

**TITLE VII AT 50:
CONTEMPORARY CHALLENGES FOR
U.S. EMPLOYMENT DISCRIMINATION LAW**

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INTRODUCTION

In June 2003, Jennifer Lu and eight other young adults of color filed a lawsuit against Abercrombie & Fitch (A&F) alleging that the clothing retailer had engaged in race, color, and national origin discrimination by refusing, among other things, to hire qualified African Americans, Latinos/as, and Asians to work on its sales floors as “Brand Representatives.”² The plaintiffs allegedly did not have the “A&F Look,” a “virtually all-white image” that Abercrombie used to market its clothing.³ When the company did hire people of color, the plaintiffs asserted that A&F “channel[ed] them to stock room and overnight shift positions and away from visible sales positions, keeping them out of the public eye.”⁴ Over time, the lawsuit expanded as other A&F applicants and employees across the United States joined the original plaintiffs. As a result of work done by the Equal Employment Opportunity Commission, private law firms, and a coalition of civil rights groups, in November 2004, the lawsuit settled with A&F agreeing: (1) to pay \$50 million dollars in damages and fees; and (2) to implement a variety of measures designed to diversify its workforce and to end the company’s discriminatory practices.⁵

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² Complaint at 1, *Gonzalez v. Abercrombie & Fitch Co.*, No. 03-2817 (N.D. Cal. June 17, 2003), *available at* http://www.naacpldf.org/files/case_issue/Abercrombie_Complaint.pdf.

³ *Id.*

⁴ *Id.*

⁵ See Press Release, U.S. Equal Employment Opportunity Commission, EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch (Nov. 18, 2004), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/11-18-04.cfm> (summarizing settlement terms).

Had Jennifer Lu and her fellow plaintiffs sought employment with Abercrombie & Fitch or a similar retailer forty years earlier, they would have been without legal options under U.S. federal law. In 1963, policies like Abercrombie & Fitch's were prevalent in the United States, and employers were free to exclude women and people of color from employment opportunities at will.⁶ Indeed, people of color and women were discouraged from even applying for employment in some sectors of the economy due to the ubiquitous presence of employment ads, often found in classified sections of newspapers, seeking individuals of a specific race or gender.⁷

This state of affairs changed on July 2, 1964, when in the midst of Freedom Summer⁸ and at the height of the Civil Rights Movement, the U.S. Congress enacted the Civil Rights Act of 1964 (CRA of 1964). If *Brown v. Board of Education*⁹ had removed the first pillar in the fortress of Jim Crow¹⁰ by invalidating the doctrine of separate but equal, then the CRA augured its ultimate destruction. The civil rights legislation was hard won, requiring the courageous efforts of Presidents Kennedy and Johnson, Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference, the National Women's Party, and countless other organizations and individuals whose sacrifice should not be forgotten. The Act passed after three contentious months of debate in the U.S. Senate, including a 54-day filibuster, and with sizable opposition from southern representatives who feared the effects of racial integration.¹¹ This fear was illustrated in U.S. Senator Richard Russell's (GA) infamous statement that "[w]e will resist to the bitter end any measure or any movement which would have a tendency to bring about social

⁶ H.R. REP. NO. 88-914, pt. 2, at 26-30 (1963).

⁷ Nicholas Pedriana & Amanda Abraham, *Now You See Them, Now You Don't: The Legal Field and Newspaper Desegregation of Sex-Segregated Help Wanted Ads 1965-75*, 31 LAW & SOC. INQUIRY 905, 906 (2006).

⁸ Freedom Summer refers to a famous campaign undertaken during the summer of 1964 in the Deep South to eliminate laws and other tactics designed to deny African Americans the right to vote. James Chaney (an African American from Mississippi), Andrew Goodman and Michael Schwerner (two northerners of Jewish heritage) were killed by members of the Ku Klux Klan for their protest activity during Freedom Summer.

⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (invalidating state-sanctioned segregation in public schools).

¹⁰ Jim Crow refers to that era in U.S. history, from approximately 1876 through roughly 1964, which was defined by laws and social practices mandating racial segregation in most aspects of American life.

¹¹ U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., *The Road to Civil Rights: The Civil Rights Act of 1964* (Oct. 17, 2013), available at <http://www.fhwa.dot.gov/highwayhistory/road/s34.cfm>.

equality and intermingling and amalgamation of the races in our (Southern) states,"¹² and U.S. Senator Strom Thurmond's (SC) observation that these

so-called Civil Rights Proposals, which the President has sent to Capitol Hill for enactment into law, are unconstitutional, unnecessary, unwise and extend beyond the realm of reason. This is the worst civil rights package ever presented to the Congress and is reminiscent of the Reconstruction proposals and actions of the radical Republican Congress.¹³

At the time of its enactment, the Civil Rights Act of 1964 was the most comprehensive piece of civil rights legislation in U.S. history. The Act was wide-ranging, prohibiting discrimination in voting, public accommodations, public facilities, education, employment, and federally assisted programs. A centerpiece of this landmark legislation was Title VII,¹⁴ which bars discrimination in employment on the basis of race, color, religion, sex, and national origin.¹⁵

Over the years, Title VII has been, in some ways, interpreted broadly by the U.S. Supreme Court. Yet, in many respects, interpretations of the statute have not kept pace with the changing nature of discrimination in the modern workplace. This essay examines the evolution of Title VII and three contemporary challenges to U.S. employment discrimination law. Part I briefly describes several ways in which the statute has been expanded. Part II then turns to three issues that underscore conceptual limitations with recent interpretations of Title VII and with U.S. anti-discrimination law more generally: (1) sexual orientation and gender identity discrimination; (2) implicit bias, structural discrimination, and the requirement of intent; and (3) formalism. Examination of these matters demonstrates how U.S. courts have addressed three highly contested issues with which all legal systems must contend: (1) what constitutes discrimination; (2) upon what basis does one determine which classes or groups are protected; and (3) what are the ultimate goals of anti-discrimination law. I conclude that although there has been progress, recent cases touching upon these issues pose considerable

¹² *Id.*

¹³ *1963 Year in Review: Civil Rights Bill*, UNITED PRESS INT'L, available at <http://www.upi.com/Archives/Audio/Events-of-1963/Civil-Rights-Bill/> (transcript including Senator Thurmond's statement).

¹⁴ See 42 U.S.C. § 2000e (2013).

¹⁵ The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-633a (2013), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2013), contain similar prohibitions against discrimination on the basis of age and ability.

challenges for the pursuit of corrective and distributive justice in the United States.

I. TITLE VII'S EXPANSION

Title VII forms the heart of U.S. employment discrimination law. The statute bars intentional discrimination targeted at specific individuals and groups¹⁶ as well as the use of neutral criteria that disparately affect protected groups.¹⁷ For example, Title VII would render illegal a city's refusal to promote a woman to police chief if that refusal were based upon a belief that police officers will not follow or respect a female chief.¹⁸ Title VII would also prohibit a policy requiring that police officers possess a four-year college degree (i.e., a neutral criterion that might produce a disparate impact on racial minorities) unless the police department can show that having advanced educational credentials is necessary to perform the job.¹⁹

Over the years, Title VII has been, in some ways, interpreted expansively by the U.S. Supreme Court to cover forms of discrimination that may not have been anticipated by or within the contemplation of Congress at the time the CRA of 1964 was enacted. For example, Title VII's prohibition against sex discrimination initially focused on the wholesale exclusion of women from the workplace or their segregation within certain occupations.²⁰ Title VII challenged those who believed that a woman's place was solely in the home or that women could be teachers, librarians, nurses, and waitresses, but not police officers, firefighters, doctors, lawyers, and mechanics. As Title VII opened up employment spaces that were previously off limits to women and people of color, second generation discrimination emerged,²¹ including sexual and racial harassment and more nuanced forms of racial and gender stereotyping. Thus, while women and people of color were allowed into previously segregated spaces, once there they were frequently subject to

¹⁶ See 42 U.S.C. § 2000e-2(a) (2013); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (establishing the initial framework for proving cases of disparate treatment or intentional discrimination based on circumstantial evidence).

