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IRRESISTIBLE AS A MATTER OF LAW: WHY TITLE VII JURISPRUDENCE ADMINISTERED THE *COUP DE GRACE* TO THE PURPOSIVIST METHOD OF STATUTORY INTERPRETATION

Robert A. Pellow[*]

INTRODUCTION

A tale as old as time—boy falls in love with girl; the two get married and live happily ever after as husband and wife. However, aforementioned wife becomes increasingly jealous of her husband's female assistant, to whom her husband has become increasingly attracted to as the years passed. Naturally, this storybook tale ends in the assistant's firing and subsequent litigation under Title VII of the Civil Rights Act.[1]

While this hypothetical situation concerning intra-office attraction may not be that uncommon in the modern workplace, the corresponding litigation of *Nelson v. Knight*[2] fully exposed the inconsistencies underlying the "but-for" standard as applied in a significant number of cases involving gender discrimination under Title VII of the Civil Rights Act.[3] Despite the clear language articulated by Title VII—namely that employers are prohibited from discriminating against "any individual with respect to . . . compensation, terms, conditions, or privileges of employment, *because of such individual's . . . sex*,"[4] federal courts have gerrymandered the lucid "because of . . . sex"[5] standard to impose a series of arbitrary rulings based more on subjective judicial opinion than the purview of Title VII's explicit prohibition of employment discrimination "because of such individual's . . . sex."[6]

This comment will argue that, despite the logic engineered by the federal circuits in select Title VII cases involving gender discrimination, the reality is a severe and pervasive display of reverse-legislation[7] in which the courts have substituted their

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1. Hypothetical based on the facts of Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013).
2. *Id.*
3. *See, e.g.*, Bracey v. Ne. Utils. Serv. Co., No. CV126027883S, 2013 WL 6334262, at *7 (Conn. Super. Ct. Nov. 1, 2013).
4. 42 U.S.C. § 2000e–2(a)(1) (1964) (emphasis added).
5. *Id.*
6. *Id.*
7. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1383 (2001) ("[C]onventional wisdom has been that during the Lochner era, Supreme Court Justices failed to adhere to

own biased judgment while hiding behind a faulty misrepresentation of Title VII's "because of . . . sex" language.[8] This deviant strain of federal case law has continued to survive, inevitably resulting in a collapse of the proverbial house of cards when the Supreme Court of Iowa acquiesced to the fallacy developing within the federal circuits and affirmed summary judgment for Dr. James Knight in a case[9] that sparked media controversy across the country not only because of the draconian *ex ante* ramifications to female employees, but also the questionable logic employed by the ironically all-male Supreme Court to reach its decision.[10]

Besides the fact that many of the suspect cases provide legal controversies ripe for Supreme Court of the United States adjudication, the underlying mechanism by which they were decided displays the inherent flaw in the purposivistic method of judicial statutory interpretation.[11] While advocates of purposivism's counterpart—textualism—are often attacked for their rigid, conservative approach to statutory interpretation, this comment will show that within the ambit of the Title VII cases described herein, employing a pure textualist approach would ironically advance liberal causes[12] and further reduce the substantial inconsistencies that arise as an inevitable result of the expanded judicial authority that purposivism bequests.

Part I delves into the two primary methods of judicial statutory interpretation and the justifications for same. Part II then looks into the history of Title VII of the Civil Rights Act of 1964, the legislative intent underlying the passage of this seminal piece of legislation, and the specific types of behavior the act was intended to stifle. Part III examines the implications of the "because of . . . sex" language and reviews the Supreme Court's case law consistently holding to a strict textualist construction of the language of Title VII. Part IV seeks to expose the Title VII cases foregoing the plain language of the statute in favor of a perplexing display of mental gymnastics, in which several federal appellate circuits employ a purposivistic method as a vehicle to inject their own subjective opinions into the seemingly objective frame of the Title VII statute. Finally, Part V advocates for a return to strict textualist principles by arguing that: (1) purposivism is not logistically feasible due to the mass inconsistencies in the law it generates among the numerous members of

constitutional norms requiring deference to majoritarian decisions and inappropriately struck down laws by substituting their own views for those of legislative bodies.").

8. 42 U.S.C. § 2000e–2(a)(1) (1964).

9. Nelson v. Knight, 834 N.W.2d 64, 64 (Iowa 2013).

10. The media has been very outspoken concerning their opposition to the decision rendered by the Supreme Court of Iowa. *See generally* Rekha Basu, *Basu: Iowa Supreme Court Ruling in 'Too Irresistible' Case is an Embarrassment*, DES MOINES REGISTER (Dec. 30, 2012), http://www.desmoinesregister.com/article/20121230/BASU/312300029/Basu-Iowa-Supreme-court-ruling-in-Too-irresistible-case-is-an-embarrassment.

11. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 815 (1994) ("[P]urposivism calls on judges to identify the statute's broader purposes and to resolve the interpretive question in light of those purposes.").

12. It should be noted, however, that there is no direct correlation between conservatism and textualism or, *sed contra*, liberalism and purposivism. Rather, "as an empirical matter, the more conservative justices (Justices Antonin Scalia and Clarence Thomas) have embraced 'plain meaning' approaches and the more liberal justices have not." Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 828–29 (2006).

the judiciary; and (2) purposivism acts as the impetus for judicial legislation in violation of the constitutionally mandated doctrine of separation of powers.

I. THE BASICS OF STATUTORY INTERPRETATION: PURPOSIVISM VS. TEXTUALISM

Many would be surprised to discover that there is no "intelligible, generally accepted, and consistently applied theory of statutory interpretation" within the ambit of American jurisprudence.[13] To the contrary, debate over the various methods of interpretative methods date back to ancient times.[14] As a result, two varying schools of thought emerged as the primary methods of statutory construction: (1) textualism, which places great emphasis on the objective meaning of the statute's text and discourages any consideration of subjective legislative intent; and (2) purposivism, which generally emphasizes the actual or perceived intent of the Legislature and seeks to rule according to the "spirit" of the statute.[15] It then follows that cases brought pursuant to a statute, such as Title VII, can be won or lost before the commencement of any meaningful litigation—as the dispositive factor may often be the method of interpretation the judge opts to employ.

A. TEXTUALISM

> The legal instruments that are the subject of interpretation have not typically been slapped together thoughtlessly but are considered expression of intelligent human beings. In whatever age or culture, human intelligence follows certain principles of expression that are as universal as principles of logic. For example, intelligent expression does not contradict itself or set forth two propositions that are entirely redundant. Lapses sometimes occur, but they are departures from what would normally be expected.[16]

The textualist approach to statutory exegesis is most commonly associated with Supreme Court Justice Scalia.[17] This approach advocates for the primacy of the enacted text and thus heavily emphasizes text–based interpretative rules, such as dictionary definitions and "textual" canons as opposed to acquiescing to extrinsic

13. Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177 (2008) (citing HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

14. Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 890 (2000).

15. O'Gorman, *supra* note 13.

16. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012).

17. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762 (2010).

evidence concerning legislative intent.[18] Textualists do not believe that documents evincing legislative intent are law and often view reliance on legislative history as a judicial method for implementing personal policy as opposed to the black letter law.[19] According to textualists, the role of the judiciary is very limited in regard to statutory interpretation as a result of separation of powers—as a result, "judges strive to 'interpret' but not 'make' law."[20] The textualist dogma has substantial roots in Supreme Court jurisprudence—the high Court has often upheld the plain language interpretation of a statute despite the emergence of unintended consequences.[21] When dealing with a lucid statutory provision, "the sole function of the courts is to enforce it according to its terms."[22]

B. PURPOSIVISM

Generally, purposivism "permits a judge to go beyond the semantic context of a statute's text and consider other evidence of congressional intent to ascribe meaning to the text."[23] Contrary to textualism, purposivism seeks to interpret the text in a way that most accurately carries out the spirit of the statute.[24] In doing so, purposivists often go beyond the words of the statute itself in favor of interpretive aids such as legislative history, and often encourage a broader judicial role in statutory interpretation.[25] Purposivists such as Supreme Court Justice Breyer often ask how a "'reasonable member of Congress' . . . would have wanted a court to interpret the statute in light of present circumstances in the particular case."[26] It may thus be deduced that purposivism allows for a significant expansion of judicial power—as a judge may "seemingly update (and thus alter) the views of the enacting Congress based on changed circumstances"—whether actual or perceived.[27]

II. TITLE VII OF THE UNITED STATES CIVIL RIGHTS ACT

Title VII of the Civil Rights Act was enacted in 1964 to "prohibit all practices in whatever form which create inequality in employment opportunity due

18. *Id.* at 1763. *See also* Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

19. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 25 (2006) ("When courts purport to find such a true underlying purpose, textualists observed, they are simply passing off their own preferred policies for those of Congress.").

20. Gluck, *supra* note 17, at 1763.

21. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). All efforts to construe the provisions of the Code should start with the plain language of the statute. *Id.*; *see also California v. Montrose Chem. Corp. of Cal.*, 104 F.3d 1507, 1513 (9th Cir. 1997). The Court should presume that, in the statutes, Congress says what it means, and means what it says. *Id.*; *In re* Lenartz, No. 01-40268, 2001 WL 35814401, at *2 (Bankr. D. Idaho May 3, 2001) ("If Congress, in the plain language of a statute, creates unintended consequences, the problem must be remedied by Congress, not the courts.").

22. *Ron Pair Enters.*, 489 U.S. at 241.

23. O'Gorman, *supra* note 13, at 193.

24. Gluck, *supra* note 17, at 1764.

25. *Id.*

26. O'Gorman, *supra* note 13, at 195.

27. *Id.*

to discrimination on the basis of race, religion, sex, or national origin."[28] The statute makes it unlawful for public and private employers, labor organizations, and employment agencies "to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin,"[29] and covers a wide range of employment discrimination claims, including those based on hiring, firing, promotion, and conditions or benefits of employment.[30] In passing Title VII, Congress clearly manifested its belief that "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[31] The Equal Employment Opportunity Commission (EEOC) was subsequently created to define and enforce the provisions of the Title VII statute.[32]

Ironically, conventional wisdom holds that it was Congress's reluctance to grant women equal rights that led to the inclusion of "sex" as a protected class under Title VII.[33] Considering the time period in which it was passed, it is clear that "Title VII's primary purpose was to end racial discrimination and the suggestion to include the word 'sex' was offered by Representative Howard Smith of Virginia as a last-ditch effort to sabotage the legislation."[34] Representative Smith believed that a Congress composed primarily of men would not support a bill that would give women "their first equal job rights with men."[35] However, "the amendment passed by a margin of 168-133 and Title VII became a federal discrimination law that included 'sex' as a protected class along with race, color, religion, and national origin."[36]

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28. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination,* 16 DUKE J. GENDER L. & POL'Y 169, 170–71 (2009) (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976)).

