] *Id.* at 675-78.

[44] *Id.* at 678. The Court has clarified that the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e-(k) (1982), does not per se invalidate state statutes according special preferences to pregnant employees. Construing the PDA to establish " 'a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise,' " the Court upheld a California statute requiring employers to provide unpaid leave and certain rights to reinstatement for employees who are unable to continue working because of their pregnancy. *See* California Fed. Savings & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691-95 (1987) (quoted portion at 692 quoting Ninth Circuit Court of Appeal's decision at 758 F.2d 390, 396 (1985)). The Court emphasized, however, that the PDA proscribes state enactments "mandat[ing] special treatment of pregnant workers based on stereotypes or generalizations about their needs and abilities." *Id.* at 691 n.17; *see also id.* at 694.

[45] *Id.* at 679-81.

[46] The Court emphasized that an employer need not cover the pregnancy expenses of employees' spouses equally with the pregnancy expenses of employees. Rather, the cost of employees' spouses' pregnancies must be covered to the same extent that other spousal disabilities are compensated. *Id.* at 684 n.25. Moreover, excluding the costs of employees' dependents' pregnancies from the health care plan does not constitute per se discrimination since both male and female employees may have pregnant dependents. *Id.*

afford the broadest possible definition of discrimination.[47] Therefore, support for this Article's proposed definition of discrimination emanates from the sources set forth in *Newport News*.

B. Title VII's Legislative History

The history of the 1964 Act and 1972 amendments[48] establishes that Congress embraced an expansive definition of discrimination. The previously cited excerpt from the Clark-Case Memorandum expressly refers to section 2000e-2(a) as definitional and proposes a broad definition of discrimination.[49] At the very least, the legislative history encourages the courts to evolve their own broad definition proscribing all employment conditions based upon the statute's five forbidden criteria.

Near the outset of the Senate debate on Title VII, Senator Dirksen submitted a list of questions concerning its scope and meaning. Senator Clark, who, along with Senator Case, floor-managed the bill, responded to Senator Dirksen's questions with a memorandum reprinted in the *Congressional Record*.[50] Senator Clark offered the following definition of discrimination:

> Objection: The language of the statute is vague and unclear. It may interfere with the employer's right to select on the basis of qualifications.
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> Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act, for even a longer period. *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.[51]

To placate certain senators, an amended version, known as the Dirksen Compromise, was introduced. This contained some changes regarding procedures for enforcement,[52] but the provision defining unlawful dis-

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[47] Prior to *Newport News*, lower courts eschewed the *Gilbert* analysis, looking instead to legislative history and similar sources to define discrimination. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977) (sexual harassment opinion).

[48] In 1972, after a thorough review of Title VII and court interpretations, Congress enacted several far-reaching amendments. Significantly, § 2000e-2(a) was left untouched. *See generally* Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUM. RTS. L. REV. 311 (1973).

[49] *See* Clark-Case Memorandum, *supra* note 28.

[50] *See* 110 CONG. REC. 7215-18 (1964); *see also supra* note 28.

[51] 110 CONG. REC. at 7218 (emphasis added).

[52] *See* Vass, *supra* note 28, at 446-56.

crimination remained the same. Explaining that the usual management prerogative would remain intact, Senator Clark clarified that employers may hire whomever they want, subject to one important limitation: "In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin or sex."[53]

Similarly, interpreting the language of section 2000e-2(a), Senator Muskie stated that the provision "give[s] clear indication of the type of practice that will be considered unlawful."[54] Quoting that section's language, the senator concluded, "[W]hat more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?"[55]

The Senate rejected attempts to limit the definition of discrimination. Senator McClellan proposed an amendment limiting Title VII's coverage to situations in which an employer discriminates "solely" on the basis of one of the forbidden criteria.[56] Senator Case identified the danger posed by this limitation:

> The difficulty with this amendment is that it would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.[57]

The 1972 amendments demonstrated Congress' continuing commitment to a broad definition of discrimination in order to adequately combat the varied and complex forms of racial and sexual prejudice in the labor market. For example, the Senate Report accompanying the new amendments noted: "Employment discrimination, as we know today, is a . . . complex and pervasive phenomenon. Experts familiar

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[53] 110 CONG. REC. 13,079 (1964) (remarks of Sen. Clark).

[54] *Id.* at 12,618 (remarks of Sen. Muskie).

[55] *Id.* Reviewing other provisions regarding discrimination, exemptions, and defenses, Senator Muskie drew a further conclusion:

> 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 me, stem at least partially from the predisposition of the person expressing such doubt. For my part, I believe this title to be reasonable in objective and method, and clearly and carefully drawn.

Id.

[56] *Id.* at 13,837-38 (1964).

[57] *Id.* at 13,837 (remarks of Sen. Case).

with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs."[58]

Clearly, Congress drafted section 2000e-2(a) as a broad, definitional provision designed to make unlawful any and all discrimination predicated on the five forbidden criteria. Eschewing overly ornate or complex definitions, Congress simply stated that the term "discrimination" means just what it implies. Thus, in their interpretive memorandum, Senators Clark and Case were comfortable asserting:

> 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 of the five forbidden criteria . . . .[59]

C. A Supreme Court Paradigm for Analyzing Title VII Cases

Despite their belief that Congress did not define discrimination within Title VII,[60] courts have embraced an expansive outlook consistent with both Title VII's plain language and its legislative history. Thus, courts have supplied the definition of discrimination proposed by

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[58] S. REP. NO. 92-415, 92nd Cong., 1st Sess., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2137, 2144 (1972).

[59] 110 CONG. REC. 7213 (1964). As the foregoing examples show, Congress realized that it could not anticipate every form or mode of discrimination that would arise in the course of Title VII litigation. Therefore, it drafted a statute flexible enough to cover all discrimination. *See supra* note 32. Not surprisingly, the courts have recognized that Congress' reluctance to clarify singular situations as unlawful discriminatory conduct does not reflect an intent to limit the statute's coverage. Similarly, the fact that debates or reports emphasize the most egregious or troublesome forms of discrimination "does not create a 'negative inference' limiting the scope of the act to the specific problem that motivated its enactment." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 679 (1983) (quoting United States v. Turkette, 452 U.S. 576, 591 (1981)); *see also* Barnes v. Costle, 561 F.2d 983, 994 (D.C. Cir. 1977) (sexual harassment cognizable under Title VII).

Judicial reluctance to limit the definition of discrimination on the basis of negative inferences gleaned from legislative history applies in other civil rights contexts as well. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976) (42 U.S.C. § 1981's proscription against racial discrimination in making and enforcing contracts applies to white as well as black individuals); David v. Paul, 395 U.S. 298, 307-08 (1969) (Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1982), proscribes discrimination in access and enjoyment of public accommodations and covers recreation parks as well as public accommodations at which the public are merely spectators).

[60] *See supra* notes 31-47 and accompanying text.

this Article: all employment conditions, criteria, or actions that concern or implicate one of the prohibited classifications are unlawful unless subject to a statutory exemption or defense.

The following discussion supports this assertion by examining leading precedents from two discrete but interrelated perspectives. First, this Article combs the decisions to discern basic philosophical and sociological touchstones guiding courts in identifying Title VII violations. These perspectives form a paradigm, expressing both Title VII's purpose and its thrust to reform certain untenable behavior in the labor market.[61]

The second perspective recounts the Supreme Court's legal analyses in isolating and identifying prima facie discrimination under Title VII. Predicated on the Title VII paradigm, these analyses provide useful guidelines for discerning the presence or absence of discrimination and possible defenses thereto. Reviewing the means of establishing a prima facie case illustrates that evidence of policies or practices of the defendant implicating any of the five forbidden criteria establishes the probable existence of unlawful discrimination.

1. The Title VII Paradigm

"Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[62] The courts recognize that Title VII, a national policy of the utmost importance,[63] is "a complex legislative design directed at a historic evil of national proportions."[64] Thus, Title VII's overriding purposes are to eliminate unlawful discrimination, to eradicate the consequences of dis-

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[61] It is worth emphasizing that the following review is not simply an exercise in counting polemics. To the contrary, every statutory scheme — particularly in the realm of civil rights — is designed to promote certain social morality by encouraging or discouraging types of behavior. The courts often recognize the particular social-moral goals as guideposts for statutory analysis. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 517-18 (1982); United States v. Sisson, 399 U.S. 267, 297-98 (1970) (Harlan, J., plurality).

[62] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citations omitted).

[63] *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); *Alexander*, 415 U.S. at 47.

[64] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). One court described Title VII's enforcement design as "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

criminatory acts,[65] and to provide a remedy for discrimination victims.[66] These considerations establish the great reach Congress accorded to Title VII, prompting courts to rule that any difference in treatment predicated on any of the forbidden criteria constitutes discrimination.[67]

Additionally, courts have recognized several intermediate considerations necessary to give the statutory paradigm full force and effect. Four are emphasized in this discussion: (1) Title VII protects every individual from unlawful discrimination; (2) Title VII bans discrimination regarding *any* employment opportunity or practice; (3) Title VII proscribes *any* racial, sexual or similar stereotype in making employment decisions; and (4) Title VII rejects a definition of discrimination based solely on the economic effects of an employer's policy.

a. Title VII Protects Every Individual

A clear and primary concern of section 2000e-2(a)[68] is protecting *individuals* from unlawful employment practices. Indeed, the term "individual" is used four times in this section, indicating Congress' recognition that discrimination harms every person against whom it is directed. The Supreme Court has consistently held that "the principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[69] Similarly, in *Los Ange-*

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[65] "Congress directed the thrust of the [Fair Employment] Act to the *consequences* of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis in the original); *see also* Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3035 (1986) (Brennan, J., plurality); *Albemarle*, 422 U.S. at 422-23.

[66] *See, e.g.*, Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1090 (1983) (Marshall, J., with three Justices, concurring in part and dissenting in part); *Franks*, 424 U.S. at 763; *Albemarle*, 422 U.S. at 418.

[67] *See, e.g.*, Bibbs v. Block, 778 F.2d 1318, 1321-22 (8th Cir. 1985) (en banc); Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1082-83 (1983) (Marshall, J., with four Justices concurring in part) (pension annuity scheme paying smaller monthly benefits to women than to similarly situated men violates Title VII).

The Central District of California stated the proposition most succinctly: "It is clear, therefore, that the term 'discrimination' contains no qualifications. *Every difference is discrimination.*" Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 665 (C.D. Cal. 1972) (emphasis added) (invalidating defendant's grooming policy proscribing long hair on male employees. *Aros*' holding, so far as the particular grooming policy is concerned, is in disrepute. *See infra* Part III.).

[68] *See supra* note 2 (complete text of 42 U.S.C. § 2000e-2(a)).

[69] Connecticut v. Teal, 457 U.S. 440, 453-54 (1982). Brennan, J., recounts numerous remarks in the legislative history emphasizing that Title VII protects all individual discriminatees. *Id.*

les Department of Water and Power v. Manhart,[70] the Court stated, "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 . . . . Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[71]

Title VII's focus on the individual has prompted courts to apply a broad definition of discrimination. For instance, because it prohibits racial discrimination against any individual, Title VII protects whites as well as nonwhites.[72] Moreover, an individual may press a Title VII claim even if the defendant-employer can demonstrate that, as a general matter, its policies or procedures do not discriminate against the protected group to which the individual belongs.[73] In preparing for trial, an individual may demonstrate discrimination against her individually, against her group, or both.[74] Either way, the statute's clear focus, protecting each individual, demands a broad definition of discrimination.

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[70] 435 U.S. 702 (1978).

[71] *Id.* at 708. Justice Stevens went on to note that, "even 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* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1080 (1983) (Marshall, J., with four Justices, concurring in part); *id.* at 1108 (O'Connor, J., concurring in part); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("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.") (citations omitted, emphasis in original); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (holding that individual may pursue her employment discrimination claim in court even if she previously submitted claim to voluntary grievance procedure established by collective bargaining agreement); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

[72] *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[73] *See* Connecticut v. Teal, 457 U.S. 440 (1982) (individual discriminatees may challenge portion of employer's hiring process even if final hiring statistics reveal no unlawful discrimination); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) (employer's policy of hiring only bricklayers previously known to employer may result in discriminatory denial of employment opportunity to "at the gate" minority applicants even if minority group is well represented in bricklayer workforce). *Teal* is discussed in detail *infra* notes 189-99 and accompanying text).

[74] *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (discrimination directed to particular individual unlawful) *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment test that disqualifies significantly larger proportion of minority applicants than white applicants and that is unrelated to employment qualifications employment is unlawfully discriminatory). For a more detailed discussion of this dichotomy, see *infra* notes 120-57, 165-99 and accompanying text.

b. Title VII Bans Discrimination Regarding Any Employment Opportunity

Recognizing the many ways employers can discriminate against job applicants and employees, Congress drafted Title VII to cover deprivations of any employment opportunity, regardless of type.[75] Title VII "speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[76] Title VII's protection of all employment opportunities has been recognized since the Supreme Court first interpreted the statute,[77] and continues as a guiding consideration in contemporary Title VII analysis.[78] This achieves a major goal of Title VII — "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[79]

c. Title VII Proscribes Stereotypes Based on Any of the Five Forbidden Criteria

A statute's commitment toward eliminating unlawful discrimination may be measured by its effect on prevailing stereotypes associated with forbidden criteria. Clearly, stereotypical assumptions such as "blacks and whites cannot work together harmoniously" or "a woman's proper place is in the home" may play no part in employment decisions.

The statute, however, goes beyond invalidating the most blatant forms of discrimination based on stereotypes. Indeed, courts have consistently applied Title VII to proscribe employers' use of virtually any

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[75] *See supra* note 2 (complete text of 42 U.S.C. § 2000e-2(a)); *see also, e.g.*, Bibbs v. Block, 778 F.2d 1318, 1321-22 (8th Cir. 1986) (en banc). Addressing the question of "mixed motivations" in individual disparate treatment cases, the Court concluded, "every kind of disadvantage resulting from racial prejudice in the employment setting is outlawed." *Id.* at 1322. *See also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (opinion of Goldberg, J., set forth *supra* note 32); *cf.* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2405-06 (1986) (citing Judge Goldberg's opinion in *Rogers* for proposition that Title VII proscribes racial and sexual harassment).

[76] *Teal*, 457 U.S. at 448 (emphasis in original, footnote omitted).

[77] *See Griggs*, 401 U.S. at 429-30.

[78] *See, e.g.*, California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 693 (1987); Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2405 (1986) (Title VII prohibits sexual harassment that results in work environment saturated with gender discrimination); Pullman-Standard Co. v. Swint, 456 U.S. 273, 276 (1982).

[79] *Griggs*, 401 U.S. at 431; *see also Teal*, 457 U.S. at 447; Dothard v. Rawlinson, 433 U.S. 321, 328 (1977).

racial or sexual stereotype. Thus, for example, in an early decision invalidating a policy requiring that female, but not male, flight attendants be unmarried, the Seventh Circuit held, "The scope of [Title VII] is not confined to explicit discrimination based 'solely' on sex . . . . [The statute was intended] to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[80]

Similarly, the Supreme Court has rejected reliance upon stereotypical assumptions regarding gender and race to justify discriminatory employment policies. The leading precedents, *Los Angeles Department of Water and Power v. Manhart*[81] and *Arizona Governing Committee v. Norris*,[82] are particularly instructive in defining discrimination because the stereotypes invalidated were factually valid.

In *Manhart*, the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. The Department justified the larger contributions because "[a]s a class, women live longer than men."[83] Despite the apparent reality that, as a class, women will receive greater pension payments because of their longevity, the Court held that an employer may not compel individual women to contribute more money to their pension accounts than similarly situated men. Justice Stevens, writing for the majority, began his analysis by noting:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.
>
> It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females.[84]

Justice Stevens next noted that although the stereotype of women's greater longevity is generally accurate, not every woman within the group would outlive the similarly situated men. Thus, some women

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[80] Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (emphasis omitted). The *Sprogis* court's observation was not a cry in the dark; it has been repeatedly cited as a guidepost for Title VII analysis. *See, e.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2404 (1986); Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978).

[81] 435 U.S. 702 (1978).

[82] 463 U.S. 1073 (1983) (per curiam).

[83] *Manhart*, 435 U.S. at 704.

[84] *Id.* at 707 (footnote omitted). Justice Stevens continued: "Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." *Id.*

paid more money into the pension plan — thereby reducing their take-home pay — without collecting greater net pension payments during retirement. Justice Stevens concluded that because Title VII protects each individual from unlawful discrimination,[85] the Act forbids employers from charging female employees more on the presumption that the pension program will subsidize women, as a class, to a greater extent than men.[86]

The Court rejected the employer's argument that the pension plan discriminated on the basis of longevity rather than gender. Justice Stevens wrote, "[s]uch a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' "[87] *Manhart*'s mandatory pension plan was designed and administered by the employer.[88] Hinting that the opinion may be limited to its facts, the Court cautioned

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[85] *See supra* notes 68-74 and accompanying text.

[86] *Manhart*, 435 U.S. at 708-11.

[87] *Id.* at 711 (quoting *Developments in the Law, Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971) [hereafter *Developments in the Law*]).

Similarly, the Court rejected the employer's purported justification based on the portion of 42 U.S.C. § 2000e-2(h) commonly referred to as the "Bennett Amendment," which incorporates the substantive defenses of the Equal Pay Act, 29 U.S.C. § 206(d) (1982), into a Title VII sex-based wage discrimination challenge. *See generally* County of Washington v. Gunther, 452 U.S. 161 (1981). The Equal Pay Act generally outlaws sex-based wage differentials in an employment situations when male and female employers are engaged in identical work. One defense cognizable under the Equal Pay Act is: "a [wage] differential based on any other factor other than sex . . . ." 29 U.S.C. § 206(d)(iv) (1982). The employer in *Manhart* asserted that the pension plan discriminated on the basis of life span, a "factor other than sex." Quoting the lower court opinion, Justice Stevens responded, "We agree with Judge Duniway's observation that one cannot say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on." *Manhart*, 435 U.S. at 712-13 (footnote omitted).

[88] Although *Manhart* concerned a sexually discriminatory plan, it cannot seriously be argued that the Court's standards invalidating the use of gender stereotypes apply with less vigor in the realm of racial, ethnic, or religious discrimination. "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." 435 U.S. at 709; *see also* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1084 (1983) (Marshall, J., with four Justices, concurring in part).

A discriminatory policy based on sexual stereotypes may be lawful if the employer can demonstrate that the policy is necessary to the normal operation of that particular business. *See* 42 U.S.C. § 2000e-2(e) (1982) (the "bona fide occupational qualification" exception). Because a pension plan bears no relation to an individual's job performance by definition, the statutory defense is inapplicable to discriminatory retirement plans. *Norris*, 463 U.S. at 1084 n.13.

that Title VII does not "revolutionize the insurance business."[89]

Whatever doubt existed concerning *Manhart*'s application to a full range of employment situations ended in *Arizona Governing Committee v. Norris*.[90] *Norris* held that Title VII "prohibits an employer *from offering* its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay lower monthly retirement benefits to a woman than to a man who has made the same contributions . . . ."[91] In addition to reaffirming Title VII's ban against the use of sexual stereotypes in employment contexts, *Norris* greatly expanded the Court's definition of discrimination and rejected any lingering argument that Title VII violations arise solely because of the economic burdens placed on discriminatees.[92]

The pension program challenged in *Norris* was designed and managed by a third party.[93] Employee participation in the plan was strictly voluntary, with deductions calculated from participating employees' monthly salaries without regard to gender. Upon retirement, employees could choose from three options.[94] One option, the pension annuity

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[89] *Manhart*, 435 U.S. at 717. The Court noted that while an employer cannot relegate the plan's administration to a corporate shell in order to avoid responsibility, *id.* at 718 n.33, an employer does not violate Title VII by giving all similarly situated employees an equal sum of money to purchase their own pension plans on the open market; *id.* at 717-18; *see also* General Elec. Co. v. Gilbert, 429 U.S. 125, 139 n.17, *reh'g denied*, 429 U.S. 1079 (1976).

[90] 463 U.S. 1073 (1983) (per curiam).

[91] *Id.* at 1074 (emphasis added).

The rationale invalidating the pension plan was written by Justice Marshall, joined by Justices Brennan, White, Stevens, and O'Connor. *Id.* at 1075-91. Additionally, Justice Marshall, with Justices Brennan, White, and Stevens, dissented from the denial of retroactive monetary relief. *Id.* at 1091-95. Justice Powell wrote for a majority consisting of himself, Chief Justice Burger, and Justices Blackmun, Rehnquist, and O'Connor regarding the issue of relief. *Id.* at 1105-07. In addition, Justice Powell, joined by the Chief Justice and Justices Blackmun and Rehnquist, dissented from the finding of liability under the statute. *Id.* at 1095-1105. Finally, Justice O'Connor, who supplied the swing vote for both issues, clarified her position at 1107-11. This Article is concerned solely with the question on liability as defined in *Norris*.

[92] That latter aspect of *Norris* is examined in detail *infra*, notes 99-106 and accompanying text.

[93] *See Norris*, 463 U.S. at 1075-79 (Marshall, J.). Regarding the plan's technical operation, the defendant-employer's role was limited to deducting contributions from participating employees and channeling the money to the pension company, which invested the funds in a diversified portfolio. The employer made no contributions itself. *Id.*

[94] Two options were nondiscriminatory. The employees could simply retrieve their contributions and accumulated interest or could have that fund paid out periodically. *Id.* at 1076.

plan, disbursed lower monthly income to female retirees than to similarly situated males.[95]

The Court found the employer's scheme indistinguishable from the plan invalidated in *Manhart*.[96] Recalling *Manhart*'s admonitions against the use of any stereotype effectively discriminating against individuals on the basis of a forbidden criterion, the Court rejected the purported justification that the pension plan's actuarial value for female retirees would equal the value for male retirees. Rather, the plan was unlawful because individual females may predecease similarly situated males and thereby receive less benefit despite their equal contributions.

Thus, *Norris* and *Manhart* stand for the proposition that Title VII tolerates no discrimination predicated upon stereotypical assumptions regarding race, gender, national origin, or religion. No matter how ingrained or accepted a stereotype may be, premising employment practices upon such stereotypes is unlawful unless justified by accepted statutory defenses.[97]

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[95] *Id.* at 1076-77. Sex was the discriminatory factor. No other considerations that might affect longevity — such as alcohol or cigarette consumption — were utilized. Nevertheless, the annuity option was the most popular choice because it guaranteed a set income for the remainder of the retirees' lives. Additionally, it was more tax advantageous than receiving a lump-sum payment. *Id.*

[96] "We have no hesitation in holding . . . that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Id.* at 1081 (footnotes omitted).

[97] *Id.* at 1080-84. *Manhart* and *Norris* were not the Court's first occasions to identify Title VII's policy proscribing the use of discriminatory stereotypes. Dothard v. Rawlinson, 433 U.S. 321 (1977), concerned a challenge to an Alabama law resulting in 75% of all prison guard jobs being "male only." *Id.* at 325-27. Holding that the rule was obviously gender-based and thus discriminatory under Title VII, the Court inquired whether the policy was nonetheless justifiable as a bona fide occupational qualification (BFOQ) under 42 U.S.C. § 2000e-2(e) (1982). The Court unequivocally held that BFOQ is a narrow defense forbidding discrimination based on stereotyped characterizations of the sexes. *Id.* at 333-34. Thus, as a general matter, a woman may decide for herself whether a given job environment is too dangerous or inhospitable. The choice should not be imposed by an employer's well-intentioned but paternalistic conception of the proper role of women. *Id.* at 335-36. Nevertheless, the majority found the prison conditions in Alabama so hostile and tense that the presence of female guards might lead to disorder — thus jeopardizing an essential function of prisons. *Id.*

Dissenting in part, Justice Marshall, joined by Justice Brennan, criticized the Court for apparently employing the very stereotypical paternalism it purported to eschew. Justice Marshall argued that the majority, based on little evidence, assumed that the presence of female guards will lead to rape, violence, and disorder. *Id.* at 342-43 (Marshall, J., dissenting in part). To the contrary, Justice Marshall noted, the record contained no evidence that prisons' tenuous stability would be shattered by women guards. Given that rape or other violence committed against any prison personnel inevitably

The Court found the factual distinctions between *Norris* and *Manhart* immaterial. The Court held that the pension plan was unlawfully discriminatory even though (1) no employee was compelled to participate in the retirement program, and (2) those employees who chose to participate could select one of the two gender-neutral retirement options rather than the discriminatory annuity scheme. The Court unequivocally ruled:

> Title VII forbids *all discrimination* concerning "compensation, terms, conditions, or privileges of employment," not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice . . . . *An employer that offers* one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis.[98]

Therefore, under Title VII, no individual may be made to choose between discriminatory and nondiscriminatory employment terms and conditions. The availability of nondiscriminatory alternatives neither mitigates the illegality of offering race or gender-based options, nor alters the fact that this introduces an impermissible criterion.

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leads to severe discipline, it is unlikely that a rash of sexual assaults would follow if females were hired as prison guards. *Id.* at 343-46.

Although, as Justice Marshall pointed out, the sociology of the majority opinion is questionable, *Dothard*'s definition of discrimination, like those in *Manhart* and *Norris*, covers all stereotypes predicated on any of the five forbidden criteria. Arguably, the court's ruling that the defendants had established a BFOQ may be limited to the unusually dangerous environment of prison life. *Cf.* Garrett v. Okaloosa County, 734 F.2d 621, 624 (11th Cir. 1984); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085-86 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (forbidding women correctional officers in prison may not constitute a BFOQ when prison is not overcrowded or rampant with impending violence); Edwards v. Department of Corrections, 615 F. Supp. 804, 808-10 (N.D. Ala. 1985) (femaleness is not a BFOQ for position of shift commander at women's prison). Indeed, it may be argued that the Court's analysis of the nature and scope of stereotypes has become increasingly sophisticated in the wake of *Manhart* and *Norris*. Thus, with those precedents as guides, the Court might reappraise its BFOQ holding in *Dothard* should the opportunity arise.

[98] *Norris*, 463 U.S. at 1081-82 n.10 (emphasis added). In addition, the Court distinguished *Norris* from instances in which the employer merely gives employees equal sums of money with which to purchase any plans they wish on the open market. *See supra* note 89. Because the employer solicited bids from private companies and thereafter selected and helped to implement the particular pension plan, the employer was "legally responsible for the discriminatory terms on which annuities are offered by the companies chosen to participate in the plan." *Norris*, 463 U.S. at 1089.

d. Title VII's Definition of Discrimination Is Not Predicated Solely on the Adverse Economic Effects of an Employment Policy or Practice

Norris clarified that Title VII violations need not be predicated solely on adverse economic burdens. Most forms of unlawful employment discrimination produce serious economic disadvantages to discriminatees. Indeed, *Norris* involved economic issues concerning retirement benefits, and certainly is sensitive to economic deprivations resulting from unlawful discrimination. But the opinion does not stop there. By emphasizing that the unlawful act was the mere "offer[ing]" of a discriminatory term and condition of employment, the Court demonstrated that any use of impermissible criteria as part of an employment decision, in any employment context, violates Title VII.

The *Norris* Court derived its rationale from earlier opinions involving pregnancy discrimination. In *General Electric Co. v. Gilbert*,[99] the Court upheld an employer's health care plan excluding coverage for pregnancy because the plan was of equal economic value to both male and female employees. There were no conditions for which males were covered but females were not. Applying the subsequently enacted 1978 Pregnancy Discrimination Act,[100] the Court reversed *Gilbert* in *Newport News*, finding that Congress intended that distinctions based on pregnancy constitute per se sexual discrimination.[101] Thus, it is immaterial that a given health care plan covers men and women equally for medical conditions included within the plan. The arguable economic parity of the discriminatory health plan is simply not germane. Title VII was enacted to eradicate discrimination. Therefore, excluding a gender specific medical condition, such as pregnancy, constitutes per se sex discrimination. Applying *Newport News*' philosophy in *Norris*, the Court concluded that discrimination arises from individuals' actual treatment, rather than from economic ramifications alone.[102]

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[99] 429 U.S. 125 (1976); *see supra* notes 33-47 and accompanying text.

[100] 42 U.S.C. § 2000e-(k) (1982).

[101] *See* Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). A more complete analysis of *Gilbert* and *Newport News* is found *supra* notes 33-47 and accompanying text.