¹⁷ See 42 U.S.C. § 2000e-2(b) and 2000e-2(k) (2013); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), discussed *infra* at page 21.

¹⁸ See 42 U.S.C. § 2000e-2(a) (2013).

¹⁹ See 42 U.S.C. § 2000e-2(k); *Griggs*, 401 U.S. at 431.

²⁰ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-68 (2001).

²¹ See *generally id.* (examining internal workplace structures and norms that serve to exclude women and people of color).

hostile and abusive treatment, denied opportunities for advancement, and required to perform their race or gender in certain prescribed ways.

Fortunately, due to the groundbreaking work of scholars like Catharine MacKinnon, “sex” in Title VII has been read to include prohibitions against sexual harassment²² and to embrace, to some extent, gender stereotyping.²³ Thus, not only are women no longer automatically excluded from certain workplaces, they are also no longer forced to suffer (without some legal recourse) the indignity of unwelcome sexual demands at work or to endure workplaces permeated with sexually demeaning language and images. In addition, confident and assertive women need not fear that they will be told to “walk more femininely, talk more femininely, and enroll in charm school”²⁴ in order to be considered for promotion. This is not to say that women are no longer subject to discriminatory workplace restrictions and hostility. They are. The above interventions, however, have enabled more women to seek redress in these circumstances.

In addition to arguing for a broad interpretation of “sex” under Title VII, since 1964 U.S. scholars have also pressed the courts to acknowledge and to accept that individuals may be subject to discrimination on multiple bases. For example, an employer may treat an Asian woman differently from a White woman or an Asian man because the Asian woman is *both* a woman *and* a person of color. Thus, she may be subject to stereotypes to which White women and Asian men are immune.²⁵ Prominent U.S. legal scholars such as

²² See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (Yale Univ. 1979). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing quid pro quo and hostile environment sexual harassment claims).

²³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (recognizing claim based on gender stereotyping).

²⁴ *Id.* at 235 (recognizing claim of a woman who was told that her chances of being promoted to partnership would increase if she would “take a course at charm school” and “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”).

²⁵ For example, Asian women are sometimes stereotyped as “passive, repressed, naïve lotus blossoms; sexually exotic or seductively mysterious geisha; or devious and wicked dragon ladies.” Neither Asian men nor White women are generally subject to these stereotypes. Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, n. 41 (2010) (citing Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996)).

Kimberlé Crenshaw and Angela Harris²⁶ have argued persuasively that such intersectional claims ought to be acknowledged. Still other scholars have urged courts to consider the ways in which persons are differently situated within protected categories and how intra-group differences, like skin color or various identity performances, may be used to harm subsets of workers. Thus, employers who hire African Americans but prefer lighter-toned African Americans over darker-toned African Americans may find their decision-making subject to challenge under Title VII's prohibition against color discrimination.²⁷ Similarly, employers who prefer people of color who consciously or subconsciously cloak or downplay their racial identity as opposed to highlighting it, or women who embrace conventional notions of femininity as opposed to those who reject such notions, may also find themselves on the wrong end of a lawsuit.²⁸ All of these claims,²⁹ and

²⁶ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

²⁷ See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L. J. 1487 (2000) (examining colorism within African-American communities); Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. IRVINE L. REV. 1105 (2013) (examining colorism in Asian and Asian-American communities).

²⁸ See generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006). Thus, employers may prefer African Americans with racial performances more similar to that of President Obama than that of Al Sharpton or Jesse Jackson. Indeed, Senator Harry Reid and Vice President (then Senator) Joe Biden's observations about President Obama's appeal during the 2008 Democratic primaries lend support to the salience of identity performance. Few will forget Biden's statement, "I mean, you got the first mainstream African-American who is articulate and bright and clean and a nice-looking guy... I mean, that's a storybook, man" or Senator Reid's observation that the United States was ready to embrace a Black presidential candidate, especially Obama who was a "light-skinned" African American "with no Negro dialect, unless he wanted to have one." JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* 36 (2010) (recording Reid's comments); Jason Horowitz, *Biden Unbound: Lays into Clinton, Obama, Edwards*, N.Y. OBSERVER (Feb. 5, 2007, 12:00 AM), <http://observer.com/2007/02/biden-unbound-lays-into-clinton-obama-edwards> (documenting Biden's comments).

²⁹ As noted earlier, even in areas where Title VII has been interpreted broadly, there has been pushback. Harassing practices that many women find hostile and offensive are still too commonly viewed by men as appropriate. See Gary Langer,

employment discrimination lawsuits in general,³⁰ are incredibly difficult for plaintiffs to win. These theoretical developments in U.S. anti-discrimination law are nonetheless important because they reflect a recognition, on some level, of both the complexity of social identities and the nuanced ways in which discrimination occurs.

Although Title VII's development has been slow, and not necessarily linear, the statute, coupled with the Equal Pay Act,³¹ the Pregnancy

One in Four U.S. Women Reports Workplace Harassment, ABCNEWS.GO.COM (Nov. 16, 2011), <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>. Plaintiffs who assert intersectional claims based upon multiple factors are likely to be accused of whining. And proving intra-group claims will likely be difficult as employers may successfully argue that they are not discriminating, for example, on the basis of race if they hire some African Americans (even if those who are hired have a preferred skin tone or racial performance). For additional examination of these issues, see Trina Jones, *Intra-group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657 (2010) (examining difficulties faced by plaintiffs alleging intra-group discrimination). However, with at least a doctrinal basis for bringing these claims, one hopes and expects that over time material and normative changes will occur.

³⁰ A voluminous literature documents both plaintiffs' low success rates in these cases and explores possible reasons for these outcomes. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (finding that employment discrimination cases settle less often than other types of cases and that plaintiffs in employment discrimination cases are less likely to win than other plaintiffs); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 566 (2003) (showing that employment discrimination plaintiffs fare poorly on appeal, with a 7 percent reversal rate when defendants win at trial compared to a 42 percent reversal rate when plaintiffs win at trial); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (showing that plaintiffs in employment discrimination cases win only 18.7 percent of the time in bench trials, compared with success rates of 43.6 percent and 41.8 percent for insurance and personal injury cases, respectively); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (June 15, 2007) (showing that in 2006 the national average for summary judgment grants resulting in termination of cases was 70 percent in civil rights cases and 73 percent in employment discrimination cases—the highest for federal civil cases).

³¹ 29 U.S.C. § 206 (2013).