29. 42 U.S.C. § 2000e–2(b) (1964).

30. *Id.*

31. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989); *see also Franks*, 424 U.S. at 763.
We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, and ordained that its policy of outlawing such discrimination should have the "highest priority." (internal citations omitted).
Id.

32. Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997).

33. *Id.* (citing Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 428 (E.D. Mich. 1984) ("This Court—like all Title VII enthusiasts—is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House . . .") (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INT'L & COMP. L. REV. 431, 441–42 (1966)), *aff'd*, 805 F.2d 611 (6th Cir. 1986)").

34. Katie J. Colopy, Sandra K. Dielman & Michelle A. Morgan, *Gender Discrimination in the Workplace: "We've Come a Long Way, Baby,"* 49 THE ADVOC. (Tex.) 11, 11 (2009) (citing BARBARA WHALEN & CHARLES WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–17 (1985)) (noting that protection against gender discrimination, which was not included in the Civil Rights Act of 1963, was added to the Civil Rights Act of 1964 as a last minute effort to stop the bill's passing); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (noting "the prohibition of discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives"); Diaz v. Pan AM World Airways, Inc., 442 F.2d. 385, 386 (5th Cir. 1971) (noting that the language protecting gender was adopted one day before the House's passage of the law); Barnes v. Costle, 561 F.2d 983, 986–87 (D.C. Cir. 1977) (noting that the sex amendment was an attempt to block the bill from passing).

35. Gay Gilson, *History of Title VII and Sex Discrimination*, CORPUS CHRISTI EMPLOYMENT LAW BLOG (Sept. 8, 2011), http://gilsonlaw.com/blog/2011/09/08/history-of-title-vii-and-gender-discrimination-2/.

36. Colopy et al., *supra* note 34, at 11; 42 U.S.C. § 2000e(2)(a)–(c) (1964).

While there is generally a dearth of legislative history on Title VII—and what is available often provides insufficient or conflicting specifics on the congressional intent underlying discrimination premised on one's gender—the history "does provide a clear picture of Congress's intent to balance employee and employer rights."[37] On one end of the spectrum, Congress sought to rid the country of discrimination directed at minorities—especially African-Americans.[38] On the other, Congress understood that "internal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination practices."[39] Understandably, conflict often arises when these two objectives are juxtaposed—namely when both legitimate and illegal discriminatory motives are present in an employment decision.[40]

To fully understand the nature of a Title VII claim, one must appreciate the distinction between the two prima facie claims—(1) disparate treatment and (2) disparate impact.[41] The Supreme Court has elaborated on the concept of disparate treatment, stating:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some cases be inferred from the mere fact differences in treatment.[42]

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37. *See* Tracy L. Bach, *Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1257–58 (1993) (noting that "Judge Goldberg of the Fifth Circuit wrote that 'the legislative history of Title VII is in such a confused state that it is of minimal value in its explication.'" Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970)). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 243–44 (1989),

> An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, comanagers [sic] of the bill in the Senate . . . . Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Cong. Rec. 7247 (1964). . . . The memorandum went on: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." 110 Cong. Rec. 7213 (1964).

Id.

38. Bach, *supra* note 37, at 1258.
39. *Id*.
40. *Id.*
41. *See generally* Holder v. City of Raleigh, 867 F.2d 823, 826 (4th Cir. 1989).
42. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

"The Supreme Court in *McDonnell Douglas Corp. v. Green* delineated the basic process for establishing any disparate treatment claim under Title VII."[43] "In order to establish a claim for disparate treatment, the complainant must first establish a prima facie case of discrimination" by a preponderance of the evidence.[44] Under the *McDonnell Douglas* burden-shifting framework, the plaintiff had the burden of proving that: (1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) the employer treated similarly-situated, gender conforming employees more favorably; and (4) she was qualified to do the job.[45] "For example, in the case of sex discrimination, an employment policy or practice must be shown to treat women and men differently on its face. The burden then shifts to the employer to provide a legitimate, nondiscriminatory reason for its policy or practice."[46] If the employer is able to '"articulate [a] . . . legitimate, nondiscriminatory reason' for the treatment of the plaintiff, then the burden shifts back to the employee to show" by a preponderance of the evidence "that the employer's stated reasons are pretextual."[47] "If the plaintiff does not do so, the defendant is entitled to judgment."[48]

Disparate impact, on the other hand, involves some facially neutral employment criterion, which has an adverse impact upon a protected group.[49] The distinction between "disparate treatment" and "disparate impact" analysis under Title VII, according to the Fourth Circuit Court of Appeals in *Holder v. City of Raleigh*, is not merely a matter of legal formality—"[r]ather it expresses the Supreme Court's view that individual decisions which are not impermissibly motivated may become

43. Allegra C. Wiles, *More Than Just a Pretty Face: Preventing the Perpetuation of Sexual Stereotypes in the Workplace*, 57 SYRACUSE L. REV. 657, 666 (2007); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

44. Wiles, *supra* note 43, at 666; *McDonnell*, 411 U.S. at 802.

45. *McDonnell*, 411 U.S. at 802.

46. Wiles, *supra* note 43, at 666.

47. *Id.*

48. *Id.*

49. 42 U.S.C. § 2000e–2(k)(1)(A)(i):

> An unlawful employment practice based on disparate impact is established . . . only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

Id. See also Holder v. City of Raleigh, 867 F.2d 823, 826 (4th Cir. 1989) (noting that "[i]f the inquiry in a disparate treatment case focuses upon the existence of discriminatory intent, the inquiry in a disparate impact case is generally directed toward the business justification for the disputed employment test or practice."); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."); N.A.A.C.P. v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 476 (3d Cir. 2011):

> Even "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')" are unlawful. Ricci, 129 S.Ct. at 267. "The touchstone is business necessity." *Griggs*, 401 U.S. at 431 . . . . "If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."

Id.

actionable as a pattern of exclusion emerges, even without proof of actual wrongful intent."[50]

Despite the broad protections that Title VII extends to members of its delineated classes, it is imperative to note that Title VII was not designed as a general fairness statute.[51] In *Holder*, the Fourth Circuit was faced with a racially motivated Title VII allegation, yet eloquently acquiesced to the limited protections afforded by Title VII in holding:

> While we share [Plaintiff's] distaste for a decision which appears to have been made for reasons other than merit, we do not believe that Title VII authorizes courts to declare unlawful every arbitrary and unfair employment decision . . . . The list of impermissible considerations within the context of employment practice is both limited and specific: "race, color, religion, sex, or national origin." We are not free to add our own considerations to the list . . . a racially discriminatory motive cannot, as a matter of law, be invariably inferred from favoritism shown to the basis of some family relationship.[52]

Over time, Title VII jurisprudence developed to recognize two different avenues to a disparate treatment action—"pretextual" and "mixed-motive."[53] This distinction can be traced back to the seminal Supreme Court case, *Price Waterhouse v. Hopkins*, in which the Court examined Title VII's causation requirement mandated by the use of the phrase "because of."[54] The Court issued a plurality opinion, as the Justices differed as to whether Title VII's "'because of' meant that the forbidden consideration must be a 'but-for' cause . . . or only that the impermissible consideration must have 'played a motivating part' in the decision to take the [adverse employment] action."[55] However, the Court did partially answer the question posed by acknowledging a "mixed-motive" claim under Title VII:

> When . . . an employer considers both gender and legitimate factors at the time of make a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later,

50. *Holder*, 867 F.2d at 826 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988)).
51. *See generally Holder*, 867 F.2d at 825–26.
52. *Id.*
53. *See* Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 214–15 (3d Cir. 2000) (noting "[o]ur court's cases have recognized two types of disparate treatment employment discrimination actions–'pretext' and 'mixed motive'–and have applied different standards of causation depending on the type of case the plaintiff presented. *See, e.g.*, *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 472 (3d Cir. 1993) (recognizing distinction between 'pretext' and 'mixed-motive' cases in a Title VII retaliatory discharge action)"); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (holding "[w]hatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.").
54. Miller v. CIGNA Corp., 47 F.3d 586, 592 (3d Cir. 1995).
55. *Id.* The *Miller* Court noted that the "but-for" cause involved "one without which the adverse employment action would not have been taken." *Id.*

> in the context of litigation, that the decision would have been the same if gender had not been taken into account.[56]

Justice Brennan, in announcing the judgment of the Court, elaborated on the functionality of the "but-for" test and its applicability to Title VII cases:

> But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way . . . . The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made.* Moreover, since we know that the words "because of" do not mean "*solely* because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations-even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.[57]

The court in *Watson* observed that:

> Congress responded to *Price Waterhouse* with Section 107(a) of the revised 1991 Act, which amended Title VII to include the following provision: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e–2(m). Section 107(a) of the 1991 Act thus mandates liability in a set of cases . . . in which consideration of a protected trait was a motivating factor in the adverse employment action even though permissible factors independently explain the outcome. This plainly alters the scope of the *Price Waterhouse* affirmative defense, which, as

56. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989); *Watson*, 207 F.3d at 215 (citing *Price Waterhouse*, 490 U.S. at 244)

> [O]nce a plaintiff demonstrates that the adverse decision is the result of mixed motives (*i.e.*, that it is the 'result of multiple factors, at least one of which is illegitimate' and the illegitimate factor played 'a motivating part' in the adverse decision), the burden shifts to the employer to persuade the jury by a preponderance of the evidence that it would have reached the same decision even if the protected trait had not been considered.

Id.

57. *Price Waterhouse*, 490 U.S. at 240–41 (emphasis in original).