[102] *See Norris*, 463 U.S. at 1085 n.14 (Marshall, J.). Specifically, Justice Marshall wrote:

> The enactment of the [Pregnancy Discrimination Act] buttresses our holding in *Manhart* that the greater cost of providing retirement benefits for women as a class cannot justify differential treatment based on sex. . . . In enacting the PDA, Congress recognized that requiring employers to cover pregnancy on the same terms as other disabilities would add ap-

Dissenting in *Norris*, Justice Powell argued that because the state could not implement its own pension scheme, the state was simply a neutral conduit providing its employees with pension coverage that, when purchased by private individuals on the open market, was outside the reach of Title VII and other federal civil rights legislation.[103] Now forbidden from offering a discriminatory option, the employer must design its own plan, assume the financial burden required to equalize the sexually disparate annuity payments, or offer no retirement program at all.[104] Arguing that the majority holding was contrary to logic and legislative history, Justice Powell stated that, henceforth, employees might be unable to take advantage of the low group rates often associated

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> proximately $200 million to their total costs, but *concluded that the PDA was necessary "to clarify [the] original intent" of Title VII . . . . Since the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles, . . . Congress' decision to forbid special treatment of pregnancy despite the special costs associated therewith provides further support for our conclusion in* Manhart *that the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan.*

Id. (emphasis added, citations omitted).

[103] *Id.* at 1096-97 (Powell, J., dissenting).

[104] *Id.* One commentator has criticized the *Norris* majority's holding that Arizona discriminated unlawfully by merely "offering" its employees a pension annuity program predicated on sexually disparate actuarial tables. *See* Note, *Title VII and the Use of Sex-Based Actuarial Tables in Annuity Pension Plans*, 26 B.C.L. REV. 88, 114-17 (1984) [hereafter Note, *Actuarial Tables*]. The author based her critique on the Court's reliance on a constitutional law opinion, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). In that case, the Court invalidated the state's maintenance of a unisex nursing school despite the fact that coeducational nursing training was available at other state institutions. Whatever merit this criticism may have, the arguable misapplication of a constitutional law opinion in no manner confronts the most direct and important source of the *Norris* ruling — the plain language of Title VII and *Manhart*. As has been discussed, that language proscribes all gender discrimination. Because a pension plan predicated on sex-based actuarial tables makes blatant gender distinctions, its introduction as a term or condition of employment, albeit one subject to voluntary acceptance by each employee, constitutes forbidden discrimination under the statute. As explained *infra*, Congress' definition of discrimination boldly reconstructs the limits of acceptable conduct in employment. The new employment environment tolerates no gender discrimination unless the discriminator can demonstrate that such is necessary for the safe and efficient conduct of business. Guided by the clear language and purposes of the statute, the *Norris* majority correctly held that the employer may not offer a discriminatory term or condition of employment even when the employer does so for seemingly munificent purposes.

It is noteworthy that Justice O'Connor, the author of *Hogan*, joined the *Norris* majority on the ground that a plain reading of the statute required the Court to hold as it did. *Norris*, 463 U.S. at 1107-09.

with employer-sponsored pension plans.[105]

As Justice Marshall explained, however, a complete and viable definition of discrimination cannot limit itself to a review of economics alone. Any form of discrimination that affects individuals on the basis of race, gender, sex, religion, or national origin represents the intrusion of a stereotype into employment situations. This is contrary to Title VII's plain language and purpose. Thus, an employer, even for seemingly sound economic motives, cannot import discriminatory conduct into its policies unless it can demonstrate that the discriminatory policy constitutes a bona fide occupational qualification.[106]

The foregoing discussion has highlighted major philosophical and sociological considerations underlying Title VII. Viewed as a whole, they present a paradigm for analyzing fair employment litigation. In brief, Title VII demands a broad definition of discrimination — broad enough to protect every individual from the deprivation of any form of employment opportunity by any means, device, practice, or policy. Furthermore, if even one individual suffers, the statute is violated — regardless of whether that individual's race, gender, or ethnic group is represented in the applicable workforce; regardless of whether the plan or policy is voluntary or mandatory; and regardless of whether any nondiscriminatory options are available.

More than this, the concept of employment discrimination extends beyond economic ramifications. Indeed, discrimination is not a function of the degree to which the discriminatee suffers harm. As a matter of statutory interpretation, discrimination cannot be defined by a subjective assessment that the discriminatee has suffered above a certain mandatory threshold. Rather, discrimination is predicated on actual treatment and treatment based on any of the five forbidden criteria constitutes discrimination. In this manner, discrimination itself constitutes

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[105] *Norris*, 463 U.S. at 1098-99. This concern has been shared by some commentators. *See, e.g.*, Note, *Sex Discrimination — Pensions — The Court Takes a Stand*, 30 WAYNE L. REV. 1329, 1342-43 & citations at n.103 (1984).

[106] *Norris*, 463 U.S. at 1107-09. Recently, the Court had occasion to reaffirm that unlawful discrimination may take forms other than deprivation of economic opportunities. Holding that Title VII forbids employers from sexually harassing employees, Justice (now Chief Justice) Rehnquist wrote, "the 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, 106 S. Ct. 2399, 2404 (1986) (citing Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

sufficient harm to invoke judicial intervention.

D. Methods for Establishing Prima Facie Violations of Title VII

Separate but inextricably entwined considerations with the foregoing Title VII paradigm are the methodologies for demonstrating a prima facie case of discrimination. Although judicial opinions have clarified several alternative methods for establishing prima facie violations of Title VII, all share certain unifying themes. First, the standards for making a prima facie case are broadly applied.[107] Thus, the plaintiff need not exhaust every avenue of proof, but rather, need only present evidence of discriminatory conduct.[108] The modes of proof are always flexible enough to encompass any factual situation. In this regard, the modes of proof are better described as guidelines. As such, they may be modified on a case-by-case basis, affording each plaintiff the chance to demonstrate the existence of unlawful discrimination.[109]

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[107] *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 313 (1977) (Brennan, J., concurring).

[108] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). Of course, a plaintiff who fails to utilize all available evidence does so at the peril of losing to a resourceful defendant. *Id.*

[109] *See, e.g.*, United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). Focusing on "individual disparate treatment" analysis, Justice (now Chief Justice) Rehnquist emphasized that judicial standards regarding prima facie presentations do not constitute immutable rules of analysis, but rather, useful and logical allocations of proof between parties. *Id.* at 714-15. Courts should not substitute literal application of such allocations of proof for reasoned assessment of the entire body of evidence. Thus, in cases such as *Aikens*, in which both sides made full evidentiary presentations at trial, fine distinctions concerning the quantum of evidence necessary to shift burdens of proof serve no useful purpose.

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the "defendant intentionally discriminated against the plaintiff."

Id. at 715 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

As *Aikens* emphasizes, under such circumstances, the court must weigh all the evidence to discern whether unlawful discrimination has occurred regardless of whether, as a procedural matter, the defendant might have challenged the adequacy of the plaintiff's prima facie case by filing a motion for judgment prior to presenting a full evidentiary defense. *See also* Mitchell v. Baldrige, 759 F.2d 80, 83 (D.C. Cir. 1985) (explaining the elements of the individual disparate treatment prima facie case in relation to FED. R. CIV. P. 41(b) permitting defendants to dismiss claims at the conclusion of the plaintiff's case).

The same flexibility adheres to other means through which plaintiffs may establish

The variety of modes of proof, and their flexibility of application, promote a broad definition of unlawful discrimination. This Article reviews four modes of proof. The first three, generally ascribed the heading of "disparate treatment," are: (1) per se discriminatory conduct; (2) individual disparate treatment; and (3) systemic disparate treatment. The fourth category is commonly referred to as "disparate impact."[110]

In an oft-quoted footnote, Justice Stewart provided a useful shorthand definition of "disparate treatment":

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.[111]

Importantly, the intent requisite does not narrow Title VII's definition of discrimination. "Disparate treatment" supposes that the defendant has chosen to act in a discriminatory fashion. Since the offending behavior is not accidental, an averment of intent necessarily accompanies a plaintiff's complaint of "disparate treatment."[112]

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prima facie proofs such as the "disparate impact" case. *See, e.g.*, Bazemore v. Friday, 106 S. Ct. 3000, 3008 (1986) (applying principles of *Aikens* to systemic disparate treatment case); Connecticut v. Teal, 457 U.S. 440 (1982).

[110] Of course, anyone suffering any form of unlawful discrimination may be said to be *treated* in a discriminatory manner. Courts have assigned the terms "disparate treatment" and "disparate impact" simply as convenient referents.

[111] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citation omitted). A year after *Teamsters*, Justice Stevens offered a similar although simpler interpretation: discrimination occurs when the practice or policy under scrutiny "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which, but for that person's sex, would be different.'" Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 711 (1978) (quoting *Developments in the Law*, *supra* note 87, at 1170) (footnote omitted). The Court has reaffirmed the *Manhart* "but-for" standard as an appropriate standard to discern discrimination. *See, e.g.*, Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1079-81 (1983) (Marshall, J., with four Justices, concurring in part).

[112] The definition of "intent" is a question of law, while determining whether a given situation reveals discriminatory intent is a question of fact. *Accord* Anderson v. City of Bessemer, 470 U.S. 564, 566 (1985); *see* Pullman-Standard v. Swint, 456 U.S. 273 (1982). According to the Court, a defendant intentionally discriminates when she acts "because of" racial, sexual, or ethnic consideration. *Pullman-Standard*, 456 U.S. at 277. This does not mean that the defendant necessarily wished to harm, debase or degrade individuals because of race or sex. It is possible — indeed, not unusual — to make purposeful discriminatory distinctions based on apparently well-meaning but misguided intentions, such as refusing to hire women because of the stereotypical assumption that they lack the physical capacity to perform the work. *See, e.g.*, Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (addressing when employer may

1. Per Se Discrimination

Per se discrimination occurs when an employer's policy, term, condition, or practice is blatantly linked to one of the five forbidden criteria. Title VII clearly proscribes such overt discrimination.[113] Surprisingly, recognizing per se discrimination is not always easy. In fact, several of

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forbid pregnant employee from working in radioactive environment); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Moreover, the courts have consistently held that proof of intent may be established through circumstantial evidence as direct admissions of discriminatory animus are relatively uncommon. For a fuller discussion of disparate treatment cases based on inferential evidence, see *infra* notes 120-64 and accompanying text.

[113] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Logically, a plaintiff has no problem establishing discriminatory intent since, under per se analysis, an employer specifically designed its policy to make racial, sexual, or other forbidden distinctions. *See, e.g.*, Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983). One clever commentator has identified an instance of per se discrimination wherein the conduct, although adjudged unlawful, did not reflect an intent to discriminate on the part of the discriminator. *See* Note, *Actuarial Tables*, *supra* note 104, at 117-19. Discussing Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), the commentator criticizes the majority for holding that the employer violated Title VII by offering, as one choice among retirement options, a pension annuity scheme predicated on sex-based actuarial charts. The employer in *Norris* did not design or administer the plan; those functions were handled by a third party corporation. See *supra* notes 90-106 for a detailed discussion of *Norris*.

The commentator argues that, while ***the insurance company*** deliberately discriminated by using sex as a factor to design its payment schedules, ***the employer*** offered the plan to its employees to enable them to take advantage of the convenience and economic benefits of group rate retirement programs. It seems unlikely that the employer chose the offending plan because it discriminated against females.

The critique is ingenious, but it does not obviate the viability of the *Norris* rationale. First, as discussed earlier, the statute's plain language flatly forbids the use of gender distinct conditions of employment. The gender-based retirement program was such a term and condition. Moreover, as discussed in detail *infra* notes 165-99, the thrust of Title VII's proscriptions are directed to the ***consequences*** of discriminatory conduct, not to punishing the discriminator. The consequence of offering the discriminatory pension plan was to influence female employees to accept a program that treated them not according to their individual life spans, but according to the stereotypical group characteristic that women outlive men. Finally, as argued *supra* notes 111-12 and accompanying text, the intent requirement under disparate treatment applies because, in virtually all instances, the prima facie presentation cannot be made without the plaintiff pleading that the discriminator intended to discriminate. As a matter of reality, cases arising under disparate treatment concern discriminatory conduct that could not have occurred by accident. The isolation of an odd instance, such as *Norris*, wherein the discriminatory treatment involves per se but unintentional discrimination, demonstrates not that the *Norris* opinion is infirm, but that, on rare occasions, per se treatment does not involve discriminatory animus.

the Supreme Court's major Title VII opinions were written to clarify that seemingly blatant discriminatory conduct was, indeed, discriminatory. For example, an early decision concerned a private employer's policy not to hire or retain women with preschool aged children, with no similar restriction applied to men. In a brief per curiam opinion, the Court held that the policy clearly constituted unlawful discrimination because Title VII does not permit "one hiring policy for women and another for men."[114]

Recently the Court recognized that sexual harassment constitutes per se discrimination under Title VII.[115] Chief Justice (then Justice) Rehnquist clarified that Title VII proscribes not only "quid pro quo" harassment,[116] but also harassment that creates a "hostile environment,"[117] even though not linked to the withholding or bestowing of employment

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[114] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam). The *Phillips* Court rejected the argument that Title VII only forbids discrimination directed against an entire protected group. Martin Marietta's policy did not affect all women, and interestingly, the affected workforce was overwhelmingly female. Nevertheless, the Court recognized that in applying a preschool-aged-children rule solely to women, Martin Marietta created a distinction predicated on sex. Policies concerning a particular subgroup of a protected classification have come to be called "sex-plus" or "race-plus" discrimination — that is, sex or race, plus an additional characteristic.

[115] *See* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986). The Court defined sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* at 2405 (quoting EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1985)).

[116] "Quid pro quo" harassment occurs when the harassing behavior is coupled with a promise by the harasser either to reward the victim with some employment benefit or to punish the victim's resistance by withholding or rescinding an employment benefit. *Id.*

[117] *Id.* Although such harassment may adversely affect the victimized employee's economic well being, the Court explained that gender based discrimination need not have an adverse economic consequence to be unlawful. *Id.* at 2504; *see also supra* notes 99-106 and accompanying text. The unlawful nature of sexual harassment is premised on Title VII's general command that "terms, conditions and privileges of employment" may not be predicated on gender distinctions. The work environment — as much as salaries, job descriptions, and the like — constitutes a term or condition of employment. Quoting from the lower courts, the *Vinson* opinion noted that gender and racial discrimination in employment is unlawful because it is arbitrary:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Id. at 2406 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

benefits.

Other opinions invalidating per se discrimination include the *Newport News* decision,[118] holding that an employer must cover the pregnancy related health costs of male employees' spouses to the same extent that it covers other spousal health expenses. The *Manhart* and *Norris* cases[119] are additional examples, forbidding an employer from administering or offering an employee pension plan discriminating on the basis of sex with regard to contributions made prior to retirement or disbursements made after retirement.

2. Individual Disparate Treatment

A second type of disparate treatment, known as "individual disparate treatment," concerns "intentional but covert discrimination" perpetrated against an individual or small group.[120] Under individual disparate treatment, a court reviews a series of seemingly neutral events to discern if they hide intentional discrimination. The burden of persuasion rests with the plaintiff.[121] However, the burden of a prima facie case is light, recognizing that direct evidence of discrimination is rarely available.[122] Thus, the hallmark of "individual disparate treatment" is flexibility. Any set of facts must be carefully examined to discern the presence or absence of discriminatory conduct.[123]

To this end, the courts have suggested various guidelines for structuring and evaluating evidence. The well-known *McDonnell Douglas* formula typifies individual disparate treatment analysis. The plaintiff makes a prima facie case by showing:

> (i) that he belongs to a [protected class]; (ii) that he applied and was qual-

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[118] *See supra* notes 42-47 and accompanying text.

[119] Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) (per curiam); Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978); *see supra* notes 81-105 and accompanying text.

[120] Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 after* Beazer *and* Burdine, 23 B.C.L. REV. 419, 421 (1982). The Furnish article provides an interesting and provocative examination of the blurring distinctions between disparate treatment and disparate impact analysis. For another general discussion of individual disparate treatment, see Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984).

[121] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[122] *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[123] *See, e.g.*, United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983); *see also supra* note 109 and *infra* note 125 and accompanying text.

> ified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[124]

Subsequently, Chief Justice (then Justice) Rehnquist explained:

> The central focus of the inquiry in a case such as this is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." . . . The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[125]

Because the *McDonnell Douglas* formulation is designed to uncover unlawful discrimination, the test may be adjusted to fit each fact situation as it arises.[126] For example, courts have modified the *McDonnell Douglas* test to cover discriminatory discharge,[127] discrimination in

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[124] McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); *see also Burdine*, 450 U.S. at 253-54 & n.6.

[125] Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978) (emphasis supplied); *see also Burdine*, 450 U.S. at 254; Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983).

[126] *See Burdine*, 450 U.S. at 253 n.6; *McDonnell Douglas Corp.*, 411 U.S. at 802 n.13.

[127] *Compare* EEOC v. Brown & Root, Inc., 668 F.2d 338, 340-41 (5th Cir. 1982) (plaintiff must show: (1) she was part of protected group; (2) there was company policy or practice covering activity for which she was discharged; (3) that nonminorities were not restricted by policy or practice or that nonminorities were given benefits of more lenient policy or practice; and (4) that plaintiff was disciplined either through strict enforcement of policy or was denied benefit of otherwise available more lenient policy) *with* Conner v. Fort Gordon Bus Co., 761 F.2d 1495, 1498 n.3 (11th Cir. 1985) *and* Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982) (requiring the plaintiff to "show that he or she is a member of a protected class, was qualified for the position held, was discharged and was replaced by a person outside the protected class.").

The fourth element of the *Conner-Lee* standard is problematic because it is conceivable that an employer might discriminatorily discharge an individual and yet replace

awarding promotions,[128] and retaliatory actions taken against an employee or applicant.[129] The courts have also applied the modified test to situations in which the employer does not offer applicants an opportunity to establish their qualifications for employment.[130]

Once the plaintiff establishes her case, the defendant must either provide a defense, or rebut the prima facie presentation. To rebut, the defendant need only produce evidence that the plaintiff was rejected, or

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that individual with a member of the protected class. For example, the discharged individual may threaten suit upon dismissal, prompting the employer to protect itself from liability by replacing the discharged individual with a member of her protected group.

[128] *See, e.g.*, Mitchell v. Baldrige, 759 F.2d 80, 84 (D.C. Cir 1985) (applying the *McDonnell Douglas* standards to vacant positions filled by promotion).

[129] 42 U.S.C. § 2000e-3(a) (1982) states:

> *Discrimination for making changes, testifying, assisting or participating in enforcement proceedings.* It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

A prima facie case of unlawful retaliation is demonstrated if the plaintiff establishes:

> (1) that she engaged in a statutorily protected activity;(2) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two. As in a case of disparate treatment, this initial burden is not great. Plaintiff merely needs to establish facts adequate to permit an inference of retaliatory motive. *McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984) (footnote omitted); *see also Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980).The causal connection component of the prima facie case may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity. In cases of alleged retaliatory discharge, failure to hire or failure to promote, the plaintiff must also show as part of the prima facie reprisal case that he was qualified for the position. *Williams v. Boorstin*, 663 F.2d 109, 116-17 (D.C. Cir. 1980); *see also Canino v. United States*, 707 F.2d 468, 471-72 (11th Cir. 1983).

Mitchell v. Baldrige, 759 F.2d 80, 86 & n.5 (D.C. Cir. 1985) (text and footnote combined, additional footnote omitted).

[130] *See, e.g.*, Ostroff v. Employment Exch., Inc., 683 F.2d 302, 304 (9th Cir. 1982) (per curiam) (plaintiff need not prove that she was qualified for employment when, because of her sex, employer refuses to accept or review her application). Of course, the question of qualifications is relevant to fashioning an appropriate remedy.

someone else was preferred, for "a legitimate, non-discriminatory reason."[131] The burden is far from onerous:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[132]

Although one commentator has argued that the Court nowhere defines "legitimate, non-discriminatory reason,"[133] the Court has clarified that "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision has not been motivated by discriminatory animus."[134]

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[131] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); *see also* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (per curiam); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

[132] *Burdine*, 450 U.S. at 254-55 (footnotes and citations omitted).

[133] *See* Furnish, *supra* note 120, at 437.

[134] *Burdine*, 450 U.S. at 257. Reviewing the factual contexts surrounding several Supreme Court individual disparate treatment decisions, Professor Furnish proposed that, "For the employer's reason to be deemed sufficient to overcome the presumption against him . . . it must have a connection with the business goal of securing a competent and trustworthy workforce." Furnish, *supra* note 120, at 437; *see also* Player, *supra* note 120, at 20. This interpretation is consistent with the statute's thrust — to proscribe discrimination. Moreover, it harmonizes the use of the two terms "legitimate" and "nondiscriminatory" under the defendant's burden to articulate a "legitimate, nondiscriminatory reason." Thus, "legitimate" refers to valid business considerations and "nondiscriminatory" means that the five forbidden criteria played no part in the employer's allegedly discriminatory actions.

However, Professor Furnish's argument is problematic in light of *Burdine*, which indicates that the defendant meets her burden by providing an evidentiary *minima* demonstrating a lack of discriminatory animus. The extremely mild burden on the defendant seems to require nothing more than a showing that there was another reason, divorced from the five forbidden classifications, that motivated her action. The purported reason must be nondiscriminatory, although it need not have a legitimate nexus with the business. Thus, for example, an employer who avers that she rejected a qualified black applicant because applicant was wearing a red shirt when she applied for work has stated a "nondiscriminatory" reason sufficient to rebut the plaintiff's prima facie case. While the reason appears silly, it constitutes a successful rebuttal because it presents the court with a motivation not predicated on an impermissible criterion. (However, such a foolish rebuttal may be defeated by the plaintiff's counter-rebuttal. *See infra* notes 135-37 and accompanying text.) This example shows that a "legitimate, nondiscriminatory reason" need not be premised on serious business considerations. Arguably, then, the use of both "legitimate" and "nondiscriminatory" by the Court is redundant.

The light rebuttal burden does not reflect a retreat from the expansive definition of

The inquiry does not end at the rebuttal stage. Fairness and logic require that the plaintiff have the opportunity to demonstrate that the prima facie presumption of discrimination was correct. Thus the plaintiff

> now must have the opportunity to demonstrate that the proffered [legitimate, non-discriminatory] reason was not the true reason for the employment decision . . . . She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[135]

The courts look to numerous factors to evaluate the strength of the plaintiff's counter-rebuttal. For instance, the courts examine the employer's patterns of previous conduct to see if the plaintiff was treated in an unusual manner. Statistics may provide an additional source of data.[136] Even hiring a member of the plaintiff's own protected group cannot insulate an employer, although treatment of the protected group as a whole is a factor to consider in discerning discriminatory intent.[137]

One particularly interesting area involves "mixed-motivations." Here, the plaintiff presents direct evidence of the defendant's use of unlawfully discriminatory criteria, and the defendant counters that it would have made the same employment decision even absent the discriminatory consideration.[138] The lower courts have not applied *McDonnell Douglas* to mixed-motive cases.[139] Unlike the *McDonnell*

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discrimination under Title VII proposed herein. As noted earlier, the plaintiff is permitted an equally light initial burden by establishing a prima facie case solely on circumstantial evidence which generates an inference of discrimination. The mere articulation of a nondiscriminatory reason must, by definition, shatter the prima facie inference because the court is presented with an alternate, but lawful, motivation to explain the allegedly discriminatory conduct.

[135] *Burdine*, 450 U.S. at 256.

[136] *See, e.g.*, Diaz v. American Tel. & Tel., 752 F.2d 1356, 1362-64 (9th Cir. 1985).

[137] *See* EEOC v. Brown & Root, Inc., 688 F.2d 338 (5th Cir. 1982); Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978) (racial balance of employer's workforce "is not wholly irrelevant on the issue of intent . . . .").

[138] *See, e.g.*, Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (en banc); Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985); Bell v. Birmingham Linen Serv., 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). *See generally* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

[139] The Supreme Court has not specifically addressed the issue of mixed motivations under Title VII, although it has done so in various constitutional and statutory contexts. *See, e.g.*, NLRB v. Transportation Management Corp., 462 U.S. 393, 399-400 (1983) (National Labor Relations Act); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416-17 (1979) (first amendment); Mt. Healthy School Dist. Bd. of Educ.

Douglas prima facie case, in which discriminatory animus is inferred from a series of outwardly neutral occurrences, the plaintiff in a mixed-motive case presents *direct* evidence of discrimination.[140] Similarly, since the plaintiff has demonstrated purposeful discrimination, the defendant cannot rely on the *McDonnell Douglas* rebuttal. The mere "articulation" of a "legitimate, non-discriminatory" reason is inadequate to rebut plaintiff's direct evidence that the defendant relied on impermissible criteria.[141]

Finding the *McDonnell Douglas* framework inapplicable, many courts have borrowed the Supreme Court's "same decision" test for mixed-motive cases.[142] Once the plaintiff has shown that unlawful discrimination was a "substantial factor" or "motivating factor"[143] for the defendant's conduct, the defendant must demonstrate "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [discriminatory] . . . conduct."[144] As applied in the Title VII context, the defendant rebuts the plaintiff's direct proof of discriminatory conduct by proving "that the adverse employment action would have been taken even in the absence of the impermissible motivation, *and that, therefore, the discriminatory animus was not the cause of the adverse employment action*.[145]

Thus, under the Title VII cases applying the "same decision test,"[146]

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v. Doyle, 429 U.S. 274, 285-87 (1977) (same); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (racial discrimination in housing under the fourteenth amendment). There are arguable indications that the standards set forth in the foregoing precedents might apply to Title VII disparate treatment cases. *E.g.*, East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977). However, for the reasons set forth *infra* notes 148-57, the most appropriate standard to address the problem of mixed motivations under Title VII is set forth in Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (en banc).

[140] *Bibbs*, 778 F.2d at 1320-21; *Blalock*, 775 F.2d at 707; Conner v. Fort Gordon Bus Co., 761 F.2d 1495, 1498 n.4 (11th Cir. 1985) (dicta). Such evidence might include racial slurs and insults made by supervisory personnel, racial innuendos, or other similar forms of race conscious behavior. *E.g.*, *Bibbs*, 778 F.2d at 1320 (key member of management, who played large part in denying plaintiff promotion, referred to plaintiff as "black militant" and called another black employee "nigger" and "boy").

[141] *See, e.g.*, *Blalock*, 775 F.2d at 707-08; *Conner*, 761 F.2d at 1498 n.4 (dicta).

[142] *See, e.g.*, *Blalock*, 775 F.2d at 710-12; Smith v. Georgia, 749 F.2d 683, 687 (11th Cir. 1985) (both applying the standards set forth in Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977)).

[143] "Substantial factor" and "motivating factor" are defined *infra* note 157.

[144] *Mt. Healthy*, 429 U.S. at 287.

[145] *Blalock*, 775 F.2d at 712 (emphasis added). *But see Bibbs*, 778 F.2d 1320-24, discussed *infra* notes 147-56 and accompanying text.

[146] *See, e.g.*, cases cited *supra* note 142.

the courts utilize an expansive definition of discrimination. Introducing an unlawful criterion violates the statute if discrimination was in any manner a motivating factor. It does not matter how minor the influence of the illegal criterion, so long as the defendant is unable to convince the court that it would have acted identically absent consideration of the unlawful criteria.[147] For example, suppose an employer, weighing the respective qualifications of two applicants, one male and the other female, compares such significant factors as education, experience, and references. Finding the applicants virtually indistinguishable, the employer reasons "because I have no substantial, business related basis to differentiate the applicants, I'll hire the man."

Under this hypothetical situation, the employer has violated Title VII's prohibition against gender discrimination. Gender became the motivating factor — the "but for" cause — affecting the ultimate decision. Note, however, that the employer resorted to gender discrimination only after exhausting certain neutral criteria. Gender was neither the employer's first choice of criteria nor was gender a consideration of high priority. However, gender was the "but for" cause, even though it was the least important motivation on the employer's list.