Discrimination Act,³² and the Family and Medical Leave Act,³³ has produced considerable change in the United States over the last fifty years. These statutory interventions, and the normative shifts to which they have contributed, have led to workplaces and employment standards that look very different from what U.S. workers experienced five decades ago. In 1960, 37.7 percent of women participated in the U.S. labor force.³⁴ In 2012, that number had risen to 57.7 percent.³⁵ In addition, the percentage of doctors, lawyers, accountants, professors, U.S. senators, representatives, governors, and Forbes 500 CEOs who are female has increased significantly. In 1960, nearly two-thirds of women in the U.S. workforce held clerical, service, or sales positions and only 13 percent held professional positions.³⁶ In 2010, 40.6 percent of employed women held managerial and professional positions.³⁷ In addition, in 1963, women earned 59 cents³⁸ on the dollar compared to what a White man earned. Today, that figure is about 80 cents.³⁹

The above advances are critically important as employment is essential to the economic well-being and dignity of employees and their families. Yet, considerable obstacles remain to equality of opportunity. Indeed, the glass and marble ceilings have yet to shatter. Although more women are in managerial and professional positions than in the past, they are still underrepresented in the highest echelons of business.⁴⁰ Moreover, racial

³² 42 U.S.C. § 2000e(k) (2013).

³³ 29 U.S.C. § 2601 (2013).

³⁴ NATIONAL EQUAL PAY TASK FORCE, *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future* 10 (June 2013).

³⁵ UNITED STATES DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Women of Working Age*, available at <http://www.dol.gov/wb/stats/recentfacts.htm#rates>.

³⁶ NATIONAL EQUAL PAY TASK FORCE, *supra* note 34, at 6.

³⁷ UNITED STATES DEP'T OF LABOR, WOMEN'S BUREAU, *Women in the Labor Force in 2010*, available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm>.

³⁸ NATIONAL EQUAL PAY TASK FORCE, *supra* note 34, at 6.

³⁹ UNITED STATES DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Women's Earnings as a Percent of Men's in 2012*, available at http://www.bls.gov/opub/ted/2012/ted_20120110.htm. The data are more alarming for people of color. For example, in 1963, Black families earned 55 cents for every dollar earned by a White family. Michael A. Fletcher, *Fifty Years after March on Washington, Economic Gap between Blacks, Whites Persists*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/business/economy/50-years-after-the-march-the-economic-racial-gap-persists/2013/08/27/9081f012-0e66-11e3-8cdd-bcdc09410972_story.html. In 2011, that figure was 66 cents. *Id.*

⁴⁰ See Claire Cain Miller, *An Elusive Jackpot: Riches Come to Women as CEOs, but Few Get There*, N.Y. TIMES (June 7, 2014),

and sexual harassment are continuing problems and disturbing levels of job segregation remain not only by gender, but by race. For example, while 34.8 percent of employed White men hold managerial or professional positions, the same is true for only 15.3 percent of employed Latino men and 23.5 percent of employed Black men.⁴¹ The percentages by race of employed workers in managerial or professional positions are similarly stratified for women: 41.5 percent of White women compared to 24.1 percent of Latina women and 33.8 percent of Black women.⁴² The unemployment rate of African Americans has also been consistently double that of Whites.⁴³

II. CONTEMPORARY CHALLENGES

As demonstrated in Part I, Title VII has evolved over the last five decades and has improved the employment experiences of covered groups.

http://www.nytimes.com/2014/06/08/business/riches-come-to-women-as-ceos-but-few-get-there.html?_r=0 (noting that women represent only 5.5 percent of the 200 highest paid CEOs in the United States); Bryce Covert, *The Record-Breaking Number of Women in CEO Jobs is Still Pretty Pitiful*, THINK PROGRESS (Sept. 22, 2014), <http://thinkprogress.org/economy/2014/09/22/3570450/women-ceo-highest-share/> (noting that while women hold 5 percent of CEO positions at Fortune 500 companies, that number is still “very small when compared to women’s 47 percent share of the overall workforce and 38 percent share of management jobs”).

⁴¹ UNITED STATES DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *Statistics, Earnings and Employment by Occupation, Race, Ethnicity, and Sex, 2010*, available at http://www.bls.gov/opub/ted/2011/ted_20110914.htm.

⁴² *Id.* In addition to workforce stratification by race, gender divisions continue to exist. See NATIONAL EQUAL PAY TASK FORCE, *supra* note 34, at 6 (noting that in 2012, women were still “much more likely to enter occupations where the majority of workers [were] female, including healthcare, education and human service fields” and that “over half of all women continue[d] to be employed in lower-paying sales, service and administrative support positions”).

⁴³ See Drew Desilver, PEW RESEARCH CENTER, *Black Unemployment Rate is Consistently Twice that of Whites* (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/>; UNITED STATES DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, Economic News Release, Table A-2. *Employment Status of the Civilian Population by Race, Sex, and Age*, available at <http://www.bls.gov/news.release/empstat.t02.htm> (noting that in December 2014, the unemployment rate for Whites was 4.6 percent, for African Americans it was 10.2 percent, and for Asians it was 4.2 percent). See also UNITED STATES DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, Economic News Release, Table A-3. *Employment Status of the Hispanic or Latino Population by Sex and Age*, available at <http://www.bls.gov/news.release/empstat.t03.htm> (noting that in December 2014, the unemployment rate for Hispanics was 6.4 percent).

But challenges remain and efforts to address some of these challenges may be hampered by the failure of U.S. law to keep pace conceptually with the changing nature of discrimination in the modern workplace. This Part examines three areas that highlight ways in which that law has lagged: (1) LGBTQ⁴⁴ rights; (2) implicit bias, structural discrimination, and the requirement of intent; and (3) formalism. It then briefly considers why U.S. anti-discrimination law has, in some areas, seemingly reached a standstill.

A. Sexual Orientation and Gender Identity

Despite substantial advocacy for the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) persons, neither U.S. constitutional law nor U.S. statutory law afford adequate protection to these individuals.⁴⁵ In the realm of U.S. constitutional law, there has been incremental progress since 1986, when the U.S. Supreme Court in *Bowers v. Hardwick* upheld the constitutionality of a Georgia law that criminalized certain sexual acts between same-sex individuals.⁴⁶ In a 5-4 opinion, the Court stated that the U.S. Constitution conferred neither “a right of privacy that extends to homosexual sodomy” nor a “fundamental right to engage in homosexual sodomy.”⁴⁷ In reaching this determination, the justices in the majority observed that they were not “inclined to take a more expansive view of [the Court’s] authority to discover new fundamental rights imbedded in the Due Process Clause,” noting that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”⁴⁸

⁴⁴ Although I reference lesbian, gay, bisexual, transgender, and queer persons through use of the acronym LGBTQ, it is important to note that the analysis herein focuses primarily on sexual orientation. Sexual orientation, in the simplest sense of the term, means the gender to whom a person is sexually and/or romantically attracted. Sexual orientation should not be confused with gender identity, which broadly refers to a person’s internal sense of being male, female, or somewhere else along a gendered continuum and the expressive activity or behavior that may accompany that person’s sense of identity.

⁴⁵ Although this essay focuses primarily on statutory protections in the employment arena, it is important to keep trends elsewhere in the law in mind as they may affect the development and scope of statutory protections. The analysis in this section is therefore not limited to Title VII and employment.

⁴⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁷ *Id.* at 190-91.

⁴⁸ *Id.* at 194.

In 2003, however, the U.S. Supreme Court reversed this stance in *Lawrence v. Texas*.⁴⁹ In that case, the Court invalidated a Texas sodomy law that criminalized same-sex sexual activity. The Court noted:

[this case] involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.⁵⁰

In 2013, the Supreme Court again decided a case involving the rights of sexual minorities in *United States v. Windsor*.⁵¹ In that case, the Court

⁴⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁰ *Id.* at 578 (internal citations omitted). In a sharp turnaround from *Bowers*, the Court recognized that constitutional principles are not fixed, but rather evolve, observing:

[those] who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment ... knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id.