> explained above, completely absolved the employer from liability if it could adequately prove that the adverse action would have been taken even if the protected trait had not been considered. Significantly, Section 107(a) does not, at least on its face, alter the other significant holding of *Price Waterhouse* set forth in Justice O'Connor's concurrence—i.e., the distinction drawn between "pretext" and "mixed-motive" cases and the evidentiary showing necessary to trigger a shift in the burden of persuasion with respect to causation. [58]

From this revision, significant litigation arose attempting to determine the scope of the change in language.[59]

III. WHAT DOES "BECAUSE OF . . . SEX" MEAN?

A verbis legis non est recedendum.[60] Despite this clear principle of legal interpretation, the very premise of a lawyer's occupation is to interject doubt into a seemingly clear principle of law when beneficial to their client.[61] Thus, courts have often been called upon to decide whether the alleged discrimination is actionable under Title VII—i.e., whether the discrimination occurred "because of" sex and not because of some other unprotected characteristic.[62] It is worth noting that this causation requirement regarding gender is not confined solely to Title VII.[63]

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58. *Watson*, 207 F.3d at 216 (emphasis added).
See Robinson v. Se. Pa. Transp. Auth., 982 F.2d 892, 899 n.8 (3d Cir. 1993) (1991 Act overruled "that portion of *Price Waterhouse* that permitted an employer to avoid liability if it could demonstrate it would have taken the same action in the absence of discriminatory motive") (emphasis added); *Tanca v. Nordberg*, 98 F.3d 680, 681 (1st Cir. 1996) ("*Congress partially overruled Price Waterhouse* in the 1991 Act by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases") (emphasis added); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999) ("Section 107(a) . . . overruled the Supreme Court's decision in *Price Waterhouse to the extent* that that decision holds an employer can avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive") (emphasis added); *Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir.1997) (Section 107 "was enacted solely to overrule *the part* of Price Waterhouse that allowed an employer to avoid all liability by prevailing on its dual motivation defense").

59. Fuller v. Phipps, 67 F.3d 1137 (4th Cir. 1995), *abrogated by* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2148 (2003) (holding "Section 107 was . . . [applicable] only in 'mixed-motive' cases; not in 'pretext' cases such as this one"); *Fields*, 115 F.3d at 124 (holding "the distinction between 'dual motivation' and 'substantial motivation' jury instructions survives the 1991 Act").

60. '"Do not depart from the words of law."' Scalia, *supra* note 16, at 56 (citing *Cf. Digest* 32.69 pr. (Marcellus). *Cf*. also Unif. Statute & Rule Construction Act §19 (1995) "('*Primacy of Text*. The text of a statute or rule is the primary, essential source of its meaning.')." This is the essence of the textualist approach to statutory interpretation.

61. Scalia, *supra* note 16, at 54.

62. This distinction is often easy. *See, e.g.*, EEOC v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994). The employer was on the record stating "[T]he only people you will be seeing running the lines will be men; there will be no more women hired." *Id.* at 896. However, in other cases it is often quite difficult to determine whether the adverse employment action was taken "because of" plaintiff's sex, or simply some other unprotected reason.

63. *See, e.g.*, Wernsing v. Ill. Dep't of Human Servs., 427 F.3d 466, 468 (7th Cir. 2005) (discussing the issue of whether "wages in a former job are a 'factor other than sex'" for purposes of the Equal Pay Act (EPA) of 1963 and noting the split in the Federal Circuits as to whether the employer must show an "acceptable business reason" to justify this disparity in wages); *contra* Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982).

When applied to Title VII jurisprudence, many courts have strongly adhered to the "supremacy-of-text principle"[64] as advocated by Justice Scalia and other avid textualists.[65] An unembellished reading of the statute very clearly reveals an explicit prohibition on employment discrimination against "any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[66] In the seminal Title VII case *Price Waterhouse*, the Supreme Court held that a woman who was denied partnership in an accounting firm because she did not match a sex stereotype had an actionable claim under Title VII.[67] Hopkins, the plaintiff in *Price Waterhouse*, was described as "macho," "overcompensated for being a woman," and was advised to take "a course at charm school" by her male counterparts in addition to being informed that she would improve her partnership chances if she would "walk more femininely, . . . wear make-up, have her hair styled, and wear jewelry."[68] The Court, in a plurality decision, interpreted the text of Title VII to "mean that gender must be *irrelevant* to employment decisions."[69] The Court went on to elaborate on this point—holding briefly in a footnote that "[t]his passage, however, does not suggest that the plaintiff *must* show but-for cause*; it indicates only that if she does, she prevails*."[70] Justice O'Connor, writing a concurring opinion, further compared the "because of . . . sex"

64. Scalia, *supra* note 16, at 56.

65. *Id.* at 56; *see, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989).

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

Id. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

> [S]tatutory prohibitions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment of any kind meets the statutory requirements.

Id. See also Nichols v. Azteca Restaurant Enters. Inc., 256 F.3d 864, 874 (9th Cir. 2001) ("Sexual harassment is actionable under Title VII to the extent it occurs 'because of' the plaintiff's sex."); Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 222 (3d Cir. 2000) (affirming a jury verdict in a Title VII case because the charge, taken as a whole, adequately informed the jury that sex had to be a but-for cause of the adverse employment action).

66. 42 U.S.C. § 2000e–2(a)(1); Barnes v. Costle, 561 F.2d 983, 988 (D.C. Cir. 1977) ("Congress could hardly have been more explicit in its command that there be no sex-based discrimination 'against any individual with respect to his . . . terms, conditions, or privileges of employment . . . .") (citing 42 U.S.C. § 2000e-2(a)); *see also* United Steelworkers of America v. Weber, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting) (noting that "[w]hen [C]ongress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity" and there was "no lack of clarity, no ambiguity" in the Title VII statute).

67. See generally Price Waterhouse, 490 U.S. at 228.

68. *Id.* at 235.

69. *Id.* at 240 (emphasis added).

70. *Id.* at 240 n.6 (emphasis added). The logic of this footnote is essentially the foundation of this note. Naturally, many Title VII cases will require more than a mere "but-for" analysis, thus reinforcing the need for further analysis (i.e. the motivating factor test). However, as advocated by *Price Waterhouse*, if the plaintiff can show that gender was the "but-for" cause of the adverse employment decision, the plaintiff wins. Despite this principle, as this note will discuss, many cases fail to follow this bright-line rule and instead attempt to decide cases on other grounds.

language to that of tort law causation noting that the language of the Title VII statute manifestly calls for "but for causation."[71]

This plain language approach to Title VII interpretation was manifested by the Supreme Court in *City of Los Angeles, Department of Water and Power v. Manhart*.[72] The Court in *Manhart* held that despite actuarial studies finding that, as a class, women lived longer than men, "[a]n employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and policy of [Title VII]."[73] Such practice, held the Court, "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[74]

In the same vein, *International Union v. Johnson Controls, Inc.*[75] was a class action challenging the employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure.[76] In reversing the decision of the Seventh Circuit Court of Appeals, the Supreme Court candidly cited to *Manhart* in holding that the policy in *Johnson Controls* "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which *but for* that person's sex would be different.'"[77]

Finally, *Meritor Savings Bank, FSB v. Vinson* was another seminal Supreme Court case which established sexual harassment as an actionable form of sex discrimination under Title VII.[78] Concerning the causation requirement—i.e., that the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination "because of . . . sex"[79]—the Court found that the employer's harassment was targeted at Vinson's sex.[80] According to the Court, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[81]

71. *Price Waterhouse*, 490 U.S. at 262–63 (O'Conner, J., concurring).

72. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

73. *Id.* The *Manhart* court also stressed the basic policy of Title VII—requiring a court to "focus on fairness to the individuals rather than the fairness to classes." *Id.* The mere fact that gender is inadvertently tied to a longer life expectancy does not remove gender from the Title VII analysis.

74. *Id.* (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1205 (7th Cir. 1971) (Stevens, J., dissenting)).

75. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).

76. *Id.* at 192.

77. *Id.* at 200 (emphasis added) (quoting *Manhart*, 435 U.S. at 711). The International Union court struck down the reasoning of the lower court that "because the asserted reason for the sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination." *Id.* at 198. Instead the court held that, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Id.* at 199.

78. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

79. 42 U.S.C. § 2000e–2(a)(1) (1991).

80. See Meritor Sav. Bank, 477 U.S. at 72.

81. *Id.* at 64. The Supreme Court has often expanded the purview of Title VII to all discrimination because of sex in the terms and conditions of employment. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) ("Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.").

While the aforementioned Supreme Court cases clearly articulate the prohibition of any gender-related criterion to be considered in employment decisions, resourceful attorneys have attempted to circumvent the plain language of Title VII by injecting the façade of a nondiscriminatory motive which is inadvertently premised on the very subject classifications Title VII was meant to protect against.[82] While several federal courts have fallen prey to this fallacy[83]—others have correctly exposed this erroneous logic and allowed legitimate Title VII claims to proceed beyond summary judgment.[84] This point is best articulated by the District of Columbia Court of Appeals in *Barnes v. Costle*—a case involving, *inter alia*, a Title VII claim alleging sex-based discrimination when a female employee was fired after refusing the sexual advances of her male supervisor.[85] In crafting a rather clever—albeit legally incorrect argument—the attorneys for the employer argued, and the district court agreed, that the plaintiff was not fired "based on . . . sex," but rather was "discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor . . . [and] because she decided not to furnish the sexual consideration claimed to have been demanded."[86] In a scathing opinion, the appellate circuit rejected this faulty rationale:

> We cannot accept this analysis of the situation charged by [the employer]. But for her womanhood, from aught that appears, [Plaintiff's] participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. The circumstance imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor. Thus gender cannot be eliminated from the formulation which appellant advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII . . . . It is clear that the statutory embargo on sex discrimination is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is

82. *See generally* Barnes v. Costle, 561 F.2d 983, 983 (D.C. Cir. 1977).
83. *See infra* Part III.
84. *See Barnes*, 561 F.2d at 990.
85. *Id.* at 985.
86. *Id.* at 990.