Significantly, courts applying the "same decision" test permit unlawful criteria into the employment context. This may well taint the transaction with a corrupting influence because the discrimination, although manifest, cannot be determined to constitute a "but for" cause. Arguably, the Eighth Circuit put forth a more appropriate interpretation of Title VII in *Bibbs v. Block*.[148] In *Bibbs*, the court divided the Title VII action into two phases: (1) a determination of liability and, (2) if liability is found, the formation of appropriate remedies.[149] Referring to section 2000e-2(a)[150] as the guide for defining unlawful discrimination, the *Bibbs* court concluded:

> It is not only failing to hire someone, or discharging him or her, because of race or sex, that is unlawful. The statute also forbids employers "otherwise to discriminate . . . with respect to compensation, terms, conditions, or privileges of employment, because of . . . race," § 703(a) (1), and makes it unlawful for employers "to limit . . . or classify . . . employees

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[147] This standard, however, does permit certain instances of lawful discriminatory conduct. *See infra* notes 148-57 and accompanying text.

[148] 778 F.2d 1318 (8th Cir. 1985) (en banc).

[149] *Id.* at 1321-24; *see also* Brodin, *supra* note 138, at 323-26. Bifurcating the Title VII trial to address first the issue of liability and then the remedy is commonplace. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 356-62 (1977) (systemic disparate treatment/individual disparate treatment case).

[150] *See supra* note 2.

> in any way which would deprive *or tend to deprive* any individual of employment *opportunities or otherwise adversely affect"* him or her because of race. Section 703(a)(2). To put it in terms of the present case, *it would be unlawful for defendant to put Bibbs at a disadvantage in the competition for promotion because of his race*, as well as actually to deny him the promotion for this reason. (Indeed, if an employer requires black employees to meet a higher standard, the statute is violated even if they actually meet it and get the jobs in question.) *Every kind of disadvantage resulting from racial prejudice in the employment setting is outlawed.* Forcing Bibbs to be considered for promotion in a process in which race plays a discernible part is itself a violation of law, regardless of the outcome of the process. At the very least, such a process "tend[s] to deprive" him of an "employment opportunit[y]." Section 703(a)(2).[151]

Once liability is established, the appropriate remedy depends upon whether the employer would have made the same employment decision regardless of discrimination in the decisionmaking process.[152] The *Bibbs* court, therefore, applied the "same decision" standard to discern the appropriate remedy.[153] The *Bibbs* rationale departs from other opinions regarding the scope of the definition of discrimination under Title VII. According to *Bibbs*:

> Congress has made unlawful *any kind of racial discrimination, not just discrimination that actually deprives someone of a job.* A defendant's showing that the plaintiff would not have gotten the job anyway does not extinguish liability. It simply excludes the remedy of retroactive promotion or reinstatement.[154]

As *Bibbs* asserts, direct evidence of unlawful discrimination tends to demonstrate that, at the very least, the particular employment transaction became unlawfully tainted. It is difficult at best, perhaps impossible, to determine whether and to what extent the discrimination affected the decision.[155] Thus, at the very least, the discriminatee is placed

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[151] *Bibbs*, 778 F.2d at 1321-22 (emphasis in original for quoted language from § 2000e-2(a)(2); other emphasis added).

[152] *Id.* at 1322-24.

[153] *Id.* at 1322.

[154] *Id.* at 1323 (emphasis added). Thus, a plaintiff who establishes initial liability on the part of the defendant, but who is not entitled to reinstatement, promotion, or attendant remedies, may still obtain a declaratory judgment, appropriate injunctive relief, and an award of attorney's fees covering the issues upon which the plaintiff prevailed. *Id.* at 1324.

[155] *E.g.*, *id.* at 1326-28 (Lay, C.J., concurring). Indeed, while joining the court's opinion to guarantee a majority, Chief Judge Lay, joined by Judges Heaney and McMillan, argued that the opinion of the court does not go far enough. According to Chief Judge Lay, Title VII proscribes *any* introduction of racial discrimination into employment situations. Moreover, the plaintiff's access to relief should not be limited by the *Mt. Healthy* "same decision" standard because under the majority's ruling, a plaintiff

at a "disadvantage resulting from racial prejudice in the employment setting"[156] — a disadvantage clearly contemplated among the prohibitions set forth in section 2000e-2(a).

Furthermore, imposing the foregoing liability onto employers is fitting. While determining whether the discrimination was sufficient to constitute an unlawful "disadvantage" may not be precise or simple, as the Supreme Court clarified in a related area:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by [the National Labor Relations Act]. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.[157]

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may obtain a technical victory — a verdict of unlawful discrimination — yet the only meaningful recovery would be attorney's fees. *Id.*

[156] *Id.* at 1322 (majority opinion); *cf.* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) (Title VII prohibits employment environment tainted by sexual harassment).

[157] NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983). Arguably, the *Bibbs* standards are not clearly defined. It remains uncertain just how much discriminatory conduct must occur to give rise to liability under Title VII. The opinion speaks of discrimination that results in established or probable "disadvantage" to a protected individual. However, it is difficult to know what quantum of prejudicial conduct must occur to create an unlawful "disadvantage." For instance, would a single careless racial slur or an "off-the-cuff" sexist joke send a message to others that the alleged discriminator wishes to take adverse action against the alleged discriminatee? If so, then it may be said that the alleged discriminatee has been placed at a distinct and unlawful "disadvantage" because the other decisionmakers will have to consider whether they wish to oppose the perceived desires of the alleged discriminator regardless of whether the discriminator's motives are pure or tainted.

If the *Bibbs* case goes that far — and its language indicates that it might — a serious question arises whether such an application of Title VII offends notions of free speech and privacy protected by the first, fifth, and fourteenth amendments of the Constitution. Is Title VII furthered through frustrating constitutional protections by making it a violation of federal law when, in the course of an employment decisionmaking project, representatives of the employer make jokes or random insults predicated on forbidden criteria? *See generally* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 172-79 (1982). Interests concerning free speech and the privacy of ideas may well mitigate the fullest possible reach of the *Bibbs* language.

The importance of this question is not lessened by arguing that, in many instances, it is the employer, not the representative making the allegedly unlawful comments, who will be subject to liability. Clearly, an employer forced to litigate over the racially discriminatory comments, jokes, innuendos, or similar conduct of a representative might severely discipline the instigator. The inclination to discipline would be particularly strong should the employer lose or settle the suit — thereby bearing considerable expenses both in time and money. Thus, a genuine question exists whether the full reach of the *Bibbs* holding could chill free, although offensive, speech and ideas.

Discrimination, defined under the "individual disparate treatment" mode, is broad enough to cover any form of individually felt unlawful conduct. The touchstone is the requirement that courts review each situation to discern if an employment action was unlawfully tainted by consideration of any of the five forbidden criteria.

3. Systemic Disparate Treatment

The third form of disparate treatment is known as "systemic disparate treatment," or a "pattern and practice case." This type of litigation is commonly prosecuted by the government,[158] although private individuals may also file complaints.[159]

The Court explained the substance of a pattern and practice case in

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Professor Brodin suggested a workable solution in his article on mixed-motivations in Title VII cases. *See* Brodin, *supra* note 138. Professor Brodin proposed the system ultimately adopted by the *Bibbs* court — a determination of liability followed by the fashioning an appropriate remedy. Brodin, *supra* note 138, at 323-26. According to Professor Brodin, however, liability would be premised on proof that race was a "motivating factor" in the given employment decision, although it need not have been a "but-for" factor. *Id.* at 323. "Motivating factor" might be generally understood as follows:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. [*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).]This includes evidence as to general patterns of defendant's practices, the sequence and timing of events leading up to the decision, whether the decision is a departure procedurally or substantively from the norm, and statements by persons involved in the process evidencing racial animus. *Id.* [*Arlington Heights*] In the employment context, "the trier of fact determines the reasons for an employee's discharge based on 'reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole,' " *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 430 (D. Utah 1971) (citation omitted).

Brodin, *supra* note 138, at 305 n.63.

Under Professor Brodin's standards, the likelihood of violating either free speech or the privacy of ideas is slight, while Title VII's goal of eradicating arbitrary discrimination in employment is fully preserved.

[158] In fact, the nickname "pattern or practice" is derived from 42 U.S.C. § 2000e-6, permitting the Equal Employment Opportunity Commission to commence litigation alleging "a pattern or practice" of discrimination on the part of a private employer, and permitting the Attorney General to prosecute such suits against public sector employers. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 301 n.1 (1977).

[159] *Compare* Pouncy v. Prudential Ins. Co., 668 F.2d 795, 801-02 (5th Cir. 1982) *with* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).

International Brotherhood of Teamsters v. United States[160] and *Hazelwood School District v. United States.*[161] The plaintiff bears the initial burden of establishing a prima facie case of discrimination. Alleging a systemwide pattern and practice of discriminatory conduct requires the plaintiff "to prove more than the mere occurrence of isolated, 'accidental,' or sporadic discriminatory acts. [Rather, she must] establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure — the regular, rather than the unusual, practice."[162]

As with "individual disparate treatment," flexibility is the hallmark of systemic disparate treatment analysis. Realizing that direct evidence is rarely available, the courts have held that plaintiffs may present any cogent evidence to demonstrate a continuous course of discrimination. Indeed, evidence may come in a wide range of forms which, taken together, present a mosaic of unlawful conduct.

A pattern and practice case invariably uses some form of statistical analysis demonstrating discriminatory behavior over a lengthy period of time. Statistics are an integral portion of the plaintiff's systemic discrimination presentation. Indeed, particularly gross statistical disparities may conclusively demonstrate discrimination.[163]

In addition, the plaintiff is advised to bolster the statistical presentation with: (1) evidence of the defendant's and the industry's history of discrimination; (2) proof of standardless or subjective policies and practices; and (3) testimony of individual discriminatees.[164]

Systemic disparate treatment is another example of the courts broadly defining "discrimination." The plaintiff is invited to amass any and all evidence to demonstrate a pattern or practice of discrimination. Naturally, the defendant may attempt either to rebut the inference of discrimination or to justify discriminatory conduct pursuant to recognized defenses. Still, given the many forms discriminatory behavior may take, plaintiffs in a systemic disparate treatment case may utilize any and all cogent evidence to prove their claims.

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[160] 431 U.S. 324 (1977).

[161] 433 U.S. 299 (1977).

[162] *Teamsters*, 431 U.S. at 336 (footnote omitted); *see also* Bazemore v. Friday, 106 S. Ct. 3000, 3008 (1986); *Hazelwood*, 433 U.S. at 307;

[163] *Teamsters*, 431 U.S. at 339-40 & n.20; *see also Hazelwood*, 433 U.S. at 307.

[164] *Hazelwood*, 433 U.S. at 303-04 & n.20; *see also Teamsters*, 431 U.S. at 335-43.

4. The Disparate Impact Case

The Fair Employment Act proscribes not only overt discrimination, but also "practices that are fair in form, but discriminatory in operation."[165] Thus, "[t]he objective of Congress . . . is plain from the language of the statute . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[166] To promote these ends, the Supreme Court recognized the disparate impact framework as a means to establish unlawful discrimination.

Explaining the essence of the disparate impact case, Justice Stewart stated in *Teamsters*, "the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group."[167]

The order of proof in disparate impact cases is threefold. First, the plaintiff must establish by a preponderance of the evidence that "the facially neutral standards in question select applicants . . . in a significantly discriminatory pattern."[168] The burden then shifts to the defend-

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[165] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[166] *Id.* at 429-30; *accord* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 693 (1987).

[167] International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977) (citation omitted). Earlier in that opinion, the Court observed "[Claims of disparate impact] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 335 n.15; *see also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[168] Connecticut v. Teal, 457 U.S. 440, 446 (1982); Dothard v. Rawlinson, 433 U.S. 321 (1975). The Supreme Court has not fully explained how to discern when a "facially neutral standard" selects individuals in a "significantly discriminatory pattern." The Court, however, has noted that:

> A precise method of measuring the significance of . . . statistical disparities was explained in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17. It involves calculation of the "standard deviation" as a measure of predicated fluctuations from the expected value of a sample . . . . [If] the observed number is greater than two or three standard deviations, then the hypothesis that . . . [individuals] were hired without regard to race would be suspect.

Hazelwood School Dist. v. United States, 433 U.S. 299, 309-10 n.14 (1977).

Another approach is offered by the Equal Employment Opportunity Commission's "four-fifths rule" whereby "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (or 80%) (eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact . . . ." *See* 29 C.F.R. § 1607.4(D) (1986).

ant to demonstrate that "any given requirement [has] . . . a manifest relationship to the employment in question."[169] If the defendant meets her burden of defense, "the plaintiff may then show that other selection devices without similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.' "[170]

Two additional considerations inform the disparate impact cause of action. First, the defendant's intent to discriminate plays no part in assessing liability under disparate impact.[171] As explained in *Griggs v. Duke Power Co.*:

> We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability . . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.[172]

Thus, disparate impact has been characterized as discrimination without intent, reflecting Title VII's broad remedial goals to eradicate the effects of unlawful discrimination. Recognizing that discrimination is often perpetuated against entire groups, and cognizant of Title VII's expansive thrust to uncover all forms of discrimination, the Supreme Court acknowledged that employers at times use devices, tests, standards, and criteria that unintentionally deprive individuals of equal em-

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For a discussion of assessing statistics in disparate impact cases, see L. LARSON, EMPLOYMENT DISCRIMINATION §§ 72-74 (1983).

The "four-fifths rule" has received mixed acceptance by the courts. *Compare* Bibbs v. City of Chicago, 38 F.E.P. 844 (N.D. Ill. 1984) (applying "four-fifths rule") *with* Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (four-fifths rule used in conjunction with standard deviation analysis) *and* Cormier v. P.P.G. Indus. Inc., 519 F. Supp. 211 (W.D. La. 1981), *aff'd*, 702 F.2d 567 (5th Cir. 1983) (rejecting four-fifths rule).

[169] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)); *see also* Connecticut v. Teal, 457 U.S. 440, 446-47 (1982). The standards for determining business necessity are discussed *infra* notes 210-17 and accompanying text.

[170] *Dothard*, 433 U.S. at 329 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)); *accord Teal*, 457 U.S. at 447. For a discussion of how the plaintiff-defendant burdens of disparate impact and individual disparate treatment differ or merge, see generally Furnish, *supra* note 120.

[171] *See, e.g.*, *Dothard*, 433 U.S. at 329; International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[172] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis added).

ployment opportunities. The statute is best served, therefore, by both invalidating the offending employment policy and granting discriminatees complete relief.[173] Indeed, the lack of requisite intent is the major difference between disparate impact analysis under Title VII, and constitutional analysis under the equal protection clauses of the fifth and fourteenth amendments.[174]

The second major consideration is that the impact case is predicated on a presentation of statistical data demonstrating that some device, criteria, test, or policy disproportionately harms a protected group. The Supreme Court has clarified that any cogent statistical showing will suffice to make the prima facie case:

> Statistics are . . . competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.[175]

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[173] There has been some debate regarding whether the disparate impact cause of action is found at 42 U.S.C. § 2000e-2(a)(2) alone or also 42 U.S.C. § 2000e-2(a)(1). *See, e.g.*, Seville v. Martin Marietta Corp., 41 F.E.P. 572, 575-76 (D. Md. 1986). See *supra* note 2 for the texts of these statutory provisions.

For a discussion of the debate, see, *e.g.*, Rigler, Connecticut v. Teal, *The Supreme Court's Latest Exposition of Disparate Impact Analysis*, 59 NOTRE DAME L. REV. 313, 325-35 (1984); Scanlon, *The Bottom Line Limitation to the Rule of* Griggs v. Duke Power Co., 18 U. MICH. J.L. REF. 705, 714 (1985). Given the thrust of both section 2000e-2(a)(1) and section 2000e-2(a)(2) to eradicate the full panoply of unlawful discrimination and recognizing the broad and general language used in both provisions, the holdings of those courts limiting disparate impact analysis exclusively to a section 2000e-2(a)(2) is problematic at best. *See also infra* note 196.

[174] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238-46 (1976) (challenge to facially neutral governmental employment policy under fourteenth amendment must demonstrate both unlawful discriminatory intent and effect). However, a challenge to the same policy under Title VII need only be based on discriminatory effect. *Id.* at 247-48. By contrast, civil rights statutes that are specifically drafted to link their definition of discrimination to constitutional equivalents require a showing of discriminatory intent. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring) (discriminatory intent required under 42 U.S.C. § 2000d, which proscribes racial discrimination in programs receiving federal money). However, a plurality therein clarified that, under certain circumstances, authorized federal agencies may promulgate regulations proscribing practices based solely on discriminatory effects even when the enabling statute, viewed in isolation, proscribes only intentional discrimination. *Id.* at 639-45 (Stevens, J., with Brennan and Blackmun, J.J., dissenting).

[175] International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977); *see also* Hazelwood School Dist. v. United States, 433 U.S. 299, 312 (1977); *cf.* Bazemore v. Friday, 106 S. Ct. 3000, 3008-11 (1986). Although these precedents concern systemic disparate treatment, there is no reason to presume that disparate impact cases would be treated differently.

Understandably, statistics have been the source of much debate. *See, e.g.*, Cohn, *On*

The single mandatory rule in demonstrating disparate impact is that the statistical analysis must compare the policy's effect on the allegedly prejudiced group with its effect on others similarly situated. In this way, the court may determine if the control group and the group of alleged discriminatees are being treated equally.[176]

A statistical presentation is subject not only to the defense of "business necessity," but also to logical rebuttals establishing that the plaintiff's data are not probative. Thus, as the courts become more sophisticated in handling statistics, plaintiffs must be careful to control for the proper variables.[177]

These caveats aside, the courts have not hesitated to recognize the discriminatory effects of seemingly neutral policies in a wide variety of settings. For instance, on several occasions, the Supreme Court has invalidated the use of general intelligence examinations and high school diploma requirements as employment selection devices impacting discriminatorily on minorities.[178] In addition, the courts have recognized unlawful impact arising from such selection devices as minimum height

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the Use of Statistics in Employment Discrimination Cases, 55 IND. L.J. 493 (1980); Shoben, *In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn*, 55 IND. L.J. 515 (1980); Cohn, *Statistical Laws and the Use of Statistics in Law: A Rejoinder to Prof. Shoben*, 55 IND. L.J. 537 (1980). *See generally* 3 L. LARSON, *supra* note 168, § 74. For the purposes of the inquiry herein, the important point is that the courts encourage the presentation of *any* cogent statistical evidence to disclose unlawful discrimination.

[176] *Compare* EEOC v. Greyhound Line, Inc., 635 F.2d 188, 192-93 (3d Cir. 1980) (EEOC failed to establish that defendant's policy forbidding public contact employees to wear beards results in disparate impact against black males; although significant proportion of black males in defendant's workforce could not shave with safety or comfort because of racially-linked skin condition, EEOC failed to provide comparative data demonstrating that white males were not comparably burdened by similar skin conditions) *with* EEOC v. Trailways, Inc., 530 F. Supp. 54, 57-59 (D. Colo. 1981) (substantially same facts as *Greyhound*, but EEOC succeeded in establishing prima facie case by demonstrating that Trailways' "no-beard" policy resulted in disparate impact on black males that was not felt by white males).

[177] For example, one plaintiff failed by neglecting to perform a regression analysis — a process that statistically controls for more than one variable. Although showing a possible sexual disparate impact regarding teachers' salary by comparing salary with the educational background of male and female teachers, the plaintiff "did not analyze the employment data using a method that considered the combined effect of education and experience on the salaries paid to male and female teachers." Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721, 731 (8th Cir. 1982); *see also* Bazemore v. Friday, 106 S. Ct. 3000, 3008-11 (1986) (discussing regression analysis under Title VII).

[178] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* L. LARSON, *supra* note 168, § 75.

and weight requirements,[179] arrest records,[180] dismissing employees who receive a certain number of wage garnishments,[181] and employment practices predicated on nepotism.[182]

Similarly, the flexibility of disparate impact analysis is emphasized by the wide variety of statistics available to demonstrate discrimination. As a practical and logical matter, the courts prefer "applicant flow data" demonstrating whether a policy or device impacts discriminatorily on a pool of actual job applicants.[183] Preference for applicant flow data is understandable, since such statistics relate to those individuals who actually manifested an interest in the job, promotion, or other employment opportunity.

Courts, however, are aware that applicant flow data may fail to explain the dynamics of discrimination in certain situations. Often a discriminatory policy, or a company's reputation for discrimination, may dissuade individuals from competing for employment or taking advantage of employment-related opportunities. Statistics demonstrating such "chill" may be more probative than applicant flow data.

For example, census information may help establish unlawful discrimination. The nationwide data relied upon in *Dothard v. Rawlinson*[184] demonstrated that the State of Alabama's minimum height and weight requirements for prison guards summarily disqualified 41.13% of all possible female applicants while disqualifying less than 1% of all males.[185] This blatant discriminatory impact likely discouraged women from even applying for jobs. Any applicant flow data, therefore, would invariably fail to account for those who never applied.[186] Similarly, sig-

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[179] *E.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977) (Alabama's height and weight requirements for prison guards impermissibly discriminatory against women); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

[180] *E.g.*, Reynolds v. Sheet Metal Workers, 490 F. Supp. 952 (D. Colo. 1980); Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972); *see also* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (application of disparate impact analysis to employer's policy refusing to hire individuals with criminal conviction records).

[181] *See, e.g.*, Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp. of Am., 332 F. Supp. 490 (C.D. Cal. 1971); *cf.* Keenan v. American Cast Iron Pipe Co., 707 F.2d 1274 (11th Cir. 1983).

[182] Banilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984).

[183] *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *cf.* Hazelwood School Dist. v. United States, 433 U.S. 299, 313 n.21 (1977).

[184] 433 U.S. 321 (1977).

[185] *Id.* at 329.

[186] *Id.* at 330-31; *see also id.* at 337 (Rehnquist, J., with two Justices concurring);

nificant disparities between the racial composition of an employer's workforce and the racial composition of the appropriate working age population may reveal purposeful discrimination.[187]

By contrast, courts will review intermediate forms of population data when jobs involve special training or skills but applicant flow data are unreliable. In such cases, the courts look at the proportion of minority or other protected individuals in the relevant geographic area who possess the special skills required.[188]

A 1982 Supreme Court opinion, *Connecticut v. Teal*,[189] reaffirmed the flexibility that underscores disparate impact or disparate treatment cases. Moreover, the opinion emphasized Title VII's broad purposes to protect every individual from any deprivation of employment opportunities. As such, the opinion stands as a highwater mark to demonstrate the commitment of Congress and the courts to eliminate discrimination wherever it hides.

Teal held that an employer violates Title VII by utilizing the racially disparate results of a written examination, even if the percentage of minorities ultimately promoted parallels or exceeds their percentage in the applicant pool. Specifically, the challenged written examination

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id. at 340 (Marshall, J., with Brennan, J., concurring in part).

[187] [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population of the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a workforce and that of the general population thus may be significant even though § 703(j), 42 U.S.C. § 2000e-2(j), makes clear that Title VII imposes no requirement that a workforce mirror the general population.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). Thus, it is appropriate to use general population data, constrained to the proper geographic area, when reviewing policies affecting job skills that "many persons possess or [that can be] fairly readily acquired." Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

[188] A classic illustration is Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), in which a pattern and practice challenge was brought against the hiring policies of a 78 square mile school district in St. Louis County, Missouri. In addition to testimony of numerous individual discriminatees and a review of the school district's history of discrimination, the government submitted data comparing the racial composition of the teaching staff with the racial composition of the "qualified public school teacher population in the relevant labor market." *Id.* at 308 (footnote omitted). The Court remanded for a determination of the relevant geographic referent over the dissent of Justice Stevens who was satisfied with the government's prima facie case. *Id.* at 325-30 (Stevens, J., dissenting).

[189] 457 U.S. 440 (1982).

resulted in a passing rate of 79.54% for white and 54.17% for black applicants, so that the black passing rate was 68% of the white pass rate.[190] The test was a "pass/fail barrier" — applicants who failed the examination were no longer eligible for promotion. However, sufficient minority applicants passed the test that Connecticut promoted them in excess of their representation in the applicant pool.[191] The Court, however, rejected Connecticut's argument that overall hiring data — the "bottom line" — insulated it from liability for discrimination in components of the hiring process. The Court unequivocally held that the "bottom line" neither constitutes nondiscriminatory conduct nor provides a defense to discrimination.

The Court emphasized that Connecticut's "bottom line" defense contravened the clear language and policy of Title VII. First, the Court noted that, "[t]he statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[192] Thus, any device that operates to deprive applicants of an employment opportunity because of race or sex violates Title VII. The Court stated that none of the prior precedents suggested that Title VII's protection is limited to instances in which the protected class as a whole suffers discrimination.[193]

Recalling admonitions in previous cases,[194] the Court additionally noted that using the "bottom line" violates Title VII's mandate to protect every individual from discrimination.[195] Recognizing the broad policy objective of Title VII as expressed by both the statute's clear lan-

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[190] *Id.* at 444.

[191] Of the total applicant pool of 329, 48 or 14.6% were black and 259 or 85.4% were white. However, of the 46 individuals finally promoted, 11 or 23.9% were black, a significantly greater percentage than their representation in the total applicant pool. *Id.* at 444 & n.4.

[192] *Id.* at 448 (emphasis added).

[193] *Id.* at 449-51.

[194] *See supra* notes 68-106 and accompanying text.

[195] *Teal*, 457 U.S. at 453-56. While overall hiring data may be used as evidence to help rebut a case of intentional discrimination, *see* Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978), it cannot justify otherwise unlawful disparate impact, *id.* at 454-55. The Court also relied on its holding in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) to support its conclusion that the racial or sexual composition of the workforce cannot insulate employers from liability for discriminating against discrete pockets of protected groups. As discussed *supra* note 114 and accompanying text, the *Phillips* Court invalidated defendant's practice of discharging women, but not men, with preschool age children. Although the policy only impacted on a subclassification of females — women with preschoolers — and although plaintiff's workforce was overwhelmingly female, the Court ruled that plaintiff, and those similarly situated, stated a cognizable claim of unlawful discrimination.

guage and the foregoing precedents, the Court concluded:

> Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory.[196]

Teal is particularly important, therefore, to the expanding concepts of discrimination under Title VII. The *Teal* majority eschewed an interpretation of disparate impact limiting the theory to proscribe only certain forms of discrimination. Instead, the Court clarified that no policy or practice may have a discriminatory impact against any portion of a protected group unless it falls within one of the stringent statutory defenses. Had the Court ruled otherwise, plaintiffs could be excluded from job opportunities not because of any legitimate, job-related considerations, but because of their failure to satisfy discriminatory tests or standards. The Court recognized that Title VII is not blinded to such discrimination simply because other members of the plaintiff's group fortuitously escaped discriminatory treatment.

However, the Court was bitterly divided. Justice Powell dissented, joined by Chief Justice Burger, Justice (now Chief Justice) Rehnquist, and Justice O'Connor. The dissent argued that the majority had confused the individual disparate treatment framework (which directly addresses *individually* felt discrimination) with disparate impact (which addresses group wide discrimination).[197] The dissenters were unwilling to acknowledge that subgroups or distinct portions of protected groups could suffer discrimination as well as the overall group itself.[198]

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[196] *Teal*, 457 U.S. at 455. The *Teal* majority premised its opinion on the proscriptions of 42 U.S.C. § 2000e-2(a)(2) (*see supra* note 2 for statutory text). The majority implied that different considerations may underlie a "bottom line" case involving discriminatory *hiring* under 42 U.S.C. § 2000e-2(a)(1). *Teal*, 457 U.S. at 448 n.9. However, given the opinion's broad language, this dictum seems insubstantial. Section 2000e-2(a)(1) protects "individuals" both from discriminatory terms and conditions of employment and from unlawful discrimination in hiring. Clearly, the *Teal* Court's broad assertions must apply to individuals in the hiring context. Thus, the dichotomy in footnote 9 should be a distinction without a difference. However, some courts have argued that disparate impact analysis is not cognizable under 42 U.S.C. § 2000e-2(a)(1). *See, e.g.*, Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983); Seville v. Martin Marietta Corp., 41 F.E.P. 573, 575-76 (D. Md. 1986). For a full discussion, see Rigler, *supra* note 173, at 325-35.

[197] *Teal*, 457 U.S. at 456-63 (Powell, J., dissenting).