⁵¹ 133 S. Ct. 2675 (2013). In 2013, the U.S. Supreme Court also decided *Hollingsworth v. Perry*, a case challenging a ballot initiative (Proposition 8) which provided that only marriages between a man and a woman would be valid and recognized in California. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *Perry*, the lower courts had found Proposition 8 to be illegal. The Supreme Court declined to decide the case on its merits, finding that the parties who were appealing the lower court rulings lacked “standing” to pursue the case before the Supreme Court. The effect of the Court’s ruling was to reinstate the lower courts’ determinations that Proposition 8 was invalid.

considered key provisions of the Defense of Marriage Act (DOMA), a federal statute that defined marriage as a union between a man and a woman and, in effect, rendered same-sex couples ineligible for certain federal benefits. In invalidating parts of DOMA, the Court determined that

the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.⁵²

Importantly, in *Windsor*, instead of banning all state-imposed prohibitions on same-sex marriage, the Court merely extended protection to those same-sex couples whose marriages were legal under their state's laws. Thus, the Court declined to address whether a constitutional right to same-sex marriage existed, leaving that issue for another day.

That day came on June 26, 2015, when, in one of the most positive developments for the rights of sexual minorities to date, the U.S. Supreme Court announced its decision in *Obergefell v. Hodges*.⁵³ In *Obergefell*, the Sixth Circuit Court of Appeals had upheld Ohio's prohibition against same-sex marriage, thus creating a split in the circuit courts regarding the power of states to ban same-sex marriages (and to refuse recognition of same-sex marriages performed elsewhere).⁵⁴ On review, the Supreme Court found such

⁵² *Windsor*, 133 S. Ct. at 2696. The Court also noted that "the liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the law." *Id.*

⁵³ 135 S. Ct. 2584 (2015). Before *Obergefell*, the Supreme Court declined to consider a number of cases that would have offered the Court an opportunity to clarify the legal status of same-sex marriage. *See, e.g.*, *Schaefer v. Bostic*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014) (declining to hear a Fourth Circuit decision supporting marriage equality in Virginia); *Bogan v. Baskin*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) (declining to hear a Seventh Circuit decision supporting marriage equality); *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014) (declining to hear a Tenth Circuit decision supporting marriage equality).

⁵⁴ The Court granted certiorari in three other cases decided by the Sixth Circuit which raised the same legal issues: *Tanco v. Haslam*, 135 S. Ct. 1040 (involving a Tennessee ban); *Deboer v. Snyder*, 135 S. Ct. 1040 (involving a Michigan ban); and *Bourke v. Beshear*, 135 S. Ct. 1041 (involving a Kentucky ban). The Court consolidated the four cases and limited its review to the following questions: (1) "Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?" and (2) "Does the Fourteenth Amendment require a

bans unconstitutional and also held that states may not refuse to recognize same-sex marriages performed in other states.⁵⁵ The Court noted:

...the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them....

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.⁵⁶

While *Lawrence*, *Windsor*, and *Obergefell* were significant steps forward and were heralded by civil rights advocates, they do not extend the same protection to LGBTQ persons that U.S. constitutional law offers other groups. As things currently stand, the Court has never found sexual orientation (or gender identity) to be a suspect or a quasi-suspect classification, which would subject distinctions on this basis to the highest level of constitutional review or at least intermediate review. Under strict scrutiny, the most demanding level of review, a governmental classification must serve a compelling state interest and the means employed to achieve

state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

⁵⁵ 135 S. Ct. at 2605, 2607-08.

⁵⁶ 135 S. Ct. at 2604. The Court articulated four reasons why marriage is a fundamental right and noted that these reasons apply with equal force to same-sex and opposite-sex couples: (1) the "right to personal choice regarding marriage is inherent in the concept of individual liberty;" (2) the right to marry "supports a two-person union unlike any other in its importance to the committed individuals;" (3) marriage "safeguards children and families;" and (4) marriage is a "keystone of our social order." 135 S. Ct. at 2599-2602.

that interest must be narrowly tailored.⁵⁷ Under intermediate scrutiny, the challenged decision must further an important governmental interest and utilize means that are substantially related to that interest.⁵⁸ Instead of employing strict or intermediate scrutiny in *Lawrence* and *Windsor*, the Court applied a sort of “heightened” rational basis level of review (the lowest level of review with a bit of added bite). Under that standard, the government merely has to set forth a rational basis for its decision to treat a class of citizens differently, which in *Lawrence* and *Windsor* it could not do.⁵⁹

In *Obergefell*, while the Court found that state bans on same-sex marriage violate both due process and equal protection principles secured by the Fourteenth Amendment, the Court did not clearly set forth the governing standard or framework that it employed in reaching this result. In other words, it did not clarify what level of scrutiny applies to decisions based on sexual identity.⁶⁰ In addition, the opinion is narrowly focused on marriage equality and does not address the pervasive and ongoing discrimination that LGBTQ persons continue to face in other areas.

These omissions are important because, without protected class status, LGBTQ persons remain vulnerable to discriminatory actions by governmental actors (particularly at the state level) in a variety of settings, including employment, interactions with the criminal justice system, and the provision of goods and services.⁶¹ To be sure, the Court is making progress in the area of LGBTQ rights. But, like the Court’s “with all deliberate speed” approach in the second *Brown v. Board of Education* decision,⁶² the present

⁵⁷ *Windsor*, 133 S. Ct. at 2716-17 (Alito, J., dissenting) (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 201, 720 (2007)).

⁵⁸ *Id.* Intermediate scrutiny is often applied to gender-based classifications. *See* *Craig v. Boren*, 429 U.S. 190, 198 (1976).

⁵⁹ *Windsor*, 133 S. Ct. at 2696; *Lawrence*, 539 U.S. at 594.

⁶⁰ Justice Kennedy hints at the possibility that such bans may be an unlawful form of sex-based discrimination, but he does not explicitly endorse this view. *See* 135 S. Ct. at 2603 (noting that “sex-based classifications in marriage remained common through the mid-20th century” and that “[t]hese classifications denied the equal dignity of men and women”).

⁶¹ *See* Marcia Coyle and Tony Mauro, *Marriage Ruling Historic, But Not Final Word on Gay Rights*, NAT’L L. J. (June 29, 2015) (discussing limitations of *Obergefell* and some of the remaining challenges for LGBTQ persons); Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 27, 2015) (same), available at http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?_r=0.

⁶² In *Brown I*, decided in 1954, the Supreme Court invalidated the principle of separate but equal that had been established roughly six decades earlier in *Plessy v. Ferguson*. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that

Court has, at least until *Obergefell*, seemed satisfied taking an incremental approach regarding the constitutional rights of LGBTQ persons.⁶³

On the statutory front, the rights of LGBTQ persons also continue to be inadequately protected. Strong arguments can be made that discrimination against lesbian, gay, and bisexual individuals⁶⁴ on the basis of sexual orientation is a form of normative gender stereotyping (e.g., men should not love men) and is per se based on sex (e.g., a woman who loves a man is not penalized in the same way as a man who loves a man).⁶⁵ Yet, U.S. courts have not generally included discrimination on the basis of sexual orientation within Title VII's prohibition against sex discrimination.⁶⁶ Courts have relied

segregation in public education violated the plaintiffs' equal protection rights); *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) (upholding a Louisiana statute mandating separate railway cars for Whites and Blacks). However, a year later, in *Brown II*, the Court stated that implementation of a remedial plan for the constitutional violation it had recognized in *Brown I* should occur "with all deliberate speed"—rather than immediately—given the need to deal with varied local conditions. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955).