> enough that gender is a factor contributing to the discrimination in a substantial way.[87]

Moreover, many federal gender discrimination cases have properly acknowledged Title VII's broad prohibition on discrimination "because of . . . sex"[88] yet still found no discrimination to have occurred. For example, in *Lang v. Star Herald*, the plaintiff, Lang, brought a Title VII action against her former employer alleging discrimination based on her pregnancy when she was terminated after exhausting her paid leave time and refused to apply for an indefinite unpaid leave of absence.[89] Despite the fact that the pregnancy was a natural consequence of Lang's gender, the Eighth Circuit Court of Appeals correctly noted that she failed to produce any evidence that the leave-of-absence policy was different for her than it was for any other employee.[90] In other words, it would not have mattered if the leave requested was due to pregnancy or any other factor—thus the adverse employment action taken was not found to be "because of . . . sex" and no disparate treatment was shown within the purview of Title VII.[91]

Accordingly, in *Preston v. Wisconsin Health Fund*, the Seventh Circuit affirmed summary judgment for the defendant in a case where the plaintiff, a male, alleged gender discrimination when he was replaced as the director of a dental clinic by a woman who was allegedly engaged in a romantic relationship with the clinic's CEO.[92] While it was true that the plaintiff was passed up by a member of the opposite sex (who was essentially using her membership of her respective gender to obtain an employment advantage), the court correctly concluded:

> A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman. Such favoritism is not based on a belief that women are better workers, or otherwise deserve to be treated better, than men; indeed, it is entirely consistent with the opposite opinion. *The effect on the composition of the workplace is likely to be nil, especially since the*

87. *Id.*; *see also* Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1049 (3d Cir. 1977); *see also* Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032, 1032 (4th Cir. 1977); *see also* Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979).

88. 42 U.S.C. §2000e–2(a)(1) (1991).

89. Lang v. Star Herald, 107 F.3d 1308, 1310–11 (8th Cir. 1998). It is important to note that Congress enacted the

> Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), in which Congress explicitly provided that, for purposes of Title VII, discrimination 'on the basis of sex' includes discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions.' 'The Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.'"

Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 198–99 (1991) (*quoting* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983)).

90. *Lang*, 107 F.3d at 1313.

91. *Id.*

92. Preston v. Wisconsin Health Fund, 397 F.3d 539, 540–41 (7th Cir. 2005).

> *disadvantaged competitor is as likely to be another woman as a man–were [Plaintiff] a woman, [the CEO] would still have to fire her to make way for [his paramour] unless [the CEO] was romantically entangled with both of them. Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination.*[93]

Despite the potential unfairness of this principle, the fact remains that Title VII is not an absolute safeguard from any and all unfair or arbitrary employment decisions—it only affords protection against discrimination premised on one of the enumerated classifications listed therein.[94]

IV. THE FALLACY OF PURPOSIVISM TITLE VII STATUTORY ANALYSIS

As noted in the previous section, the Supreme Court has consistently afforded broad deference to the statutory language of Title VII in determining whether an adverse employment decision was based on a legitimate, nondiscriminatory reason, or based on one of the illegal criterion enumerated in the Title VII statute. However, the argument fashioned by the defendant in *Barnes*[95] has often been used—and many federal district and circuit courts have selectively embraced this misrepresentation in an attempt to harmonize the language of Title VII with the subjective predisposition of the judiciary to deem a certain act non-discriminatory.[96] Section IV will point out the numerous cases that have been percolating within the federal circuits which inevitably led to the controversial *Nelson* decision, and will argue that each type of case was incorrectly decided when juxtaposed with the ambit of Title VII jurisprudence as decided by the Supreme Court.

Of most importance, these cases manifest the inherent flaws that arise as a result of the expanded judicial power afforded by the purposivistic method of statutory interpretation. While the Supreme Court has consistently advocated for a broad "plain-meaning" interpretation of Title VII, lower-tiered federal courts have often taken advantage of extrinsic evidence—such as legislative intent and public policy incentives—in order to inject their own views concerning discrimination into the

93. *Id.* at 541 (emphasis added); *see also* De Cintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986) (reasoning that the male employees "were not prejudiced because of their status as males; rather, they were discriminated against because . . . [the supervisor] preferred his paramour."); Schobert v. Ill. Dep't of Trans., 304 F.3d 725, 733 (7th Cir. 2002) ("Whether the employer grants employment perks to an employee because she is a [protégé], an old friend, a close relative or a love interest, that special treatment is permissible [under Title VII] as long as it is not based on an impermissible classification."); Womack v. Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998) ("Title VII does not encompass a claim based on favoritism shown to a supervisor's paramour.").

94. *See, e.g.*, Holder v. City of Raleigh, 867 F.2d 823, 825–26 (4th Cir. 1989).

95. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).

96. *See generally* Jesperson v. Harrah's Operating Co., 392 F.3d 1076, 1080 (9th Cir. 2004) (holding the plaintiff failed to show the grooming policy imposed a greater burden on women); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (finding a grooming policy restricting men from having long hair was not discriminatory).

case.[97] Not surprisingly, this has resulted in a gross deviation from both the plain language of Title VII as well as Supreme Court cases like *Manhart* that liberally interpreted the same—while also resulting in significant and inevitable inconsistencies among the various members of the federal judiciary.[98]

A. GROOMING STANDARDS

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[99]

The controversial holding of *Jespersen v. Harrah's Operating Co.* involved the plaintiff, Darlene Jespersen, challenging a sex-differentiated grooming policy imposed by her employer, Harrah's.[100] This "Personal Best" policy imposed several requirements applied equally to both genders; however the program additionally required female, but not male, bartenders to tease, curl, or style their hair, wear stockings, and wear significant amounts of makeup consisting of face powder, blush, mascara, and lip stick.[101] Jespersen, an otherwise exemplary employee, attempted to comply with the requirement of the personal best policy, yet discovered that "wearing makeup made her feel sick, degraded, exposed, and violated."[102] Eventually, Jespersen stopped wearing makeup because "it took away [her] credibility as a person . . . and was so harmful to her dignity and her effectiveness

97. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989) (discussing Congress's intention to restrict discrimination based on select categories, which is stated plainly in the statute); *Jesperson*, 392 F.3d at 1080 (holding that Title VII would only apply to "immutable characteristics," which does not include Harrah's grooming policy).

98. *See* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978). *Compare Jesperson*, 392 F.3d at 1080 (finding grooming standards outside the scope of Title VII), *with* O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (finding dress code requiring female sales clerks to wear a "smock" while allowing male clerks to wear shirts and ties impermissible, even absent a discriminatory motive, because it perpetuated sexual stereotypes), *and* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (striking down a dress code that required women to wear a uniform but allowed men to wear business suits).

99. *Price Waterhouse*, 490 U.S. at 251 (*quoting* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

100. *Jespersen*, 392 F.3d at 1077–78.

101. *Id.* at 1077. During the twenty-plus years Jespersen worked at Harrah's, her employer encouraged, but did not require, its female employees to wear makeup. *Id.* It was not until Harrah's implemented its "Beverage Department Image Transformation Program," which imposed "appearance standards" on its employees, that issues concerning Jespersen's lack of makeup became apparent. *Id.* While all servers were required to "[b]e well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform," the plan required a facially different approach to accomplishing this based on gender. *Id.* Most pertinent to this case was that woman were required to wear colored nail polish, makeup, and styled/teased hair, while men were prohibited from doing so. *Id.*

102. *Id.*

behind the bar that she could no longer do her job," a decision for which she was subsequently terminated.[103]

While there was no dispute that the grooming standards were facially different between men and women, and irrespective of the Supreme Court precedent in *Price Waterhouse*[104] and its progeny, the Ninth Circuit Court of Appeals—in a relatively brief opinion considering the gravamen of the situation—affirmed summary judgment for the employer in a majority opinion that elicited a scorching dissent from Judge Thomas.[105] The majority, while acknowledging controlling Supreme Court case law such as *Johnson Controls* and *Manhart*,[106] completely reversed field by denying Jespersen the right to present her case to a jury by arbitrarily holding: (1) that Jespersen failed to present evidence showing that the "Personal Best" program imposed greater burdens on female bartenders when compared to their male counterparts,[107] and (2) that the Supreme Court precedent of *Price Waterhouse* concerning sex stereotypes, while applicable to cases involving sexual harassment, was not relevant to cases involving appearance and grooming standards.[108]

The dissent vehemently disagreed, holding that Jespersen had easily satisfied her burden of proof necessary to survive summary judgment under both *Price Waterhouse* and the Ninth Circuit's unequal burdens test.[109] In the same vein, the dissent attacked the flawed logic employed by the majority, subtly alluding in dicta that the majority may have gerrymandered the law in order to achieve the desired result.[110] While the *Jespersen* case was subsequently issued a rehearing en banc, the

103. *Id.*

104. *Price Waterhouse*, 490 U.S. at 256, 258 (holding that when an employer takes an adverse employment action against a plaintiff based on the plaintiff's failure to conform to sex stereotypes, the employer has acted *because of sex*).

105. *Jespersen*, 392 F.3d at 1083 (Thomas, J., dissenting).

106. *Id.* at 1079–80 (majority opinion) ("We must decide whether these standards are discriminatory; whether they are 'based on a policy which on its face applies less favorably to one gender . . . .' If so, then Harrah's would have discriminated against Jespersen 'because of . . . sex.'") (*quoting* Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982).

107. This strict "unequal burden" requirement is largely inconsistent with a significant amount of precedent case law. *Jespersen*, 392 F.3d at 1083; Jennifer L. Levi, *Clothes Don't Make the Man (Or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 96 n.34–35 (2006) (citing O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (finding "dress code requiring female sales clerk to wear [a] 'smock' while allowing male clerks to wear shirt[s] and tie[s]" impermissible, even absent a discriminatory motive, because it perpetuated sexual stereotypes); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029–30 (7th Cir. 1979) (striking down a dress code that required women to wear a uniform but allowed men to wear business suits); Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1553–54 (11th Cir. 1987) (finding that the creation of facially neutral makeup rule was evidence of a pretext for sex discrimination); Harding v. Goodyear Tire & Rubber Co., 929 F. Supp. 1402, 1406 (D. Kan. 1996) (considering evidence that a "no tank tops" requirement only applied to female employees could support inference of sex discrimination).

