
ESSAY

CONFUSION ON THE COURT: DISTINGUISHING DISPARATE TREATMENT FROM DISPARATE IMPACT IN *YOUNG V. UPS* AND *EEOC V. ABERCROMBIE & FITCH, INC.*

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I.

Distinguishing between disparate treatment and disparate impact, the primary concepts of illegal discrimination first employed in seminal decisions¹ interpreting and applying Title VII of the Civil Rights Act of 1964,² may seem straightforward. Disparate treatment analysis asks whether an agent of an employer, with or without animus, has considered one of the five protected statuses specified in Title VII³ in taking some employment action.⁴ Disparate

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¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (treating Title VII liability under a disparate treatment theory); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing Title VII liability under a disparate impact theory).

² Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

³ Section 703 of Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. The Pregnancy Discrimination Act of 1978 effectively added pregnancy as a sixth category by expanding the definition of sex to include pregnancy. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)). *See also infra* notes 69-70 and accompanying text.

⁴ The Court in numerous decisions has made clear that the disparate treatment proscribed by Title VII encompasses any consideration of a protected status category that causes an adverse employment-related decision, regardless of whether this proscribed consideration is animus-based. *See, e.g., Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (upholding a finding that unions’ intentional discrimination constituted a violation of Title VII despite there being “no suggestion below that the Unions held any racial animus against or denigrated blacks generally”); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 (1983) (per curiam) (“The use of sex-segregated actuarial tables to calculate retirement benefits violates

impact analysis asks whether an employer has taken some action under a policy or practice that has disproportionately adverse effects on members of a group defined by a protected status.⁵ The former is illegal regardless of any business justification, except in rare cases where a protected status (other than race or color) is considered a bona fide occupational qualification (“BFOQ”).⁶ The latter is illegal only where an employer cannot demonstrate that the policy or practice serves a necessary business goal or where the plaintiff can demonstrate an alternate means to achieve such a demonstrated goal without the adverse effects.⁷ Under current law, the former warrants legal as well as equitable relief, while the latter warrants only equitable relief.⁸

Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class . . .”).

Title VII’s disparate treatment cause of action, which protects only the five listed status categories, thus differs from the Constitution’s equal protection standard, which potentially protects any status group, but requires proof of some level of animus or lack of equal regard, even for classifications—unlike race—that do not raise heightened suspicions of such animus. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that Amendment 2 of Colorado’s constitution violated the Equal Protection Clause because it “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding an equal protection violation where a permit requirement appeared “to rest on an irrational prejudice against the mentally retarded”); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 588 (1979) (stating the constitutional equal protection issue as “whether the rule reflects an impermissible bias against a special class” of narcotics users); *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135-97 (1980) (explaining when a classification should be reviewed under a stricter standard of scrutiny, and the role of the motivations behind such a classification).

⁵ *See, e.g.*, *Griggs*, 401 U.S. at 431-32 (explaining that while the defendant company lacked discriminatory intent in adopting high school diploma and aptitude test requirements, such requirements violated Title VII because they “operate[d] as ‘built-in headwinds’ for minority groups and [were] unrelated to measuring job capability”).

⁶ The BFOQ defense applies only to religion, sex, and national origin discrimination. 42 U.S.C. § 2000e-2(e).

⁷ The disparate impact cause of action was codified as § 703(k) of Title VII by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (1991) (codified at 42 U.S.C. § 2000e-2(k)). Section 703(k) provides:

An unlawful employment practice based on disparate impact is established under this subchapter only if—(i) a complaining party demonstrates that . . . a particular employment practice . . . causes a disparate impact . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party [demonstrates a satisfactory] alternative employment practice and the respondent refuses to adopt such alternative employment practice.

⁸ *See* 42 U.S.C. § 1981A(a)(1) (providing compensatory and punitive damages for violations of Title VII predicated on a disparate treatment theory); *id.* § 2000e-5(g) (providing for equitable relief, including injunctions and back pay, for all violations of Title VII).

But even the wise men and women on the Supreme Court continue to have difficulty distinguishing the two. In two decisions from the 2014-15 Term, *Young v. United Parcel Service, Inc.*⁹ and *EEOC v. Abercrombie & Fitch Stores, Inc.*,¹⁰ the Court seemed to give contradictory answers to an important, unresolved conceptual definitional question: Does disparate treatment include assigning members of a protected group, based on their protected status, to a larger disfavored group that is defined by neutral principles and that includes others who are not members of the protected group? Or, in the alternative, does such an assignment have only a disparate impact on the protected group?

In *Young*, the first of these decisions, all members of the Court, though divided on the appropriate analysis, seemed to assume that consideration of protected status in assigning an individual to a more broadly defined, larger disfavored group is not overt disparate treatment. Justice Breyer, writing for the five-member majority in *Young*,¹¹ and Justice Alito, in a concurring opinion,¹² both seemed to agree with Justice Scalia's opinion for the three dissenters that the light duty accommodation policy of United Parcel Service ("UPS") for disabled drivers could not be treated as overt illegal disparate treatment against the protected category of pregnant women.¹³ The Justices each reached this conclusion even though UPS's policy considered the pregnancy-based explanation for Peggy Young's lifting disability in assigning her disability to a larger residual category of disfavored disabilities that UPS did not accommodate with temporary light duty work.¹⁴

In *Abercrombie*—a conceptually identical case involving alleged discrimination based on religion rather than on pregnancy—eight members of the Court held that consideration of a protected religious practice under a general policy that defined a larger disfavored group was illegal disparate treatment, absent the availability of a statutory defense.¹⁵ These eight Justices concluded that disparate treatment analysis was appropriate for Abercrombie's application of its neutral "Look Policy," which prohibited the wearing of caps, to deny employment to Samantha Elauf, a young Muslim woman who wore a hijab scarf to her job interview. This was despite the fact that the neutral policy

⁹ 135 S. Ct. 1338 (2015).

¹⁰ 135 S. Ct. 2028 (2015).

¹¹ *Young*, 135 S. Ct. at 1343-44; see *infra* notes 85-98 and accompanying text.

¹² *Id.* at 1361 (Alito, J., concurring); see *infra* note 109.

¹³ *Id.* at 1366 (Scalia, J., dissenting); see *infra* notes 99-109 and accompanying text.

¹⁴ UPS at least purported to accommodate only "(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act (ADA)." *Id.* at 1344 (majority opinion) (citation omitted).

¹⁵ *Abercrombie*, 135 S. Ct. at 2031, 2034 (holding that Abercrombie's neutral policy could be challenged under a disparate treatment cause of action); *id.* at 2034-35 (Alito, J., concurring) (agreeing that Abercrombie's neutral policy could be challenged under a disparate treatment cause of action, but contending that Title VII requires an employer to have knowledge of the employee's protected status).

defined a larger disfavored group that included non-religious cap-wearers.¹⁶ Only Justice Thomas, in a separate opinion that argued that Abercrombie's neutral policy could be challenged only under the theory that it had a disparate impact on applicants with certain religious practices,¹⁷ maintained consistency with the conceptual definition of disparate treatment apparently accepted by all members of the Court in *Young*.

In my view, the Court's decision in *Young* was unfortunate. As I will explain below,¹⁸ the majority opinion not only diluted the Pregnancy Discrimination Act ("PDA")'s¹⁹ amendments to Title VII with a confusing approach that provided incomplete guidance for future cases (including Peggy Young's case itself on remand), but the opinion also weakened the appropriate clarification that the *Abercrombie* decision might have given to the conceptual line between the disparate treatment and disparate impact forms of discrimination proscribed by Title VII.

In the remainder of this Essay, I first explain why disparate treatment analysis is appropriate in cases, like *Young* and *Abercrombie*, where protected status is taken into account under a neutral policy that defines a disfavored group which encompasses the protected class, but which is also broader and more inclusive. I then use this explanation to defend the application of disparate treatment analysis in *Abercrombie*, and to criticize the Justices for failing to apply it in *Young*. My criticism of the *Young* decision includes a further explanation of the sources of the Justices' lack of perception and enables me to conclude with a message of hope for a future perception and clarification not obstructed by the same sources.

II.