⁶³ To be sure, there may be advantages to this approach. Changes in public opinion and the trend in the lower courts in favor of sexual equality may have influenced the Court's ruling in *Obergefell*. Interestingly, in *Obergefell*, Justice Kennedy may have signaled that the time for "all deliberate speed" was over with regard to the rights of LGBTQ persons. In response to the Sixth Circuit's argument that it would be "appropriate . . . to await further public discussion and political measures before licensing same-sex marriage," Justice Kennedy notes that "there has been far more deliberation than this argument acknowledges." 135 S. Ct. at 2605. He goes on to point out that "when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking. . . . This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity." *Id.*; *but see* 135 S. Ct. 2584, 2612 (Roberts, C.J., dissenting (arguing that "stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept"))).

⁶⁴ I omit transgender and queer here in order to avoid conflating the diverse concerns and in some cases differing challenges faced by members of LGBTQ communities. *See supra* note 44.

⁶⁵ For analogous reasoning in a case involving interracial relationships, see *Parr v. Woodmen*, 791 F.2d 888 (11th Cir. 1986) (finding employer's refusal to hire the plaintiff because he had a spouse of a different race to be a form of prohibited race discrimination under Title VII).

⁶⁶ *See, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (recognizing same-sex harassment claim based on gender stereotyping).

upon a textual analysis, noting that Title VII does not explicitly include sexual orientation in its list of protected classifications and that “sex” for purposes of Title VII means biologically driven differences between men and women.⁶⁷ Courts have also relied upon legislative history, concluding that Congress did not intend to protect sexual orientation when Title VII was initially enacted.⁶⁸ (This argument is of course analytically flawed given that courts have read Title VII to include sexual harassment and gender stereotyping claims, neither of which, arguably, was contemplated by Congress in 1964.)⁶⁹ Although Congress has come increasingly closer to enacting the Employment Non-Discrimination Act (ENDA),⁷⁰ with the Senate voting to pass this Act in 2013, few expect this or similar legislation to pass the House of Representatives and to make it to President Obama’s desk, particularly given the Republican Party’s control of both the House and the Senate through 2016. This lack of statutory protection for LGBTQ persons exists despite the efforts of gay rights advocates and despite the increasing acceptance of LGBTQ persons by non-LGBTQ Americans, particularly younger Americans.⁷¹

⁶⁷ See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that Title VII does not protect transsexuals, and noting that “[i]f the term sex as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”).

⁶⁸ See, e.g., *id.* at 1086; see also *DeSantis*, 608 F.2d at 329 (holding that Congress did not intend “sex” in Title VII to include “sexual orientation”).

⁶⁹ See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (recognizing gender stereotyping claim); see also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (noting that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

⁷⁰ The Employment Non-Discrimination Act (ENDA) would prohibit discrimination based upon sexual orientation, among other things, and has been introduced several times in Congress. To date, this legislation has failed to pass both houses of Congress. For an overview of ENDA’s history, see Amanda Terkel, *ENDA Vote: Senate Votes to Outlaw LGBT Workplace Discrimination*, HUFFINGTON POST (Nov. 7, 2013), http://www.huffingtonpost.com/2013/11/07/enda-vote_n_4228502.html (discussing the Senate’s most recent action on ENDA, but predicting difficulties in the House); Human Rights Campaign, *Employment Non-Discrimination Act: Legislative Timeline*, available at <http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline>.

⁷¹ See Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States* (July 29, 2013), available at <http://www.gallup.com/poll/163730/back-law->

To be sure, there has been notable progress within the executive branch. For example in July 2014, President Obama signed Executive Order 13672, which amends previous executive orders and prohibits discrimination on the basis of gender identity as well as sexual orientation.⁷² In December 2014, the Department of Justice announced that its position in future litigation would be that “Title VII . . . extends to claims of discrimination based on an individual’s gender identity, including transgender status.”⁷³ And, in July 2015, the Equal Employment Opportunity Commission (EEOC) took a major step forward in protecting the rights of LGBTQ persons by ruling that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII.⁷⁴ In *Baldwin v. Department of Transportation*, the EEOC found that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title

legalize-gay-marriage-states.aspx (examining opinion poll data across demographic groups).

⁷² See News Release, The White House, *Executive Order—Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity*, available at <https://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employemen>.

⁷³ This was a reversal from a position that the DOJ had taken in 2006. News Release, U.S. Department of Justice, *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims* (Dec. 18, 2014), available at <http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

⁷⁴ *Baldwin v. Dep’t of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), available at <http://www.eeoc.gov/decisions/0120133080.pdf>. The Equal Employment Opportunity Commission (EEOC) had already taken the position that Title VII prohibits discrimination on the basis of transgender identity. The EEOC had also previously stated that discrimination against lesbian, gay, and bisexual workers based on sex stereotypes (e.g., beliefs that men should love only women or that women should love only men) is a form of sex discrimination under Title VII. See U.S. Equal Employment Opportunity Commission, *What You Should Know: EEOC and Enforcement Protections for LGBT Workers*, available at http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2010) (accepting Title VII transgender identity claim), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>; *Veretto v. United States Postal Serv.*, EEOC DOC 0120110873 (July 1, 2011) (accepting Title VII sexual orientation claim), available at <http://www.eeoc.gov/decisions/0120110873.txt>.

VII.”⁷⁵ The Commission reasoned that sexual orientation discrimination is sex discrimination because “it involve[s] treatment that would not have occurred but for the individual’s sex; because it [is] based on the sex of the person(s) the individual associates with; and/or because it [is] premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.”⁷⁶

The President’s actions and those of the DOJ and the EEOC grant greater protection to LGBTQ persons who are employed by the federal government or by federal contractors.⁷⁷ Although private employers are not technically bound by these actions, these developments are nonetheless significant for plaintiffs in private sector cases. For example, one can expect that some courts will defer to the EEOC’s interpretation of Title VII in cases involving private employers.⁷⁸ In addition, plaintiffs desiring to sue private employers can now expect that the EEOC will more likely find cause in cases alleging sexual orientation discrimination and that the EEOC may choose to litigate some of these claims.

These developments are indeed positive. However, the lack of explicit statutory protection under Title VII (or a statute like ENDA) and the absence of protected class status for constitutional purposes leave LGBTQ persons

⁷⁵ *Baldwin v. Dep’t of Transp.*, EEOC Appeal No. 0120133080, at 6 (July 15, 2015), available at <http://www.eeoc.gov/decisions/0120133080.pdf>.

⁷⁶ *Id.* at 14.

⁷⁷ *Baldwin* applies to federal employee claims as the case involved the Commission’s review of a federal agency determination. The case was brought by a Federal Aviation Administration (FAA) employee who alleged that he had been discriminated against because he was gay. After the FAA dismissed the complaint, the employee appealed to the EEOC. *Id.* at 1.