108. *Jespersen*, 392 F.3d at 1083.

109. *Id.* (Thomas, J., dissenting); *see also* Levi, *supra* note 107, at 95.

> The basis of . . . [Jespersen's] claim was simple—the "Personal Best" program required women, but not men, to conform to certain dress and make-up requirements and, therefore, constituted disparate treatment based on sex. According to the Ninth Circuit and well-established law, in order to prevail, Jespersen only had to prove that "but for" her sex, she would have been treated differently. A clearer case could hardly have been framed.

Id.

110. *Jespersen*, 392 F.3d at 1085 ("Title VII does not make exceptions for particular industries, and we should not write them in.").

Ninth Circuit failed to retreat from its initial ruling despite powerful dissents from Judge Pregerson and Judge Kozinski.[111]

Of most significance to the scope of this comment, the *Jespersen* majority opinion arbitrarily held the precedent of *Price Waterhouse* was inapplicable to cases involving appearance and grooming standards absent a claim of sexual harassment.[112] However, the dissent properly pointed out that *Price Waterhouse* made no such distinction—to the contrary, the Supreme Court specifically held that in drafting Title VII, "Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes."[113] Additionally, *Price Waterhouse* was not a case of sexual harassment, further leading to the conclusion that the distinction engineered by the Ninth Circuit was completely erroneous.[114] The *ex ante* ramifications of the law as articulated by the *Jespersen* majority, according to the dissent, would essentially lead to the absurd result of allowing Title VII claims to proceed in cases involving harassment due to a failure to comply with sexual stereotypes, but refusing relief when the plaintiff is fired, or otherwise discriminated against for the same reason.[115] This court-made distinction directly contradicts not only the plain language of Title VII, but also precedent set forth by the Supreme Court.[116]

The *Price Waterhouse* Court specifically held that discrimination premised on a failure to conform to preconceived sexual stereotypes is "discrimination because of . . . sex."[117] Considering the broad interpretation of the Title VII statute advocated by this comment and many Supreme Court cases, this is the only logical

111. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) [hereinafter *Harrah's*].

112. *See Jespersen*, 392 F.3d at 1083.

113. *Id.* at 1084 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)). The dissent continued to note that "Jespersen ha[d] articulated a classic case of *Price Waterhouse* discrimination and ha[d] tendered sufficient undisputed, material facts to avoid summary judgment." *Id. See also* Smith v. City of Salem, 369 F.3d 912 (6th Cir. 2004) (holding, based on *Price Waterhouse*, that the suspension of a pre-operative transsexual employee based on his gender non-conforming appearance and behavior is actionable under Title VII); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding, based on *Price Waterhouse*, that harassment of a male employee for failure to act masculine enough is actionable under Title VII).

114. *Jespersen*, 392 F.3d at 1084 ("The majority attempts to distinguish this case from *Price Waterhouse* . . . because this is not a sexual harassment case. But neither was *Price Waterhouse*, in which the adverse employment action taken against the plaintiff was that she was denied partnership."). The dissent continued to note that, even if *Price Waterhouse* had been a case of sexual harassment, this would not matter because "[t]he question of whether an action is 'because of sex' is separate from the question of whether the action constitutes an adverse employment action actionable under Title VII . . . ." *Id.* (emphasis added).

115. *Id.*

116. *See* 42 U.S.C. § 2000e–2(a)(1) (1991); *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discrimina[tion]* . . . because of . . . sex.'") (alteration in original); *Price Waterhouse*, 490 U.S. at 251 ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '"[i]n forbidding employers to discriminate individuals because of their sex, Congress intended to strike at *the entire spectrum of disparate treatment of men and women resulting from sex stereotypes*.'") (alteration in original)(emphasis added); *see also* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against women because, for instance they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur *but for* the victim's sex.") (emphasis added); Doe v. City of Belleville, 119 F.3d 563, 582 (7th Cir. 1997) (rejecting the defendant's argument that *Price Waterhouse* does not apply to personal appearance standards), *vacated on other grounds*, 523 U.S. 1001 (1998). *Id.*

117. *See, e.g.*, Int'l Union v. Johnson Controls, Inc., 499 U.S. 207 (1991).

conclusion.[118] Consider the facts of *Jespersen,* as applied through the lens of Title VII jurisprudence candidly articulated by *Johnson Controls*, "[Harrah's] policy does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which *but for* that person's sex would be different.'"[119] Regardless of the opinion engineered by the *Jespersen* majority, the vexing fact remains that the makeup policy would not have applied, and thus Jespersen would not have been fired had she been a man—thus any logical connection between the sequences of events must inadvertently conclude that gender was the "but-for" cause of the adverse employment action.[120] The *Jespersen* majority additionally noted the case *EEOC v. Sage Realty Corp.*, in which the court held that an employer requiring female employees to wear a sexually provocative uniform was sufficient to show discrimination "because of . . . sex."[121] The only difference between the *Sage Realty* uniform and *Jespersen*'s "facial uniform"[122] seems to be judicial bias—that a revealing, sexually provocative uniform is somehow warranted Title VII protection as discrimination "because of . . . sex," while a makeup requirement is not.[123]

Further, the *Jespersen* majority attempted to justify their opinion with the fact that women as a class were not offended by the "Personal Best" program, noting "the only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement."[124] This logic, however, seems to be a direct contradiction to the holding of the Supreme Court in *Manhart*,[125] where the Court specifically addressed this issue—holding that Title VII requires the courts "focus on fairness to individuals rather than fairness to classes."[126] While other women may not have felt the policy to be offensive, the mere fact that Jespersen failed to conform to this view should not preclude her case from going forward.[127]

Consider also the Eleventh Circuit Court of Appeals's case *Harper v. Blockbuster Entertainment Corp*., in which the court succinctly affirmed the dismissal of an action brought by four male employees of Blockbuster who brought

118. *See supra* Part II.

119. *Int'l Union*, 499 U.S. at 200.

120. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1114 (9th Cir. 2006) (en banc) (Pregerson, J., dissenting) ("Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination 'because of' sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that 'gender must be *irrelevant* to employment decisions.'") (citing *Price Waterhouse*, 490 U.S. at 240) (emphasis in original).

121. *Harrahs's*, 444 F.3d at 1112; EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609 (S.D.N.Y. 1981).

122. Judge Pregerson's dissent in *Jespersen* coined this term to further his opinion that the "Personal Best" policy held women to a significantly higher standard than their male counterparts. *Harrah's*, 444 F.3d at 1114.

123. Pregerson's dissent addresses this point as well, analogizing *Jespersen's* "facial uniform" to *Carroll*, in which the Seventh Circuit found a bank rule that required woman to wear "employer-issued uniforms" but only required men to wear "business attire of their choosing" to be discrimination under Title VII. *Harrah's*, 444 F.3d at 1116 (*citing* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029 (7th Cir. 1979)).

124. *Harrah's*, 444 F.3d at 1112.

125. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 712 (1978).

126. *Id.* at 709. The Court also emphasized the fact that the language of Title VII "makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.' . . . The statute's focus on the individual is unambiguous." *Id.* at 708 (emphasis in original).

127. The *Manhart* court gave the following hypothetical: "If height is required for a job, a tall woman may not be refused employment merely because, on the average, woman are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.*

suit under Title VII claiming gender discrimination and retaliatory discharge based on their refusal to comply with a grooming policy prohibiting men, but not women, from wearing long hair.[128] Despite the obvious applicability of *Price Waterhouse*[129] to the civil action, the Eleventh Circuit instead opted to disregard the potentially negative Supreme Court precedent and instead rely solely on an extensive list of pre-*Price Waterhouse* cases from the 1970s holding that grooming standards are to be non-discriminatory.[130] The court then erroneously attempted to distinguish the present grooming standard with the Supreme Court opinions in *Johnson Controls*, *Newport News*, and *Manhart.*[131] Irrespective of the rationale, it appears that the judiciary desired to rule in favor of Blockbuster, and would not be deterred by the clear language of Title VII and the Supreme Court.[132]

A. SEXUAL ORIENTATION

In perhaps the most perplexing of all the categories in which courts have failed to apply the broad "but for . . . sex" reasoning, Title VII cases involving claims of sexual orientation discrimination most clearly manifest the judiciary's conscious disregard of the plain language of the Title VII statute. Contrary to the belief of most Americans, under the current judicial interpretations of Title VII, there are no federal discrimination laws prohibiting private employers from discriminating on the basis

128. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998).

129. Indeed, the *Jespersen* decision in the Ninth Circuit discussed this case extensively. *See* Jesperson v. Harrah's Operating Co., 392 F.3d 1076, 1082 (9th Cir. 2004).

130. *Harper*, 139 F.3d at 1388. Naturally, these archaic cases seem to clash with the standards imposed by the Supreme Court in *Price Waterhouse*. For example, in *Willingham v. Macon Tel. Pub. Co.*, the Fifth Circuit held that Title VII "never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities." 507 F.2d 1084, 1092 (5th Cir. 1975). Indeed, this seems to clash with the language subsequently articulated by the Supreme Court in *Price Waterhouse* holding that "[C]ongress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes*."* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). Additionally, consider dicta from *Newport News* stating "[t]he same result would be reached even if the magnitude of the discrimination were smaller. . . " Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 683 (1983).

131. *See Manhart*, 435 U.S. at 711 (stating "[s]uch a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"), *vacated*, 461 U.S. 951 (1983); Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 187 (1991). The Court attempted to hold that the firing of the Blockbuster employees was not a denial of an employment opportunity based on one's sex, but rather "related more closely with the employer's choice of how to run his business . . ."' *Harper*, 139 F.3d at 1389. However, this fails to acquiesce to the principle of *International Union*, which held that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Int'l Union*, 499 U.S. at 188. Secondly, the Eleventh Circuit attempted to deny the applicability of the "but-for" test used in *Manhart* and *Newport News* because these cases were based on discrimination "based on sex alone." *Harper*, 139 F.3d at 1389. However, this premise fails to account for the interpretation of "but for" articulated by Justice Brennan in *Price Waterhouse*, noting that '"because of' do[es] not mean 'solely because of.'" *Price Waterhouse*, 490 U.S. at 284. In fact, Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of." 110th CONG. REC. 2693, 2728 (1964); *See generally* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 669 (1983).