[198] This presupposes that the dissenters are correct in attempting to distinguish between the overall group and a sub-grouping thereof. After all, it is unclear what overall group would satisfy the dissenters' standards under disparate impact. Determining an

The dissenters failed to recall why a unanimous Court established the *Griggs* disparate impact framework. Courts accept proof of disparate impact because groups consist of individuals. If a group suffers discrimination, so too must the individuals composing the group. Because Title VII proscribes discrimination against any and all individuals, disparate impact analysis must apply to any group demonstrating, in a statistically acceptable fashion, that an employment practice resulted in disparate impact predicated on a forbidden criteria.

The infirmity of the dissenters' position, therefore, is clear. They elevated a means of uncovering unlawful discrimination into an end of the statute itself. Protecting groups is a means to attaining the primary statutory end — protecting individual discriminatees. Justice Powell would transform that means into an end by holding that under disparate impact analysis Title VII only protects groups. However, a majority remembered that Title VII protects all individuals and covers all employment opportunities, terms, and conditions. The *Teal* majority applied a broad definition of discrimination — broad enough to protect the most helpless discriminatees.[199]

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overall group itself involves defining that group from the realm of other possible larger groupings. Disparate impact claims do not assert, for example, that a given employer's policy discriminates against every black or every woman. Rather, discriminatory practices affect blacks who cannot pass a standardized intelligence test as in *Griggs*, or women who fail to attain a certain physical height, as in *Dothard* — sub-groupings of all blacks and all women.

Moreover, "groups" under disparate impact analysis are defined by geographic location, skills, age, and other limiting factors. Clearly, the "groups" that the dissenters would recognize under disparate impact analysis are themselves sub-groupings. The *Teal* majority simply recognized an additional level of subgroup subject to Title VII protection.

[199] Along similar lines, Justice Powell offered a policy argument. He reasoned that the employer should not be held liable under a federal civil rights statute when it already had implemented a system that promoted a significant number of minority applicants. *Teal*, 457 U.S. at 463-64 (Powell, J., dissenting). Similarly, Professor Larson criticized the majority decision as:

> leav[ing] us with an uneasy feeling. Is Title VII really performing its function when it tells an employer whose selection process is already producing a disproportionately large minority representation that he must alter it so that the disproportion is even larger?

L. LARSON, *supra* note 168, § 74.42(c), at 14-63. The Powell-Larson position requires two responses.

First, Professor Larson has mischaracterized the *Teal* holding. *Teal* does not require the employer to increase the minority component of the applicable workforce. Rather, *Teal* proscribes the employer from relying on a discriminatory basis to allocate promotions. An employer might replace the test with some other nondiscriminatory device that, in a lawful manner, would render promotion results identical or substantially

E. Defenses, Exemptions, and Affirmative Action

Understandably, neither Title VII itself nor court opinions hold that every conceivable instance in which employers or unions use forbidden criteria is unlawful. To the contrary, certain defenses and exemptions are recognized, permitting the limited consideration of otherwise unlawful factors.

The following sections briefly review defenses and exemptions, including race conscious affirmative action measures. These exemptions and defenses, although necessary to a fair and efficient statutory scheme, are very limited, reflecting Congress' intent to carve only the most narrow exceptions to Title VII's otherwise broad coverage. By deliberately excluding certain discriminatory behavior from the realm of unlawful discrimination, Congress set the limits regarding the acceptable use of race, gender, and other usually forbidden criteria. That Congress created such a limited program of statutory exemptions and defenses fortifies the conclusion that the overall proscriptions of section 2000e-2(a) were intended to read as expansively as the language used would allow.

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similar to those challenged in the first instance.

Second, as the *Teal* majority made clear, Title VII's ban protects every individual or group of individuals. Thus, the employer cannot shield discrimination against one group by focusing on a nondiscriminatory conduct directed toward a related group.

Suppose, for example, an employer told an applicant, "I won't hire you because you're black." Surely, the fact that the employer's workforce happened to be predominantly black would not shield such direct discrimination. Identically, the employer cannot be permitted to accidentally discriminate against a group by means of the disparate effects of a neutral employment policy simply by noting that her overall treatment of the group is nondiscriminatory. The fact that several members of the protected group did not suffer discrimination is no more comforting to the affected members of the subgroup than it would be to the individual discriminatee in the per se discrimination example. In both cases, individuals suffered discrimination predicated on an impermissible criterion. In both cases, Title VII applies. The only possible basis to differentiate the two examples is to assert that direct or purposeful discrimination is worse or more harmful than disparate impact. The Supreme Court has never embraced such a distinction, nor would it seem likely to do so. The Court has established that Title VII is directed to the consequences of discrimination, and has eschewed creating a hierarchy of Title VII causes of action that would serve only to confuse and obscure the statute's effective application. Thus, pursuant to *Griggs* and the general understanding of the purposes of Title VII, the *Teal* Court was correct to disapprove the "bottom line" arguments.

1. The Bona Fide Occupational Qualification Defense ("BFOQ")

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 . . . ."[200] The courts have consistently interpreted the BFOQ defense as "the narrowest of exceptions to the general rule requiring equality of employment opportunities."[201]

The Supreme Court explained the BFOQ standards in *Western Airlines v. Criswell*.[202] Brought under the Age Discrimination in Employment Act ("ADEA"),[203] the opinion invalidated Western Airlines' requirement that flight engineers retire upon reaching age sixty.[204]

Affirming the trial court ruling that Western Airlines' policy fell

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[200] 42 U.S.C. § 2000e-2(e)(1) (1982).

[201] Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). Later in the opinion, the Court reiterated its holding by accepting the Equal Employment Opportunity Commission's "consistent interpretation . . . that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Id.* at 334 (footnote omitted).

[202] 472 U.S. 400 (1985).

[203] 29 U.S.C. §§ 621-634 (1982). Although expressly reviewing the Age Discrimination in Employment Act ("ADEA"), the *Criswell* holding clearly applies in the Title VII context as well. As the Court noted:

> The restrictive language of the statute [ADEA], and the consistent interpretation of the administrative agencies charged with enforcing the statute convince us that, *like its Title VII counterpart*, the BFOQ exception "was in fact meant to be an extremely narrow exceptions to the general prohibition" of age discrimination contained in the ADEA.

Criswell, 472 U.S. at 412 (quoting *Dothard*, 433 U.S. at 334) (emphasis added).

Moreover, as explicated in the text below, the *Criswell* opinion embraced the BFOQ standards under the ADEA set forth by the Fifth Circuit in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). The *Tamiami* standards, in turn, were derived from two Fifth Circuit cases addressing the appropriate scope of the BFOQ defense under Title VII. *See* Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) and Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 225 (5th Cir. 1969); *see also Criswell*, 472 U.S. at 412-14 and *supra* notes 18-21. Thus, the letter and spirit of BFOQ under the ADEA are born from — and are applicable to — the understanding of BFOQ under Title VII.

[204] At the time *Criswell* was issued, the ADEA generally prohibited compelled retirement prior to age 70. *See* 29 U.S.C. §§ 623, 631(a) (1978). Section 631(a) was amended in 1986 to proscribe, with limited exceptions, any mandatory retirement age. *See* Pub. L. No. 99-592, §§ 2(c), 6(a), 100 Stat. 3342, 3344 (Oct. 31, 1986). Additionally, the act provides an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." *Criswell*, 472 U.S. at 403 (quoting 29 U.S.C. § 623(f)(1) (1982)) (footnote omitted).

outside BFOQ protection, the Court adopted the BFOQ standards set forth by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*[205] Specifically, the *Tamiami* standard requires the defendant to prove two separate, although interrelated, facts. First:

> [T]he job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business. . . .The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure [safety].[206]

Second, the *Tamiami* standard mandates that age "qualifications be something more than 'convenient' or 'reasonable' — 'they must be reasonably necessary . . . to the particular business' and this is so only when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry."[207]

The Court relied extensively on the ADEA's legislative history to explain the narrow scope of the BFOQ defense. The ADEA's preamble summarizes both the legislative findings and the statute's purpose: "to promote employment of older persons based on their ability rather than age [and] to prohibit *arbitrary* age discrimination in employment."[208] As the preamble clarifies, the thrust of the ADEA — identical to Title VII — is to eliminate certain forms of "arbitrary" discrimination. The *Criswell* Court emphasized that "Congress recognized that classifications based on age, like classifications based on religion, sex, or national origin, may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business."[209] Borrowing from Title VII, Congress enacted a BFOQ defense designed to permit only such age discrimination as is necessary — and, thus, not

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[205] 531 F.2d 224 (5th Cir. 1976).

[206] *Id.* at 236 (emphasis supplied, as quoted in *Criswell*, 472 U.S. at 417).

[207] *Criswell*, 472 U.S. at 414 (footnote omitted). The Court explained:

> This showing could be made in two ways. The employer could establish that it "had reasonable cause to believe, that is, *a factual basis for believing*, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved. . . ."
>
> Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is "impossible or highly impractical" to deal with the older employees on an individualized basis.

Id. (emphasis added) (citations omitted).

[208] 29 U.S.C. § 621(b) (1982) (quoted in *Criswell*, 472 U.S. at 410 (emphasis added)).

[209] *Criswell*, 472 U.S. at 411.

arbitrary — in a given employment context.

The foregoing discussion of BFOQ establishes two points germane to this Article's inquiry. First, the BFOQ defense under Title VII was drafted to be sparingly applied — permitting only those forms of discrimination that are necessary to the safe conduct of business. In that manner, the discrimination allowed pursuant to the defense is not arbitrary and, therefore, does not offend the goals of Title VII.[210] Second, the inclusion of a specific defense under Title VII illustrates that Congress was able to narrow the definition of unlawful discrimination to the extent it felt appropriate. It follows, then, that any form of discrimination against race, gender, religion, color, or national origin that cannot find its justification in a given defense or exemption must be considered unlawful under Title VII.

2. The Business Necessity Defense

As previously mentioned,[211] the Supreme Court has established the "business necessity defense" applicable to disparate impact cases. As one commentator noted, "The startling thing about Supreme court decisions that describe the defendant's burden in disparate impact cases is how little substance they contain."[212] Both the Supreme Court and lower court rulings offer a confusing patchwork of seemingly conflicting standards.[213]

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[210] The lower courts have not hesitated to apply the narrow reading of BFOQ, thereby rejecting defendants' assertions that certain discriminatory behavior was justifiable. *See generally* 1 L. LARSON, *supra* note 168, ch. 4 (1985).

Of particular importance is the courts' rejection of the preferences of defendants' customers as a basis to justify discriminatory conduct. *E.g.*, Diaz v. Pan Am. World Air Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (invalidating defendant's policy limiting the positions of flight attendants and ticket agents to women). *See generally* 1 L. LARSON *supra* note 168, § 15.40. Exceptions to the rule that "customer preference" does not constitute a BFOQ are few. *See, e.g.*, Local 567 AFSCME v. Michigan, 40 F.E.P. 1648 (E.D. Mich. 1986) (customer preference concerning intimate bodily or other significant privacy interests may constitute a BFOQ).

[211] *See supra* note 169 and accompanying text.

[212] Furnish, *supra* note 120, at 426.

[213] Regarding Supreme Court cases, compare, *e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977) (discriminatory requirement must be necessary to safe and efficient job performance) with New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (discriminatory employment requirement involving municipal jobs intimately concerned with public safety need only be "job related"). In fact, the premiere Title VII opinion, Griggs v. Duke Power Co., 401 U.S. 424 (1971), offers three different standards: (1) the discriminatory component must be "related to job performance,"

Arguably, the most stringent standard is appropriate, since the defense permits an employer to engage in otherwise unlawful discriminatory conduct. The "business necessity" defense is a judicially created one, emanating from no specific statutory provision. Indeed, the one codified defense, the BFOQ defense, does not expressly justify racial discrimination — only sex, national origin, and religious discrimination.[214] By contrast, the business necessity defense may apply in race cases. Thus, courts must apply any judicially devised defense very narrowly, particularly one that allows discriminatory conduct that the statute strongly implies may not exist.[215]

It is worth recalling that the Supreme Court recently clarified the scope and substance of the BFOQ defense. *Western Air Lines v. Criswell*[216] stated that the BFOQ defense must be very narrowly applied and is applicable only if the employer demonstrates that the discriminatory conduct or policy is *"reasonably necessary* to the essence of his business. . . . The greater the safety factor, . . . the more stringent may be the job qualifications designed to insure [safety]."[217]

By so ruling, the Court at once affirmed the BFOQ's narrow application and confirmed that courts are capable of making the difficult and fine determination whether a given discriminatory practice is necessary

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id. at 426; (2) it must be "significantly related to job performance," *id.* at 432; and (3) the employer must demonstrate that the discriminatory device has a "manifest relationship" to the employment in question, *see generally* Furnish, *supra* note 120, at 426-32.

Regarding lower court opinions, compare Crawford v. Western Elec. Co., Inc., 745 F.2d 1373, 1384-85 (11th Cir. 1984) (business necessity defense must be narrowly applied); and Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) with Aguilera v. Cook County Police & Corrections Merit Bd., 760 F.2d 844, 846-47 (7th Cir.), *cert. denied*, 106 S. Ct. 237 (1985) (applying his general paradigm of economic theory, Judge Posner argued that all an employer needs to show is that the discriminatory practice is " 'efficient,' which is pretty much the same thing as 'reasonable' ") and Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972) (the more skilled and complex the job, especially if involving factors affecting health and safety of the public, the lighter is defendant's burden to prove business necessity).

[214] *See* 42 U.S.C. § 2000e-2(e) (1982), discussed *supra* notes 200-10; *see also, e.g.*, Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652-53 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980).

[215] While it is true that the BFOQ defense does not recognize defendable racial discrimination, the statute undeniably permits some racial discrimination. *Id.* at 653-54. For example, it seems noncontroversial that an FBI project to send an undercover agent to infiltrate the Klu Klux Klan would specify the selection of a white agent. Compare lawful, race-conscious affirmative action plans discussed *infra* notes 230-53.

[216] 472 U.S. 400 (1987); *see supra* notes 202-10.

[217] *Criswell*, 472 U.S. at 413 (quoting *Usery*, 531 F.2d at 236) (emphasis added).

to the "essence of . . . business," even when the business implicates the public's safety, as do the passenger airlines in *Criswell*. In this manner, the purposes of Title VII are best promoted: the statute strikes at all arbitrary forms of forbidden discrimination while permitting the employer to discriminate when the use of forbidden criteria is necessary to maintain the enterprise.[218]

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[218] In light of *Criswell*, many of the lower court interpretations of business necessity cited at footnote 213 are problematic at best. Specifically, the Tenth Circuit's admonition in *Spurlock* that the greater the business' connection with public safety the lighter the business' burden is to establish business necessity clearly conflicts with the Supreme Court's standard that "the greater the safety factor, measured by the likelihood of harm in case of accident, the more stringent may be the job qualifications designed to insure (safety)." *Id.*

The above quote states that the stringency of job qualifications may increase according to the urgency of the safety factors germane to the given employment. The Court, however, did not relieve the defendant of the burden of demonstrating the need for the degree of stringency set forth by the challenged employment policies. Contrary to the assertions of the *Spurlock* court, the burden upon the defendant is not lightened in proportion to the safety concerns emanating from the particular job. Rather, the burden remains the same, although the employer's actual demonstration of serious safety concerns will tend to justify unusually burdensome job qualifications.

Similarly, Judge Posner's attempt to import a mere "reasonableness" standard into Title VII cannot go without response. In Aguilera v. Cook County Police & Corrections Merit Bd., 760 F.2d 844, 846-47 (7th Cir.), *cert. denied*, 106 S. Ct. 237 (1985), Judge Posner offered the following definition of the business necessity defense:

> One popular formulation — "essential to safe and efficient" conduct of the employer's business, which originated in the Supreme Court's decision in *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14, 97 S. Ct. 2720, 2728 n.14, 53 L.Ed.2d 786 (1977) — seems very stringent indeed, but is not. It would be if it just said "essential" to the employer's business . . . but "essential to . . . efficient," is just another way of saying "efficient," which is pretty much the same thing as "reasonable."

Id. at 846-47.

This judicial sleight of hand is amazingly transparent. First, Judge Posner quotes the Supreme Court's *Dothard* formulation, which equates business necessity with policies and practices that are "essential *to safe* and efficient" conduct of the employer's business. *Id.* Next, Judge Posner asserts that this standard would be a "stringent" one if the words "and efficient" did not appear therein. Finally, he conveniently discards the words "safe and" to reformulate the phrase to read: "essential to . . . efficient" conduct of the employer's business. *Id.*

Of course, these intellectually dishonest maneuvers cannot succeed in ridding the *Dothard* formulation of the phrase "safe and" — a phrase that clearly modifies the word immediately following: "efficient." Put more bluntly, "safe and efficient" must mean something more than merely "efficient." To survive scrutiny under business necessity, the challenged policy or practice must be "essential to" *both* safety and efficiency. Otherwise, were Judge Posner's interpretation accepted, the business necessity defense would devour the disparate impact cause of action. Rarely, if ever, would an

As with BFOQ, the narrowness of the business necessity defense helps to establish that the definition of discrimination under Title VII must be construed as broadly as the statute's words allow.

3. Exemptions Under Title VII

In addition to the foregoing defenses, Title VII expressly exempts certain employers and certain conduct from the realm of unlawful discrimination. For example, religious organizations may discriminate on a sectarian basis in hiring.[219] Also, Title VII does not apply to employers with fewer than fifteen employees,[220] and the statute only covers employers engaged in interstate commerce.[221]

Section 2000e-2(h) contains important exemptions from the general coverage of Title VII. The seniority system exception provides a useful illustration.[222] The Supreme Court has interpreted that provision to protect bona fide seniority systems[223] from disparate impact challenges.[224] The Court explained that "special treatment under Title

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employer's discriminatory practice be unrelated to enhancing efficient operation of the business.

[219] 42 U.S.C. § 2000e-1 (1982) states:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

[220] 42 U.S.C. § 2000e(b) (1982) states in part: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ."

[221] *See id.*; Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429 (N.D. Ill. 1985) (employer not engaged in interstate commerce).

[222] 42 U.S.C. § 2000e-2(h) (1982) states in relevant part: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . ."

[223] A "bona fide" seniority system is one that is neither designed nor maintained for the purpose of discriminating on the basis of any of the five forbidden classifications under Title VII. *See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63, 87 n.2 (1977) (Stevens, J., dissenting); International Bhd. of Teamsters v. United States, 431 U.S. 324, 353, 355-56 (1977). For a definition of the term "seniority system" see, *e.g.*, California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980).

[224] The Supreme Court has clarified that bona fide seniority systems are immune from disparate impact review regardless of whether the system was in force prior to the effective date of Title VII, International Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977), or was created after the Act's effective date. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 68-77 (1977).

VII"[225] was accorded to seniority systems in light of Congress' decision to balance two important labor policies. On the one hand, Title VII reflects Congress' intent to eradicate arbitrary discrimination from the employment realm. On the other hand, Congress did not wish to outlaw employees' vested rights attained under seniority systems.[226] The Court emphasized the singular importance of the collective bargaining process in general, and negotiations for seniority systems in particular, as integral components of a free market in labor-management relations.[227] Furthermore, seniority systems are of particular concern to employees because they provide a generally fair, neutral, efficient, and predictable method of allocating employment resources, such as promotions, working hours, assignments, and vacations.[228]

This brief review of exemptions raises two germane points. First, Congress chose to limit the coverage of Title VII's prohibitions to promote significant goals, such as protecting the integrity of the collective bargaining process and preserving the security engendered to employees pursuant to bona fide seniority systems. These limited exemptions advance important policies. Thus, these exemptions recognize a limited but manifest set of circumstances under which the general proscription against employment discrimination is set aside to promote countervailing labor policies.

Second, the specific exemptions demonstrate again that Congress limited the statute's otherwise broad coverage when it wished. Congress set forth Title VII's coverage and its limitations; thus, the definition of discrimination should be no less broad than that clarified by the statute itself.[229]

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[225] Trans World Air Lines v. Hardison, 432 U.S. 63, 81 (1977).

[226] *Patterson*, 456 U.S. at 71-77.

[227] *Id.* at 76-77. The Court further emphasized that Congress did not wish Title VII to unduly impinge on free and open collective bargaining.

[228] *E.g.*, *Teamsters*, 431 U.S. at 349-53. It should be noted that while bona fide seniority systems are not challengeable under disparate impact analysis, actual discriminatees will be awarded their rightful place within the system, and thereby will obtain the seniority they would have earned but for the discrimination they suffered. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). Thus, for example, although unable to attack the disparate effects of a given seniority system, discriminatees may successfully challenge the disparate effects of other employment policies, such as a hiring scheme, and, if successful, obtain seniority retroactive to the dates the discriminatees should have been hired.

[229] The same mode of analysis informs a companion exemption set forth at 42 U.S.C. § 2000e-2(h). In addition to protecting seniority systems, Title VII also exempts "bona fide . . . merit system[s]" from disparate impact analysis. The exemption has been narrowly defined to cover only systems "which present[ ] a means or order of

4. Affirmative Action

Aside from initial discrimination itself, few civil rights issues have inspired such diverse and impassioned debate as affirmative action.[230] Affirmative action is the permissible reliance upon a usually irrational criterion, such as race or gender, as part of a program designed not to demean or debase downtrodden groups, but to remedy the effects of discrimination.

This area is very complex, and this Article does not attempt to conclusively establish whether and under what circumstances affirmative action programs are rational. Rather, harmonizing this Article's thesis with affirmative action case law requires only a demonstration that a court may reasonably uphold or create affirmative action plans.

Supreme Court cases clarify the special importance of carefully constructed and appropriately constrained affirmative action plans. In *Sheet Metal Workers v. EEOC*,[231] a majority of the Supreme Court held that under appropriate circumstances, section 2000e-5(g)[232] — the

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advancement or reward for merit." Brock v. Georgia Southwestern College, 765 F.2d 1026, 1036 (11th Cir. 1985). Employers cannot enjoy the benefits of this exemption by simply designating practices or procedures as "merit systems." Rather, employers must demonstrate with clarity that the particular employment procedure under scrutiny is a legally defined merit system. *See, e.g., id.* ("informal and unsystematic . . . *ad hoc* subjective" evaluations of teachers does not constitute bona fide merit system); Walls v. Mississippi State Dep't of Pub. Welfare, 730 F.2d 306, 320 (5th Cir. 1984) (nonjob-related employment test cannot be valid measure of individual merit); Mordago v. Birmingham-Jefferson County Civil Defense Corps, 706 F.2d 1184, 1188-89 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984) (a written set of job descriptions, regularly evaluated, is not a "merit system," if it has been found that the set of positions described present no means or order — "system" — of advancement or reward for merit. *Id.* at 1188).

[230] *E.g.*, Lavinsky, *The Affirmative Action Trilogy and Benign Racial Classification — Evolving Law in Need of Standards*, 27 WAYNE L. REV. 1 (1980); Wright, *Color Blind Theories and Color Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980).

[231] 106 S. Ct. 3019 (1986).

[232] 42 U.S.C. § 2000e-5(g) (1982) states in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate . . . . No order of the court shall require the admission of reinstatement of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or

remedial component of Title VII — "empowers a district court to order race-conscious relief *that may benefit individuals who are not identified victims of unlawful discrimination.*"[233]

The plurality supported its holding on a number of grounds, emphasizing that the language of section 2000e-5(g) "plainly expresses Congress' intent to vest district courts with broad discretion to award 'appropriate' equitable relief to remedy unlawful discrimination."[234]

> was suspended or discharged for any reason other than discrimination of account of race, color, religion, sex, or national origin in violation of . . . this title.

[233] *Sheet Metal Workers*, 106 S. Ct. at 3025 (emphasis added). Justice Brennan wrote the Court's opinion. Justices Marshall, Blackmun, and Stevens joined Parts IV, V, and VI, in which Justice Brennan explained why the challenged affirmative relief was viable under both Title VII and the U.S. Constitution. *See id.* at 3034-54. Two other Justices, however, clarified in separate opinions their positions supporting the basic holding that § 2000e-5(g) does not forbid judicial creation of affirmative action programs that benefit nondiscriminatees. Finding that the plain language of § 2000e-5(g) does not apply solely to individual, actual victims of unlawful conduct, and concluding that the relevant legislative history does not clearly forbid applying that statutory provision to nondiscriminatees, Justice Powell wrote "I . . . agree [with Justice Brennan's opinion] that § 706(g) [42 U.S.C. § 2000e-5(g)] does not limit a court in all cases to granting relief only to actual victims of discrimination." *Id.* at 3054 (Powell, J., concurring in the judgment and concurring in part).

Similarly, Justice White, in his separate opinion, wrote:

> As the Court observes, the general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of discrimination. But I agree that § 706(g) does not bar relief for nonvictims in all circumstances. *Hence, I generally agree with Parts I through IV-D of the Court's opinion.*

Id. at 3062 (White, J., dissenting) (emphasis added) (Justice White's dissent was predicated on his belief that the particular relief sustained in *Sheet Metal Workers* constituted a rigid quota rather than a temporary union membership goal). Thus, while the Brennan opinion headed a "plurality," arguably, it commands the approval of a majority of Justices.

In addition to its discussion of Title VII, the *Sheet Metal Workers* opinion rejected the constitutional arguments brought against the challenged affirmative action programs. *See id.* at 3052-53 (plurality opinion); 3054-57 (Powell, J., concurring in part and concurring in the judgment). For a complete discussion of the *Sheet Metal Workers* case, see Morris, *New Light on Affirmative Action*, 20 U.C. DAVIS L. REV. 219 (1987).

[234] *Id.* at 3035 (plurality opinion). The plurality rejected the too narrow interpretation of the remedial provision offered by both the petitioners and the Solicitor General. Justice Brennan stated:

> The last sentence of § 706(g) prohibits a court from ordering a union to admit an individual who was "refused admission . . . for any reason other than discrimination." It does not, as petitioners and the Solicitor General suggest, say that a court may order relief only for the actual victims of

Similarly, Justice Brennan's opinion argued that permitting courts to create race-conscious remedies that may benefit nondiscriminatees conflicts with neither the Act's original legislative history[235] nor the history of the 1972 amendments,[236] and is consistent with analyses made by both the Equal Employment Opportunity Commission and the Department of Justice.[237]

Justice Brennan explained why race-conscious relief is lawful and appropriate under a statute strongly proscribing such considerations in most employment contexts. Brennan emphasized that the Act is designed to strip away hurtful, irrational barriers that demean and denigrate individuals, rather than distinguish employees and applicants on the basis of merit.[238] While under section 2000e-5(g) courts may not create unnecessary or unduly burdensome remedies, the provision re-

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> past discrimination. The sentence on its face addresses only the situation where a plaintiff demonstrates that a union (or an employer) has engaged in unlawful discrimination, but the union can show that a particular individual would have been refused admission even in the absence of discrimination, for example because that individual was unqualified. In these circumstances, § 706(g) confirms that a court could not order the union to admit the unqualified individual.

Id.

[235] *Id.* at 3038-44 (plurality opinion).

[236] *Id.* at 3045-47 (plurality opinion).

[237] *Id.* at 3044-45. Justice Brennan concluded:

> Our examination of the legislative history of Title VII convinces us that, when examined in context, the statements relied upon by petitioners and the Solicitor General do not indicate that Congress intended to limit relief under § 706(g) to that which benefits only the actual victims of unlawful discrimination. Rather, these statements were intended largely to reassure opponents of the bill that it would not require racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination.

Id. at 3038 (plurality opinion, citation omitted).