⁷⁸ To be sure, some courts may disagree based upon an absence of Congressional intent. That is, some courts may read Congress’ failure to pass ENDA as evidence that Congress does not intend to prohibit discrimination based on sexual orientation in federal statutory law. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001). Indeed, the weakest part of the EEOC’s reasoning in *Baldwin* is on this point. The Commission argues that “the Supreme Court has ruled that ‘[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.’” *Baldwin*, EEOC Appeal No. 0120133080, at 13. The problem with this reasoning is that this is not an area where Congress has failed to act by doing nothing. Congress considered ENDA and the Act’s sponsors were unable to secure enough votes to pass the legislation (although they came very close the last time around). This suggests that far from being neutral or agnostic on the issue, Congress (at least a Republican-controlled Congress) does not want to protect against discrimination based upon sexual orientation.

vulnerable to discriminatory acts by state-level governmental employers and private employers. Importantly, an impediment for both constitutional and statutory law appears to be a general reluctance to expand the number of protected classifications in U.S. anti-discrimination law.⁷⁹ This reluctance is heightened by a belief among some policy makers that sexual orientation⁸⁰ is different from race, color, religion, sex, and national origin. Historically, U.S. courts have relied upon four factors as gatekeepers to protected status: (1) immutability; (2) visibility; (3) relevancy; and (4) a pervasive history of discrimination.⁸¹ Although the appropriateness of employing some of these factors has been persuasively challenged, their continued use demonstrates an unwillingness to depart from previous analytical models once these models have become entrenched, and a reluctance to engage in the sort of context-specific analysis required to root out various forms of discrimination.⁸² These factors may influence popular and judicial understandings of sexual orientation as many Americans still seem to believe that sexual orientation is not innate and others maintain that it does not have to be rendered visible—thus, in their minds, differentiating sexual orientation from other protected classifications such as race and gender.

The poverty of these arguments is readily apparent. For example, and as others have noted, immutability should be abandoned as a gatekeeper to protected status.⁸³ To be sure, few would contest the unfairness of penalizing persons for traits they cannot change. The immutability theory, however, implies that decisions based on mutable traits are somehow less pernicious and therefore merit less attention, presumably because groups can escape harm by electing to change the trait. Yet, as Professor Kenji Yoshino has observed, “Jews generally can change or conceal their religion, while blacks

⁷⁹ However, as the EEOC points out in *Baldwin*, treating sexual orientation discrimination as sex discrimination does not require an expansion of protected categories. *Baldwin*, EEOC Appeal No. 0120133080, at 14.

⁸⁰ Here, I focus only on sexual orientation to avoid conflating discrimination based on sexual orientation and discrimination based on gender identity. *See supra* note 44.

⁸¹ Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

⁸² Analytical inflexibility and shortcuts may also be used as convenient covers for animus and hostility toward marginalized groups.

⁸³ Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 490, 493-98, 505 (1998) (critiquing judicial reliance on immutability and visibility). *See also* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 503 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994).

generally cannot change or conceal their race. This surely does not make anti-Semitic legislation more legitimate than racist legislation.”⁸⁴

Even assuming *arguendo* that lesbian, gay, and bisexual persons could change their orientation,⁸⁵ it does not follow that they should do so. Indeed, the suggestion that sexual minorities should change or hide their orientation to avoid discrimination violates what has been referred to as the “new immutability,” a theoretical approach that would protect traits that “society deems too important to ask anyone to change,”⁸⁶ or to conceal.

B. Implicit Bias, Structural Discrimination, and the Requirement of Intent

In addition to failing to provide adequate protection for LGBTQ persons, U.S. anti-discrimination law has focused on proof of intent in order to establish a discrimination claim. Yet, as U.S. society has come to embrace an anti-discrimination norm (in theory), such proof is increasingly difficult to find as individuals either cover their motives or are driven by subconscious or implicit bias.⁸⁷ A focus on intent, and an approach that views

⁸⁴ Yoshino, *supra* note 83, at 505.

⁸⁵ Importantly, the majority in *Obergefell* seemed to accept that sexual orientation is immutable. 135 S. Ct. 2584, 2596 (2015) (noting “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable”). Some within the scientific and broader community, however, continue to challenge this conclusion. *See, e.g.*, David Masci, PEW RESEARCH CENTER, *Americans Are Still Divided On Why People Are Gay* (Mar. 6, 2015), available at <http://www.pewresearch.org/fact-tank/2015/03/06/americans-are-still-divided-on-why-people-are-gay/>.

⁸⁶ Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 377-78 (2014); *see also* Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1412-19 (2009) (examining the “new immutability”). In short, the immutability analysis misses the mark because the ability or inability of a group to avoid negative action reveals little about whether that action is legitimate and whether a group merits protection. As the “new immutability” theorists posit, the immutability analysis also ignores the costs of conversion, or changing one’s status. As Professor Yoshino notes, change or conversion may not be a real option for those who will see the loss associated with a change of status as greater than the gains from escaping discrimination. Yoshino, *supra* note 83, at 510. Thus, any suggestion that LGBTQ persons should change or cover their identity, if that were indeed possible, includes an implicit, perhaps unconscious, belief that their current identity lacks value or positive meaning, which is untrue.

⁸⁷ *See generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (examining the development and application of implicit biases); *IMPLICIT RACIAL BIAS ACROSS THE LAW* 25, 45, 61

discrimination as individually motivated, isolated acts, also fails to address embedded structural barriers and mechanisms that produce disparate employment outcomes along lines of race and gender.

In early Title VII cases, the U.S. Supreme Court seemed to acknowledge the difficulties inherent in an intent-based model when it allowed plaintiffs to establish a prima facie case of discrimination by showing a statistically significant disparity between an employer's workforce and the relevant labor market. In *Hazelwood School District v. United States*⁸⁸ and *International Brotherhood of Teamsters v. United States*,⁸⁹ the Court allowed an inference of intentional discrimination to be drawn from such disparities. In *Griggs v. Duke Power Company*,⁹⁰ the Court went even farther by declining to require that plaintiffs establish intent. In that case, the employer utilized a high school diploma requirement and intelligence tests that produced a disparate impact on racial minorities. In invalidating these requirements, the Court observed that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."⁹¹ Further, the Court stated that "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."⁹² Thus, facially neutral criteria that produce a disparate impact on protected groups were prohibited if they were not job-related and were not consistent with an employer's legitimate business needs.

In the Civil Rights Act of 1991, Congress cleared up any uncertainty about whether Title VII embraced disparate impact theory by adding specific language to the statute codifying the theory.⁹³ Yet, disparate impact claims are still subject to question and debate. To be sure, the Supreme Court has long held that a showing of impact alone is insufficient to establish a constitutional violation.⁹⁴ Thus, plaintiffs bringing equal protection challenges against state actors must offer additional proof to show intentional discrimination. In recent years, however, members of the Court have

(Justin D. Levinson & Robert J. Smith eds., 2012) (examining the impact of implicit biases in various areas of the law).

⁸⁸ 433 U.S. 299 (1977).

⁸⁹ 431 U.S. 324 (1977).

⁹⁰ 401 U.S. 424 (1971).

⁹¹ 401 U.S. at 431-32.

⁹² *Id.* at 432.

⁹³ 42 U.S.C. sec. 2000e-2(k) (2013).

⁹⁴ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

displayed skepticism about whether Title VII's statutory inclusion of disparate impact theory can survive constitutional challenge.

This point was made most clearly in the 2009 case of *Ricci v. DeStefano*.⁹⁵ In that case, the city of New Haven, Connecticut, administered a test to determine who, among its firefighters, would be eligible for promotion to the position of lieutenant or captain.⁹⁶ When the test produced a disparate impact on minority firefighters, the city threw out the results.⁹⁷ Seventeen White firefighters and one Latino firefighter, all of whom had passed the test, then sued the city alleging that they had been subject to intentional discrimination because the city had relied upon race in deciding not to utilize the test results.⁹⁸ The city acknowledged in its defense that it had tossed the test because of its impact on minority firefighters and because the city feared that, had it used the test, the city would have been subject to a claim of disparate impact discrimination.⁹⁹ Thus, the U.S. Supreme Court was called upon to resolve the question of whether an employer is liable under Title VII's prohibition of intentional discrimination if the employer refuses to use the results of a screening device that produces a disparate impact on a protected group. The Court, in a 5-4 split opinion, responded that an employer would not be liable if it had a strong basis in evidence to believe that a disparate impact claim would be brought against it.¹⁰⁰ Because New Haven lacked such a basis, the Court found for the plaintiffs.¹⁰¹ Significantly, Justice Scalia wrote a separate concurring opinion in which he stated that the Court's "resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?"¹⁰² He noted that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."¹⁰³ Justice Scalia seems to believe that impact cases are

⁹⁵ 557 U.S. 557 (2009).