It is illuminating to begin with the Court's resolution of a conceptual distinction between disparate treatment and disparate impact that might be considered the converse of the issue at the core of *Abercrombie* and *Young*. The converse question is whether discrimination against a non-protected status category that is totally encompassed within—but is not coextensive with—a larger protected status category can be challenged as disparate treatment of the larger category's protected status or rather must be challenged only for its disparate impact on the protected status. This was the conceptual question at the core of the pre-PDA challenge to the disability plan considered by the

¹⁶ *Id.* at 2031 (majority opinion).

¹⁷ *Id.* at 2037-38 (Thomas, J., concurring in part and dissenting in part) (arguing that Abercrombie's neutral Look Policy "is a classic case of an alleged disparate impact" because it "fall[s] more harshly on those who wear headscarves as an aspect of their faith").

¹⁸ See *infra* notes 82-98 and accompanying text.

¹⁹ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)) (clarifying that discrimination "'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").

Court in *General Electric Co. v. Gilbert*.²⁰ The disability plan challenged in that case paid weekly sickness and accident benefits but expressly excluded from the plan's coverage disabilities arising from pregnancy. Since only women can become pregnant, all employees disadvantaged by the plan were a subset of a Title VII-protected status group. Justice Rehnquist, however, writing for the Court, held that General Electric's plan could be challenged, if at all, only for having a disparate impact on women²¹ because there was no finding that the exclusion of pregnancy from the plan was based on a consideration of the sex of those who might become pregnant,²² or that the exclusion was "a simple pretext for discrimination against women."²³ According to the Court, even though the plan's exclusion of pregnancy was intentional discrimination on the basis of pregnancy (the defining status characteristic of the exclusion), it did not amount to intentional discrimination against women (who composed the entire class not provided benefits).²⁴

The *Gilbert* holding made for bad public policy and of course was soon superseded by the passage of the PDA.²⁵ The Court's pre-PDA resolution of the underlying conceptual question nonetheless made sense. Absent a factual finding that an employer took into account the protected status (sex) defining the larger set (women) when deciding to disfavor those in the subset (pregnant women), there is no basis for concluding that the adverse decisions were influenced by some consideration of the protected status of sex, rather than by other considerations, such as cost. Unlike cases such as *Phillips v. Martin Marietta Corp.*,²⁶ in which the Court did accept disparate treatment analysis for establishing discrimination against a subset comprised entirely of women,²⁷ that basis cannot be established in subset discrimination cases such as *Gilbert*, where there are no comparators outside of the protected status who share the characteristic defining the disfavored subset. In *Martin Marietta*, the employer hired some women, but not those with preschool-age children. The employer did, however, hire men with preschool-age children,²⁸ demonstrating that the employer was influenced in part by the protected status of sex in disfavoring the subset of women with young children. Such proof of course is not available in the rare case, as in *Gilbert*, where the non-protected status—in *Gilbert*,

²⁰ 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

²¹ *Id.* at 137-38.

²² *Id.* at 136 ("Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability.").

²³ *Id.*

²⁴ *Id.* at 136-38.

²⁵ *See Shaw*, 463 U.S. at 89.

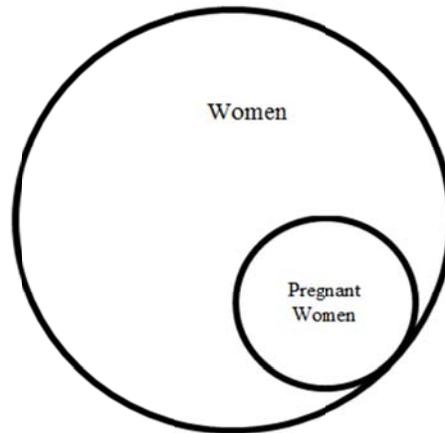
²⁶ 400 U.S. 542 (1971) (per curiam).

²⁷ *Id.* at 544.

²⁸ *Id.*

pregnancy (pre-PDA)—cannot be shared by those outside the protected status defining the larger set.

Illustration 1 – *General Electric, Co. v. Gilbert*



Cases like *Young* and *Abercrombie*, where protected status defines the subset but not the set, are also distinguishable from cases like *Gilbert*, where protected status defines the set but not the subset. In the former cases, there is no factual dispute over whether the employer considered a protected status—such as pregnancy or the religious practice of wearing head scarves—when assigning individuals defined by such status to a larger set of disfavored individuals defined by unprotected categories. Moreover, as in cases like *Martin Marietta*, readily available comparators exist to confirm consideration of the protected status. Many favored individuals outside the plaintiff's protected status group are in all potentially relevant respects identical to the plaintiff, except for the protected status.

Illustration 2 – *Young v. United Parcel Service, Inc.*

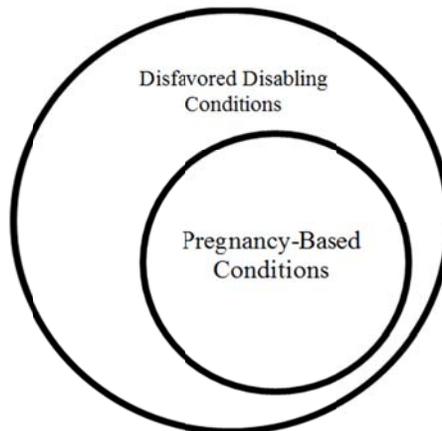
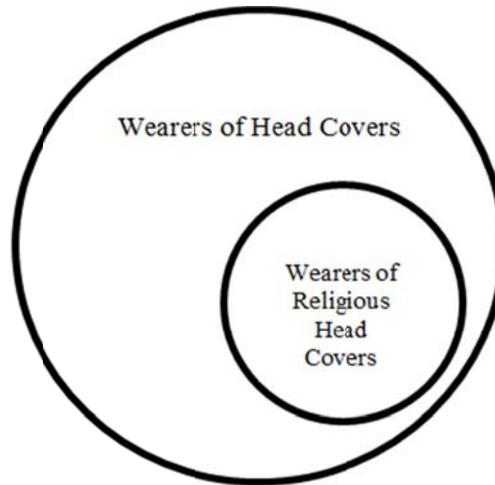


Illustration 3 – EEOC v. Abercrombie & Fitch Stores, Inc.

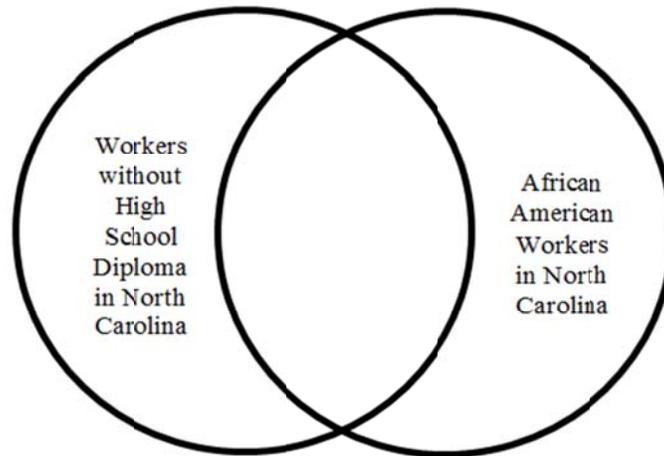
Cases like *Young* and *Abercrombie*, where the employer assigns all those in a protected status (pregnant women or women wearing hijabs) to a larger disfavored group that is not defined by such status (those with disfavored disabilities or those who wear head covers), also are distinguishable from paradigmatic disparate impact cases where protected status defines neither a set nor a subset of the disfavored. In disparate impact cases, the protected status is not at all considered by the employer when determining disfavored status. For instance, in *Griggs v. Duke Power Co.*,²⁹ the Supreme Court decision that first pronounced a disparate impact cause of action under Title VII, the employer presumably adopted high school diploma and aptitude test score requirements for employment without any consideration of the race-based status disproportionately affected by the neutral requirements.³⁰ Similarly, in *Dothard v. Rawlinson*,³¹ the Court's first application of the disparate impact cause of action to sex discrimination, the employer presumably applied minimum height and weight requirements for employment as a prison guard without any consideration of the sex-based status disproportionately affected by the neutral requirements.³²

²⁹ 401 U.S. 424 (1971).

³⁰ *Id.* at 432 (“The Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.”).