[238] *Id.* at 3035-36 (plurality opinion citing Griggs v. Duke Power Co., 401 U.S. 424 (1969); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), and Steelworkers v. Weber, 443 U.S. 193 (1979)). As discussed earlier, *Griggs* established the "disparate impact" cause of action under Title VII, *see supra* notes 165-99 and accompanying text, while *Teamsters* addressed disparate treatment in general and the system disparate treatment case in particular, *see supra* notes 120-64 and accompanying text. Moreover, *Weber* upheld a race-specific affirmative action plan collectively bargained for between a union and an employer. *See infra* notes 250-53 and accompanying text. Thus, this core point of *Sheet Metal Workers'* rationale is predicated on the full spectrum of Title VII theory and analysis. Put in slightly different terms, the theory upon which the plurality upheld court-enforced affirmative action plans is inextricably linked to the entire Title VII paradigm of unlawful discrimination.

quires courts to formulate relief as expansive as is necessary to eradicate the vestiges and effects of a regime of discrimination. As Justice Brennan explained:

> In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.[239]

The plurality fortified its logic by noting that broad affirmative relief may be necessary to thaw the "chill" engendered when a business' reputation for discrimination is so prevalent and longstanding that minorities are dissuaded from applying at all. This "chill" may persist long after the employer has ceased direct, manifest acts of discrimination. Reputation alone often perpetuates the effects of a history of unlawful conduct.[240]

The Brennan opinion stated that strong, race-conscious relief constitutes a prompt, and often immediately effective, remedy. Eradicating the effects of persistent discrimination may be best effected through clear, pointed, and potent measures. The merits of such measures include their susceptibility to immediate enforceability.[241]

Thus, court-ordered affirmative action to remedy a proven history of discrimination reflects a clear instance in which race-consciousness furthers the letter and spirit of Title VII. Unlike irrational discrimination, affirmative action is not designed to impede a discriminated group's entry into the labor market. Neither is such relief designed to humiliate and demean individuals, or to preserve artificial, nonjob-related barriers to employment. To the contrary, limited affirmative action plans break a persistent cycle of discrimination, allowing individuals to compete for employment opportunities on rational bases, such as merit and seniority.[242] A carefully drafted and constrained affirmative action pro-

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[239] *Sheet Metal Workers*, 106 S. Ct. at 3036 (plurality opinion).

[240] *Id.* at 3036-37.

[241] *Id.* at 3037.

[242] The *Sheet Metal Workers* plurality emphasized that, while the given facts of each case will dictate the nature and extent of appropriate affirmative relief, if any, the

gram is a rational and legitimate use of race-consciousness intended to promote the goals of Title VII.[243]

"equitable discretion" informing "a court's judgment should be guided by sound legal principles." *Id.* at 3050. The plurality emphasized that affirmative relief cannot be implemented "simply to create a racially balanced work force." *Id.* Rather, the trial court must determine if recourse to race specific remedies is required to remedy the effects of past discrimination presented by the case-at-bar. *Id.* Perusal of Supreme Court opinions offers some useful general guidance regarding the appropriate parameters of an affirmative action program.

First, as mentioned above, race conscious measures are justifiable only when all other possible relief falls short of rectifying the effects and persistence of past discrimination. *Cf.* Steelworkers v. Weber, 443 U.S. 193, 197-99 (1979) (even absent pending litigation, voluntary, narrowly tailored affirmative action scheme may be lawful under Title VII to promote the statute's primary goal of achieving equal employment opportunities); *id.* at 209-13 (Blackmun, J., concurring) (voluntary affirmative action plans designed to forestall likely possibility of imminent Title VII lawsuit not unlawful under the Act).

Second, the program should set forth goals and timetables to achieve appropriate racial compositions of the applicable workforces. The program should self-terminate upon attaining the goals. By contrast, Title VII likely will not permit a rigid quota system intended to persist over time after the goals and timetables are met. *See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442, 1451 (1987) (upholding voluntary gender based affirmative action program); *Sheet Metal Workers*, 106 S. Ct. at 3051 n.49 (plurality opinion); Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

Lastly, the plan ought not "unnecessarily trammel the interests of white employees." Johnson v. Transportation , 107 S. Ct. 1442, 1451 (1987); *Sheet Metal Workers*, 106 S. Ct. at 3052 (plurality opinion); *Weber*, 443 U.S. at 208 (holding an affirmative action plan lawful because no incumbent workers were discharged and only a portion of the slots in the affirmative training program were designated solely for minority applicant); *see infra* notes 250-53 and accompanying text.

[243] Admittedly, some nonminority workers or applicants will lose some employment opportunities as a result of vigorous enforcement of an affirmative action plan. Simple logic dictates that a race-conscious affirmative action program necessitates a limited racial preference affording, under limited circumstances, advantages to minority applicants not shared by nonminorities. As the court has explained, such race-consciousness is lawful if necessary to alleviate the effects of persistent discrimination in a given workforce — discrimination which, over the course of time, reflected consistent advantages enjoyed by white employees at the expense of minority individuals. The affirmative action program attempts to equalize in a swift stroke the cumulative and indisputably unfair effects of years — often decades — of unlawful discrimination. The temporary disadvantage of nonminority workers, many of whom enjoyed earlier advantages pursuant to employer or union discrimination, is an unfortunate necessity to attain the greater goal of Title VII — general equality of opportunity regardless of race.

While the individual, temporarily disadvantaged white employees may not have actively fostered or condoned the earlier unlawful discrimination, they nevertheless were the fortuitous beneficiaries of their employers' and unions' discriminatory contract. As such, they were placed in a better position than they would have been had their unions and employers not been discriminators under Title VII. Thus, if any deprivations oc-

The identical analysis appears in other Supreme Court affirmative action opinions. Writing for the majority in *Local Number 93, International Association of Firefighters v. Cleveland*,[244] Justice Brennan ruled that, in appropriate circumstances, section 2000e-5(g) 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."[245] Noting that voluntary compliance is "the preferred means of achieving the objectives of Title VII,"[246] and recognizing further that "[i]t is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination,"[247] the Court held that whatever limits on post-trial relief may emanate from section 2000e-5(g) simply do not inure to settlements via consent decrees.[248] The Court determined that section 2000e-5(g) applies to post-trial court ordered relief, and therefore does not address the legality of consent decrees entered into between the parties in a Title VII action and the trial court.[249]

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cur, a properly designed affirmative action program arguably deprives incumbent nonminority employees of little except the expectations garnered when they enjoyed the unearned advantages emanating from a discriminatory system. *Cf.* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (actual discriminatees are entitled to award of retroactive seniority even though putting discriminatees in their rightful place within seniority system may place discriminatees in more senior position than incumbent white employee and thereby displace, to degree, that white employee's seniority status). In brief, looked at from the perspective of costs and benefits, an affirmative action plan — as with all legal and equitable relief — is not without costs. To be lawful, an affirmative action plan's benefits — promotion of the goals of Title VII — must outweigh the costs — harm to individual, probably innocent, nonminority members. When an affirmative action plan engenders too great a cost to innocent others, it must fall.

[244] 106 S. Ct. 3063 (1986).

[245] *Id.* at 3066.

[246] *Id.* at 3072 (citations omitted). *Accord Johnson*, 107 S. Ct. at 1451 & n.8.

[247] *Id.* The Court rested its conclusion on a discussion of Steelworkers v. Weber, 443 U.S. 193 (1979) which is discussed *infra* notes 250-53 and accompanying text.

[248] *Firefighters*, 106 S. Ct. at 3074.

[249] Although consent decrees may not be governed by Title VII's remedial provisions, 42 U.S.C. § 2000e-5(g) (1982), they are not immune from liability for violation of the Act's substantive provisions such as the proscription against discrimination at 42 U.S.C. § 2000e-2(a), set forth *supra* note 2. They are also not immune from violating provisions establishing specific statutory exemptions such as the protection of bona fide seniority systems under § 2000e-2(h). For a discussion of seniority systems, see *supra* notes 222-29 and accompanying text. As Justice O'Connor clarified in her concurring opinion:

> I join the Court's opinion. I write separately to emphasize that the Court's

Again, a paradigmatic basis supporting the Court's acceptance of

> holding is a narrow one. The Court holds that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by § 706(g), whatever those limits may be. Rather, the validity of race-conscious relief provided in a consent decree is to be assessed for consistency with the provisions of § 703, such as § 703(a) and § 703(d), which were at issue in Steelworkers v. Weber, 443 U.S. 193 (1979), and in the case of a public employer, for consistency with the Fourteenth Amendment. As the Court explains, non-minority employees therefore remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under § 703 or the Fourteenth Amendment.

Firefighters, 106 S. Ct. at 3080 (O'Connor, J., concurring).

Illustrative of the foregoing point is Firefighters v. Stotts, 467 U.S. 561 (1984) and its explication in the recent Supreme Court affirmative action decisions. *Stotts* involved a consent decree entered into by the plaintiffs and the City of Memphis. The decree established certain affirmative action hiring provisions, but left untouched the extant collectively bargained seniority system. Thus, affirmative hirees joined the workforce with no accumulated seniority. A municipal budget deficit required the lay-off of city personnel, including a certain number of firefighters. Pursuant to the terms of the seniority system, the city dismissed the least senior firefighters, a process that effectively decimated the gains earlier achieved through the affirmative hiring plan.

The plaintiffs sought to modify the decree to prevent the layoff of the affirmative action hirees. The Supreme Court held that no such modification could issue. Among the several grounds cited, the majority argued that the seniority system exemption under Title VII, 42 U.S.C. § 2000e-2(h) (1982), "permits the routine application of a seniority system absent proof of an intention to discriminate." *Stotts*, 467 U.S. at 577 (quoting Teamsters v. United States, 431 U.S. 324, 352 (1977)). Because the city implemented the proposed layoffs in response to unforeseen economic events, rather than discriminatory animus, the consent decree could not be lawfully amended under Title VII to disrupt the enforcement of the bona fide seniority provision. Despite language in *Stotts* that might be interpreted to proscribe all relief favorably affecting individual nondiscriminatees, *id.* at 578-83, the Court subsequently clarified the actual meaning of that decision:

> Stotts discussed the "policy" behind § 706(g) in order to supplement the holding that the District Court could not have interfered with the city's seniority system in fashioning a Title VII remedy. This "policy" was read to prohibit a court from awarding make-whole relief, such as competitive seniority, back pay, or promotion, to individuals who were denied employment opportunities for reasons unrelated to discrimination. The District Court's injunction was considered to be inconsistent with this "policy" because it was tantamount to an award of make-whole relief (in the form of competitive seniority) to individual black firefighters who had not shown that the proposed layoffs were motivated by racial discrimination. See Note, Race-Conscious Remedies Versus Seniority Systems: Firefighters Local Union No. 1784 v. Stotts, 30 St. Louis Univ. LJ 257, 269 (1985). However, this limitation on *individual* make-whole relief does not affect a court's authority to order race-conscious affirmative action. The purpose

race-conscious affirmative action — this time in a settlement — is the concept that, under controlled circumstances, racial considerations promote the essential goals of Title VII, and thus represent rational discrimination.

Interestingly, the Supreme Court's first examination of the interrelationship between the Act and affirmative action occurred in *Steelworkers v. Weber*,[250] wherein the Court sustained the legality of a voluntary affirmative action plan created by the employer and the union to forestall potential Title VII actions against the company.

Specifically, the collectively bargained employee training program, in which a percentage of the slots were reserved for minority applicants, was meant to rectify a racial imbalance in certain skilled workforces and would last only until the percentage of minorities in the given workforces matched the relevant labor market.[251] In a five-to-two opinion, the Court upheld the program even though white applicants were denied slots in favor of less senior minority workers.

Justice Brennan, writing for the majority, noted that the extant, although unintentional, racial imbalance in the workforce, coupled with the care with which the program was crafted, rendered the affirmative action lawful. In support of its holding, the 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

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> of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination . . . . We decline petitioners' invitation to read Stotts to prohibit a court from ordering any kind of race-conscious affirmative relief that might benefit nonvictims. This reading would distort the language of § 706g, and would deprive the courts of an important means of enforcing Title VII's guarantee of equal employment opportunity.

Sheet Metal Workers, 106 S. Ct. at 3049-50 (plurality opinion) (footnotes omitted).

The Court similarly clarified that *Stotts* does not prohibit the entry of a consent decree which takes race-conscious measures unless the decree offends substantive provisions of Title VII such as §§ 2000e-2(a) and 2000e-2(h). *See Firefighters*, 106 S. Ct. at 3077-79.

[250] 443 U.S. 193 (1979).

[251] *Id.* at 197-99.

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.[252]

As with the examples of *Sheet Metal Workers* and *Firefighters v. Cleveland*, *Weber*'s affirmative action plan supports the conclusion that racial consciousness, designed to reverse the effects of persistent discrimination, is rationally related and perhaps integral to achieving equality. These measures do not debase, humiliate, or harm the majority. Rather, they are necessary infusions of highly concentrated equality to energize the transformation of a labor realm from its irrationally discriminatory practices. Thus, affirmative action, in carefully con-

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[252] Justice Brennan clarified the position of the Court by noting:

> [I]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204. In a concurring opinion, Justice Blackmun, although joining the majority, voiced concern at the possible breadth of Justice Brennan's ruling. *Id.* at 209-16. Justice Blackmun proposed that the underlying policy considerations of Title VII may be best served by affirmative action plans initiated after the employer engages in an "arguable violation" of that statute. Under such conditions, the employer devises the plan to forestall the commencement of a good-faith, and likely successful, discrimination suit. *Id.* at 212-13. It would be ludicrous, Blackmun observed, to permit nonminority employees to mount a successful challenge to the affirmative action plan. This would effectively prevent the employer from voluntarily obeying the law prior to the institution of legal action by alleged minority discriminatees. Still, joining the majority opinion, Justice Blackmun recognized that, "strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not." *Id.* at 214 (Blackmun, J., concurring). The Court has reaffirmed that the majority approach in *Weber* and Justice Blackmun's concurrence reflect harmonious positions explaining the legal and policy viability of properly constrained voluntary affirmative action plans. *See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1451 & n.8 (1987). Therein, a divided Court upheld a voluntary affirmative action promotion of a female to the position of road dispatcher. The Court found that the gender of the applicant was a factor "to be taken into account for the purpose of remedying underrepresentation" in the relevant workforce. *Id.* at 1453. The Court applied, in the gender discrimination context, *Weber*'s holding that an employer may enforce a voluntary affirmative action program to remedy a "manifest [racial] imbalanc[e] in traditionally segregated job categories." Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (cited in *Johnson*, 107 S. Ct. at 1452; *see also id.* at 1460 (O'Connor, J., concurring). Justice O'Connor parted with the majority in her belief that a "manifest imbalance" must reflect data sufficient to sustain a prima facie case against the defendant. *Id.* at 1461. The majority responded that such a correlation would likely "create a significant disincentive for employers to adopt an affirmative action plan." *Id.* at 1453).

trolled doses, is integral to the ultimate elimination of irrational discrimination in employment, thereby promoting the broad definition Congress accorded "discrimination" under Title VII.[253]

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[253] The Supreme Court has upheld affirmative action programs in other contexts as well, noting that important considerations of fairness and equality of opportunity will justify otherwise unlawful race-conscious actions. *See, e.g.*, United States v. Paradise, 107 S. Ct. 1053 (1987) (court-ordered "one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety . . . [in this instance] survives even strict scrutiny analysis: it is 'narrowly tailored' to serve a 'compelling governmental purpose.' " *Id.* at 1057, 1064 (four Justice plurality opinion per Brennan, J.) (quoting Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1846 (1986) (Powell, J.)). The plurality, therefore, declined to discuss whether the interim promotion quota could constitutionally be sustained under a less stringent legal standard. *Id.* at 1064. In his concurring opinion, Justice Stevens opined:

> In this case, the record discloses an egregious violation of the Equal Protection Clause. It follows, therefore, that the District Court had broad and flexible authority to remedy the wrongs resulting from this violation — exactly the opposite of the Solicitor General's unprecedented suggestion that the judge's discretion is constricted by a "narrowly tailored to achieve a compelling governmental interest" standard.

Id. at 1077 (citation and footnote omitted).

See also Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986) (plurality opinion of Powell, J.) (under the fourteenth amendment, "racially based affirmative action program is legitimate if predicated on a compelling state interest and carefully designed to promote that interest; the mere existence of general societal discrimination unrelated to specific prior discriminatory conduct by a state cannot alone support racial affirmative action"); *id.* at 1857-58 (White, J., concurring); *id.* at 1853-54 (O'Connor, J., concurring in part and concurring in the judgment). In Fullilove v. Klutznik, 448 U.S. 448 (1980), a divided Court upheld a provision of the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701-6710 (Supp. II 1978), specifically § 6705(f)(2), which mandated that, absent administrative waiver, no less than 10% of public works program grants be used — "set aside" — to retain minority contractors and firms. In one plurality opinion, the Chief Justice, joined by Justices White and Powell, emphasized that Congress devised the program to remedy past systematic discrimination. Deference to the legislature, accented by the limited and temporary nature of the set-aside program, validated the affirmative measure. *Id.* at 475-84.

Justice Powell submitted a concurring opinion applying the strict scrutiny standard, but noted that the elimination of both present discrimination and present effects of past discrimination may be compelling governmental interests supporting limited race-explicit measures. *Id.* at 497-517. Indeed, Powell indicated that a congressionally enacted set-aside, designed to eliminate discrimination and then self-terminate, need be only reasonable, rather than the most expeditious means to achieve those ends. *Id.* at 510, 515. Justice Marshall, joined by Justices Brennan and Blackmun, believed that the program satisfied "middle level" scrutiny. *Id.* at 517-22.

III. Defining Discrimination in Situations Involving Mutable Characteristics

A. Introduction to the Problem

Many employers impose sexually based grooming codes concerning attire, hairstyles, and other aspects of appearance. Remarkably, not one prevailing court of appeals decision has held that grooming codes restricting the hair length of male employees are sexually discriminatory. The courts have not found the policy gender based, but justifiable under the BFOQ defense. Rather, every court of appeals addressing the question has categorized the policy as not sexually discriminatory.[254] These opinions have been broadened to uphold sexually and racially based grooming codes[255] and ethnically based language rules.[256] However, the cases have not been consistent. For example, courts have struck down grooming codes setting maximum weight requirements for female, but not male, employees.[257] Additionally, courts have overturned policies prescribing a set wardrobe for female employees when

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[254] *See* Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977) (divided panel); Earwood v. Continental Southeastern 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. Missouri Pac. Ry., 527 F.2d 1249 (8th Cir. 1975); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc, four judges dissenting); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973) (per curiam); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) (divided panel). An en banc opinion overruled the sole court of appeals decision to recognize that male long hair rules constitutes sex-based discrimination. *See* Willingham v. Macon Tel. Publishing Co., 482 F.2d 535 (5th Cir. 1973) (divided panel), *rev'd*, 507 F.2d 1084 (5th Cir. 1975) (en banc).

[255] *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986) (sexually based dress and appearance code to enhance company's image is proper exercise of management prerogative); Bellissimo v. Westinghouse Elec. Co., 764 F.2d 175, 181 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986) (same); Smith v. Delta Air Lines, Inc., 486 F.2d 512 (5th Cir. 1973) (discharge of black male because his sideburns did not conform to employer's grooming requirements did not result from racial discrimination); Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (rejecting plaintiff's challenge that employer's policy forbidding wearing of "corn rows" hair style discriminates on basis of black culture).

[256] *See, e.g.*, Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (employee may be discharged for violating employer's rule forbidding use of Spanish in presence of an English-speaking customer).

[257] *See, e.g.*, Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983); *cf.* Association of Flight Attendants v. Texas Int'l Airlines, Inc., 26 E.P.D. Cases ¶ 31,986 (S.D. Tex. 1981). *But see* EEOC v. Delta Air Lines, Inc., 24 E.P.D. Cases ¶ 31,455 (S.D. Tex. 1980).

no comparable restrictions are placed on male employees, or when the wardrobes result in sexual harassment.[258]

Cases upholding sexually and racially based grooming codes premise their rationales on a heuristic distinction between immutable (virtually unchangeable) characteristics and mutable (relatively easily changed) characteristics. Thus, according to these courts, Title VII proscribes only policies and practices affecting immutable characteristics; the employer is free to discriminate on the basis of mutable characterstics.[259] However, under Title VII's definition of discrimination, any distinction predicated on sex or race is unlawful, unless subject to a statutory exemption or defense. This is especially so with a policy that, on its face, makes sexual or racial distinctions.[260] Therefore, labeling a given characteristic as "mutable" or "immutable" should be meaningless under Title VII. The label renders a sex-based distinction no less sex based.

Indeed, the infirmity of the "mutability" cases is demonstrated not only by contrast with the earlier established general definition of discrimination, but also by inconsistencies among "mutability" decisions. As detailed below, the courts have carved multiple and significant exceptions to the general doctrine that Title VII recognizes no discrimination emanating from mutable characteristics. When viewed in total, the exceptions overwhelm the rule to the point that the intellectual, not to mention legal, integrity of the mutability doctrine is problematic at best.

In addition to incompatability with the prevailing definition of dis-

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[258] *See, e.g.*, Tamimi v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987) (employer's policy requiring female employees to wear makeup violates Title VII); Priest v. Rotary, 40 F.E.P. 208, 215 (N.D. Cal. 1986) (same); EEOC v. Sage Realty Co., 507 F. Supp. 599 (S.D.N.Y. 1981) (employer violated Title VII by compelling female employee to wear sexually provocative hostess uniform); Marentette v. Michigan Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) (same); Carroll v. Talman Fed. Savs. and Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (employer's mandated "career ensemble" for women violated Title VII). *But see* Craft v. Metromedia, Inc., 766 F.2d 1205, 1214-16 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986). By contrast, the Ninth Circuit in Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977), upheld an employer's policy requiring male employees to wear ties; *see also*, Devine v. Lonchein, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) (analogizing to Title VII precedent, court held that judge may require male attorneys to wear neck ties to preserve courtroom decorum).

[259] *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Fagan v. National Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973).

[260] Indeed, who but lawyers would seriously dispute that a male only hair length rule is not predicated on a sex-based distinction?

crimination and inconsistent application, there is a third consideration. Permeating mutability doctrine is the presumption that the interests of the discriminatees are too unimportant and too insubstantial for cognizance by a federal court applying a federal statute. Whether the specific issue involves grooming codes, language rules, or some other employment standard, the judicial consensus is that because they may alter their behavior to comply with the employer's rules, individuals have little legitimate interest — and less at stake — in insisting upon their conduct of choice. Thus, for example, because a male can easily shave, he has no protectable interest against his employer's sexually premised rule forbidding beards.

The following discussion takes strong issue with the presumption that the personal or societal importance of individual conduct is measured in inverse ratio to the degree to which, as a physical reality, it may easily be foregone. One simply has nothing to do with the other. The fact that behavior or custom may easily or not easily be altered provides few clues regarding the personal importance attached to such behavior or custom. Individuals define themselves, express their singular personalities, and conceive their special identities through a wide amalgam of acts, including choice of clothing, personal grooming, language, and other arguably mutable characteristics. If we recognize that individual dignity, personal freedom, and sense of self are often intimately tied to mutable characteristics, then we must criticize the cavalier fashion with which courts dismiss individuals' claims that employers' racially, sexually, or ethnically premised rules unjustly restrict personal integrity and expression.

This is not to say that employers cannot issue standards regarding dress, grooming, and other mutable characteristics. Rather, this Article argues only that, when discriminatory, courts must measure the legal viability of such policies under the rigid requirements of the appropriate statutory defenses. As demonstrated in the following discussion, mutability analysis is legally infirm, unsound as a matter of Title VII policy, and logically unjustifiable.[261]

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[261] The question of grooming has been the subject of much conflicting constitutional litigation. Courts are split on whether provisions of the Constitution protect individuals from certain limitations regarding their personal appearance, although many decisions withhold constitutional protection for personal grooming. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-16 (1978); Ingram & Domph, *The Right to Govern One's Personal Appearance*, 6 OKLA. CITY U.L. REV. 339 (1981).

B. The Origin of "Sex Plus" Discrimination

The Supreme Court recognized early in the history of Title VII litigation that the statute forbids discrimination against subclassifications of a protected group. Thus, in *Phillips v. Martin Marietta Co.*,[262] the Court held that the plaintiff stated a cognizable cause of action in challenging her employer's policy dismissing all female employees with preschool-aged children.[263]

The *Phillips* decision is crucial to an understanding of the subsequent cases challenging discrimination predicated on a forbidden criterion, such as sex, coupled with some additional factor, such as parenting. Commonly referred to as the "sex plus" doctrine, the *Phillips* holding extended the statute's scope, recognizing that Title VII covers discrimination against a portion of, as well as the entire, protected class.[264]

The sex (or race) plus doctrine has been applied in a wide variety of Title VII settings,[265] the sole exception being cases involving mutable characteristics.[266]

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[262] 400 U.S. 542 (1971) (per curiam).

[263] Rejecting the rationale of the lower courts that Title VII only proscribes discrimination against an entire protected classification, the Court noted:

> Section 703(a) [42 U.S.C. § 2000e-2(a)] of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals, therefore, erred in reading this section as permitting one hiring policy for women and another men, when each have preschool age children.

Id. at 544.

[264] *Id.*

[265] The term "sex plus" is attributed to Judge Brown's dissent from the Fifth Circuit's denial to review *Phillips* en banc. He noted, *inter alia*, that "[f]ree to add non-sex factors, the rankest sort of discrimination against women can be worked by employers." Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting).

[266] The general breadth of "discrimination plus" analysis is demonstrated by such cases as Jeffries v. Harris City Community Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) and cases cited therein. *Jeffries* stands for the common sense proposition that:

> Recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females. Therefore, we hold when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black male and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.

C. Early Hair Length Cases

Relying on the statute's plain language, legislative history, and judicial opinions, early cases found policies limiting males' hair length per se unlawful.[267] These courts held that under Title VII, "whenever male employees are subject to one standard while female employees are subject to a different standard, this is discrimination on the basis of sex."[268] The courts referred to Title VII's legislative history, particularly the definition of discrimination set forth in the Clark-Case interpretive memorandum.[269] Additionally, the courts relied on Supreme Court precedents, including *Phillips*, for the proposition that "an employment practice may be discriminatory even if it adversely affects only a portion of the protected class."[270]

Furthermore, the courts rejected the contention that hair length was too inconsequential to warrant judicial consideration. As noted by one court:

> 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.[271]

Id. at 1034; *cf.* Chambers v. Omaha Girl's Club, 629 F. Supp. 925, 942 (D. Neb. 1986) (interpreting 42 U.S.C. § 1985 (3) (1982)). In addition, the Supreme Court reaffirmed the vitality of the "plus" line of cases in Connecticut v. Teal, 457 U.S. 440, 455-56 (1982) (holding that claims involving "bottom line" defenses concern form of race or sex plus discrimination). For a thorough discussion of *Teal*, see *supra* notes 189-99 and accompanying text. *Teal* is a fitting companion to *Phillips*, since the former recognizes in the disparate impact realm what the latter stands for under disparate treatment — that no individual may be permitted to suffer unlawful discrimination simply because the group as a whole has not been likewise subjected to identical discrimination.

[267] *See* Willingham v. Macon Tel. Publishing Co., 482 F.2d 535 (5th Cir. 1973) (divided panel), *rev'd*, 507 F.2d 1084 (5th Cir. 1975) (en banc); Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972); Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357 (C.D. Cal. 1972); Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971).

[268] Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 665 (C.D. Cal. 1972).

[269] *See, e.g., id.* at 664-65; *Willingham*, 482 F.2d at 537-38 n.3. The legislative history of Title VII is discussed *supra* notes 48-59 and accompanying text.

[270] *Willingham*, 482 F.2d at 538 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971), and citing *Phillips*).

[271] *Aros*, 348 F. Supp. at 666. Similarly, the *Willingham* panel noted that any contention that employing men with long hair might adversely affect the particular business is best considered as a defense rather than part of the plaintiff's prima facie proof. *Willingham*, 482 F.2d at 538.

The early grooming cases recognized that Title VII invalidates such blatantly gender discriminatory policies as hair length employment policies for males only. "It is clear, therefore, that the term 'discrimination' contains no qualification. Every difference is discrimination."[272]

D. The Legal Standards Provided by Cases Supporting the Mutability/Immutability Dichotomy

Policies setting one standard of employment conduct for men and a second for women seem clearly discriminatory. Nevertheless, many courts have held that sex-based grooming codes are not sexually discriminatory. Remarkably, several of the legal and policy considerations discussed below are asserted by the courts with little, if any, supporting citations or scholarly references. In other instances, the courts rely on narrow and literal readings of Supreme Court opinions that, as demonstrated in the first portion of this Article, were written to expand rather than constrain the scope of Title VII coverage. Although recognizing that policies such as male-only hair length rules are predicated on gender distinction,[273] the courts assert that such employment rules present no sex-based discrimination.

The underlying premise supporting the mutability line of cases is that not every sexually disparate policy is per se unlawful under Title VII.[274] As stated by the Seventh Circuit in a case involving a sexually disparate dress code:

> We share the reluctance of the courts . . . to pass on whether a particular personal appearance regulation promulgated by an employer is "reasonable." 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 even though the standards prescribed differ somewhat for men and women.[275]

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[272] *Aros*, 348 F. Supp. at 665.