132. *Harper*, 139, F.3d at 1388. In fact, the court even acknowledged the fact that the EEOC initially took the position that grooming standards did present a prima facie claim for gender discrimination under Title VII, but retreated from this based upon the decisions out of the various courts of appeal. *Id.* This is true despite the fact that "[t]he [a]dministrative interpretation of the Act [Title VII] by the enforcing agency [i.e. the EEOC] is entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

of sexual orientation.[133] This is true despite the presence of Title VII, which makes it unlawful to "discriminate against, any individual because of . . . sex."[134] When analyzed at even the most elementary level, the conclusion that an adverse employment decision premised on one's sexual orientation is not "because of . . . sex" not only perverts the clear language of the statute, but also contradicts the straightforward "but-for" analysis often utilized by the Supreme Court.[135] Consider the following hypothetical: Plaintiff, a male, is happily employed by his employer until it is discovered that Plaintiff is romantically involved with another man—an "offense" for which Plaintiff is terminated. Despite the arguments to the contrary, this author is unable to comprehend how gender is not the inadvertent factor resulting in the plaintiff's termination. In simplest terms, had plaintiff been a woman and been attracted to the same man, the adverse employment condition would not have existed.[136]

Despite this obvious application of deductive reasoning, federal courts have consistently held the exact opposite—"that the term 'sex' in Title VII refers to gender and not to sexual orientation" and thus plaintiffs claiming discrimination on the basis of sexual orientation are often denied the protections afforded by Title VII.[137] This flawed reasoning is often premised on one of two justifications: "(1) because precedent says so; and (2) because congressional intent or legislative history says so."[138]

For example, in *Higgins v. New Balance Athletic Shoe, Inc*., the First Circuit Court of Appeals was faced with an allegation of harassment on the basis of the plaintiff's sexual orientation.[139] While the court strongly admonished the harassing behavior directed towards the plaintiff, referring to the behavior as "a noxious practice, deserving of censure and opprobrium," the court affirmed summary judgment for the employer on the grounds that "we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[140] In support of its decision, the First Circuit succinctly cited to two cases with little to no additional analysis: [141] *Hopkins v.*

133. *See* Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 234–35 (2012). Schwartz continues to note that "under existing interpretations of federal law, an employer can openly terminate, demote, reduce the pay of, or other-wise [sic] engage in an adverse employment action against an employee because of his or her sexual orientation." *Id.*

134. 42 U.S.C. § 2000e–2(a)(1) (1991).

135. *See, e.g.*, *Manhart*, 435 U.S. at 711, *vacated*, 461 U.S. 951 (1983); *see, e.g.*, *Int'l Union*, 499 U.S. at 200.

136. *See Int'l Union*, 499 U.S. at 200. The policy in *International Union* "d[id] not pass the simple test of whether the evidence shows 'treatment of a person in a manner which *but for* that person's sex would be different.'") (emphasis added). *Id.*

137. Schwartz, *supra* note 133, at 235.

138. *Id.* at 236.

139. 194 F.3d 252, 256 (1st Cir. 1999).

140. *Id.* at 259. Additionally, the *Higgins* court rejected plaintiff's attempt to bring a gender stereotype claim because the plaintiff had failed to assert this theory to the trial court. *Id.* at 261; *see also* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.").

141. *Higgins*, 194 F.3d at 259.

Baltimore Gas & Electric Co.[142] and *Williamson v. A.G. Edwards & Sons*.[143] In *Hopkins*, the Fourth Circuit was faced with the issue of whether sexual harassment is actionable under Title VII when the harasser and harassee are of the same gender.[144] Irrespective of the fact that *Hopkins* was not a case concerning sexual orientation, the court noted in dicta:[145]

> It follows that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability . . . . Similarly, Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee's sexual orientation and not at the fact that the employee is a man or a woman.[146]

In the same vein, *Williamson* ironically involved a Title VII case concerning race discrimination where the African-American plaintiff merely happened to be a homosexual.[147] Despite the plaintiff's claims that he was treated differently than his white counterparts, the Eighth Circuit held that the complaint and subsequent deposition testimony suggested the real issue was Plaintiff's homosexuality and thus affirmed summary judgment for the employer without any further analysis.[148]

Other courts have done more than blindly rely on precedent and instead attempted to rely on congressional intent arguments to support the contention that Title VII does not protect individuals because of their sexual orientation.[149] These cases seem to apply the following logic: "Title VII does not apply to sexual orientation because: (1) earlier case law has determined that the congressional intent behind 'sex' discrimination was to 'put women on equal footing with men;' and (2) later Congresses have not passed proposed bills extending Title VII to sexual orientation."[150] Besides the fact that textualists often downplay the significance of legislative intent arguments in favor of an analysis of the words of the legal text, the courts adhering to the legislative intent argument candidly admit that there is a "dearth of legislative history on Title VII."[151] Additionally, the Supreme Court has often applied Title VII to situations that Congress could not have possibly considered

142. 77 F.3d 745 (4th Cir. 1996).
143. *See* Williamson v. A.G. Edwards & Sons, 876 F.2d 69, 70 (8th Cir. 1989).
144. *Hopkins*, 77 F.3d at 747.
145. *Id.* at 747; Schwartz, *supra* note 133, at 237. ("Therefore, the first case Higgins cites [i.e. Hopkins] as 'settled' law reaches its conclusion only as a matter of unreasoned dicta.") (alteration added).
146. *Hopkins*, 77 F.3d at 751–52.
147. *Williamson*, 876 F.2d at 70.
148. *Id.* (*citing DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir.1979), *abrogated by* Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 874 (9th Cir. 2001).
149. *See, e.g.*, DeSantis, 608 F.2d at 329 (*citing* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977), *overruled by* Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)).
150. Schwartz, *supra* note 133, at 239.
151. *Holloway*, 566 F.2d at 662; *see also* Bach, *supra* note 37.

at the time the legislation was passed.[152] Unfortunately, this same logic has been applied in many cases involving sexual stereotyping as well.[153] In *Spearman v. Ford Motor Co.*, a homosexual plaintiff brought a Title VII action for sexual harassment and retaliation claiming that his coworkers perceived him to be too feminine to fit the masculine image at Ford, and thus subjected him to an agonizing array of verbal assaults and threats.[154] In affirming the ruling of the trial court granting summary judgment to the employer, the Seventh Circuit held that harassment, based solely on a person's sexual preference or orientation is not an unlawful employment practice under Title VII.[155] This ruling, however, fails to accept the notion that, had Mr. Spearman been a woman and acted in an effeminate manner, the adverse conditions of the workplace would not have existed.[156] Even more interesting is the fact that the *Spearman* court acknowledged the Supreme Court's opinion in *Oncale*, yet still found no discrimination to have occurred.[157] It is unfortunate that many courts have fallen prey to the notion that illegal gender discrimination is not present in cases where the perception of homosexuality (or the homosexuality itself) is the inadvertent reason behind nonconformance with a sexual stereotype, when a practical approach to this problem clearly reveals that the two are inexplicably intertwined.[158] Pursuant to the Supreme Court in *Price Waterhouse*, discrimination for failure to conform to a sexual stereotype is prima facie discrimination.[159] Unfortunately, courts have seemingly ignored this precedent and instead opted to

152. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id.

153. *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Hamm v. Weyauwega Milk Prod., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003).

154. *Spearman*, 231 F.3d at 1082–83.

155. *Id.* at 1084.

156. *See, e.g.*, City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978); *vacated*, 461 U.S. 951 (1983); Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).

157. *Spearman*, 231 F.3d at 1084–86. Indeed, the only difference between the two cases seems to be the fact that the *Oncale* plaintiff was a heterosexual, while the *Spearman* plaintiff was a homosexual.

158. *See Hamm*, 332 F.3d at 1065 n.5. The Hamm court noted the fact that it would be difficult to distinguish between a failure to adhere to sex stereotype (permissible under Title VII) and discrimination based on sexual orientation. This distinction should be legally irrelevant as any broad "but for" analysis would reach the same conclusion. The flawed reasoning employed by the Seventh Circuit would inevitably result in valid Title VII actions for effeminate heterosexual men, while depriving homosexual men of protection for the same behavior. Regardless of one's sexuality, the male plaintiffs are failing to comply with sexual stereotypes associated with their gender and thus discriminated because of their sex. *See, e.g.*, Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (holding that "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes" and concluding that harassment and abuse was actionable under Title VII because the waiter was abused for failing to act "as a man should act" and "for walking and carrying his tray 'like a woman.'"); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (finding a valid Title VII claim where a man alleged he was the victim of assaults "of a sexual nature" because of stereotypical assumptions).

159. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989); *invalidated by* 42 U.S.C. § 2000e–2(m) (1991).

draw a distinction based on the source of the effeminate behavior—a distinction that should hold no legal significance.[160]

B. PREGNANCY DISCRIMINATION

In *General Electric Co. v. Gilbert*, the Supreme Court held that a pregnancy-related exclusion in an employee disability plan did not violate Title VII.[161] This rationale was premised on the equal protection analysis set forth in *Geduldig v. Aiello*, which held:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.[162]

Congress, however, quickly responded by enacting the Pregnancy Discrimination Act (PDA) to overturn the *Gilbert* ruling.[163] The PDA expressly repudiated the narrow interpretation of the "because of . . . sex" language as stated by the Supreme Court, and instead held that the Title VII terms "because of sex" or "on the basis of sex" include discrimination on the basis of pregnancy, childbirth, or related medical conditions.[164] While this author has continually declined to advocate for legislative intent arguments, this act of Congress seems to strongly favor a broad interpretation of the Title VII "because of" language.[165]

C. AFFIRMATIVE ACTION

While not directly related to gender discrimination *per se*, the seminal case discussing the inevitable conflict between racial discrimination, affirmative action, and Title VII—*United Steelworkers of America v. Weber*—also became the forum for the Supreme Court to discuss the merits of statutory interpretation in the context of Title VII.[166] In *Weber*, the Court was faced with a Title VII challenge to an affirmative action plan—collectively bargained for by both the employer and the respective union—that reserved fifty percent of all openings in an in-plant training

160. *Price Waterhouse*, 490 U.S. at 251 ("Congress intended to strike at *the entire spectrum of disparate treatment of men and women resulting from sex stereotypes*.") (emphasis added).
161. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976), *invalidated by* 42 U.S.C. § 2000e(k).
162. Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974), *vacated by* 42 U.S.C. § 2000e.
163. Lang v. Star Herald, 107 F.3d 1308, 1311 n.2 (8th Cir. 1998).
164. *Id.*; 42 U.S.C. § 2000e(k).
165. In fact, a subsequent House Report stated, "It is the Committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted the Act [Title VII]." Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 678 (1983) (alteration added) (citing H.R. REP. NO. 95-948, at 2 (1978)). Additionally, a Senate's Report quoted passages from the two dissenting Justices [in *Gilbert*] stating that they '"correctly express both the principle and the meaning of Title VII.'" *Id.* (citing S. REP. NO. 95-331, at 2–3 (1977).
166. United Steelworkers of America v. Weber, 443 U.S. 193, 201–02 (1979).

program for African Americans until the percentage of African-American workers in the plant accurately represented the percentage of African Americans present in the local work force.[167] While the district court and Fifth Circuit Court of Appeals both found that Title VII's prohibition on discrimination "because of . . . race" had been violated, the Supreme Court disagreed and reversed.[168] The Supreme Court majority held, and the battle subsequently ensued over whether the plain language of Title VII's explicit prohibition of discrimination "because of . . . race" should be applied to situations that may not have been apparent to Congress at the time of the statute's drafting—namely whites being discriminated against due to the affirmative action plan reserving half the positions for African Americans.[169] While the majority opinion utilized a highly purposivistic approach—acquiescing to legislative intent and legislative history in lieu of the plain language of the statute—to hold that the affirmative action plan did not discriminate against the white applicants in violation of Title VII, the dissenting Justices penned highly critical dissents attacking their fellow Justices for ignoring the plain language of a statute of "extraordinary clarity."[170]

The two dissenting opinions by Chief Justice Burger and Justice Rehnquist strongly promoted a textualist approach to interpreting Title VII and scolded the Court for exceeding the scope of its constitutionally afforded power by failing to follow the law of the Title VII statute.[171] The very beginning of Chief Justice Burger's dissent eloquently manifests the very necessity of textualism in statutory interpretation by holding:

> The Court reaches a result I would be inclined to vote were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.[172]

Justice Rehnquist took this analysis one step further by comparing the majority's purposivistic approach—and seeming sudden shift in its Title VII jurisprudence—to George Orwell's dystopian government described in his famous novel *1984*.[173] The inherent flaw of purposivism, according to Chief Justice Burger and Justice

167. *Id.* at 197.
168. *Id.* at 209.
169. *Id.* at 202–04.
170. *Id.* at 216.
171. *Id.* at 217.
172. *Weber*, 443 U.S. at 216 (Berger, C.J. dissenting).
173. *Id.* at 217 (Rehnquist, J. dissenting).

Rehnquist is that it effectively allows the judiciary to elude "clear statutory language, 'uncontradicted' legislative history and uniform precedent" simply because the Court wants to achieve a "desirable" result.[174] This is simply too much power for the judiciary to constitutionally hold.[175]

V. INTRA-WORKPLACE RELATIONSHIPS AND THE INEVITABLE DECISION OF *NELSON V. KNIGHT*

In extremely controversial fashion, the Supreme Court of Iowa released its opinion affirming summary judgment for employer James Knight on July 12, 2013.[176] According to the court, the issue "[c]an a male employer terminate a female employee because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and employee" should be answered in the affirmative.[177] The facts of the case were relatively simple—Dr. Knight, a dentist, hired Nelson in 1999 as a dental assistant directly out of school.[178] Nelson worked for Dr. Knight for the next decade with both parties enjoying the business relationship.[179] On several occasions leading up to her dismissal, Dr. Knight complained to Nelson that her clothing was too tight, too revealing, and distracting and often requested she put on her lab coat.[180] Despite these complaints, Nelson and Dr. Knight began texting each other outside of the workplace about both work and innocuous personal matters.[181]

As the communication increased between the two, Dr. Knight allegedly began making comments of a more sexual nature to Nelson.[182] Although Nelson did not respond to these "inappropriate" text messages, she did not take any affirmative measures to cease the communications.[183] Upon learning of the extended communications between Dr. Knight and Nelson, Dr. Knight's wife confronted her husband and insisted he terminate Nelson's employment on the grounds that she was "a big threat to [their] marriage."[184] On January 4, 2010, Dr. Knight called Nelson into his office where, in the presence of his pastor, he informed her that he was firing her and handed her an envelope containing one month's severance pay.[185] Subsequently, Dr. Knight replaced Nelson with another female dental assistant. The court noted that historically, all of Dr. Knight's dental assistants have been women.[186]

174. *Id.* at 227.
175. *Id.*
176. Nelson v. Knight, 834 N.W.2d 64, 64 (Iowa 2013).
177. *Id.* at 65.
178. *Id.*
179. *Id.* ("Dr. Knight admit[ted] that Nelson was a good dental assistant. Nelson in turn acknowledge[d] that Dr. Knight generally treated her with respect, and she believed him to be a person of high integrity.").
180. *Id.*
181. *Id.*
182. *Nelson*, 834 N.W.2d at 66.
183. *Id.*
184. *Id.* (alteration added).
185. *Id.*
186. *Id.*

Thereafter, Nelson brought suit against Dr. Knight on August 12, 2010, alleging that Dr. Knight discriminated against her on the basis of sex.[187] It is significant to note that Nelson did not contend or allege that Dr. Knight committed sexual harassment.[188] Nelson advanced a straightforward "but for" argument—that she would not have been terminated "but for" her gender.[189] Dr. Knight moved for summary judgment, which was sustained by the district court on the grounds that, "Ms. Nelson was fired not because of her gender but because she was a threat to the marriage of Dr. Knight."[190] This was subsequently affirmed by the Supreme Court of Iowa on the same grounds.[191]

In rendering its opinion, the Supreme Court of Iowa relied heavily on federal case law concerning consensual workplace relationships that have held that an employer does not engage in unlawful gender discrimination by discharging a female employee who is involved in a consensual relationship that has triggered personal jealousy—regardless of the fact that the resulting jealousy would not have existed but for the employees gender.[192] These cases will be analyzed in detail in the proceeding paragraphs.

With a set of facts somewhat analogous to those of *Nelson*, *Tenge v. Phillips Modern Agriculture Co.*, centered on a personal relationship between the owner of a small business and a valued employee of the business that was seen by the owner's wife as a threat to their marriage.[193] During the course of her employment Tenge, the employee, admitted to several instances of inappropriate "touching" with the owner in addition to numerous written notes containing sexual content that led to her firing at the request of the owner's wife.[194] Tenge subsequently brought suit alleging she was terminated because she was a woman in violation of Title VII of the Civil Rights Act.[195] The District Court for the Northern District of Iowa granted the employer's motion for summary judgment on the grounds that, *inter alia*, Tenge failed to establish a prima facie case for sex discrimination.[196] The Eighth Circuit was thus faced with "the limited question of whether Title VII's prohibition on discrimination on the basis of 'sex' includes a termination on the basis of an employee's admitted consensual sexual conduct with a supervisor."[197] In affirming the employer's motion for summary judgment, the Eighth Circuit reasoned:

> The ultimate basis for Tenge's dismissal was not her sex, it was [her employer's] desire to allay his wife's concerns over Tenge's admitted sexual behavior with him . . . . Tenge was terminated due

187. *Id.* Although the lawsuit was brought under Section 216.6(1)(a) of the Iowa Code, the Court turned to federal cases analyzing Title VII of the Civil Rights Act to decide the case.
188. *Nelson*, 834 N.W.2d at 65.
189. *Id.* at 67.
190. *Id.*
191. Nelson v. Knight, No. 11-1857, 2012 WL 6652747, at *8 (Iowa Dec. 21, 2012).
192. *Id.* at *6.
193. Tenge v. Phillips Modern Ag. Co., 446 F.3d 903, 903 (11th Cir 2006).
194. *Id.* at 906.
195. *Id.* at 905.
196. *Id.* at 906.
197. *Id.* at 907.

> to the consequences of her own admitted conduct with her employer, not because of her status as a woman. Thus [Tenge's employer's] stated reason for Tenge's termination does not constitute direct evidence of sex discrimination.[198]

However, in handing down its ruling, the Eighth Circuit added a brief caveat: "The question is not before us of whether it would be sex discrimination if Tenge had been terminated because Lori [the owner's wife] perceived her as a threat to her marriage but there was no evidence that she had engaged in any sexually suggestive conduct."[199]

In the same vein, *Platner v. Cash & Thomas Contractors, Inc.* was decided by the Eleventh Circuit Court of Appeals.[200] Appellant Jeri Platner was employed by Cash & Thomas Contractors, Inc., a general contracting firm.[201] Steve Thomas, the son of the owner, was married to Savonda, who was the mother of his child.[202] While at work, Platner would often socialize with other employees, including Steve Thomas—which eventually resulted in Savonda becoming "extremely jealous" of Platner to the extent she began to suspect the two of carrying on an affair.[203] "During the course of this domestic brouhaha [the owner] became aware . . . of the apparently irreconcilable conflict between his daughter-in-law and Platner"[204] and feared Savonda may leave his son if the situation continued to percolate.[205] Platner was subsequently fired and brought suit alleging sex discrimination under Title VII.[206]

The District Court for the Southern District of Georgia held a one day bench trial and entered judgment in favor of the employer.[207] In so ruling, the Court made the factual conclusion that:

> Jack Thomas dismissed Jeri Platner because of the discord that existed in his family and undoubtedly in his business . . . . Mr. Thomas's motives and intentions were to protect his son . . . . There was no [gender] stereotyping that was borne out of the preponderance of the evidence. There was simply, in the mind of Jack Thomas, a desire to get his business, and to the extent that he could achieve it, his families equilibrium back in balance, and he did what he thought to be . . . needful and that is that he cast out the offending part by dismissing Ms. Jeri Platner.[208]

198. *Id.* at 910.
199. *Tenge*, 446 F.3d 903, 910 n.5 (11th Cir. 2006). Ironically, this was the factual scenario of Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013).
200. Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 902 (11th Cir. 1990).
201. *Id.* at 903.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 904.
206. *Platner*, 908 F.2d at 902.
207. *Id.*
208. *Id.* at 904.