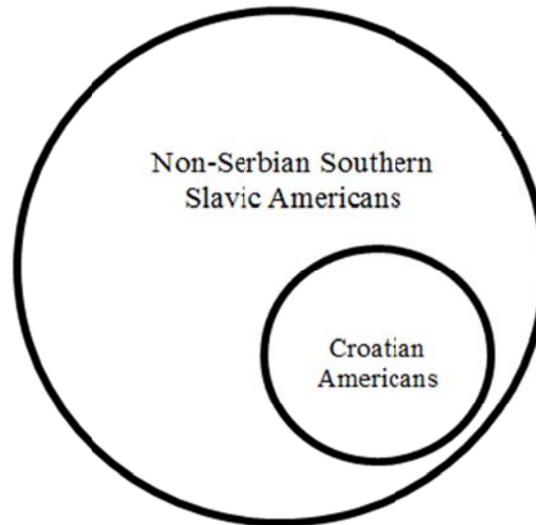
³¹ 433 U.S. 321 (1977).

³² *Id.* at 328 (“The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive.”).

Illustration 4 – *Griggs v. Duke Power Co.*

What makes cases like *Young* and *Abercrombie*, where protected status defines the subset rather than the set, conceptually difficult is the fact that there are otherwise identical individuals—other “comparators”—outside the plaintiff’s protected subset, but within the larger set, who are disfavored. In *Young*, those with certain disabilities other than pregnancy presumably were also denied the benefit of light duty work, and in *Abercrombie*, those who wore caps or other secular head coverings to their interviews presumably were also denied employment. Ultimately, however, the unfavorable treatment of these other comparators should not insulate such cases from disparate treatment analysis. The statutory language in § 703(a)(1) of Title VII, on which the disparate treatment cause of action is based, makes it “an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s” protected status.³³ Such proscribed discrimination can occur where individuals in the plaintiff’s protected class are not the only disfavored individuals—disparate treatment analysis only asks whether the plaintiff’s protected status affected the employment action. Consider, for example, a national origin discrimination case brought by a Croatian-American against a Serbian-American-owned business that the Croatian claimed discriminated against her because of her ethnic background. If the Croatian could point to favored Serbian-American comparators, she could establish disparate treatment on the basis of national origin, regardless of whether the employer could point to equally disfavored Slovenian-American or Bosnian-American comparators.

³³ 42 U.S.C. § 2000e-2(a)(1) (2012).

Illustration 5 – Croatian-American Hypothetical

This Balkanized hypothetical admittedly does not fully capture the discrimination in *Young* and *Abercrombie* because, in my hypothetical, the employer seems to be disfavoring the Croatian not under a legal, neutral policy, but rather under a general policy of discrimination against anyone of at least southeastern European, non-Serbian descent. The general policy defining the larger set is itself as illegal a form of national origin discrimination as is any more particularized form of discrimination against the plaintiff's subset of Croatian-Americans. Indeed, it generally will be true that other disfavored comparators outside the plaintiff's protected class-defined subset, but within a larger encompassing set, will have a cause of action similar to that of the plaintiff for any form of status discrimination subject to universalistic and symmetrical prohibitions. Such prohibitions, such as those in Title VII against discrimination based on race, non-pregnancy sex, and national origin, as well as forms of religious discrimination, can be invoked in the same manner by all and cut equally in all directions.³⁴ For such prohibitions, it is difficult to imagine realistic cases where larger sets of disfavored workers include comparators who do not have causes of action similar to those that the illegally defined subsets of workers might have.³⁵

³⁴ See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that white employees can challenge adverse treatment because of their race under Title VII).

³⁵ It is not difficult for a law professor, however, to imagine unrealistic hypotheticals, like the employer who sincerely hates very curly hair and therefore refuses under this neutral principle to hire anyone that the employer knows is of African descent regardless of the current length or style of their hair. Even if the neutral principle is not a pretext for

As further explained below, however, the prohibition of pregnancy discrimination embodied within Title VII's prohibition of sex discrimination at issue in *Young* and the prohibition of the type of religious discrimination at issue in *Abercrombie* are both more like the non-universalistic and asymmetrical prohibitions of age and disability discrimination in the Age Discrimination in Employment Act of 1967³⁶ ("ADEA") and the Americans with Disabilities Act of 1990³⁷ ("ADA"), respectively. The prohibition of age discrimination in the ADEA is non-universalistic because the statute protects only workers who are forty and older, and it is asymmetrical because it protects against age discrimination that favors younger workers but not age discrimination that favors older workers.³⁸ The prohibition of disability discrimination by the ADA is non-universalistic because it protects only disabled workers, and it is asymmetrical because it does not protect the non-disabled from any discrimination that favors the disabled.³⁹

disfavoring blacks (which, of course, it realistically would be), the employer's policy presumably would and should be treated as overt disparate treatment on the basis of race. The disfavored status-protected subset of blacks is included within the larger disfavored set that is defined by an unprotected status—very curly hair.

³⁶ 29 U.S.C. §§ 621-634 (2012).

³⁷ 42 U.S.C. §§ 12101-12213 (2012).

³⁸ 29 U.S.C. § 631(a) (limiting protections "to individuals who are at least 40 years of age"); see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that the ADEA does not prohibit favoring older workers over younger workers).

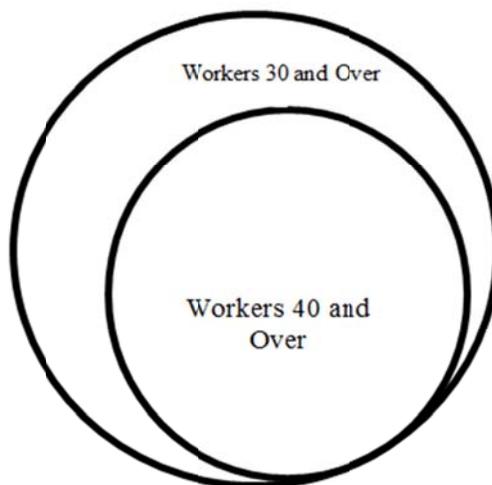
It is conceptually possible to have a discrimination prohibition that is non-universalistic but is symmetric. This was how the dissenters in *Cline*, for instance, interpreted the ADEA. *Id.* at 602 (Thomas, J., dissenting) (insisting that the ADEA also prohibits favoring older workers over younger workers within the protected class); see also *id.* at 601 (Scalia, J., dissenting). Such a prohibition, however, cannot function consistently in practice. If the dissenters' view of the ADEA was correct—if the ADEA prohibited discrimination against younger workers as well as against older workers—then an employer could not favor older workers in the forty-and-over protected class, but only workers in that protected class could have a cause of action to object. Thus, an employer with impunity could have a policy of hiring only those workers forty and over because the policy disfavored no workers in the protected class, but the employer could not have a policy of hiring only those fifty and over because such a policy would disfavor workers who would be protected by the ADEA between their fortieth and fiftieth birthdays.

³⁹ 42 U.S.C. § 12112(a). Contrast the asymmetrical discrimination statutes with the symmetrical prohibition of race discrimination under Title VII. A Caucasian worker, like an African-American worker, has a cause of action against an employer that bases an adverse employment decision on the worker's race. See *McDonald*, 427 U.S. at 280 (holding that white employees can challenge under Title VII adverse treatment based on race); see also, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 619 (1987) (assessing a male plaintiff's claim that a voluntary affirmative action program favoring women violated Title VII); *United Steelworkers v. Weber*, 443 U.S. 193, 193-94 (1979) (assessing a white plaintiff's claim that a voluntary, race-conscious affirmative action program violated Title VII).