[273] *See, e.g.*, Dodge v. Giant Food, Inc., 488 F.2d 1333, 1335 (D.C. Cir. 1973) (per curiam).

[274] *See, e.g. id.*; *see also* Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 181 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986); Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

[275] Carroll v. Talman Fed. Savs. & Loan Ass'n, 604 F.2d 1028, 1032 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980). The *Carroll* court invalidated the dress code under review, finding it unlawfully sexually discriminatory. *See infra* notes 358-65 and accompanying text. Along similar lines, the D.C. Circuit Court of Appeals made the following pronouncement:

> 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

Thus, by reading a "reasonableness" standard into a statute when none previously existed, and shifting the burden to the plaintiff to show that the policy is not "reasonably related to the employer's business needs," mutability analysis turns Title VII totally around.

The common knowledge that employers often promulgate dress codes does not support the conclusion that "it is not usually thought" that such codes are sexually discriminatory. As demonstrated by the Supreme Court cases establishing the definition of discrimination, wide varieties of racial and gender discrimination — blatant, subtle, and exotic — were not and "are not at all uncommon in the business world." Their persistence served as the catalyst to challenge, not the justification to maintain, their continued existence. Their persistence prompted Congress to take legislative measures to eradicate such discrimination from employment because employers had little inclination to do so themselves. It is remarkable and disquieting, therefore, that courts under "mutability analysis" uphold racially and sexually premised policies in part because they reflect the very history of social and gender discrimination that renders most other forms of race and sex consciousness intolerable.

The courts have set forth several proposed justifications for upholding sexually premised grooming codes. Each will be discussed and criticized in turn.

(1) Title VII's Classifications of Prohibited Criteria Address Immutable Characteristics; Therefore, Congress Was Unconcerned With

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> 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. National Cash Register Co., 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973). Courts have recently reaffirmed the argument. *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205, 1214-16 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986) (employer may require employees to abide by sexually disparate dress and appearance code consistent with "community standards" when code "contributes greatly to the company's image" and is not judicially deemed to be " 'outmoded sex stereotype' "); *Bellissimo*, 764 F.2d at 181 (3d. Cir. 1985) (same); Devine v. Lonschein, 621 F. Supp. 894, 897 (S.D.N.Y. 1985). *Lonschein*, analogizing Title VII precedent, upheld a state court judge's order mandating that male attorneys wear neckties. Even though the state court judge *ordered* the attorney to wear a tie, the federal court reasoned that the challenged "differences in style of dress result not from mandates imposed upon the male and female attorneys by some coercive authority — but rather because this is the current fashion." *Id.*

Discrimination Predicated on Mutable Characteristics

As the Ninth Circuit stated, "[s]ince 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."[276] From the outset, the proposition that Title VII is concerned solely with immutable characteristics is flawed.[277] The accompanying assertion that not all sex-based — and by implication race, color, and ethnic based — distinctions are discriminatory likewise is certainly incorrect. The opening portions of this Article demonstrated that Title VII proscribes all distinctions that are predicated on, or otherwise affect, any of the prohibited criteria unless either specifically exempted from coverage or properly validated under the BFOQ or business necessity defenses.

The fact that Congress focused on characteristics that appear, at first blush, to be immutable is hardly surprising. Congress' reason for listing the prohibited criteria in terms of seemingly immutable characteristics is obvious. The immutable nature of the characteristics is fortuitous. Rather, Congress selected the terms "race", "color," "sex," and "national origin" because they reflect most fully — describe most completely and without exception — those factors that would no longer constitute legitimate employment considerations. To clarify that only those forms of discrimination fitting the express exemptions and defenses would be lawful, Congress defined unlawful conduct under Title VII in the most expansive terms possible — bold terms such as "race" and "sex."

A hypothetical offered by Professor Tribe illustrates Congress' lack of concern with distinctions between mutable and immutable characteristics.[278] Imagine that a scientist has invented a potion that can turn a

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[276] Baker v. California Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *see also* Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Fagan v. National Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973); Carino v. University of Oklahoma, 25 F.E.P. 1332, 1336-37 (W.D. Okla. 1981).

[277] Of course, the plain language of the Act itself, which proscribes discrimination on the basis of religion, contradicts the proposition that Title VII covers only immutable characteristics. While the decision to embrace or reject religion in general or a given faith in particular may be difficult to make, religiosity is undeniably a mutable characteristic. For further discussion of this anomaly, see *infra* notes 331-33 and accompanying text.

[278] Professor Tribe presented this illustration during a series of classes at Harvard Law School. I am unaware of any written source for this example.

person's skin from black to white and back again at will. For simplicity's sake, assume further that the potion has no harmful side effects and costs nothing to acquire. Professor Tribe's hypothetical case posits that a bigoted employer tells black employment applicants that he will hire them only if they agree to take the potion while on the job, thereby becoming white during working hours. The black applicants proudly refuse to accept employment under those terms and sue pursuant to Title VII. Although race under this example has become a mutable characteristic — indeed, it has become more easily and economically alterable than, say, hair length — it seems extremely unlikely that any court would rule in the employer's favor, much less dismiss the suit for failure to state a cause of action.

This hypothetical illustrates that Title VII is concerned with more than merely traditional discrimination or discrimination grounded solely in deprivations of economic benefits.[279] Rather, Title VII is directed towards protecting the dignity, self esteem, and individuality of employees and employment applicants. Discrimination because of race or gender, in addition to having profoundly detrimental economic effects, offends the person of the employee or job applicant in an illegitimate manner — a manner unsupported by and not properly related to the reasonable exercise of management prerogative. Professor Tribe's illustration, therefore, provides further evidence that Congress did not select the terms to reflect immutable characteristics.

As previously shown, Title VII's proscriptions against racial and gender discrimination protect *every individual* from discrimination regarding *any* term, condition, or opportunity of employment.[280] Title VII's purpose is frustrated when an entire classification of racially or sexually premised discrimination — mutable aspects associated with race and gender — is defined as outside its purview. The Supreme Court has recognized that Title VII was designed to eliminate racial and gender discrimination from employment.[281] Neither logic nor law demonstrates that discrimination based on mutable characteristics interferes to a lesser degree than does immutable characteristic discrimination with regard to terms, conditions, and employment opportunities of affected individuals.

If the plain language, legislative history, and general judicial interpretation are insufficient to discredit immutable characteristic analysis, recent Supreme Court precedent clearly holds that the discriminatee's

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[279] *See supra* notes 80-106 and accompanying text.

[280] *See supra* notes 68-79 and accompanying text.

[281] *See supra* notes 60-67 and accompanying text.

ability to choose whether to maintain or alter certain behavior does not constrain the individual's protection under Title VII. In *Arizona Governing Committee v. Norris*,[282] the Court held that the challenged pension annuity program unlawfully discriminated on the basis of gender by securing female retirees less in monthly payments than similarly situated male retirees.[283] The employer attempted to justify the sexually disparate payments by arguing that employees were not required to join any retirement plan. Furthermore, employees participating in the retirement program could choose among three alternative payment plans: (1) receiving their accumulated investment portfolios in one "lump sum" payment; (2) dividing the accumulated worth of their portfolios and receiving equal installments over a set period of time; or (3) receiving a monthly annuity for life.[284] Although only the third alternative was sexually discriminatory, the Court ruled that the unlawful nature of that annuity program was neither protected nor insulated by the fact that it was part of a package including nondiscriminatory retirement options.[285] The Court held:

> It is irrelevant . . . that participation in the Arizona deferred compensation plan is voluntary. *Title VII forbids all discrimination concerning "compensation, terms, conditions, or privileges of employment," not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice.* It is likewise irrelevant that the Arizona plan includes two options — the lump-sum option and the fixed-sum-for-a-fixed-period option — that are provided on equal terms to men and women. *An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis. . . .*[286]

Therefore, *Norris*, in clear terms, repudiates the legal and logical underpinnings of immutable characteristic analysis. Indeed, *Norris* involved not one, but two levels of mutable characteristics. First, employees could choose whether to participate in any of the retirement options. Second, if they decided to take part, employees could choose among three alternative retirement plans, only one of which was sexually discriminatory. These two layers of mutability — of choices — could not hide or disguise the unlawful use of gender characteristics as part of the annuity option. The pension annuity plan imposed an arbitrary mode

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[282] 463 U.S. 1073 (1983) (per curiam). For further discussion of *Norris*, see *supra* notes 90-106 and accompanying text.

[283] *Id.* at 1079-91.

[284] *Id.* at 1076-77.

[285] *Id.* at 1081-82 n.10.

[286] *Id.* (emphasis added) (citation omitted).

of gender discrimination that could not be validated by linking the plan to other, nondiscriminatory alternatives.[287]

(2) There Is No Significant Loss of Employment Opportunities When the Alleged Discriminatee Can Easily Conform to the Employer's Grooming Code

An additional line of reasoning supporting the immutable characteristic analysis holds: "If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."[288]

Virtually all courts subscribing to the mutability/immutability dichotomy assert that discrimination is a function of the difficulty associated with conformity to the rule or policy under challenge.[289] Once again, the lower courts have failed to appreciate the purpose and effect of Title VII's coverage as clarified by the Supreme Court. While it is true that Title VII is not designed to obliterate traditional management

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[287] It cannot be cogently argued that *Norris* and the mutability cases are distinguishable because the former concerned longevity as measured by pension payments — a characteristic which, although mutable, cannot be changed without great personal costs — while the latter concern easily altered characteristics such as hair length. As the Court emphasized, the legal infirmity of the Arizona pension annuity program was that it made blatant sex-based distinctions regarding the disbursement of retirement funds. That the affected employees could have foregone the discriminatory annuity plan in favor of alternative, nondiscriminatory retirement options was not significant. As the opinion clarified, the mere *offering* of a discriminatory term or condition constitutes a violation of Title VII. Thus, the *Norris* Court rejected the concept that mutability affects the coverage of Title VII.

Moreover, the policies under review in *Norris*, although of great importance, were fringe benefits that did not directly affect employees' abilities to compete for and maintain employment. By contrast, grooming codes and other policies usually concern employees' or applicants' opportunities to obtain and hold a job. The male, for instance, who refuses to cut his hair is either fired or his employment application is rejected. Therefore, the rationale of *Norris* should apply with extra vigor to mutability analysis, because the policies surrounding mutability analysis directly address the very opportunity to secure a livelihood.

[288] Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc).

[289] *See, e.g.*, Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Knott v. Missouri Pac. Ry., 527 F.2d 1249, 1252 (8th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Fagan v. National Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973); Rogers v. American Airlines, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

prerogatives, the statute severely limits the exercise of such prerogative when based on impermissible criteria.

As the discussions of the *Norris* opinion show,[290] employer liability is not a function of whether the employee may "choose to subordinate his preference by accepting the [discriminatory] code along with the job."[291] Rather, the single appropriate inquiry is whether the alleged discriminatee has been subjected to a policy, term, or condition based on an impermissible criterion. If the answer is yes, and if the policy cannot be substantiated by a statutory exemption or defense, the employer is liable. The fact that the discriminatee may alter behavior to conform with the policy is immaterial because, under the statute, the discriminatee does not have to tolerate making such a choice.[292]

Moreover, it cannot seriously be argued that failure to conform with the employer's requisites does not result in serious detriment. To the contrary, the individual may lose a job, be denied employment, be severely disciplined, or be subject to other undesirable treatment. Indeed, if the courts subscribing to this line of reasoning are correct, Title VII would allow a wide variety of policies that contemporary case law has held illegal. For instance, an employer's policy refusing to promote blacks from menial positions might be lawful. To paraphrase the Court: "If the [black menial] employee objects to the [promotion] code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference [for opportunity for promotion] by accepting the code along with the job."[293]

Surely, the above result is anathema to Title VII policy and practice. The foregoing, therefore, shows that imposing a discriminatory policy must affect employment terms, conditions, and opportunities regardless of whether the policy affects mutable characteristics, immutable characteristics, or both.

(3) Congress Did Not Intend That Title VII's Prohibition Against Gender Discrimination Apply to the Same Extent as its Proscription Against Racial Discrimination

Most remarkable among the purported justifications underlying mutability analysis is the pronouncement in *Willingham v. Macon Telegraph Publishing Co.*[294] that sex discrimination is neither as serious

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[290] *See supra* notes 90-106, 282-87 and accompanying text.

[291] *Willingham*, 507 F.2d at 1091.

[292] *See, e.g.*, *Norris*, 463 U.S. at 1081 n.10.

[293] *Willingham*, 507 F.2d at 1091.

[294] 507 F.2d 1084 (5th Cir. 1975) (en banc).

nor as important as are other forms of unlawful discrimination. The Fifth Circuit, reviewing selected legislative history, concluded, "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."[295] To justify its assertions, the *Willingham* court stated:

> The amendment adding "sex" was passed one day before the House of Representatives approved Title VII of the Civil Rights Act and nothing of import emerged from the limited floor discussion . . . . Ironically, the amendment was introduced by Representative Howard Smith of Virginia, who had opposed the Civil Rights Act, and was accused by some of wishing to sabotage its passage by his proposal of the "sex amendment."[296]

This contention, of doubtful validity when first espoused, has been totally repudiated. Nothing in the plain language of Title VII indicates that the statute protects against sex discrimination less than other prohibited forms of discrimination. Indeed, sex is listed alongside of race, color, religion, and national origin in the statutory provisions defining unlawful conduct.[297] No language modifying or limiting the statute with regard to sex is found in any of those sections. Moreover, while sex discrimination may be lawful if the employer can demonstrate a BFOQ, so too may national origin and religious discrimination.[298] Again, there is no indication that sex discrimination is accorded lesser coverage than the other protected classifications.[299]

Although the amendment to include "sex" among the prohibited cri-

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[295] *Id.* at 1090. Several opinions upholding mutability analysis are based on *Willingham*, citing that case as prime authority. *See, e.g.*, Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976) (per curiam). Thus, the legal viability of these precedents rests on the strength of the *Willingham* opinion. As that case is premised in large measure on a total misapprehension of the coverage of Title VII's ban against gender discrimination, the holdings relying on *Willingham* are questionable.

[296] *Willingham*, 507 F.2d at 1090.

[297] *See, e.g.*, 42 U.S.C. § 2000e-2(a) (1982) (set forth *supra* note 2); *see also* §§ 42 U.S.C. 2000e-2(b)-2000e-2(c) (1982) (set forth *supra* at notes 24 and 25).

[298] *See* 42 U.S.C. § 2000e-2(e) (1982) and discussion of the BFOQ defense, *supra* notes 200-10 and accompanying text.

[299] Neither can it be maintained that the "Bennett Amendment," 42 U.S.C. § 2000e-2(h) (1982), expresses Congress' intent to limit the definition of sexual discrimination. That provision incorporates into Title VII the four affirmative defenses recognized under the Equal Pay Act, 29 U.S.C. § 206(d) (1982), solely for the purposes of insuring conformity between the two statutes. As clarified by the Supreme Court, the Bennett Amendment applies the four defenses only to sex-based wage claims under Title VII. The amendment does not in any other manner limit the nature or type of sex-based claim in general, or wage-based claim in particular, which may be brought under Title VII. *See* County of Wash. v. Gunther, 452 U.S. 161 (1981).

teria was introduced by Representative Smith, a vocal opponent of the bill, in an attempt to frustrate its passage,[300] the amendment did pass. We must presume that those voting for the Act's adoption believed that the amendment was an appropriate extension of the statute's coverage. Otherwise, we are forced to conclude that Congress adopted the amendment frivolously, without recognizing that it provided an additional classification of unlawful discrimination under the statute — a statute that Congress knew would have profound and manifest effects.

Moreover, *Willingham* is hasty in concluding that "nothing of import emerged from the limited floor discussion" of the Smith amendment.[301] While there were confusing comments offered both by representatives opposing the Act, and by proponents of the bill who feared that the original Act would be defeated,[302] there was also intelligent

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[300] *See* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441-42 (1966).

[301] Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc).

[302] The legislative history is, as *Willingham* implies, ironically humorous as Congressman Smith, an ardent foe of the Civil Rights Act, implored for adoption of the sex amendment, and Congressman Celler, a major proponent of Title VII, deemed it necessary to oppose extending the Act's coverage. Part of the exchange is reprinted here for the student of congressional ironies.

Amendment Offered by Mr. Smith of Virginia

MR. SMITH OF VIRGINIA: Mr. Chairman, this amendment is offered to the fair employment practices title of this bill to include within our desire to prevent discrimination against another minority group, the women, but a very essential minority group, in the absence of which the majority group would not be here today.

Now, I am very serious about this amendment. It has been offered several times before, but it was offered at inappropriate places in the bill. Now, this is the appropriate place for this amendment to come in. I do not think it can do any harm to this legislation; maybe it can do some good. I think it will do some good for the minority sex.

I think we all recognize and it is [an] indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex. Now, if that is true, I hope that the committee chairman will accept this amendment.

That is about all I have to say about it except, to get off of this subject for just a moment but to show you how some of the ladies feel about discrimination against them, I want to read you an extract from a letter that I received the other day. This lady has a real grievance on behalf of the minority sex. She said that she had seen that I was going to present an amendment to protect the most important sex, and she says:

"I suggest that you might also favor an amendment or a bill to correct the present 'imbalance' which exists between males and females in the United States."

Then she goes on to say — and she has her statistics, which is the reason why I am

discussion regarding the amendment. Many representatives made speeches emphasizing the need for protecting women from discriminatory employment practices.[303]

Furthermore, this sequence of events in the House of Representatives was only one step in Title VII's passage. Following House approval of the amended bill, the Senate considered and adopted that version. Although the Senate made several substantial changes in the bill, includ-

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reading it to you, because this is serious — "The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an "imbalance" of 2,661,000 females."

Now another paragraph:

"Just why the Creator would set up such an imbalance of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course known only to nature. But I am sure you will agree that this is a grave injustice."

And I do agree, and I am reading you the letter because I want all the rest of you to agree, you of the majority —

"But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct . . . ."

Now, I just want to remind you here that in this election year it is pretty nearly half of the voters in this country that are affected, so you had better sit up and take notice.

She also says this, and this is a very cogent argument, too:

"Up until now, instead of assisting these poor unfortunate females in obtaining their 'right' to happiness, the Government has on several occasions engaged in wars which killed off a large number of eligible males creating an 'imbalance' in our male and female population that was even worse than before."

"Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their 'right' to a nice husband and family?"

I read that letter just to illustrate that women have some real grievances and some real rights to be protected. I am serious about this thing. I just hope that the committee will accept it. Now, what harm can you do this bill that was so perfect yesterday and is so imperfect today — what harm will this do to the condition of the bill?

CHAIRMAN: The time of the gentlemen from Virginia has expired.

MR. CELLER: Mr. Chairman, I rise in opposition to the amendment.

MR. SMITH OF VIRGINIA: Oh, no.

MR. CELLER: Mr. Chairman, I heard with a great deal of interest the statement of the gentleman from Virginia that women are in the minority. Not in my house. I can say as a result of 49 years of experience — and I celebrate my 50th wedding anniversary next year — that women, indeed, are not in the minority in my house. As a matter of fact, the reason I would suggest that we have been living in such harmony, such delightful accord for almost half a century is that I usually have the last two words, and those words are, 'Yes, dear.' Of course, we all remember the famous play by George Bernard Shaw, *Man and Superman*; and man was not the superman, the other sex was. 110 CONG. REC. 2577 (1964).

[303] Representatives Griffiths of Michigan, St. George of New York, May of Washington, and Kelly of New York vocally supported the amendment on its own merits. *See* 110 CONG. REC. 2579-84 (1964).

ing withdrawing the proposed enforcement authority of the Equal Employment Opportunity Commission, the provision banning sex discrimination emerged unaltered from the Senate amendment process. Indeed, a thorough search of the Senate debates indicates that no consideration was given to omitting the prohibition on sex discrimination.[304]

Moreover, after passage by the Senate, the House had further opportunity to block the sex discrimination provision. Instead, in an unusual move, without the routine conference committee consideration, the House adopted the Senate version. While the lack of conference committee action may reflect the House leaders' hesitation to submit the bill to opportunity for weakening, it is clear that the House majority supported the prohibition against sex discrimination in three instances: (1) in approving the Smith amendment; (2) in passing the House bill; and (3) in approving the Senate version. Thus, the assertion that the prohibition against sex discrimination was not intended to have significant consequences conflicts with a comprehensive interpretation of the 1964 legislative history.

In addition, despite the Fifth Circuit's position,[305] the 1972 amendments indicate a forceful Congressional intent to ban sex discrimination. The reports of the Senate Committee on Labor and Public Welfare, and the House Committee on Education and Labor, speak in the strongest terms of their commitment to forbid employment discrimination on the basis of sex.[306]

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[304] The only Senate comment regarding sex discrimination that this search of legislative history uncovered was a question contained among certain comments and questions submitted by Senator Dirksen, which provided the basis for a reply memorandum authored by Sen. Clark. Dirksen commented on the need to protect women from manual labor. The greater number of amendments, comments, and discussion do not question the inclusion of sex among the prohibited criteria. *See, e.g.*, 110 CONG. REC. 7215-18 (1964) (Senator Clark's responses to Senator Dirksen's objections).

[305] *Willingham*, 507 F.2d at 1090.

[306] *E.g.*, S. REP. NO. 92-415, 92d Cong., 1st Sess. 7-8 (1971); H.R. No. 92-238, 92d Cong., 1st Sess., *reprinted in* 45 U.S. CODE CONG. & ADMIN. NEWS 2137 (1972). Many of the comments in these reports speak specifically of discrimination against women. For example, "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." *Id.* at 2141 (HOUSE REPORT). The House Report noted further: "Women are subject to economic deprivation as a class. Their self-fulfillment and development are frustrated because of their sex. . . . Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964." *Id.* at 2140.

Furthermore, precedent subsequent to *Willingham* unequivocally held that "Congress had decided that classifications based on sex, like those based on race, are unlawful."[307] Thus, "under Title VII a distinction based on sex stands on the same footing as a distinction based on national origin or race unless it falls within one of the few narrow exceptions. . . ."[308]

Neither is the *Willingham* argument salvaged by the fact that the grooming policy discriminated against males rather than females. The statute makes no such distinction and the Supreme Court has invalidated discrimination directed against males to the same extent as discrimination against females.[309]

(4) Distinctions Predicated on Mutable Characteristics Are Not Unlawful Because Claims Based on Such Characteristics Are Too Frivolous and Unimportant to be Cognizable Under Title VII

Thus far, the arguments against "immutable characteristics" analysis have been formalistic. That is, Title VII's plain language, legislative history, and Supreme Court interpretation reveal no distinctions between discrimination based on immutable and mutable aspects of impermissible criteria. Courts adopting the "immutable characteristics" distinction, however, implore that the plain language and meaning would apply the statute too literally. The substance of the argument is that Congress simply did not intend its powerful civil rights enactment to become a tool for challenging arguably unintrusive, reasonable, albeit gender-based, employment policies that have enjoyed acceptance in the business world.[310]

As stated by one circuit court:

> Title VII serves the important goal of eliminating arbitrary sex discrimination in employment, and our decision in no way denigrates this laudable goal. As Judge Gesell remarked in *Boyce v. Safeway Stores, Inc.*, . . . :

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[307] Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978).

[308] Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083-84 (1983) (Marshall, J., concurring in part).

[309] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (invalidating employer's health care plan that covered all medical conditions for employees' spouses except pregnancy). For a discussion of *Newport News*, see *supra* notes 42-47 and accompanying text. In a like manner, Title VII's proscription against racially-based discrimination protects whites as well as minority individuals. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

[310] *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205, 1214-16 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986); Fagan v. National Cash Register Co., 481 F.2d 1115, 1124-25 (D.C. Cir. 1973).

> [Defendant's] management may well be out of touch with the attitudes of its own customers, but all this is beside the point. The laws outlawing sex discrimination are important. They are a significant advance. They *must be realistically interpreted, or they will be ignored or displaced.*[311]

Following this rationale, the courts hold that grooming policies do not involve the kind of outmoded sexual stereotypes that Title VII was designed to eliminate.[312]

Accepting the foregoing approach based on "realism," courts declare that hair length and related considerations do not merit federal court review.[313] The courts heuristically state that grooming policies are not discriminatory, but instead, concern the management's ability to run its business as it sees fit.[314] One court has gone so far as to assert that sexually based grooming codes actually protect employees from arbitrary actions by supervisors.[315]

The policy position was aptly summarized by the District of Columbia Circuit: "The issue in these cases is one of degree . . . . The line must be drawn somewhere. . .and we draw the line to exclude Giant's [Food, Inc.] hair-length regulations from the ambit of Title VII."[316]

These courts have misdrawn the line. Certainly, limits have been set on Title VII's scope; but Congress established those limits to reach far

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[311] Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336 (D.C. Cir. 1973) (per curiam) (emphasis added). In a similar vein, the Seventh Circuit argued that ". . . the primary thrust of Title VII . . . is to prompt employers to 'discard *outmoded sex stereotypes* posing distinct employment disadvantages for one sex.'" *Craft*, 766 F.2d at 1215 (quoting Knott v. Missouri Pac. R.R., 527 F.2d 1249, 1251 (8th Cir. 1975)) (emphasis added).

[312] *Compare Craft*, 766 F.2d at 1214-16 (employer's sexually disparate grooming requirements for television newscasters do not reflect the type of "outmoded sex stereotypes" that Title VII was meant to outlaw) *and Fagan*, 481 F.2d at 1123 (upholding employer's male only hair length rules) *with* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (invalidating employer's dress code directed only at females).

[313] *See, e.g.*, Barker v. Taft Broadcasting Co., 549 F.2d 400, 401-02 (6th Cir. 1977); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336-37 n.17 (D.C. Cir. 1973) (per curiam); Rogers v. American Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981). Similarly, several courts hold that no constitutional right to govern one's personal appearance exists, or, if one exists, it is minor and subject to state regulation. *See* Ingram & Domph, *supra* note 261, at 349-50.

[314] *See* Knott v. Missouri Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (en banc) ("But a hiring policy that distinguishes on some . . . ground such as grooming codes or length of hair, is related more closely to the employers' choice of how to run his business than to equality of employment opportunity"); *Fagan*, 481 F.2d at 1124.

[315] *See Fagan*, 481 F.2d at 1123.

[316] Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).

beyond the narrow interpretation of mutability analysis. Title VII should not be constrained by a judge's concept of what is reasonable. Either a policy discriminates or it does not. If the policy is discriminatory, it is valid only if it falls within the accepted defenses.

While the definition of discrimination established earlier supports the foregoing critique of "mutability analysis," the Supreme Court's decisions in *Los Angeles Department of Water and Power v. Manhart*[317] and *Arizona Governing Committee v. Norris*[318] carry a uniquely appropriate emphasis. The decisions invalidated employer pension plans charging female employees more or paying female retirees less than similarly situated males. The sexually disparate pension programs were premised on the fact that women, as a class, live longer than men. Thus, women are likely to receive greater pension benefits than men.[319]

The Court rejected this argument, holding that even empirically accurate sexual stereotypes cannot be used when *individual* women, who do not share that group characteristic, will be treated as though they do and thereby suffer an employment disadvantage.[320] As Justice O'Connor explained:

> Although the issue presented for our decision is a narrow one, the answer is far from self-evident. As with many other narrow issues of statutory construction, the general language chosen by Congress does not clearly resolve the precise question. Our polestar, however, must be the intent of Congress, and the guiding lights are the language, structure, and legislative history of Title VII. Our inquiry is made somewhat easier by the fact that this Court, in *Los Angeles Dept. of Water & Power v. Manhart*, . . . analyzed the intent of the 88th Congress on a related question. The Court in *Manhart* found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic statistically identifiable with the group but empirically false in many individual cases.[321]

In dissent, Justice Powell lamented that, under the *Norris* rationale, employers may be unable economically to offer employee pension annuity plans.[322] Regarding the statute's substantive coverage, he wrote:

> As neither the language of the statute nor the legislative history sup-

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[317] 435 U.S. 702 (1978).

[318] 463 U.S. 1073 (1983) (per curiam). For a discussion of *Manhart* and *Norris*, see *supra* notes 81-106 and accompanying text.