The Eleventh Circuit agreed with the reasoning exhibited by the district court, noting that the ultimate basis for Platner's dismissal was not gender, but simply favoritism of a close relative.[209]

Finally, in *Bender v. Bellows & Bellows*, a disgruntled employee brought a Title VII claim against her former employer after being terminated from her job because of a previous romantic relationship with her boss.[210] In her complaint, the employee alleged her termination was based on the desire of her former employer to hide the prior relationship from his wife.[211] Summary judgment was granted by the District Court for the Northern District of Illinois and subsequently affirmed by the Seventh Circuit on the grounds that the termination was not based on the employee's sex, but rather because of her consensual sexual relationship with her former boss.[212]

Title VII cases have taken some fascinating angles when discrimination cases are brought involving consensual sexual relationships in the workplace. In its most organic form, it is easily arguable that *Tenge*, *Platner*, and *Bender* were all discriminated "because of . . . sex" in violation of Title VII, however, courts have almost universally refused to allow a Title VII claim to proceed when an employee has engaged in a romantic relationship with an employer.[213] Instead, courts typically hold that the "but-for" reason for the adverse employment is not the plaintiff's gender, but rather personal animus,[214] plaintiff's own admitted conduct,[215] or simply a failed relationship.[216]

The logic engineered by the federal circuits in the aforementioned cases is ostensibly in violation of the broad "but-for" test as advocated by the Supreme Court in a myriad of cases,[217] as well as this comment. It is both legally and factually incorrect to hold, as a matter of law, that a Title VII plaintiff was fired for any other reason besides gender when her firing was the result of an inter-office relationship.[218] The reasoning of the federal circuits in the aforementioned relationship cases, when juxtaposed with *Barnes*[219] and its progeny, elicits the conclusion that federal courts

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209. *Id.* at 905.

210. Bender v. Bellows & Bellows, 515 F.3d 757, 768 (7th Cir. 2008).

211. *Id.*

212. *Id.*

> Essentially, Benders complain[ed] of being discriminated against not because of her sex, but because of her consensual sexual relationship with Mr. Bellows. . . . [T]hese allegations [were] insufficient to support a cause of action for sex discrimination. See *Kahn v. Objective Solutions, Int'l,* 86 F. Supp. 2d 377, 380 (S.D.N.Y. 2000) (collecting cases finding that a voluntary, romantic relationship cannot form the basis of a sex discrimination suit under Title VII).

Id.

213. *See, e.g.*, Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 903 (11th Cir 2006); *Kahn*, 86 F. Supp. 2d at 382; Campbell v. Masten, 955 F. Supp. 526, 529 (D. Md. 1997); Freeman v. Cont'l Technical Serv., Inc., 710 F. Supp. 328, 331 (D. Ga. 1988).

214. *Freeman*, 710 F. Supp. at 331.

215. *Tenge*, 446 F.3d at 910.

216. *Campbell*, 955 F. Supp. at 528–29.

217. *See supra* Part II.

218. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

219. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (rejecting the defendant's argument that the plaintiff was fired because of her failure to succumb to his sexual advances, rather than her existence as a woman). The

have arbitrarily applied the strict *Price Waterhouse* test where according to the subjective opinions of the judiciary, it is warranted, and declined to do so in situations where it is not.[220] As noted above, this same disparity has been seen in a myriad of Title VII gender cases involving grooming standards,[221] sexual orientation,[222] and sex stereotypes.[223] With the presence of this distorted authority lingering within the federal circuits, a case such as *Nelson* was inevitably on the horizon.

From a policy perspective, one could see why courts may want to decline application of Title VII to cases involving consensual office relationships, as an alternative ruling could possibly allow for the anti-discrimination statute to act as a Sword of Damocles, rendering an employer helpless to fire an employee whose presence could potentially take a toll *vis-à-vis* the workplace.[224] However, this judicially imposed legislation not only distorts the plain language of Title VII prohibiting discrimination "because of . . . sex," but also set the flawed precedent that allowed the Supreme Court of Iowa to grant summary judgment to an employer who fired his employee of over ten years for a reason that was inadvertently and undeniably premised on Nelson's "existence as a woman."[225] While the Supreme Court of Iowa subsequently issued a rehearing en banc, they refused to recede from their prior ruling.[226]

VI. WHERE DO WE GO FROM HERE?

Title VII of the Civil Rights Act makes it unlawful for public and private employers, labor organizations, and employment agencies "to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."[227] The Supreme Court has consistently held that this language clearly articulates that gender must be irrelevant in employment

Barnes court correctly held that, but for the plaintiff's gender, the sexual solicitations of her employer would not have existed. *Id.*

220. *Barnes*, for example, was a case involving sexual harassment where a plaintiff was fired after refusing to succumb to her employer's sexual advances. *Id.* While the behavior of Barnes' employer was undeniably deplorable and merited Title VII intervention, the logic of the D.C. Circuit is directly relevant to general gender *discrimination* cases as well—as the language of the Title VII statute dictates both avenues of recovery. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 57 (1986); *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 702 (1978).

221. Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006). *Contra Sage Realty*, 507 F. Supp. at 599. Forcing woman, but not men, to wear sexually provocative uniforms sex discrimination [i.e. *Sage*], but forcing woman, but not men, to wear elaborate makeup is not [i.e. *Jespersen*].

222. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 252 (1st Cir. 1999).

223. Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000). *Contra* Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 864 (9th Cir. 2001). Homosexual man unable to bring Title VII claim for harassment stemming from his failure to conform to gender stereotypes [i.e. Spearman], but heterosexual man is [i.e. *Nichols*].

224. *See generally* BERGEN EVANS, DICTIONARY OF MYTHOLOGY 66 (1991). The Sword of Damocles expression is often used to describe scenarios involving a sense of impending doom. *Id.* In the legend, Damocles was invited to a feast at which he was seated under a sword suspended over his head by only a single hair. *Id.*

225. Nelson v. Knight, No. 11-1857, 2012 WL 6652747, at *8 (Iowa Dec. 21, 2012).

226. Nelson v. Knight, 834 N.W.2d 64, 64 (Iowa 2013).

227. 42 U.S.C. § 2000e(2)(a)–(c) (1964).

decisions[228] and has applied the statute to any and all areas where this principle has been violated—regardless of what Congress could have known, intended, or anticipated at the time of Title VII's passing.[229] The explicit prohibition of gender discrimination in the work place should not be arbitrarily applied based on the subjective intuitions of the judiciary as to what caliber of behavior warrants Title VII protection, but rather should be enforced according to the language of the statute.[230] This practical approach not only reduces the likelihood of reverse-legislation and curtails any separation of powers issues, but also forces Congress to take corrective action in the event a Title VII amendment is necessary.[231] Ironically, while textualism is often associated with conservatism, within the confines of Title VII jurisprudence it actually advances liberal causes as it would have permitted the court to find discrimination on behalf of Dr. Knight when he willfully fired Melissa Nelson for nothing more than her status as a woman.[232] The *Nelson* opinion, while unfortunately justified by a myriad of federal Title VII cases,[233] is premised on a logical fallacy which allows for a capricious application of Title VII in stark contrast to the painfully clear, rigid guidelines drafted by Congress at the time of its passing—a reality which was alluded to by George Orwell in his famous dystopian novel *1984*:

> It was almost impossible to listen to him without being first convinced and then maddened . . . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of understanding rippled through the crowd. Oceania was at

228. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

229. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 75 (1998).

230. *See* Scalia, *supra* note 16, at 56.

231. The concept of amending legislation is not new, even to Title VII. *See, e.g.*, *Robinson*, 982 F.2d at 899 n.8 (stating The Civil Rights Act of 1991 overruled "that portion of *Price Waterhouse* that permitted an employer to avoid liability if it could demonstrate it would have taken the same action in the absence of discriminatory motive"); *see also* Lang v. Star Herald, 107 F.3d 1308, 1311 n.2 (8th Cir. 1998) ("Congress enacted the . . . [Pregnancy Discrimination Act in 1978] to overturn *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136–38 (1976), which had held that a pregnancy-related exclusion in an employee disability plan did not violate Title VII. In *Gilbert*, a majority of the Court relied on equal protection analysis as set out in *Geduldig v. Aiello*, 417 U.S. 484, 494–97 (1974), to conclude that discrimination on the basis of pregnancy was not sex discrimination."). The Supreme Court in *Geduldig* noted: "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Geduldig, 417 U.S. at 496 n.20. Lang* states:

> By enacting the PDA, Congress not only overturned the holding of *Gilbert*, but also refuted the Court's reasoning in that case. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983). As a result of the PDA, the Title VII terms "because of sex" or "on the basis of sex" include discrimination on the basis of pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e(k).

107 F.3d at 1311 n.2.

232. Nelson v. Knight, No. 11-1857, 2012 WL 6652747, at *2 (Iowa Dec. 21, 2012).

233. *See supra* Part III.

> war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong![234]

While this language was first penned in 1949, it still represents the inherent flaw with purposivism; which is that it allows a judge an avenue to force a desired result—even a good result—by a method that is both academically dishonest and constitutionally impermissible considering the very limited scope of judicial power.[235] Through purposivism, a judge may essentially pick and choose how and when to follow any given law and—as the Courts made clear in *Weber* and later in *Nelson*—may opt to disregard the law altogether.[236] The power to create and pass law is reserved for that of Congress alone,[237] and a pure textualist approach to statutory interpretation ensures that this power remains there.

234. GEORGE ORWELL, 1984 181–82 (1949); *see also* United Steelworkers of America v. Weber, 443 U.S. 193, 217 (1979) (Rehnquist, C.J., dissenting).
235. *See Weber*, 443 U.S. at 219 (Rehnquist, C.J., dissenting).
236. *Id.*
237. U.S. Const. art 1, § 1.