The ADEA and the ADA thus may present more realistic testing hypotheticals closer to the facts of *Young* and *Abercrombie*. Consider a policy against hiring workers older than age thirty. Under such a policy, the larger, disfavored class would include comparators between the ages of thirty and forty who would not have a cause of action under the ADEA for age discrimination like the protected subset of disfavored workers over the age of forty would have. Presumably, this latter subset of workers should and would be able to claim overt disparate treatment on the basis of age despite being included by the employer's policy within a larger set of workers, many of whom could not claim such discrimination.⁴⁰

⁴⁰ Indeed, in *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008), several current Justices suggested that they would recognize the age-based assignment of older workers to a less favorable status under a broader, neutrally-defined policy as ADEA-proscribed disparate treatment. *Id.* at 150-51 (Kennedy, J., dissenting) (insisting a violation of the ADEA occurs where an employer “makes age a factor . . . to the detriment of older employees”). In that case, the Court considered a challenge to Kentucky's disability retirement plan based on its treatment of some “disabled individuals more generously than . . . some of those who become disabled only after becoming eligible for retirement” and for their normal pension—eligibility for which depended in part on age. *Id.* at 138 (majority opinion). Justice Kennedy, in a dissent joined by Justices Scalia, Ginsburg, and Alito (two of whom who are also currently on the Court), argued that the Kentucky system was “a straightforward act of discrimination on the basis of age” even though he did not question Kentucky's good faith attempt to align a disabled worker's pension with the pension the worker would have earned at retirement age without a disability. *Id.* at 152 (Kennedy, J., dissenting). Justice Kennedy did not find relevant Kentucky's use of the neutral, broader principle of pension eligibility, finding the case no different than one where “an employer divided his employees into two teams based upon age—putting all workers over the age of 65 on ‘Team A’ and all other workers on ‘Team B’—and then paid Team B members twice the salary of their Team A counterparts . . .” *Id.* at 158.

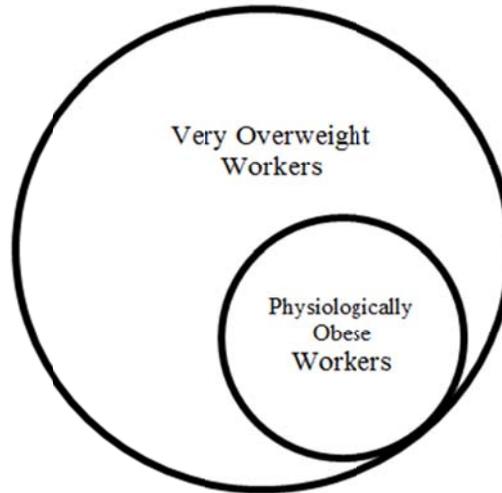
The other five Justices joined Justice Breyer's majority opinion, which upheld Kentucky's plan based primarily on the ADEA's special treatment of pensions, but cautioned the opinion would “in no way unsettle[] the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA” and that the opinion dealt with “the quite special case of differential treatment based on *pension status*, where pension status—with the explicit blessing of the ADEA—itself turns, in part, on age.” *Id.* at 147-48 (majority opinion).

Illustration 6 – ADEA Hypothetical

It might be argued that the larger set in the last hypothetical is itself defined by an age-based policy unfavorable to older workers, even if it includes some comparators with no cause of action. But consider a hypothetical based on the current ADA. Assume an employer has a policy against employing permanent workers whose body mass index (“BMI”) is above a particular level, and that the employer consequently does not hire anyone whom it deems unable to reach this BMI within six months. The employer thus rejects any applicant for employment whom it knows to be obese because of a difficult-to-control physiological condition. Assuming, as courts have held,⁴¹ that such physiologically-based obesity is a disability protected from discrimination by the ADA, but that being overweight, or even obese, generally is not,⁴² the employer’s assignment of the protected subset of the physiologically obese to its excluded neutrally defined set of unacceptably overweight workers should, and I think would, be treated as illegal, overt disparate treatment of the disabled subset.

⁴¹ See, e.g., *Cook v. R.I. Dep’t of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 23 (1st Cir. 1992) (holding that a jury could have plausibly found an impairment because the plaintiff presented evidence that her obesity was a physiological disorder).

⁴² See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) (holding that morbid obesity does not constitute an ADA impairment unless it is the “result of a physiological condition”).

Illustration 7 – ADA Hypothetical

It is difficult to distinguish conceptually this ADA hypothetical from *Young* and *Abercrombie*. In each case, the employer is culpable of considering a category protected from discrimination as the basis for assigning workers to a larger set of disfavored workers defined by principles that are neutral under the antidiscrimination laws. In each case, those neutral principles not only advantage comparators outside the protected subset; they also disadvantage comparators who are within the larger set but not the protected subset. Each case should be treated alike: as overt disparate treatment on the basis of the category defining the protected subset of workers.

An explanation of why the Court nonetheless did not afford Peggy Young, a member of a protected subset of pregnant workers, the benefit of protection from overt disparate treatment can best be examined after an analysis of why the Court inconsistently did afford this benefit to Samantha Elauf, the hijab-wearing Muslim woman in *Abercrombie*.

III.

The issue presented and directly decided by the Supreme Court in *Abercrombie* was not the conceptual distinction between disparate treatment and disparate impact discrimination that I am treating in this Essay. The Court instead granted certiorari in *Abercrombie* to resolve a split in the Courts of Appeals on whether an employer's Title VII duty to refrain from taking a materially adverse employment action against an employee or applicant for employment because of her religious practice applies only when the employee or applicant has informed the employer that the practice is religion-based and

thus possibly requires some accommodation.⁴³ Justice Scalia's opinion for a seven-Justice majority held that the employer's duty is not so conditioned—an employee or applicant can “show disparate treatment without first showing that an employer has ‘actual knowledge’ of the applicant's need for an accommodation.”⁴⁴ It is sufficient for a plaintiff to demonstrate that the employer was motivated by its agent's consideration of the plaintiff's religious practice, whether or not it knew that the practice actually was based on religion.⁴⁵ Justice Scalia founded this holding primarily on the wording of the statutory provision that expresses Title VII's prohibition of disparate treatment discrimination on the basis of religion (or race, color, sex, and national origin). That provision, § 703(a)(1) of the Civil Rights Act of 1964, Justice Scalia stressed, requires only that the plaintiff prove that a discriminatory motive caused the adverse employment decision, such as the decision not to hire the applicant, about which the plaintiff complains.⁴⁶ The provision does not include any kind of knowledge requirement.⁴⁷

This interpretation of § 703(a)(1) has little import for most status discrimination cases. An employer that is unaware of a protected status like race or sex cannot be motivated to treat an employee or applicant adversely on the basis of that protected status. The same is true for the status of religious affiliation or belief. However, Title VII defines the status category of religion to include “all aspects of religious observance and practice, as well as belief,”⁴⁸ and employers may treat employees or applicants differently because of some practice, such as the wearing of particular clothing, without knowledge of the religious reason for the practice. So for cases like *Abercrombie* that involve alleged discrimination against a religious practice, the holding is important.

The holding probably does not mean, however, that an employer can be liable for discrimination on the basis of a religious practice without the plaintiff showing that the employer had some reason to be suspicious that the practice might be religion-based. As Justice Alito argued in his concurring opinion, there certainly was such a showing in this case.⁴⁹ The record indicated

⁴³ EEOC v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015); compare *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (requiring that an employee give “only enough information about [his or her] religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements”), with EEOC v. *Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1123 (10th Cir. 2013) (requiring that an employee give “explicit” notice to the employer of his or her religious beliefs and need for accommodation), *rev'd*, 135 S. Ct. 2028.

⁴⁴ *Abercrombie*, 135 S. Ct. at 2032.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2033 (“Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge.”).

⁴⁷ *Id.* at 2032.

⁴⁸ 42 U.S.C. § 2000e(j) (2012).

⁴⁹ *Abercrombie*, 135 S. Ct. at 2034-35 (Alito, J., concurring).

that the Abercrombie employee who interviewed Samantha Elauf thought she wore a headscarf to the interview for religious reasons, and this belief was communicated to the store manager who instructed the interviewer to not hire her.⁵⁰ Without any indication that an employer's agent had some reason to think a practice might be religious, it would be hard for a factfinder to discern a motive to make an adverse employment decision based on religion. As Justice Alito argued, there would not be any "blameworthy conduct" in such a case.⁵¹ It thus was unsurprising that Justice Scalia conceded in a footnote, while declining to resolve "by way of dictum," that "it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice. . . ."⁵²

Requiring that a culpable employer possess some modicum of suspicion of a religious basis for a disfavored practice seems particularly important because, as noted, Justice Scalia expressly treated Abercrombie's rejection of Elauf as disparate treatment rather than disparate impact discrimination.⁵³ Indeed, the Court could not have used disparate impact analysis to review the Court of Appeals's decision to overturn a jury award of damages based on disparate treatment.⁵⁴

Justice Thomas was the only member of the Court to dissent from Justice Scalia's application of disparate treatment analysis in *Abercrombie*.⁵⁵ To Justice Thomas, it was "a classic case of an alleged disparate impact" on a protected group because Abercrombie "did not treat religious practices less favorably than similar secular practices"⁵⁶ Justice Thomas did not need to consider whether Abercrombie had any suspicion about whether Elauf's practice was religious before applying its Look Policy because Abercrombie would have applied the same policy to secular comparators.⁵⁷ Justice Thomas failed to perceive any difference between a case where an employer considers a protected status as a basis for assigning an employee to a larger set of disfavored workers, like *Abercrombie*, and a paradigmatic disparate impact case where an employer's challenged practice merely has a disproportionately adverse effect on a protected group without any direct consideration of protected status, like *Griggs*.⁵⁸

⁵⁰ *Id.* at 2031 (majority opinion).