⁹⁶ *Id.* at 562.

⁹⁷ *Id.*

⁹⁸ *Id.* at 563.

⁹⁹ *Id.* at 570.

¹⁰⁰ *Id.* at 585. The dissenting justices argued that the "strong basis in evidence" standard would eviscerate voluntary efforts at compliance with Title VII by in effect requiring employers to *prove* that they had engaged in disparate impact discrimination before being allowed to discontinue use of a device with a disparate impact. *Id.* at 608.

¹⁰¹ *Id.* at 592.

¹⁰² *Id.* at 594 (Scalia, J., concurring).

¹⁰³ *Id.* at 594-96 (Scalia, J., concurring).

constitutionally invalid, even within the statutory realm, given that they do not require that plaintiffs establish intentional discrimination.

In June 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹⁰⁴ the Court, in another 5-4 split opinion, seemed to breathe new air into disparate impact theory, at least regarding claims under the federal Fair Housing Act.¹⁰⁵ Relying on the logic of *Griggs* and other Title VII cases, the Court recognized the continuing viability of disparate impact theory under the FHA.¹⁰⁶ The Court, however, placed a number of restrictions on its use, noting that disparate impact theory may raise “serious constitutional questions,”¹⁰⁷ for example, if “liability were imposed based solely on a showing of a statistical disparity.”¹⁰⁸ To guard against such concerns and to “protect potential defendants against abusive disparate-impact claims,”¹⁰⁹ the Court held that a racial imbalance, without more, would be insufficient to support a claim.¹¹⁰ The Court instructed lower courts to carefully scrutinize disparate impact claims in the early stages of a lawsuit and to ensure that plaintiffs have established a causal connection between the challenged practices and the identified disparate effects.¹¹¹ In addition, the Court stated that remedial orders should “concentrate on the elimination of the offending practice” through the use of “race-neutral means” should additional measures be required.¹¹²

The above limitations came from the *majority* opinion. Writing in dissent, Justice Alito echoed many of the sentiments set forth by the majority and by Justice Scalia in *Ricci*.¹¹³ Relying on the statutory phrase “because of” (which also appears in the main prohibition of Title VII), Justice Alito argued that a disparate impact alone cannot give rise to liability under the Fair Housing Act.¹¹⁴ Justice Thomas, in a separate dissent, went even farther, chastising the majority for its reliance on *Griggs v. Duke Power Company*,

¹⁰⁴ 135 S. Ct. 2507 (2015).

¹⁰⁵ 135 S. Ct. 2513 (“[t]he question presented for the Court’s determination is whether disparate-impact claims are cognizable under the Fair Housing Act”).

¹⁰⁶ 135 S. Ct. 2516-19 (discussing the Court’s prior interpretation of Title VII in *Griggs v. Duke Power Co.* and *Smith v. City of Jackson*).

¹⁰⁷ *Id.* at 2522.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2524.

¹¹⁰ *Id.* at 2523.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 2532 (Alito, J., dissenting).

¹¹⁴ *Id.* at 2533-35.

noting that “[w]e should drop the pretense that *Griggs*’ interpretation of Title VII ... was legitimate.”¹¹⁵

These developments are dire and alarming. The importance of disparate impact theory cannot be overstated. If employers in a police department, automobile manufacturing facility, or construction company, among others, do not believe that women ought to be employed in their organizations, they are unlikely to post signs saying “women need not apply” or to express such sentiments in documents, emails, or texts. Even if these employers do not consciously desire to exclude women, they may be influenced by unconscious beliefs and biases—those shared ideas and attitudes about groups that are tacitly conveyed through our common history and cultural heritage. In a world where many persons with animus against certain groups will hide their prejudice and employ sophisticated means to cloak it, or be unaware that it exists, statistical disparities are an effective way to smoke out discreet or unconscious discriminators. Even if no conscious or unconscious motive exists, to the extent that a goal of anti-discrimination law is to ensure the inclusion of groups that have too long suffered on the periphery of opportunity by eliminating systems and structures that produce grossly unequal outcomes without apparent justification, then disparate impact theory is necessary. Unfortunately, in the United States, a substantive equality or results-oriented approach to opportunity seems to be at odds with a capitalist economic system that depends upon hierarchy, and appears to be antithetical to a social ideology founded on the American Dream and widely held beliefs that individuals control their own destinies more than, in fact, they do.

C. Formalism

The reluctance to redress sexual orientation and gender identity discrimination fully and the apparent retreat from disparate impact theory pose considerable ongoing challenges for anti-discrimination advocates in the United States. Yet, another problem has also emerged which has considerable implications for corrective and distributive justice. Over the last fifty years, U.S. anti-discrimination law has embraced a theory of formal equality, where the goal is to treat everyone (men and women, people of color and whites, religious majorities and minorities) the same. Any deviation from this formalism appears to be immediately suspect.

To be sure, a commitment to formal equality is a good starting point and has led to some progress. Indeed, one could argue that formalism produced the result in *Obergefell v. Hodges* (i.e., that same-sex marriage must

¹¹⁵ *Id.* at 2526 (Thomas, J., dissenting).

be treated the same as opposite-sex marriage).¹¹⁶ Yet, formalism alone may be insufficient. As the Supreme Court pointed out as early as *Griggs v. Duke Power Company*, treating differently situated people the same does not necessarily produce equality of opportunity or equity.¹¹⁷ Unfortunately, for some formal equality has become both the starting point and the ending point of contemporary discrimination analyses, as demonstrated by Chief Justice Roberts in a recent case in which the Court found that the use of race by school districts seeking to integrate public schools was unlawful. In his plurality opinion, Justice Roberts stated that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹¹⁸ In another case, involving affirmative action, Justice Clarence Thomas took a similarly formalistic view. In rejecting the use of race-based affirmative action measures, Justice Thomas stated that “[i]n [his] mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.”¹¹⁹ Thus, in the minds of these justices, not only is the dissimilar treatment of racial groups per se unlawful, but the justifications for such dissimilar treatment are (at least for Justice Thomas) seemingly irrelevant.

Justice Stevens has pointed to limitations inherent in reasoning of this kind. In *Adarand*, he noted:

[t]he Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a

¹¹⁶ *Obergefell v. Hodges* is discussed *supra* at pages 12-13.

¹¹⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹¹⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

¹¹⁹ *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," should ignore this distinction.¹²⁰

The rigid adherence to formal equality, which is both ahistorical and acontextual,¹²¹ has been used not only to thwart affirmative action measures and measures designed to foster greater racial integration; it has also been used to undermine initiatives that would lead to greater participation by

¹²⁰ *Id.* at 243 (Stevens, J., dissenting). Justice Stevens went on to observe:

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

Id. at 245.

¹²¹ Justice Stevens has also pointed to the importance of contextual analysis. In *Parents Involved*, he criticized Chief Justice Roberts' characterization of *Brown v. Board of Education*, noting:

The first sentence in the concluding paragraph of [Justice Roberts'] opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions.