[319] *Manhart*, 435 U.S. at 706.

[320] *Id.* at 707-09; *Norris*, 463 U.S. at 1079-82.

[321] *Norris*, 463 U.S. at 1107-08 (O'Connor, J., concurring in part).

[322] *Id.* at 1096-99 (Powell, J., dissenting in part).

> ports its holding, the majority is compelled to rely on its perception of the policy expressed in Title VII. The policy, of course, is broadly to proscribe discrimination in employment practices. But the statute itself focuses specifically on the individual and "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." This specific focus has little relevance to the business of insurance. Insurance and life annuities exist because it is impossible to measure accurately how long any one individual will live. Insurance companies cannot make individual determinations of life expectancy; they must consider instead the life expectancy of identifiable groups. Given a sufficiently large group of people, an insurance company can predict with considerable reliability the rate and frequency of deaths within the group based on the past mortality experience of similar groups. Title VII's concern for the effect of employment practices on the individual thus is simply inapplicable to the actuarial predictions that must be made in writing insurance and annuities.[323]

What the majority understood (the point the dissent rejected) is that Title VII was enacted not simply to follow, but to lead in the fight against arbitrary employment discrimination. The statute clearly invalidates the general use of sexual and other impermissible stereotypes. Congress intended more, however, for Title VII proscribes reliance upon *any* gender stereotype, including prejudices and perceptions that the enacting Congress had not yet identified as problematic. Thus, *Manhart* and *Norris* invalidated the use of sexual stereotypes even though (1) the challenged stereotype was not used to demean or humiliate women, (2) the stereotype was scientifically sound, and (3) the stereotype, as applied, reflected the logic of insurance economics, which is based on statistical probabilities.

Nevertheless, whatever the merits of economics and insurance practice may be, the logic and justice attendant to a regime of civil rights requires that no individual be disadvantaged pursuant to the presumption that such individual possesses a certain characteristic associated with a racial or gender grouping. In this manner, Title VII reflects Congress' reinvention of the justice of the labor market. Aside from the limited exceptions and exemptions, race and gender have no further legitimate place in the employment realm. Thus, as *Manhart* and *Norris* teach, courts are not competent to categorize stereotypes as "useful" or "not useful," worthwhile or outmoded, unless that conclusion is premised upon an express statutory exemption, the BFOQ or business necessity defense, or the enforcement of an appropriate affirmative action program.

The courts stand on equally unstable ground when asserting that

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[323] *Id.* at 1103 (Powell, J., dissenting in part) (citation omitted).

grooming policies do not constitute outmoded sexual stereotypes. Much has been written repudiating the assertion that hair length and other grooming considerations are too trivial to merit serious consideration by the courts. In both the Title VII and constitutional realms, sophisticated commentary dictates otherwise. Early in the debate concerning grooming rules, a California court invalidated a hair length code applying to males only and made the following observations concerning grooming, personal dignity, and Title VII:

> 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. 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. Since then, millions of individuals have landed on our shores in search of opportunity—opportunity which was denied them in their homelands because of rigid class structures and irrational group stereotypes. 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.*[324]

Judge McCree explained in *Barker v. Taft Broadcasting Co.*:

> Because an individual chooses to wear his hair in a particular way instead of in an alternative way, that hair style must have some value to him. If an employer requires a particular hairstyle as a condition of employment, he reduces the value of the job just as surely as if he had imposed a grooming code which was financially more onerous for employees of one sex. Indeed, the persistence of Title VII and constitutional litigation concerning the permissibility of hair regulations imposed by public and private defendants suggests that to many individuals that value is quite high. Although the majority opinion asserts that grooming codes "bear. . . a negligible relation to the purposes of Title VII . . . ." it can hardly be contended that the subject matter of the hair regulation suits is *de minimis*.[325]

Numerous other scholarly sources clarify the importance of personal grooming standards as integral to an individual's sense of identity. For instance, dissenting from denial of certiorari in *Ferrell v. Della Independent School District*,[326] Justice Douglas stated:

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[324] Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 666 (C.D. Cal. 1972) (emphasis added).

[325] Barker v. Taft Broadcasting Co., 549 F.2d 400, 405-06 n.7 (6th Cir. 1977) (McCree, J., dissenting) (text and footnote combined).

[326] 393 U.S. 856 (1968).

> It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideals 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.[327]

Similarly, courts have noted that judges should not substitute their judgments for those of plaintiffs who can demonstrate that grooming integrity is important to them.[328]

Research into the issue of grooming and constitutional protection led two observers to conclude, "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."[329] Likewise, Professor Tribe, discussing the constitutional aspects of personal grooming, made the following observations:

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[327] *Id.* (Douglas, J., dissenting).

[328] *See, e.g.*, Arnold v. Carpenter, 459 F.2d 939, 941-42 n.5 (7th Cir. 1972) ("It is understandable why some judges find 'long hair' claims constitutionally insubstantial. . . . for the high school student claimant, however, the right to wear 'long hair' is an issue vital to him and we have seen that he is willing to sacrifice for his claim."). Similarly, dissenting in Zeller v. Donegal School Dist., Chief Judge Seitz said, regarding the heavy caseloads of the federal courts: "Certainly the federal courts are busy, but to sacrifice constitutional rights for the sake of alleviating the workload is to abdicate our responsibility." 517 F.2d 600, 614 (3d Cir. 1975).

[329] *Ingram & Domph*, *supra* note 261, at 354 (footnote omitted). In Karr v. Schmidt, 460 F.2d 609, 621 (5th Cir. 1972) (en banc) (Wisdom, J., dissenting), *cert. denied*, 409 U.S. 989, Judge Wisdom observed:

> To me the right to wear one's hair as one pleases, although unspecified in our Bill of Rights, is a "fundamental" right protected by the Due Process Clause. Hair is a purely personal matter — a matter of personal style which for centuries has been one aspect of the manner in which we hold ourselves out to the rest of the world. Like other elements of costume, hair is a symbol: of elegance, of efficiency, of affinity and association, of nonconformity and rejection of traditional values. A person shorn of the freedom to vary the length and style of his hair is forced against his will to hold himself out symbolically as a person holding ideas contrary, perhaps, to ideas he holds most dear. Forced dress, including forced hair style, humiliates the unwilling complier, forces him to submerge his individuality in the "undistracting" mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual. I always thought this country does not condone such repression.

> *[t]o compel a person to appear in a way that he or she finds offensive is an invasion and a falsification of the self. Particularly as society grows increasingly depersonalized, one's appearance remains one of the few ways in which a necessary sense of individuality may be preserved.* As Justice Marshall wrote, an "individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle."[330]

As the foregoing demonstrates, a cost of living in a free society is occasionally experiencing things that, as a personal matter, seem unpleasant or distasteful. A society that truly values preserving and protecting individuality and dignity must protect such expression. Although some may disapprove of particular grooming and dress styles, they, in turn, enjoy the identical freedom of choice — a freedom they exercise on a daily basis. The alternative is erosion of individuality in favor of either a bland, uncontroversial homogeneity, or the triumph of an elite's selfish conception of appropriate personal definition.

Of course, employers may insist that hair be kept reasonably neat, clean, and styled, for such restrictions apply without regard to race or sex. Similarly, employers may impose grooming standards relating directly to the essence of the business. Indeed, under Title VII, so long as there is no disparate treatment or impact, employers may implement any grooming policy they wish. But the management prerogative clearly is limited to nondiscriminatory policies and practices. By thus protecting the rights of employees and employment applicants, and limiting the scope of traditional management prerogative, Congress declared that owning a business no longer justifies arbitrary policies — at least when the policies implicate the forbidden criteria.

Employees' happiness and security depend upon their employment, as do the health and well-being of their families. That dependency, however, does not allow employers to coerce employees to accept the

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[330] L. TRIBE, *supra* note 261, §§ 15-16, at 961 (1978) (quoting Kelley v. Johnson, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting)) (emphasis added). In addition, Professor Tribe responded to the arguments that grooming issues are trivial and that they do not reflect concerns shared by a significant position of the community:

> The fact is that while "[i]ndividual rights never seem important to those who tolerate their infringement," the constitutional guarantee of "liberty" is "an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty."

Id. at 595 (quoting Karr v. Schmidt, 460 F.2d 609, 619 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972) (Wisdom, J., with four judges, dissenting) and Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970)).

employer's arbitrary personal preferences.

E. Extension of Mutability Analysis Into Other Areas — A Quagmire of Conflicting Standards

The preceding section described and critiqued the basic theory of mutable characteristics analysis under Title VII. The following discussion continues in a similar vein by illustrating the internal inconsistencies through the lower federal courts' application of mutability analysis. These inconsistencies demonstrate that the mutable characteristics approach is seriously flawed. It fails to present a coherent framework explaining past decisions and guiding future rulings. Instead it is applied only when a given employment policy is found unoffensive by the reviewing court. By contrast, policies deemed unreasonable and distasteful are overturned as violating Title VII despite the fact that they are premised on undeniably mutable characteristics.

1. Cases Involving Fundamental Rights

From the outset, courts had to modify mutable characteristics analysis for Title VII's protected classification of religion.[331] Clearly, the decisions whether to subscribe to a religious belief, and if so, which one, are personal choices. Often family, friends, and community exert pressure in religious decisionmaking. Nevertheless, it cannot be said that religious practices are immutable, because they may be changed at will.

Thus, the courts were compelled to hold that Title VII does not cover discrimination based on mutable characteristics except those predicated on religious beliefs.[332] Courts, therefore, have upheld challenges against employer grooming codes that interfere with employees' religious expression.[333]

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[331] *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[332] The Fifth Circuit attempted to resolve the conflict by asserting, "Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victims' power to alter . . . or that impose a burden on an employee on one of the prohibited bases." *Id.* (footnote and citation omitted).

[333] *See, e.g.*, Karriem v. Oliver T. Carr Co., 38 F.E.P. 882, 885 (D.D.C. 1985) (Black Muslim hired as security guard cannot be compelled to remove from his uniform "conspicuous but not obtrusive" religious pin); EEOC v. Electronic Data Sys., 31 F.E.P. 588 (W.D. Wash. 1983) (preliminary injunction issued in suit challenging employer's dismissal of worker solely on basis that he violated employer's "no beard" policy because of his religions conversion); *see also* Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984) (per curiam). In *Bhatia*, an employee established a prima facie case under Title VII by demonstrating that his religious beliefs compelled him to

Moreover, the courts were obliged to harmonize mutable characteristic theory with the Supreme Court's decision in *Phillips v. Martin Marietta Co.*[334] *Phillips* held that Title VII's ban against sex discrimination applied to an employer's policy of refusing to hire women with preschool aged children, while imposing no similar restriction against men.

Attempting to square *Phillips* with the mutability theory, courts have asserted that Title VII will cover discriminatory policies predicated on mutable characteristics when they affect the exercise of a constitutionally protected "fundamental right," such as the right of parenting.[335] Dissenting judges vigorously disputed the injection of fundamental rights analysis into Title VII, noting that the statute makes no such reference either expressly in its language or obliquely through its intended coverage.[336] The definition of discrimination under Title VII is not contemporaneous with that of the Constitution. As one judge stated, "the vice of the majority's approach is that it imports *constitutional* notions of immutability and fundamentality into the process of *statutory* interpretation."[337]

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disobey his employer's "no beard" rule covering employees required to wear gas-tight respirators to avoid exposure to toxic gases. The employer, however, prevailed by demonstrating that it had made reasonable, but unsuccessful, efforts to accommodate the plaintiff by offering him alternative employment positions. *But see* EEOC v. Sambo's, 530 F. Supp. 86 (N.D. Ga. 1981) (because clean shaveness is bona fide occupational qualification for family restaurant, defendant did not violate Act by rejecting application for employment by plaintiff, a follower of Sikh religion, who wore beard and mustache pursuant to religious tenets). Similarly, cases vary on the extent to which the Constitution protects religious grooming. *Compare, e.g.*, Sharif v. City of Chicago, 530 F. Supp. 667 (N.D. Il. 1982) (preliminary injunction issued allowing police detective to wear beard grown for religious expression despite police department's ban against facial hair) *with* Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding Air Force regulation proscribing wearing of headgear while indoors as applied to orthodox Jewish commissioned officer who was ordered to remove his yarmulke).

[334] 400 U.S. 542 (1971) (per curiam), discussed *supra* notes 114, 262-66.

[335] *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 269 n.5 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973) (per curiam).

[336] Barker v. Taft Broadcasting Co., 549 F.2d 400, 404 (6th Cir. 1977) (McCree, J., dissenting); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1352 (4th Cir. 1976) (Winter, J., dissenting); *see also supra* notes 33-47.

[337] *Earwood*, 539 F.2d at 1352 (Winter, J., dissenting) (emphasis supplied). Judge Winter concluded that, absent express congressional intent, courts should not apply constitutional notions of discrimination in the Title VII context. *Id.* A year later, relying on Washington v. Davis, 426 U.S. 229 (1976), which specifically held that Title VII does not incorporate the 14th amendment definition of discrimination, *see supra*

In addition, the fact that *Phillips* involved an area of fundamental privacy under the Constitution[338] was purely fortuitous. Nowhere does the opinion so much as hint that its interpretation of Title VII's coverage is limited to, or was derived from, some statutory reference to immutable characteristics in general or fundamental constitutional rights in particular.[339]

2. Cases Involving Characteristics That, Although Mutable, Are Not Easily Changed

Further anomalies quickly arose to challenge the integrity of mutable characteristic analysis. Courts ruled that Title VII protects against discrimination based on mutable physical characteristics that are theoretically changeable at will, but not without difficulty. Thus, in *Gerdom v. Continental Airlines, Inc.*,[340] the en banc Ninth Circuit held that an airline could not impose disparate weight requisites for stewards and stewardesses. The court attempted to distinguish Continental's weight requirement from gender-disparate hair length standards. The court reasoned that in the hair length cases, the employer had promulgated socially acceptable grooming codes for both male and female employees constituting, "permissible grooming rules . . . which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes."[341] By contrast, the Continental weight requirement imposed a "significantly greater burden of compliance" onto females.[342]

Contrary to the Ninth Circuit's opinion, a male-only hair length rule

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notes 171-74 and accompanying text, Judge McCree joined Judge Winter in deploring the use of constitutional standards to limit Title VII coverage. *See Barker*, 549 F.2d at 404 (McCree, J., dissenting). As discussed *supra* notes 33-47 and accompanying text, the Supreme Court recently vindicated Judge Winter's and Judge McCree's legal analysis. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

[338] Courts have long recognized the right of parenting as part of the fundamental right to privacy emanating from the Constitution. *See* L. TRIBE, *supra* note 261, §§ 15-21 (1978).

[339] *See, e.g.*, *Barker*, 549 F.2d at 402-05 (McCree, J., dissenting); *cf.* Fagan v. National Cash Register Co., 481 F.2d 1115, 1126-27 (D.C. Cir. 1973) (Wright, J., dissenting) (noting that *Phillips* mandates the removal of all sexual stereotyping from the employment realm).

[340] 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983).

[341] *Id.* at 605-06.

[342] *Id.* at 606. The Court likewise rejected Continental's customer preference argument, finding that the purported justification was predicated on an unlawful stereotyped view of the role of women as glamorous and servile. *Id.* at 606-08.

is not "evenhanded." It places a stereotypical requisite on men — that they may not wear their hair long — that is not imposed on women. Under the hair length rule, a man who refuses to comply is discharged or his employment application is denied. Under the Continental rule, overweight women were dismissed or not hired. The hair length rule affects employment opportunities in the same manner as the female-specific weight rule. It may be surmised, therefore, that the difference between the two policies was the fact that weight, unlike hair length, is not easily altered.

Similarly, the courts have held that Title VII protects individuals against discrimination predicated on certain class and culturally premised characteristics. Indeed, *Griggs v. Duke Power Co.*,[343] the Supreme Court's first Title VII decision, concerned such an issue. The Court held that Title VII forbids the use of nonjob related, standardized intelligence tests that have the effect of disqualifying a disproportionate percentage of minority job applicants. *Griggs* additionally invalidated a requirement for a high school diploma or equivalent.

Neither the *Griggs* decision nor its progeny held that Title VII did not apply because the ability to pass standardized tests and acquire a high school diploma are arguably mutable. The Court's rationale clearly rejects such a limited and burdensome interpretation of the protections of the civil rights laws. It is true that individuals who do not have diplomas may enroll in courses, and those scoring poorly on standardized tests may take special classes, or study independently, until they acquire the skills necessary to make a stronger showing. Nevertheless, the Court stated:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. . . . [Although white individuals as a group appear to have educations superior to blacks,] *this consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools.* . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.[344]

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[343] 401 U.S. 424 (1971).

[344] *Id.* at 429-31 (emphasis added).

The courts have continually overturned the use of employment tests and standards that disparately impact protected groups.[345] These precedents show that Title VII prohibits discrimination predicated on mutable cultural characteristics.

3. Application of Mutable Characteristics Analysis to Cases Involving "Offensive" or "Outrageous" Stereotyping

Mutable characteristics analysis has not been applied in a pristine manner under Title VII. Admittedly, however, the exceptions discussed have not devastated the mutable characteristics approach. No theory is without exceptions, and those so far reviewed are compatible with the general notion that Title VII does not cover employment policies linked to characteristics that, in a physical sense, may easily be changed.

However, the next set of cases establishes that courts do not validate or invalidate challenged terms and conditions of employment pursuant to whether a given characteristic is truly mutable. Rather, courts evaluate such policies under ill-defined standards of rationality. If the policy is considered unoffensive, it stands, under the logic that Title VII does not generally address mutable characteristics. If the policy is found offensive, it falls because, although Title VII does not *usually* cover mutable characteristics, it does in *this* case.

Recently, the Supreme Court held that Title VII proscribes sexual harassment.[346] The Court unanimously ruled that the Act forbids not only harassment linked to the bestowing of an employment benefit or withholding of a burden — "*quid pro quo* harassment" — but also harassment "unreasonably interfering with the individual's work performance and creating an intimidating, hostile, or offensive working environment."[347]

Furthermore, the Court accepted the EEOC's general definition of harassment: "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[348] Overruling

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[345] *See generally* 3 L. LARSON, EMPLOYMENT DISCRIMINATION 13-15 (1986). Many neutral employment policies invalidated pursuant to disparate impact analysis, *see supra* notes 178-82, concern arguably mutable factors such as conviction records, wage garnishments, and education.

[346] Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986).

[347] *Id.* at 2405 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1985)).

[348] *Id.* at 1405-06 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1985)). The Court explained that: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 2406 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

the district court, the Supreme Court held that the plaintiff's "voluntary" participation in a sexual relationship with the defendant neither deprived the plaintiff of her cause of action nor constituted a defense under the statute.[349] As the Court clarified, the applicable inquiry is not whether the

> complainant was . . . forced to participate against her will . . . [Rather, t]he gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome". . . . the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[350]

A supervisor may sexually harass an employee merely to express hostility, anger, meanspiritedness, or frustration. However, many instances of unlawful harassment involve the singling out of a particular individual whom the harasser finds particularly attractive due to mutable characteristics. Nevertheless, as clarified above, the inquiry is whether, through word or deed, the victim has communicated to the harasser that the sexual advances are "unwelcome." No more is required of the victim.[351] The fact that the harasser's attraction to the victim is predicated on mutable characteristics is immaterial.

The Court's ruling forecloses the argument that by taking steps to make herself unattractive, the victim might have forestalled the harassment. Arguably, the victim could wear shabbier clothing, wear less or different makeup, and take other steps toward reducing alluring characteristics. It is no mystery, however, why most courts have not considered such a resolution. To blame the victim for the harassment shifts the emphasis of the statute. The employer who harasses a worker has performed an abhorrent act. The employee, who has done nothing wrong, must not be punished for attempting to be attractive and pleasing to herself and others. Moreover, to vindicate the harassment by holding the victim responsible requires a further ruling that individuals who make themselves attractive invite, or at least must expect, sexual intrusions. This form of gender based insensitivity is precisely outlawed

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[349] *See Meritor*, 106 S. Ct. at 2406.

[350] *Id.* (citation omitted). The court added, however, that evidence concerning the plaintiff's sexual history, grooming and makeup preferences, and overall sexual conduct is not necessarily "irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." *Id.* at 2407.

[351] The victim should, if at all possible, report the instances of harassment to the perpetrator's superiors to afford the employer notice and an opportunity to correct the situation. *Id.* at 2408-09.

by Title VII.

Harassment presents the first category of unlawful discrimination involving easily altered characteristics. A second category is represented by *Allen v. Lovejoy*,[352] which invalidated a requirement that married women assume their husbands' surnames. Overruling the lower court's determination that the challenged policy was not the type of employment practice that Title VII was designed to proscribe, the Sixth Circuit identified the female-only "name change" rule as precisely the sort of "artificial, arbitrary, and unnecessary barrier[]" prohibited by Title VII.[353] The "name change" policy reflected the stereotypical presumption that wives are appendages of their husbands.

Of course, effecting a name change requires little physical exertion and probably results in no economic deprivation; therefore, the challenged policy concerned a highly mutable characteristic. However, the rule constitutes gender disparate treatment and thus violates the statute.[354] Moreover, married women may feel humiliated, demeaned, and degraded when compelled either to change their names or lose their jobs. It is hardly remarkable to find that a statute eradicating all but absolutely necessary forms of gender discrimination accords no tolerance of an employer's rule that serves only to offend the dignity and individuality of married women.[355]

A set of opinions involving dress codes present a compelling denouncement of the intellectual and legal integrity of mutable characteristics analysis. The Ninth Circuit, extending its rationale in *Baker v. California Land Title Co.*,[356] held that an employer may require male

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[352] 553 F.2d 522 (6th Cir. 1977).

[353] *Id.* at 524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[354] "A rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment." *Allen*, 533 F.2d at 524.

[355] As with the Ninth Circuit's opinion in *Gerdom*, *see supra* notes 340-42, the Sixth Circuit in *Lovejoy* attempted to distinguish the hair length cases by arguing that therein the courts sustained general grooming policies applicable to both genders, while in *Lovejoy* the employer had only a single "name change" policy applying solely to married women. *Id.*

The differentiation is no more persuasive here than it was when reviewing exceptions to mutable characteristic analysis predicated on characteristics that, although mutable, are difficult to alter. Although employers may apply general, gender-neutral grooming codes that do not offend Title VII, a portion thereof that makes a blatant sex-based distinction violates the statute unless that portion constitutes a BFOQ. A rule, therefore, mandating that only men cut their hair is as sexually disparate as a rule requiring that only married women change their surnames.

[356] 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975) (upholding

employees to wear ties.[357] By contrast, the Seventh Circuit, in *Carroll v. Talman Federal Savings & Loan Association*,[358] invalidated a policy requiring women to wear a uniform, while male employees were merely required to wear customary business clothes.[359] The court held that requiring women to wear proscribed outfits constituted an unlawful term and condition of employment because of its blatant sexual basis.[360] Asserting that Title VII proscribes "any" form of sex based discrimination, the court observed:

> [T]he disparate treatment is demeaning to women. While there is nothing offensive about uniforms, *per se*, when some employees are uniformed and others are 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.[361]

The court was particularly disturbed by the employer's offensive attitude. Its brief to the Court averred that:

> the selection of attire, of clothing on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm . . . problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit-skirt fashion which is currently prevalent.[362]

The court flatly rejected as impermissible stereotyping the assertion that women engage in clothes competition and cannot be trusted to dress in a manner appropriate for business.[363]

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defendant's hair length rules for men).

[357] Fountain v. Safeway Stores, 555 F.2d 753, 755-56 (9th Cir. 1977). Interestingly, the employer, responding to employee demands, has rescinded its rules limiting male hair length and forbidding female employees from wearing pants. *Id.* The Court held, however, that since grooming codes implicate no Title VII problems, the employer could amend policies as it sees fit. *Id.* at 756.

[358] 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

[359] The female employees were required to wear either a jacket, tunic, or vest plus skirt or pants selected from what the employer euphemistically referred to as a "career ensemble." *Id.* at 1033.

[360] *Id.* at 1030. The Court emphasized, however, that the requirement would be no less unlawful if the discrimination were subtle, if the uniforms were attractive, or if only one of the women affected objected to wearing the outfits. *Id.* at 1030, 1033.

[361] *Id.* at 1033.

[362] *Id.*

[363] "Clearly, these justifications for the rule reveal that it is based on offensive . . . stereotypical assumptions, a posture which is anathema to a maturing state of Title VII." *Id.* (quoting *In Re* American Airlines, 582 F.2d 1142 (7th Cir. 1978)). Title VII, the *Carroll* court emphasized, was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 1020

However, *Carroll*'s strong language was severely eroded by the majority's closing observation that:

> We share the reluctance of the courts . . . to pass on whether a particular personal appearance regulation promulgated by an employer is "reasonable." *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 even though the standards prescribed differ somewhat for men and women.*[364]

As a matter of legal analysis, this observation is wholly contradictory to the court's earlier admonitions that a "maturing state of Title VII analysis" abhors "any" sexual discrimination, particularly those predicated on sexual stereotypes. Only a court's subjective predilections can explain a ruling that requiring women to wear uniforms is unlawful, but requiring men to cut their hair is not.

Moreover, the *Carroll* opinion wrongly asserts that Title VII only proscribes treatment based on unusual or extreme stereotypes. The statute does not exist solely to invalidate conduct the arbitrary nature of which is no longer controversial. Neither does Title VII invite courts to determine through ill defined measures of extant business practice that policies such as those struck in *Carroll* unduly demean and humiliate individuals while grooming codes in cases such as *Willingham* do not raise serious issues of individual integrity and identity. The statute is severely weakened if the only forms of discrimination it combats are those which, in the personal assessment of a court, are no longer socially worthwhile. Rather, Title VII must set, as well as follow, trends. There is no apparent principled basis, therefore, to distinguish *Carroll*'s invalidation of the employer's grooming rule affecting women and *Willingham*'s approval of a grooming rule affecting men. Only traditional acceptance of the latter, and an evolving distaste of the former, explain why one receives Title VII coverage but not the other.[365]

(quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)). The employer's justification was further eroded by the fact that during holidays and times when the uniforms were cleaned the women were permitted the same fashion freedom as men. *Id.* at 1033. The employer could not recall a single instance when women misused this privilege. *Id.*

[364] *Id.* at 1032. In this manner, the Court attempted to harmonize its holding invalidating the female-only dress code with those cases upholding male-only hair length rules. *Id.*

[365] Several courts follow *Carroll*, particularly when the prescribed uniform is sexually demeaning, provocative, or invites sexual harassment. *See, e.g.*, EEOC v. Sage Realty Co., 507 F. Supp. 599, 609 n.15 (S.D.N.Y. 1981); Marentette v. Michigan Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980); EEOC v. Clayton Fed. Sav. & Loan Ass'n, 25 F.E.P. 841 (E.D. Mo. 1981). However, the court in Lanigan v. Bart-

The contradictory and inconsistent application of mutability analysis is further revealed by contrasting *Carroll* with *Craft v. Metromedia, Inc.*[366] Christine Craft, a news anchorwoman for KMBC-TV in Kansas City, Missouri, was reassigned as a reporter in response to negative viewer reactions as to her appearance and demeanor.[367] Prior to her reassignment, KMBC engaged in a series of wardrobe and makeup changes for Craft in an effort to "soften" her image and remove her perceived aura of "coldness."[368] Based on public opinion surveys, however, the network determined that Craft was unacceptable, although her abilities to write and report news were never at issue.

The Eighth Circuit affirmed the district court's findings that Craft had failed to prove her allegations of gender discrimination under Title VII. The circuit court accepted the lower court's factual finding that "KMBC required both male and female on-air personnel to maintain professional businesslike appearances 'consistent with community standards' and that the station enforced the requirement in an evenhanded, nondiscriminatory manner."[369]

Next, the court rejected Craft's argument that while the station may have promulgated a grooming and appearance code applicable to both genders, the "standards themselves were discriminatory . . . [compelling her] to conform to a stereotypical image of how a woman anchor should appear."[370]

The court acknowledged that "the evidence included a communication from the consultant, Williford, . . . suggesting that Craft purchase more blouses with 'feminine touches,' such as bows and ruffles, because many of her clothes were 'too masculine.' The general wardrobe hints for females developed by Media Associates warned that women with 'soft' hairstyles and looks should wear blazers to establish their author-

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lett & Co. Grain, 466 F. Supp. 1388, 1391-92 (W.D. Mo. 1979), upheld the employer's rule forbidding female employees from wearing pant suits in the executive offices while allowing pant suits in other office areas. The court, rejecting plaintiff's claim that the policy constituted unlawful stereotyping, explained in circular fashion that "[p]laintiff has not established a prima facie case of discrimination. Accordingly, defendant was not obligated to justify its dress code policies." *Id.* at 1391.