⁵¹ *Id.* at 2036 (Alito, J., concurring) ("Those provisions prohibit intentional discrimination, which is blameworthy conduct, but if there is no knowledge requirement, an employer could be held liable without fault.").

⁵² *Id.* at 2033 n.3 (majority opinion).

⁵³ *Id.* at 2032-33.

⁵⁴ *Id.* at 2031.

⁵⁵ *Id.* at 2038 (Thomas, J., concurring in part and dissenting in part).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 2037-38 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

Justice Scalia's majority opinion included two responses to Justice Thomas. The second of these responses was not alone persuasive, as it did no more than note that Title VII's protection of "religious practice" is asymmetrical and non-universalistic. Thus Justice Scalia's assertion, that Title VII "does not demand mere neutrality with regard to religious practices" but rather "gives them favored treatment,"⁵⁹ merely explained why Title VII's protection against religious discrimination, like the ADA and the ADEA prohibitions discussed above, is more likely to pose the conceptual problem that is the subject of this Essay. Yet it did not explain why Justice Thomas's proposed solution to the conceptual problem was incorrect.

In this second response to Justice Thomas, Justice Scalia asserted that "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."⁶⁰ But the accommodation requirement is irrelevant to whether differential treatment of someone because she engaged in a practice that turns out to be religious constitutes disparate treatment under Title VII when someone who engaged in the same practice in a secular manner would be treated the same. The provision upon which Title VII disparate treatment is based, § 703(a)(1), contains no reference to accommodation and treats discrimination on the basis of religion the same as the other prohibited forms of discrimination.⁶¹ The statute's only mention of accommodation for religious practices is in a provision for an affirmative defense to employers, within the definition of religion, to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business."⁶² The accommodation-undue hardship defense is thus only relevant in determining what is protected *as religion* under Title VII's disparate treatment provision. It does not define the conceptual scope of the statute's disparate treatment provision and thus does not delineate what forms of discrimination are unlawful under a disparate treatment theory.

Justice Scalia's first response to Justice Thomas, however, seems to be a more direct rejection of Justice Thomas's answer to the underlying conceptual question. Justice Scalia states that Justice Thomas's analysis might have been correct "if Congress had limited the meaning of 'religion' in Title VII to religious *belief*—so that discriminating against a particular religious *practice* would not be disparate treatment though it might have disparate impact."⁶³ But since "religious practice is one of [Title VII's] protected characteristics,"⁶⁴

⁵⁹ *Id.* at 2034 (majority opinion).

⁶⁰ *Id.*

⁶¹ 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's" protected status).

⁶² *Id.* § 2000e(j).

⁶³ *Abercrombie*, 135 S. Ct. at 2033.

⁶⁴ *Id.*

differential treatment of someone engaged in the practice can constitute disparate treatment, regardless of whether that differential treatment is implemented as part of a more general policy.

In his response to Justice Thomas in his concurring opinion, Justice Alito took the same position more directly.⁶⁵ In order to prove discrimination under Title VII's disparate treatment provision, asserts Justice Alito:

A plaintiff need not show . . . that the employer took the adverse action because of the religious nature of the practice. Suppose, for example, that an employer rejected all applicants who refuse to work on Saturday, whether for religious or nonreligious reasons. Applicants whose refusal to work on Saturday was known by the employer to be based on religion will have been rejected because of a religious practice.⁶⁶

Justice Alito then supports this conclusion by noting that there would be no need to provide the accommodation-undue hardship "defense" in the definition of religion if the disparate treatment provision—the provision covering all forms of Title VII discrimination—did not have this meaning.⁶⁷

Thus, had it stood alone in the 2014-15 Supreme Court Term, *EEOC v. Abercrombie & Fitch Stores, Inc.* would have provided strong support for a conceptual definition of Title VII disparate treatment that included assigning members of a protected status group to a larger disfavored group that includes others who are not members of the protected group. Abercrombie did this by assigning Muslim women engaging in a religious practice to the larger disfavored group of "cap-wearers." But *Abercrombie* did not stand alone as a case relevant to the conceptual definition of disparate treatment. Two months before *Abercrombie*, in *Young v. UPS*, the Court had seemed to assume a different conceptual definition of Title VII disparate treatment in a case involving the application of Congress's amendment to Title VII in the PDA.⁶⁸

IV.

The PDA added a definition of sex, right after the definition of religion, in the definitional section of Title VII. The first clause of this definition states that 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."⁶⁹ By folding pregnancy discrimination into the category

⁶⁵ *Id.* at 2037 (Alito, J., concurring).

⁶⁶ *Id.* at 2036 (internal cross-reference omitted).

⁶⁷ *Id.*

⁶⁸ See *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1350 (2015) ("Moreover, disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so.").

⁶⁹ 42 U.S.C. § 2000e(k) (2012).

of sex discrimination, this clause effectively expanded the categories covered by Title VII's prohibitions of discrimination from five to six, including the disparate treatment prohibition of § 703(a)(1).⁷⁰ Had a majority of the Justices in *Young* interpreted the latter prohibition in the same manner that they interpreted it two months later in *Abercrombie*, the answer to the conceptual question posed in this Essay would be clear.

UPS required Young, one of its part-time drivers, to stay home without pay during most of her pregnancy when she was not able to lift the minimum weight that UPS required of its drivers. Her forced unpaid leave caused an eventual loss of medical coverage.⁷¹ UPS denied Young's request for an accommodation to help her with the lifting of heavy packages. UPS based its denial on the fact that Young's lifting restriction was caused by her pregnancy, deciding that this cause did not fit any of the three categories of disability causes that it accommodated under its general personnel policy.⁷² Under that policy, UPS accommodated (1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation ("DOT") certification as drivers, and (3) those who suffered from a disability covered by the ADA.⁷³ Young's pregnancy was not an on-the-job injury, did not cause her to lose her DOT certification as a driver, and was not covered as a disability under the ADA at that time because it was only temporary.⁷⁴ Thus, UPS considered Young's protected status of pregnancy in placing her in a larger set of neutrally defined disfavored workers, just as *Abercrombie* considered Elauf's religious headscarf in placing her in a larger set of neutrally defined disfavored workers.

In both cases, of course, there were other members of the disfavored set of workers—secular cap-wearers in *Abercrombie* and workers with lifting restrictions caused by off-the-job injuries in *Young*—who were not provided accommodations under the neutral company policy. These other disfavored workers would continue to be disadvantaged even if discrimination against the religious and the pregnant were eliminated. This was not a problem in *Abercrombie* because, as noted above,⁷⁵ Title VII's prohibition of discrimination against religious practice is both non-universalistic and asymmetrical: Title VII does not protect secular practices, and it does not

⁷⁰ *Id.* § 2000e-2(a)(1).

⁷¹ *Young*, 135 S. Ct. at 1344.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Courts generally held that temporary impairments were not sufficiently "substantial" to fall under the definition of disability in the ADA as originally enacted. *See, e.g.*, *Pollard v. High's of Balt., Inc.*, 281 F.3d 462, 467-71 (4th Cir. 2002) (holding that a temporary back injury was not a disability under the ADA); *McDonald v. Pennsylvania*, 62 F.3d 92, 96-97 (3d Cir. 1995) (holding that a worker fired because of an inability to work for two months after a surgery was not protected by the ADA).

⁷⁵ *See supra* note 59 and accompanying text.

prohibit accommodations that favor religious practices over secular practices. It need not have been a problem in *Young* either, however, because the Court already had held that the PDA's prohibition of pregnancy discrimination is also both non-universalistic and asymmetrical: the PDA does not protect other conditions or disabilities, and it does not prohibit employers from favoring pregnancy.