Parents Involved, 551 U.S. at 799 (Stevens, J., dissenting) (internal citations omitted).

women in the workforce. For example, a commitment to formalism has been employed to counter efforts to require that employers make necessary adjustments for workers experiencing complications from pregnancy.¹²² This was demonstrated recently in *Young v. United Parcel Service*, a case involving a UPS employee who requested a workplace accommodation in order to avoid lifting heavy items during her pregnancy.¹²³ The employer accommodated some nonpregnant workers with similar limitations, but not all such workers. In interpreting the Pregnancy Discrimination Act, which amended Title VII to include pregnancy within the definition of sex discrimination,¹²⁴ the U.S. Supreme Court held that while Title VII requires equal treatment (i.e., that employers accommodate pregnant women to the extent that they accommodate nonpregnant workers with similar restrictions), such accommodation is not required if the employer refuses to accommodate pregnant workers and some subgroup of nonpregnant workers for nondiscriminatory reasons.¹²⁵ In other words, the statute did not require that

¹²² See, e.g., *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856 (5th Cir. 2002); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994); *Marafino v. St. Louis Cty. Circuit Court*, 707 F.2d 1005 (8th Cir. 1983); see also *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-89 (1987) (finding that Title VII allows, but does not require, the preferential treatment of pregnant workers).

¹²³ 135 S. Ct. 1338, 1344 (2015).

¹²⁴ The Pregnancy Discrimination Act (PDA) added section 701(k) to Title VII. See U.S. Equal Employment Opportunity Commission, *The Pregnancy Discrimination Act of 1978*, available at <http://www.eeoc.gov/laws/statutes/pregnancy.cfm> (discussing the PDA's history); *Young v. United Parcel Serv.*, 135 S. Ct. at 1344-45 (same). Section 701(k) reads, in 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 medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. § 2000e(k). In *Young*, the Court was asked to interpret the second clause of section 701(k) in a context where the employer accommodated many, but not all, workers with nonpregnancy-related disabilities. 135 U.S. at 1344. Thus, the question arose as to which "other persons" pregnant women were to be compared.

¹²⁵ Importantly, the Court also found that neutral justifications offered to explain a failure to accommodate pregnant women could be challenged, noting,

[w]e believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies

pregnant women be afforded “most favored nation status” or that they be treated better than those nonpregnant workers who were not accommodated.¹²⁶

Oddly enough, formalism has produced other interesting claims in recent years, including assertions by workers without children that they are subject to discrimination—or a new form of parental status discrimination—because of the presence of family-friendly workplace policies (e.g., alternative work arrangements, leave policies, and dependent-care and other benefits designed to appeal to parents).¹²⁷ In short, these workers are asserting that they are being forced to work longer hours (e.g., overtime, holidays, and weekends) for less pay and fewer benefits than their colleagues with children, and that this violates the principle of equal treatment, or equal pay for equal work.¹²⁸ Significantly, only an overly formalistic and acontextual approach would give these arguments any resonance.

impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.... The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.

135 S. Ct. at 1354.

¹²⁶ *Id.* at 1349-50.

¹²⁷ Such policies would include part-time, flextime, and compressed work weeks; maternity, paternity, and other forms of family leave; and on-site childcare centers, vouchers to subsidize childcare costs, and tuition benefits, among other things.

¹²⁸ For additional discussion of parental status discrimination from the viewpoint of childfree persons, see TRINA JONES, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1255 (2014). In short, I argue that if one accepts anti-subordination as a key objective of anti-discrimination law, then merely treating childless workers differently from parents does not lead inexorably to the conclusion that discrimination is occurring. While the argument of childless workers seems persuasive at first glance, one must evaluate the purposes being served by the policies about which childless workers complain before advocating for their abolishment. To be sure, policies and practices based on generalized assumptions about the benefits of parenting should not go unchallenged. To the extent, however, that employer actions are implemented to eliminate the continued subordination and marginalization of women in the workplace, they should be maintained. Practices that serve legitimate public ends

In summary, the analysis in this section reveals that U.S. courts have developed a rather limited understanding of discrimination and that doctrinal analysis has, in some cases, veered dangerously off course. This essay maintains that discrimination is *not* simply treating individuals differently. By the same token, equal opportunity may not be satisfied merely by treating everyone the same. One must always ask the additional question of why dissimilar treatment is occurring or is required. Asking this question necessarily invites an important and critical conversation about the goals of anti-discrimination law—a discussion that involves corrective and distributive justice. Unfortunately, on the fiftieth anniversary of the CRA, it is that conversation that many Americans, including some members of the judiciary, seem no longer interested in having.

D. Why Are We Here?

In reflecting on the last fifty years, one might ask: why has U.S. anti-discrimination law lost much of its forward momentum, and what are possible implications for the future? A partial response to the first question may be the intractability of deeply-rooted norms, which include embedded beliefs about the desirability and inherent capabilities of various groups. But part of the answer may also be temporal. The United States is fifty years from a system of de jure segregation and in-your-face discrimination. The passage of time renders it more difficult for the U.S. public, whose median age is 37, to see and to understand the ways in which modern discrimination happens. Arguments based on numerical disparities inevitably encounter America's social ideology, which is based upon rugged individualism and the American Dream. The idea is that with individual effort anyone can pull herself up by her bootstraps and achieve economic prosperity. The fact that socio-economic mobility and the American Dream are largely unobtainable for masses of people is, of course, ignored or dismissed.

Another related response to the question of why U.S. anti-discrimination law is at a standstill is that Americans want to believe that we are post-race, post-sex, and post-everything else. This is an understandable impulse given this country's messy and extensive history of discrimination. It is simply more pleasant and easier all around to think that we are, or have obtained, our better selves, than to continue the hard and challenging work of grappling with our continuing imperfections.

may have adverse effects for subsets of workers (i.e., workers without children). These effects can be minimized by hiring additional workers, by making certain benefits available to all workers, and by paying workers additional compensation or offering comparable time off when they are required to do extra work.

And finally, there is a question of power. Real inclusion—like accepting the browning of America—means that, inevitably, those with the strongest hold on existing power structures will face competition and a potential diminution of their influence. History, not just in the U.S. but around the world, has shown that power is rarely voluntarily relinquished. Moreover, power that is threatened, whether materially or psychologically, often strikes back.

In this climate, “discrimination fatigue,” or an unwillingness to be receptive to existing claims of discrimination or to an expansion of protected classifications, is understandable, though thoroughly unacceptable. An embrace of formal equality, which has some value but does not go far enough in bridging opportunity gaps, is also understandable, though ultimately inadequate.

CONCLUSION

In many ways, the U.S. workplace in 2015 is very different from the workplace in 1964. Although Title VII has not eradicated all discrimination, it has affected employee demographics and influenced the ways in which Americans conceptualize the roles and capabilities of women and people of color. For these reasons, Title VII and the legions of courageous plaintiffs, lawyers, policy makers, and other activists who worked tirelessly to implement its promise deserve to be celebrated. Yet, Americans should be careful not to become blinded by celebratory zeal. While it is appropriate, and indeed desirable and encouraging, to look back and to acknowledge the slow and steady progress Title VII has produced, Americans must recognize that there is still much work to be done before full equality of opportunity is realized. As this essay has demonstrated, anti-discrimination advocates must continue to struggle against those who would refuse to extend full legal coverage to LGBTQ persons. They must resist the use of analytical techniques that fail to recognize the ways in which groups are differently situated and the discreet and subtle ways in which discrimination is practiced. Above all, they must continue to press for greater discussion and a more complex understanding of the differences between equality and equity, and dissimilar treatment and discrimination.