[366] 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986).

[367] Craft was informed that KMBC's market research indicated "overwhelmingly negative" viewer response. *Id.* at 1209. Craft averred, although the district court accepted KMSC's denial, that she was advised that "the audience perceived her as too old, too unattractive, and not deferential enough to men," including her male coanchor. *Id.* at 1209.

[368] *Id.* at 1208-09.

[369] *Id.* at 1209-10, 1212-13.

[370] *Id.* at 1214-16.

ity and credibility while women with short 'masculine' hairstyles shouldn't wear 'masculine' clothing in dark colors and with strong lines because they would appear too 'aggressive.' The district court found that Craft had been hired to 'soften' KMBC's news presentation."[371] Nevertheless, applying a "customer preference" standard, the court ruled:

> While there may have been some emphasis on the feminine stereotype of "softness" and bows and ruffles and on the fashionableness of female anchors, the evidence suggests such concerns were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and make-up, and the greater degree of conservatism thought necessary in the Kansas City market. . . . *These criteria do not implicate the primary thrust of Title VII, which is to prompt employers to "discard outmoded sex stereotypes posing distinct employment disadvantages for one sex."*

Courts have recognized that the appearance of a company's employees may contribute greatly to the company's image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative. Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were "obviously critical" to KMBC's economic well-being; and even Craft admitted she recognized that television was a visual medium and that on-air personnel would need to wear appropriate clothes and make-up. ("As television is a visual medium, television networks and local stations clearly have a right to require both male and female anchors to maintain a professional appearance while on camera.") While we believe the record shows an overemphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation — i.e., questions of substance versus image — in television journalism.[372]

According to the court, KMBC's treatment of Ms. Craft did not amount to the type of "demeaning stereotypes" invalidated in *Carroll* and *Gerdom*.[373]

This Article has demonstrated that "customer preference" and usual business practice arguments are unavailing under the BFOQ defense.[374] If an employer cannot appeal to customer preference under the explicit statutory defenses, it is difficult to fathom how "customer preference"

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[371] *Id.* at 1215.

[372] *Id.*

[373] *Id.* n.12.

[374] *See supra* note 210. *See generally supra* notes 200-10 and accompanying text.

constitutes a sufficient basis to deem sexually disparate grooming and makeup standards nondiscriminatory and thus outside the purview of Title VII. Identically, the definition of discrimination established earlier clarified that Title VII does not recognize a species of lawful discrimination entitled "not outmoded stereotype." To the contrary, every use of stereotypes predicated upon any of the five forbidden criteria constitutes unlawful discrimination unless the defendant satisfies one of the statutory exemptions or defenses.

Assuming that Craft was considered too unfeminine, it seems clear that concerns addressing her womanliness motivated the decisions to rework her image and ultimately to remove her as a newsanchor. Let us suppose that Craft was a black male rather than a white female. Under the court's holding, KMBC would be acting in perfect compliance with the statute by firing the black co-anchor who did not appear deferential enough to his white male co-anchor. Similarly, the black male anchor whose dress did not conform with a conservative, white image might impress certain viewers as radical, hostile, or simply different from that appearance with which they are most comfortable. Unless the black anchor agreed to dress according to the most conservative mode of business apparel, he might be dismissed as inappropriate in appearance and demeanor.[375]

Had Ms. Craft brought her action at a time when employers would not hire any black or female anchors, a correct interpretation of the Act would have required the trial court to raze the color and gender barriers lest customer preference become an argument totally overwhelming the statute.

Yet, under the *Craft* opinion, it would not be unlawful for KMBC to dismiss all of their female anchors — or, by analogy, all their black anchors — if preference surveys showed that viewers do not enjoy seeing women or blacks report the news. Of course, such a radical ruling was not required because the defendant made no claim that customer preference influenced it to compose a unisex or unirace staff of anchors. But the fortuity that discrimination in the media has become less general is no reason to insulate fine-tuned discrimination from Title VII's protection.

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[375] This is not to say that a black anchor who dressed in arguably inappropriate garb — a t-shirt and ripped sweatshirts, for example — might not be dismissed. Such dismissal, however, would be pursuant to a general policy forbidding "radical garb" applicable to all employees. By contrast, an employer who fires a black worker for wearing a "Black Power" t-shirt but allows a white worker to wear a shirt conveying a different political message would be liable for racial discrimination under the Act.

Nor does the fact that the *Craft* case concerned television news broadcasts convincingly distinguish it from situations in which the employer's business involves less public exposure. Whether the business is patronized by a small group of elite customers, or by a viewing audience of millions, Title VII stands as a bold protection against discrimination predicated on the five forbidden criteria. The voting public, through a public referendum, may not pass an enforceable proposition exempting selected businesses from Title VII coverage. Similarly, the public, voting by the Neilson Ratings, ought not have the power to remove an employer — such as a television station — from the coverage of Title VII. Viewers unaccustomed to watching a purportedly insufficiently demure female newscaster will have to adjust, just as the same viewers must become adjusted to seeing blacks and women, in general, as newscasters.[376]

It is difficult, therefore, to reconcile *Carroll* and *Craft* except to say that women are capable of dressing themselves but their dress nonetheless may be regulated heavily to conform with the sexually premised perceptions and prejudices of the consuming public. This, of course, is inconsistent with Title VII's definition of discrimination.

This section has shown that mutability analysis does not mean that

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[376] Importantly, *Metromedia* raised no serious claim under the first amendment.

In some instances first amendment interests do modify the coverage of Title VII. For example, few dispute that a theatrical producer may limit the casting of the roles of Romeo and Juliet to male and female thespians respectively. However, the *Craft* case does not implicate considerations of artistic integrity. *Cf.* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. Apr. 2, 1987). Jurado, a bilingual radio announcer for Los Angeles station KIIS, was asked to include bits of "street Spanish" in his broadcasts. KIIS managers hoped thereby to increase the Hispanic audience. Subsequent surveys revealed that the "street Spanish" not only failed to increase minority ratings but also confused the English speaking audience. KIIS management, therefore, ordered Jurado to cease speaking any language but English. Jurado purportedly refused to comply with the "English-only" requirement and was fired. Rejecting Jurado's Title VII claim, the court found that KIIS' decisions were not racially motivated but, rather, were "programming decision[s] motivated by marketing, ratings and demographic concerns." *Id.* at 1410. Moreover, the court found that one station representative's assertions that KIIS did not "need the Mexicans or the blacks to win in L.A.," *id.*, was not a racial slur directed at Jurado. Rather, the court held the statement to be related to demographics, noting that radio stations often target specific ethnic groups, a practice that alone "does not tend to show racial animus in employment." *Id.* For a discussion of language rulings, see *infra* notes 377-409 and accompanying text. Similarly, as the affirmative action cases implicate, the analysis in *Craft* might be substantially different if the wardrobe and makeup decisions were designed to enhance the variety and mix of the news anchors, rather than to bring a newscaster into conformity with purported prevailing sexual stereotypes.

Title VII excludes discrimination predicated on characteristics that may be changed. Rather, in practice courts define mutability analysis as follows: Title VII does not cover discrimination predicated on mutable characteristics unless (1) the characteristics involve a fundamental constitutional right; (2) the characteristics are not easily changed due to physical, economic, social, or cultural attributes; or (3) the characteristics, although clearly mutable, implicate such stereotypes as the presiding court believes to be outmoded and offensive. Put more simply, the standard now is: a court will apply mutability analysis when it pleases.

F. Ethnic and Racial Discrimination Under Mutability Analysis

Mutable characteristics analysis has not been limited to issues of grooming and dress. A particularly alarming extension of that theory holds that Title VII does not proscribe discrimination predicated on mutable cultural characteristics associated with the five forbidden criteria.

Garcia v. Gloor[377] concerned the unsuccessful appeal of an Hispanic employee who was discharged for speaking a few words of Spanish in the presence of an English-speaking customer. The employer, a Texas lumberyard and hardware outlet, forbade any employee from speaking Spanish during working hours unless the employee was on a work-break or was serving a Spanish-speaking customer. While waiting on an English-speaking customer, a coworker asked Garcia about a certain product. Garcia responded in Spanish and was immediately dismissed from work.[378]

Although the district court noted that Garcia was a marginal worker, the court of appeals reviewed his discharge as though it was predicated solely on disobeying the English-only rule.[379]

The Fifth Circuit's rationale in upholding the English-only policy was based on two assertions: (1) "The statute forbids discrimination in employment on the basis of national origin. Neither the statute nor common understanding equates national origin with the language one chooses to speak;"[380] and (2) because Garcia was bilingual and chose to disobey the English-only rule, the Spanish language cannot be equated with his sense of ethnic identity.[381]

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[377] 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113 (1981).

[378] *Id.* at 266-69.

[379] *Id.* at 267.

[380] *Id.* at 268.

[381] *Id.* at 268-69. It was undisputed that Garcia was bilingual and that much of his usefulness as a salesperson stemmed from that ability.

To support its conclusions, the *Garcia* court relied on the mutability cases, particularly *Willingham*, noting that Title VII "focuses its laser of prohibition [against factors] either beyond the victim's power to alter . . . or [those] that impose a burden on an employee on one of the prohibited bases."[382] The court drew the legal conclusion that Title VII only proscribes "burdensome" terms and conditions of employment.[383]

While acknowledging that "differences in language and other cultural attributes may not be used as a fulcrum for discrimination," the court concluded that "the English-only rule . . . did not forbid cultural expression to persons for whom compliance with it might impose a hardship."[384] Thus, in one sweep of the judicial pen, the Fifth Circuit stated that expressing pride in one's heritage is not protected under Title VII if such pride emanates from a mutable characteristic. Indeed, the court discounted as immaterial Garcia's expert witness who "testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and is to them what skin color is to others."[385]

The court emphasized that its ruling was a narrow one. Asserting that for those who spoke no English such a rule would affect a characteristic that was functionally immutable, the court explained:

> Our opinion does not impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forebears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule.[386]

The court rejected Garcia's argument, which it characterized as follows:

> Reduced to its simplest, the claim is "others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden." The argument thus reduces

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[382] *Id.* at 269. The Court noted additionally that the statute's prohibition against religious discrimination is an exception to the mutability analysis. *Id.* Further, the Court reasoned that there was no arguable disparate impact since Garcia could conform with the English-only rule if he so pleased. *Id.* at 270.

[383] *Id.* at 270.

[384] *Id.*

[385] *Id.* at 267.

[386] *Id.* at 272.

> itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity.[387]

The *Garcia* rationale was extended in *Rogers v. American Airlines, Inc.*,[388] which upheld an employer's proscription of the "corn rows" hairstyle. Plaintiff, a black woman, challenged the policy as both racially and sexually discriminatory. The court rejected her sex discrimination claim, noting that the policy was facially neutral and that plaintiff had offered no evidence of disparate impact.[389] The court also rejected the plaintiff's contention that the "corn rows" style, popular among blacks, represented a cultural and historical expression of racial identity. The court reasoned that Rogers' claim failed because she could not demonstrate that "corn rows" are worn exclusively, or even predominately, by blacks.[390] Thus, according to the court, a trait or style apparently can have no cognizable cultural importance unless (1) the trait is virtually exclusive to that culture, and (2) the plaintiff can demonstrate that nothing but that culture influenced her to adopt that particular grooming style. Therefore, if plaintiff's interest in her culture's grooming habits was first sparked by a noncultural stimulus, the plaintiff is seemingly estopped from claiming that an employer's grooming code is unlawfully discriminatory. The court dismissed the possibility that more than one factor may lead to cultural awareness, or that a person may adopt a grooming style for both cultural and other reasons.[391]

The court further asserted that, "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 distinc-

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[387] *Id.* at 271. Thus, the Court was able to characterize the English-only policy, as had the Court in *Willingham* regarding hair length, as a permissible exercise of management prerogative, the rationality of which is not a concern under Title VII. *Id.* at 269-71.

[388] 527 F. Supp. 229 (S.D.N.Y. 1981).

[389] *Id.* at 231. The court doubted whether proof of disparate impact would render the policy unlawful in light of the hair length cases. *Id.*

[390] *Id.* at 232. Moreover, the court found material the fact that plaintiff only began wearing a braided hairstyle on September 25, 1980, after seeing the movie *10*. In the movie Bo Dereck, a white actress, wore "corn rows" which resulted in a "corn rows" fad. *Id.*

[391] Of course, the court could not literally mean what it says, otherwise, for example, orthodox Jews could not demonstrate that wearing beards is a religious tradition since they are not the only sect of males to grow beards.

tions in the application of employment practices by an employer."[392]

The disturbing crux of *Garcia* and *Rogers* is that cultural reflections of national origin are weakly protected under Title VII. Thus an employer can promulgate any policy or practice — even ones unrelated to genuine business necessity — that limit, interfere with, or hinder an employee's cultural identity unless associated with immutable characteristics. The unilingual Spanish-speaking individual may embrace that language as a major factor defining her cultural individuality in a fashion most similar to a black individual's identification between cultural selfhood and skin color. However, by becoming bilingual, Garcia, in some unexplained manner, relinquished whatever legal recognition his devotion to Spanish may have had.[393] Similarly, because her inspiration to adopt "corn rows" might have stemmed in part from seeing a white actress wearing that hairstyle, and because hairstyles are mutable, Ms. Rogers could not demonstrate that "corn rows" reflect cultural and racial characteristics integral to her identity.

The courts' application of mutability analysis to aspects of cultural identity is incorrect under Title VII's expansive definition of discrimi-

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[392] *Id.* at 232 (citing Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)). The Court also cited Carswell v. Peachford Hosp., 26 E.P.D. cases, 32,012 (N.D. Ga. 1981) for the proposition that an "employee fired for wearing 'corn rows' style in violation of hospital policy is not entitled to relief under Title VII." *Id.* The court's interpretation of *Carswell* is inaccurate. In *Carswell*, the plaintiff was dismissed for wearing *beads* as an adornment for her corn rows in a manner creating a constant clicking sound. The sound disturbed and upset the hospital's psychiatric patients. The hospital, in fact, had no policy proscribing corn rows and would have permitted plaintiff to wear both the hair style and the beads if the sound was muffled.

[393] The court of appeal's rationale, therefore, could penalize an individual for taking such self-expansive steps as learning a new language. It is problematic, however, whether the court would apply the identical standard in all cases. For instance, a court might be reluctant to uphold under Title VII the firing of a bilingual orthodox Jewish employee who spoke Hebrew to a co-worker in the presence of a non-Hebrew speaking customer if the store was located in a neighborhood as Jewish as Garcia's was Mexican-American.

The courts' emphasis on Garcia's deliberate disobedience of the English-only rule is likewise problematic. Courts should not require employees to obey discriminatory policies; neither should courts penalize employees for defying such policies. It is doubtful, for example, that a court would uphold an employment policy forbidding black workers from requesting promotions simply because a given minority employee had deliberately challenged the rule by asking his supervisor for a better job. Neither, one presumes, would a court chastise the employee as insubordinate for defying such a race-based discriminatory policy. Garcia's purported insubordination, therefore, is not evidence that the employer's policy was lawful. Rather, a judicial determination of legality might be evidence that Garcia's conduct was insubordinate.

nation.[394] Indeed, the EEOC "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity . . . because an individual has the physical, cultural or linguistic characteristics of a national origin group."[395] Specifically addressing English-only rules, the EEOC advises that, since "the primary language of an individual is often an essential national origin characteristic," a rule totally proscribing the speaking of a native language is burdensome and unlawful unless justified by a BFOQ.[396] The EEOC further concluded that an employer may enforce a limited English-only rule, such as in *Garcia*, only if the rule is fully defendable as a business necessity.[397]

The EEOC's standard presents a sharp contrast to *Garcia*. The appeal to EEOC Guidelines is useful for two important reasons. First, the guidelines reflect consistent EEOC opinions that English-only rules violate Title VII.[398] Second, the guidelines concerning English-only rules were drafted in response to *Garcia v. Gloor*.[399] The Commission

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[394] The Supreme Court has not discussed the question of cultural identity under Title VII, except by implication. Its one decision regarding ethnic discrimination held that an employer's policy refusing to hire aliens does not constitute per se national origin discrimination. Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973). The Court reasoned the term national origin concerns "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.* at 88 (footnote omitted). The Court emphasized that the policy in question was not impermissible because it was applied against all aliens. *Id.* at 95. A practice, by contrast, which limited itself only to aliens of Mexican origin would be per se unlawful. *Id.* While the Court could have included discrimination against aliens as per se national origin discrimination, *see id.* at 96-98 (Douglas, J., dissenting), the holding in no way implicates that Title VII is blind to discrimination directed towards a particular heritage.

[395] Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (1986), *promulgated in* 45 Fed. Reg. 85,631, 85,636 (1980).

[396] *Id.* § 1606.7(a). The Commission noted further that such rules "may create an atmosphere of inferiority, isolation and intimidation . . . which could result in a discriminatory working environment." *Id.* (footnote omitted).

[397] *Id.* § 1606.7(b). The Commission additionally admonishes employers to be sure that employees receive adequate notice of any English-only limitations. *Id.* § 1606.7(c).

[398] *See, e.g.*, EEOC Decision No. 71,446, 2 F.E.P. 1127 (1970) (rule totally proscribing speaking Spanish at any time found violative of Title VII). The courts consider consistency of legal interpretation important. Although EEOC guidelines are "accorded great deference," Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971), the courts will withhold deference if the guidelines contravene the statute or, otherwise, are unworthy of consideration. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976). Inconsistency in the history of agency interpretation of the law may make guidelines in that area unreliable and, therefore, unworthy of deference. *Id.*

[399] *See* 45 Fed. Reg. 85,632, 85,635 (1980) (noting that the EEOC had no guidelines

began its analysis by citing statistics revealing that, as of Spring 1976, approximately 28 million persons — or thirteen percent of the total population — "have non-English language backgrounds and may be affected by an employer's speak-English-only rule."[400] Thus, the Commission concluded, rules insisting upon English on the employer's premises constitute impermissible burdens predicated on national origin.

Similarly, the Commission asserted that a limited English-only rule is unlawfully burdensome absent justification. Thus, the Commission concluded that its guidelines did not conflict with *Garcia*, which upheld the rule as business related.[401] Indeed Mr. Garcia did not argue that an employer, catering to both English- and Spanish-speaking customers, may not require bilingual public contact employees. Rather, Garcia objected to the specific application of the rule, penalizing him for using only a few words of Spanish in front of an English-speaking customer in a manner that could not have reasonably interfered with the sales transaction. Viewed in this light, the EEOC guidelines proscribe the *ad hoc* discriminatory use of an otherwise valid limited English-only rule.[402]

For instance, the Commission has found unlawful the discharge of an employee for violating an English-only rule.[403] The employer, a tai-

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regarding the type of rule under challenge in that case); *cf. Garcia*, 618 F.2d at 268 n.1.

[400] *See* 45 Fed. Reg. 85,634 (1980). The Commission clarified that about 21 million of these individuals are over 18 years old, coming from the following "language backgrounds: Spanish, 10.6 million; Italian, 2.9 million; German, 2.7 million; French, 1.9 million; Chinese, Japanese, Korean, and Vietnamese, 1.8 million; Polish, 1.5 million. Approximately 2.4 million persons in the United States do not speak English at all." *Id.* (footnote omitted).

[401] *Id.* at 85,635.

[402] The courts seem to agree with this assessment. For instance, in Saucedo v. Brothers Well Serv., 464 F. Supp. 919 (S.D. Tex. 1979), the Court held that the employer violated Title VII by firing an employee for speaking two words of Spanish in contravention of an informal English-only rule, while choosing not to fire a Caucasian employee who committed the more serious infraction of fighting. The Court emphasized that much of the work performed under the employer's direction was skilled and dangerous. Thus, as a general matter, an English-only rule may promote necessary safety policies. *Id.* at 922.

The same employer promulgated a detailed written standard requiring employees to speak English exclusively while on duty to enhance safety conditions. Because the policy applied only to (1) employees actually on duty or (2) to all employees during an emergency, the EEOC determined that the English-only rule was a business necessity and, thus, lawful. *See* EEOC Decision 83-7, 31 F.E.P. 1861 (1983).

[403] EEOC Decision 81-25, 27 F.E.P. 1820 (1981).

lor shop, attempted to justify its policy on three bases: (1) it was necessary to solve communication problems among the staff; (2) it was limited only to the tailor shop and sales floor; and (3) some customers were offended to hear Spanish spoken among the workers.[404] Citing the guidelines, the Commission stated that the absolute prohibition against Spanish speaking could not be sustained absent a true business necessity. Because it could demonstrate no genuine business necessity, the employer could not prohibit its employees from speaking Spanish in the presence of English-speaking customers. Customer discomfort upon hearing conversational Spanish cannot be used to restrain Spanish-speaking employees from conversing in Spanish. Implying that speaking Spanish is a distasteful practice creates the very sort of hostile conditions and cultural stereotypes that Title VII was designed to alleviate.[405] It is unthinkable, for example, that a court would permit workplace racial segregation because certain customers would rather be served by whites than by blacks. Similarly, indulging customers whose sensibilities are offended by hearing Spanish is no less offensive.

A congressional enactment presents an additional indication that the *Garcia* court wrongly concluded that culture and bilingualism are wholly separate. The Bilingual Education Act,[406] establishing funding and administrative mechanisms to promote the teaching of English in American schools, was amended to include an expanded declaration of policy recognizing:

> (1) that there are large and growing numbers of children of limited English proficiency;(2) that many of such children have a cultural heritage which differs from that of English-speaking persons; . . .(5) that a primary means by which a child learns is through the use of such child's native language and cultural heritage . . . .[407]

Congress, therefore, while encouraging bilingualism, cautioned that instruction in bilingual education must be "given with appreciation for

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[404] *Id.* at 1821.

[405] *See* Majia v. N.Y. Sheraton Hotel, 459 F. Supp. 375 (S.D.N.Y. 1978) (ruling that employer did not violate Title VII when individuals' lack of English skills made them unqualified for certain jobs); Morales v. Dain Kalman & Quail, Inc., 467 F. Supp. 1031, 1040 (D. Minn. 1979) (same); *cf.* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (segregation of customers on basis of national origin may create hostile employment environment charged with unlawful discrimination); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (repeated ethnic and antisemitic remarks may constitute unlawful religious and ethnic discrimination).

[406] 20 U.S.C. § 3221 (1982).

[407] *Id.* § 3222(a)(1)(2)(5).

the cultural heritage of such children, and of other children in American society . . . ."[408]

The Bilingual Education Act expresses congressional recognition both that language and culture are often linked, and that cultural heritage should not be forfeited upon attaining bilingualism.[409]

Courts speak too hastily in holding that cultural identity is divorced from mutable characteristics. Even if mutability analysis had some legal support, it is too much to assert that every easily changed characteristic lacks sociocultural value. To the contrary, it is well known that styles, makeup, clothing, language, dietary habits, jewelry, adornments, and other similar arguably mutable characteristics have profound connections with ethnic, religious, racial, and gender identity. *Garcia* and *Rogers* simply sweep too broadly and are inconsistent with Title VII's goal of eradicating racial, gender, and ethnic stereotyping from the employment market.

CONCLUSION

The new reality in the workforce, enacted when Congress passed Title VII, was aptly described by Justice Stevens in *Manhart*:[410]

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.
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> It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males and females. Myths and purely habitual assumptions about a woman's

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[408] *Id.* § 3223(a)(4)(A)(i). Interestingly the predecessor statute contained no such policy statement or protection sensitive to the interconnections between language and culture. *See* 20 U.S.C. § 880b (1968).

[409] Similarly, in another analogous context, one commentator has noted:

> The concept of human dignity in international situations is fundamentally linked to the life of the mind which in turn is closely linked to one's language. Language goes to the core of one's personality, and deprivation in relation to language deeply affects identity, a prime characteristic of that individual's group or class . . . . Further, in projecting the norm of nondiscrimination with respect to language restrictions, the United Nation's charter has consistently enumerated "language" with race, sex, religion as an impermissible ground of differentiation . . . . In addition, the European and American Conventions of Human Rights both expressly forbid discrimination on the basis of language.

See Note, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MARSHALL L. REV. 667, 676 n.38 (1982) (citing McDougal, Lasswell, & Chen, *Freedom From Discrimination in Choice of Language and International Human Rights*, 1976 U. ILL. L. REV. 151-52, 163, 167).

[410] Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

> inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.[411]

Based on the above observations, the Court in *Manhart* and *Arizona Governing Committee v. Norris*,[412] held that an employer cannot so much as *offer* its employees a sexually disparate term or condition of employment, even though (1) the employer offered nondiscriminatory alternative terms and conditions, (2) the employer did not offer the sexually-based term as a device to demean, humiliate or harm women, and (3) the stereotype is scientifically accurate.

Discrimination based on any of the five forbidden criteria is no longer acceptable in employment. No term of employment, no work related condition, no stereotype — regardless of how apparently logical, time-followed, or prevalent — may serve as the basis upon which to discriminate unless the discriminator meets the heavy burden of linking the discriminatory conduct to a statutory defense, exemption, or appropriate affirmative action program.

The reasons underlying this bold and appropriate reinvention of the market are no mystery. Discrimination based on race and gender demean and insult individuals and drastically hinder their abilities to earn a livelihood, thereby denying them both personal dignity and the opportunity to achieve. Little wonder, then, that Congress and the courts have defined discrimination under Title VII to reach as broadly as possible. Extending well beyond economic considerations, Title VII protects the selfhood, personal integrity, and individual sensibilities of employees, applicants for employment, and union members. At least so far as the five forbidden criteria are concerned, individuals do not have to forfeit their self conceptions as the price for gainful employment.

Nevertheless, the full mandate of the law remains unfulfilled. The spectre of "mutable characteristics" analysis — although diluted by exceptions — still permeates the law. A Spanish-surnamed employee, if bilingual, may be dismissed for speaking Spanish in the presence of English-speaking customers. A woman may be fired as a newsreporter based on viewer responses that she is too masculine in demeanor and style. A man with shoulder length hair may be denied employment. And a black female who chooses to wear her hair in an African tribal style may be summarily forbidden by her employer to do so.

In every case described above, the courts held that the offending conditions of employment were nondiscriminatory under the statute. Title

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[411] *Id.* at 707.

[412] 463 U.S. 1073 (1983) (per curiam); *see supra* notes 81-106 and accompanying text.

VII, however, does not recognize a species of unlawful discrimination called "not BFOQ, not business necessity, not an exemption, not affirmative action, but nonetheless lawful."

It is no longer remarkable that society, through legislation and litigation, has condemned the most abhorrent forms of employment discrimination. The mutability cases present a great test of the strength and perseverance of our civil rights laws. They will reveal whether we are fully committed to eradicating the injustice of discrimination or whether we are content only to proscribe such discrimination as makes a discrete group of judges and lawmakers uncomfortable. The broad language of Title VII, and its judicial interpretations, counsel the former. Only mutability analysis seems to favor the latter.

How far will such an interpretation go? Until the only forms of race or gender discrimination practices are those supported by a statutory exemption, defense, or affirmative action program. Perhaps the discrimination challenged in the ensuing years will involve practices that many consider unproblematic, just as much of the discrimination already outlawed was considered by some to be useful and appropriate. As the courts have consistently held, however, discrimination comes in varieties limited only by the human imagination. Former uncritical acceptance of discrimination must be recognized as no longer lawful if a civil rights enactment is to meet its full potential.

The drafting Congress knew, or should have realized, that Title VII would invalidate instances of discrimination that the framers never imagined. Such maturation is a defining characteristic of civil rights laws demanding a more tolerant, more generous, more sensitive, more diverse society than, perhaps, even the framers themselves could anticipate. The time has come, therefore, to end the use of mutable characteristics analysis as a viable part of Title VII jurisprudence.