The Court rendered this holding in *California Federal Savings and Loan Association v. Guerra*,⁷⁶ a decision that could have guided the *Young* decision but which was not a part of the central analysis of any opinion in the case. *Guerra* involved a federal preemption challenge to a California law requiring employers to provide female employees an unpaid pregnancy disability leave of up to four months but not requiring that employers provide such leave to workers disabled for other reasons.⁷⁷ The plaintiff employer argued that this California law conflicted with the federal PDA because the state law allowed employers to provide a type of preferential treatment for pregnancy that the employer construed the PDA to prohibit.⁷⁸ The Court rejected the preemption challenge in part because it rejected the employer's construction of the PDA to prohibit preferential treatment of pregnancy.⁷⁹ Rather, the Court agreed "with the Court of Appeals' conclusion that Congress intended the PDA to be a 'floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"⁸⁰ Thus, the Court confirmed that the PDA is asymmetrical and that an employer who complied with the California law would not be in violation of the PDA if it did not provide comparable benefits to other disabled workers.

The same would be true for UPS had it treated pregnancy restrictions as well as the three categories of restrictions favored by its policies. UPS would not have illegally discriminated against any other workers whose restrictions were disfavored for reasons other than their being pregnancy-based. UPS would not have violated the non-universalistic and asymmetrical PDA by accommodating Young any more than Abercrombie would have violated the non-universalistic

⁷⁶ 479 U.S. 272 (1987).

⁷⁷ *Id.* at 275-76.

⁷⁸ *Id.* at 278-79.

⁷⁹ *Id.* at 287-90. The Court in *Guerra* also stated that even if the PDA prohibited preferential treatment of pregnancy, the PDA would not preempt the California law under the narrow conflict-based preemption provision in Title VII, 42 U.S.C. § 2000e-7 (2012). *Guerra*, 479 U.S. at 290-91. Employers could comply with both the federal and state law by providing the four month disability leave for all disabilities. *Id.* at 290-91.

⁸⁰ *Guerra*, 479 U.S. at 285-86 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)). For an argument that *Guerra*'s interpretation of the PDA as asymmetric should be limited to pregnancy disability cases like *Guerra* and *Young*, see Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1176-77 (2015) (arguing that pregnancy-based disability cases are unique because they reflect accommodation for pregnancy-based harm in the workplace, rather than special treatment for pregnancy).

and asymmetrical Title VII prohibition of discrimination on the basis of religious practices had it accommodated Elauf.

Nonetheless, none of the opinions in *Young* pointed to *Guerra* as guiding precedent to decide the case under the first clause of the PDA defining the terms discrimination “because of sex” and “on the basis of sex” to encompass discrimination because of or on the basis of pregnancy.⁸¹ Each opinion assumed, perhaps encouraged by a surprising concession from Young’s attorney, that Young would lose her case if she had only the first clause on which to rely.⁸² Each assumed that the case instead turned primarily on the meaning of the second clause, which states that “women affected by pregnancy, childbirth, or related medical 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.”⁸³ This second clause does not modify disparate treatment principles but simply clarifies that these principles apply in cases where pregnancy affects, or is regarded as affecting, a woman’s ability to work.⁸⁴ In interpreting this clause, all of the Justices in *Young* seemed to accept a different conceptual definition of intentional discrimination than that accepted by eight Justices in *Abercrombie*.

Justice Breyer’s opinion for the majority in *Young* expressly rejected an interpretation of the second clause offered by Young that would have interpreted the PDA consistently with the interpretation that the Court in *Abercrombie* seemed to adopt for Title VII’s general disparate treatment prohibition in § 703(a)(1).⁸⁵ Justice Breyer’s opinion rejected Young’s contention “that the second clause means that whenever ‘an employer accommodates only a subset of workers with disabling conditions,’ a court should find a Title VII violation if ‘pregnant workers who are similar in the ability to work’ do not ‘receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.’”⁸⁶ This rejected interpretation is conceptually identical to the *Abercrombie* Court’s interpretation of what the disparate treatment prohibition covers for religious practices.

⁸¹ 42 U.S.C. § 2000e(k).

⁸² Brief for Petitioner at 22-24, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226) (arguing that the second clause of the PDA must be given meaning, and suggesting that the Petitioner would lose relying on the first clause alone).

⁸³ 42 U.S.C. § 2000e(k).

⁸⁴ The clause also clarifies that the appropriate comparators for determining disparate treatment are non-pregnant persons “similar in their ability to work”—in other words, those whose similar ability or inability to work is caused by something other than pregnancy. *Id.*

⁸⁵ *Young*, 135 S. Ct. at 1349 (rejecting Young’s interpretation of the second clause of the PDA as mandating employers to provide the same accommodations to persons disabled due to pregnancy as persons disabled due to other causes).

⁸⁶ *Id.* (quoting Brief for Petitioner, *supra* note 82, at 29).

Justice Breyer oddly rejected Young's interpretation because it would grant pregnant women a "most-favored-nation" status.⁸⁷ But granting a most-favored-nation status to a protected group is, in effect, what all antidiscrimination law does. My hypothetical Croatian-American who is not hired by a Serbian-American employer wants to claim Croatia as equal to the favored Serbian nation.⁸⁸ The Croatian's national origin discrimination claim is not different from Young's pregnancy discrimination claim except for the fact that those of all other national origins also can claim "most-favored-nation" status because the prohibition of national origin discrimination in Title VII, unlike the prohibition of pregnancy discrimination, has a universalistic sweep.

Justice Breyer claimed that the second clause cannot grant a "most-favored-nation" status because it would mean that an employer could not grant greater accommodations to some workers because of "the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria. . . . If Congress intended to allow differences in treatment arising out of special duties, special service, or special needs, why would it not also have wanted courts to take account of differences arising out of special 'causes' . . . ?"⁸⁹ Justice Breyer's claim is baffling because the answer to his question is obvious: Congress, by requiring employers to treat pregnant women as well as comparators with non-pregnancy work limitations, prohibited discrimination against a particular cause of a work limitation (pregnancy) and discrimination in favor of other such causes.⁹⁰ Congress did not prohibit discrimination favoring those who perform particular jobs, favoring those who are particularly valuable to an employer, or favoring those who are older. Presumably, Justice Breyer and other members of the Court would have no difficulty granting the Croatian-American a "most-favored-nation" status in a case where he challenged the fact that a Serbian was receiving twice the Croatian's pay for the same work because of his national origin, even though the Croatian could not claim discrimination if the Serbian's better treatment was because of his "special duties, special service, or special needs."⁹¹

⁸⁷ *Id.*

⁸⁸ See *supra* Illustration 5 and accompanying text.

⁸⁹ *Young*, 135 S. Ct. at 1350.

⁹⁰ See *supra* notes 83-84 and accompanying text.

⁹¹ *Young*, 135 S. Ct. at 1350. The Court's apparent inability to treat pregnancy discrimination like other forms of Title VII-prohibited discrimination mirrors the difficulty the lower courts have had in implementing the PDA. See, for instance, the analyses of lower court decisions in Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 87-93 (2013) (mapping the trend among lower courts of "undercut[ting] pregnant workers' rights under clause two by carving out exceptions from the classes of workers to which pregnant women may compare themselves"), and Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 614-15 (2010) (discussing Judge Posner's view that the PDA "does not, despite the urgings of feminist scholars . . . require employers to offer

One might surmise that the Court's restriction of the reach of disparate treatment analysis in pregnancy discrimination cases derived from some uncertainty about the purpose of the second clause of the PDA. Yet Justice Breyer indicated that Young's disparate treatment case needed to rely on this second clause to expand her protection, and that it is not enough for the PDA to have included pregnancy as a protected status because "disparate-treatment law normally permits an employer" to do what UPS did to Young—"implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so."⁹² Moreover, Justice Breyer's opinion asserted that the second clause was necessary to fulfill Congress's intent to overrule *Gilbert* because, in that case, General Electric had a neutral policy defining a disfavored subset of disabilities—those not derived from accidents or illnesses—that at least might include disabilities other than those included within the protected status of pregnant women.⁹³ Thus, the majority in *Young*, unlike the majority in *Abercrombie*, seemed to assume that Title VII's general prohibition of disparate treatment does not encompass consideration of protected status in the assignment of employees to a neutrally defined larger set of disfavored employees.

Justice Breyer's consequent interpretation of the second clause of the PDA in order to overrule *Gilbert* will be hard for lower court judges to understand. On the one hand, Justice Breyer's opinion seems to do no more than explain how an employer's intent to treat pregnancy-caused disabilities worse than similar disabilities with other causes could be uncovered through the framework first set forth for § 703(a)(1) cases in *McDonnell Douglas Corp. v. Green*.⁹⁴ The *McDonnell Douglas* framework allows litigants to uncover covert discriminatory intent through proof that an ostensibly neutral reason is merely a pretextual cover for proscribed intentional discrimination.⁹⁵ If this is all Justice Breyer meant, however, the opinion ultimately adopted a reading of the second clause of the PDA that does not expand on the narrowly interpreted first clause but rather simply confirms the first clause's directive that pregnancy be added to the five original status categories protected by Title VII.

maternity leave or take other steps to make it easier for pregnant women to work" (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)).

⁹² *Young*, 135 S. Ct. at 1350.

⁹³ *Id.* at 1353 ("But the second clause was intended to do more than that—it 'was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.'" (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987))).

⁹⁴ 411 U.S. 792 (1973)

⁹⁵ *Id.* at 802-03 (setting out a framework for proving employment discrimination claims under Title VII).

On the other hand, Justice Breyer's opinion might be read to merge the balancing of disparate impact analysis into the *McDonnell Douglas* framework in order to make proving pretext easier in pregnancy discrimination cases than in other disparate treatment cases. The opinion even rejected, at least "normally," as "legitimate, nondiscriminatory" reasons,⁹⁶ the quite credible rationales of expense and convenience.⁹⁷ Then, borrowing a justification-based balancing analysis from disparate impact law, the opinion stated:

[A] plaintiff may reach a jury on [the issue of pretext] by providing sufficient evidence that the employer's policies 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.⁹⁸

An interpretation of the second clause of the PDA to make proving pretext easier than in other § 703(a)(1) cases, however, has absolutely no support in the language of that clause and is a policy-based compromise more appropriate for Congress than for the Court. As part of the compromise, this interpretation also provides an unclear direction to lower courts to treat pregnancy discrimination cases differently, and unpredictably, depending on the number of other workers accommodated and the reasons for such accommodations.

Not surprisingly, Justice Scalia had a great deal of fun in his dissent ridiculing Justice Breyer's creative but vulnerable opinion, especially its apparent merging of disparate impact and disparate treatment analysis. Justice Scalia was not easily fooled by sleights of hand. He fully understood that any reading of the second clause of the PDA to merge disparate impact balancing analysis into the *McDonnell Douglas* framework finds no support in the language of that clause and that without such a reading, Breyer's opinion has "just marched up and down the hill" claiming the second clause is not redundant and superfluous:

If the clause merely instructed courts to consider a policy's effects and justifications the way it considers other circumstantial evidence of motive, it *would* be superfluous. So the Court's balancing test must mean something else. Even if the effects and justifications of policies are not enough to show intent to discriminate under ordinary Title VII principles, they could (Poof!) still show intent to discriminate for purposes of the pregnancy same-treatment clause. Deliciously incoherent.⁹⁹

⁹⁶ *Young*, 575 U.S. at 1354 (quoting *McDonnell Douglas*, 411 U.S. at 802).

⁹⁷ *Id.* ("But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates.").

⁹⁸ *Id.*

⁹⁹ *Id.* at 1365 (Scalia, J., dissenting).

Justice Scalia, however, had his fun only after choosing an interpretation of the second clause that rejected the broader conceptual definition of disparate treatment covered by § 703(a)(1) that he embraced two months later for religious discrimination in *Abercrombie*. Justice Scalia correctly asserted that the second clause of the PDA has “two conceivable readings.”¹⁰⁰ But he went astray in not seeing that the first “most natural way to understand the same-treatment clause”¹⁰¹ encompasses both of those readings, and that his second reading is only a straw man. The second reading, advanced neither by Young nor the government, is that pregnant women must be given the “*the same accommodations* as others, no matter the differences (other than pregnancy) between them.”¹⁰² Justice Scalia easily burnt the straw man in the same confused manner that Justice Breyer claimed to dismiss a most-favored-nation interpretation of the PDA.¹⁰³ “Prohibiting employers from making *any* distinctions between pregnant workers and others of similar ability” would mean that if a company “offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics;” and if it “paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth.”¹⁰⁴

Having thus charred what no one argued, Justice Scalia thereby reasonably concluded that the “same-treatment” second clause of the PDA must condemn only distinguishing “between pregnant women and others of similar ability or inability *because of pregnancy*.”¹⁰⁵ But Justice Scalia was blind to what he perceived in *Abercrombie*: that the same “because of” language in § 703(a)(1) can encompass consideration of a protected status under a more general neutral policy, as well as consideration of a protected status without reference to such a policy.¹⁰⁶ Thus, perhaps in part because the majority failed to advance the more expansive definition of intentional discrimination Justice Scalia later embraced in *Abercrombie*, he asserted that the only reasonable interpretation of the PDA requires a rejection of Young’s disparate treatment claim.

Apart from its inconsistency with his *Abercrombie* opinion, Justice Scalia’s narrow reading of the PDA is even more troubling than Justice Breyer’s

¹⁰⁰ *Id.* at 1361.

¹⁰¹ *Id.* at 1362.

¹⁰² *Id.*

¹⁰³ *See supra* notes 87-91 and accompanying text.

¹⁰⁴ *Young*, 135 S. Ct. at 1362 (Scalia, J. dissenting). A corporate director and a mechanic are of course not “similar in their ability to work,” regardless of the cause of either’s disability. More generally, an employer can pay a white male corporate officer more than a black female mechanic without raising any suspicion of race or sex discrimination. Justice Scalia’s pension example is also misleading. Pension eligibility is often based in part on age, independent of any associated disability, but eligibility based on disability cannot disfavor the disability of pregnancy.

¹⁰⁵ *Id.*

¹⁰⁶ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032-33 (2015); *see also supra* notes 44-47 and accompanying text.

incoherent reading. This narrow reading forced Justice Scalia to interpret the congressional intent to overturn *Gilbert* to be limited to ensuring a favorable result in the easier case the *Gilbert* dissenters described to support their pre-PDA case for sex discrimination—that is, where an employer “singled out” only pregnancy-related conditions for exclusion from some disability benefit.¹⁰⁷ Justice Scalia thereby adopted what is in effect a “least-favored-nation” interpretation of the PDA. An employer engages in actionable pregnancy discrimination only when it treats pregnancy-related disabilities less favorably than all other disabilities, or, perhaps using a pretext analysis, almost all other disabilities.

Justice Scalia’s “least-favored-nation” reading of the PDA, like Justice Breyer’s rejection of a “most-favored-nation” reading, is not consistent with the Court’s earlier decision in *Guerra*. Because it held that the PDA sets a floor, but not a ceiling, for pregnancy benefits,¹⁰⁸ *Guerra* should have settled how the PDA treats a case like *Young* in which an employer must choose between assigning pregnancy disabilities to a larger set of favored disabilities or to a larger set of disfavored disabilities. Because *Guerra* interpreted the PDA to be asymmetrical as well as non-universalistic, it required employers to treat pregnancy-based disabilities as well as they treat any disabilities deriving from any other causes, regardless of whether that results in the relative disfavoring of other non-protected disabilities.¹⁰⁹

It is indeed possible that the Court’s use of a conceptual definition of disparate treatment in *Young* different from that embraced two months later in *Abercrombie* derived in part from the unwillingness of a majority of the Justices to reaffirm *Guerra*’s interpretation of the PDA.¹¹⁰ Absent the

¹⁰⁷ *Young*, 135 S. Ct. at 1364 (Scalia, J., dissenting).

¹⁰⁸ See *supra* notes 76-80 and accompanying text.

¹⁰⁹ A failure to appreciate the implications of the *Guerra* decision also led Justice Alito, in his concurring opinion in *Young*, to adopt a forced interpretation of the second clause of the PDA. *Young*, 135 S. Ct. at 1356 (Alito, J., concurring). Justice Alito asserted that the clause cannot mean that pregnant women must be treated as other employees similar in their ability or inability to work, because in cases like *Young*, not all other such employees are treated the same. Some are favored with accommodation and some are not. *Id.* at 1358. Justice Alito therefore asserted that it is necessary to insert an additional two words into the clause—“similar *in relation* to the ability or inability to work”—and that these two words somehow justify his conclusion that the clause allows employers to discriminate against pregnant women and in favor of others “unable to work for different reasons” as long as the employer has some “neutral business reason for treating them differently” other than expense or inconvenience. *Id.* at 1359. The best characterization of Justice Alito’s reasoning requires borrowing a word from Justice Scalia: “Poof!” *Id.* at 1365 (Scalia, J., dissenting).

¹¹⁰ Some might speculate that Justice Ginsburg in particular was not comfortable with the favoring of pregnancy in light of her pre-judicial career advocating against laws that stigmatize women. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Ruth Bader Ginsburg, Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 377 (2009) (explaining, without taking sides,

reaffirmation of *Guerra*'s holding that the PDA is symmetrical, *Young* posed a more difficult case. If—contrary to the *Guerra* decision—the PDA prohibits discrimination in favor of pregnancy symmetrical to its prohibition of discrimination against pregnancy, then granting pregnancy “most-favored-nation” status would require employers to treat all conditions equally well, regardless of the cause of the condition. This is because pregnancy would have to be treated as well as a favored condition, and a disfavored condition would have to be treated as well as pregnancy. To the Justices, this might have seemed excessively restrictive of employer discretion because the PDA certainly does not universally prohibit discrimination between other types of disabilities in the same way that Title VII universally prohibits all forms of race or national origin or color discrimination.

The Court easily could have avoided this more burdensome restriction on employers, however, without its inconsistent conceptual framing of the disparate treatment cause of action by reaffirming *Guerra*'s holding that the PDA was intended to be asymmetrical as well as fully non-universalistic.¹¹¹ It is hard to imagine why Congress would want employees with other types of conditions to have a cause of action to challenge an employer's more favorable treatment of pregnancy when such employees would not have a cause of action to challenge more favorable treatment of conditions other than pregnancy. If an employee who breaks his leg while not at work cannot challenge an employer's accommodation only of employees who break a leg while on the job, neither should that employee be able to challenge the employer's additional accommodation of pregnancy. Not surprisingly, there are no other discrimination prohibitions that share a symmetrical and semi-universalistic nature.¹¹²

V.

Notwithstanding the failure of any opinion in *Young* to provide an adequate interpretation of the PDA,¹¹³ there remains reason for hope that the conceptual

how *Guerra* divided the feminist community because some feminists contend that “protective legislation” reinforces gender stereotypes); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 998-1001 (2013) (recounting the opposition of some feminists to an asymmetric interpretation of the PDA).

¹¹¹ As the Court explained in *Guerra*, and as Justice Ginsburg could have understood, doing so would not have stigmatized women in any way. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 291 (1987). As the *Guerra* Court recognized, Congress intended that women not be disadvantaged by the special burden of pregnancy, in addition to the same range of other burdens they generally share with men. *Id.*; see also Widiss, *supra* note 110, at 995-98 (discussing legislative history of the PDA, and Congress's understanding that pregnant women were to be treated at least as well as other similarly limited employees).

¹¹² *Cf. supra* note 38.

¹¹³ In addition to the majority opinion, Justice Scalia's dissent, and Justice Alito's concurrence, the only other opinion was a short statement from Justice Kennedy. *Young*,

problem presented by *Young* and *Abercrombie*, and addressed in this Essay, will be resolved by the Court in the future through the provision of a more expansive and appropriate scope for disparate treatment analysis. In the first place, *Abercrombie* was decided after *Young* and was a more direct interpretation of the meaning of § 703(a)(1), the provision on which the disparate treatment cause of action is based. The Justices in *Abercrombie*, unlike in *Young*, were not distracted by the need to interpret an ambiguous secondary clause in an amendment to Title VII or by specious arguments about most-favored nations.¹¹⁴ Perhaps the very incoherence and unpredictable meaning of Justice Breyer’s majority opinion in *Young* may make it more likely that the Court will have to decide another PDA case¹¹⁵ in which advocates for a more expansive interpretation of the statute will get a second chance to argue for a broader definition of disparate treatment in line with the *Abercrombie* Court’s treatment of the religious discrimination proscribed by Title VII.¹¹⁶

135 S. Ct. at 1366 (Kennedy, J., dissenting). This statement recognized the “societal concern . . . that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant.” *Id.* at 1367. Justice Kennedy, however, joined Justice Scalia’s dissenting opinion interpreting the PDA in a manner that effectively failed to address this concern. *Id.* at 1368.

¹¹⁴ See *supra* notes 87-91 and accompanying text.

¹¹⁵ Legislation was introduced in the Senate and the House in 2015 making it illegal for any employer covered by Title VII to:

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; (2) deny employment opportunities to a job applicant or employee, if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations . . . ; (3) require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept, if such accommodation is unnecessary to enable the applicant or employee to perform her job; (4) require an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations . . . ; or (5) take adverse action in terms, conditions, or privileges of employment against an employee on account of the employee requesting or using a reasonable accommodation. . . .”

Pregnant Workers Fairness Act, S. 1512, 114th Cong. (2015); see also Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. (2015). The prospects for legislation of this sort are not great, however, absent a significant change in the composition of Congress.

¹¹⁶ Justice Breyer suggested that the ADA Amendments Act of 2008, enacted “after the time of *Young*’s pregnancy[,] may limit the future significance” of the Court’s interpretation of the PDA. *Young*, 135 S. Ct. at 1348. Those amendments require employers to accommodate disabilities defined by limitations of a broad set of life activities, including lifting, standing, and bending, even if the limitations are temporary (as they normally would be if caused by pregnancy). *Id.* Even if the amended ADA, however, requires reasonable work accommodations of the kind sought by *Young* for pregnancy-caused disabilities, it may not cover all types of benefit discrimination against pregnant women, including the

It may be more likely, however, that the issue addressed in this Essay will arise again under one of the other two principal federal antidiscrimination statutes, the ADA and the ADEA, both of which share, with religious practice and pregnancy discrimination under Title VII, the asymmetric and non-universalistic characteristics that make defining disparate treatment most difficult. The ADA Amendments Act of 2008 (“ADAAA”)¹¹⁷ may render it especially likely for a case to arise where an employer discriminates against a protected group, defined by disability status, by including the protected group within a larger, neutrally defined disfavored group. The ADAAA makes this more likely because it enlarged the class protected from employment discrimination under the ADA—in contrast to those due reasonable accommodation—to include anyone with an impairment, regardless of any limitation of a major life activity.¹¹⁸ Since regulations under the ADA define impairment to include “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more body systems” or “[a]ny mental or psychological disorder,”¹¹⁹ an employer’s disfavoring of the overweight or the underweight, or the short or the tall, or the less mentally adroit or physically attractive, almost certainly will discriminate against a subset of protected impaired individuals. An employer that refuses to employ the physically unattractive for certain public interface jobs, for instance, might assign anyone with a “cosmetic disfigurement” to this larger disfavored class.¹²⁰ The Court then may be confronted again, perhaps more directly and with greater focus, with arguments that such discrimination should be treated as intentional discrimination under disparate treatment analysis, rather than merely as a neutral policy having a disparate impact.

type addressed in *Gilbert* under a disability plan that paid weekly benefits for certain kinds of disabilities, but not others. See 42 U.S.C. § 12201(c) (2012) (allowing employers to establish and administer otherwise legal bona fide benefit plans that are not a “subterfuge to evade the purposes” of the Act).

¹¹⁷ ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3554 (codified in scattered sections of 29 and 42 U.S.C.).

¹¹⁸ The ADAAA effected this enlargement by defining the category of workers “regarded as having . . . an impairment” to include those with disabilities having “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A). The ADAAA, however, also clarifies that this enlargement does not extend to the definition of those due reasonable accommodations. See *id.* § 12201(h).

¹¹⁹ 29 C.F.R. § 1630.2(h) (2015).

¹²⁰ For another example, see *supra* notes 41-42 and accompanying text.