Distinguishing Disparate Treatment from Disparate Impact; Confusion on the Court

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I.

Distinguishing disparate treatment and disparate impact, the primary concepts of illegal discrimination first employed in seminal decisions interpreting and applying Title VII of the 1964 Civil Rights Act, may seem straightforward and simple. Disparate treatment analysis asks whether an agent of an employer has taken into account some protected status, such as the five specified in Title VII, whether or not with animus, in taking some employment action. Disparate impact analysis asks whether an agent of the employer has taken some action under a policy or practice that has

4 The Court in numerous decisions has made clear that the disparate treatment proscribed by Title VII encompasses any consideration of a protected status category that causes an adverse employment-related decision, regardless of whether this proscribed consideration is animus-based. See, e.g., International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199-200 (1991) (“the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect”); Goodman v. Lukens Steel Co., 482 U.S. 656, 668-660 (1987) (upholding finding of unions’ intentional discrimination despite “no suggestion below that the Unions held any racial animus against or denigrated blacks”); Arizona Governing Committee v. Norris, 5463 U.S. 1073, 1084 (1983) (“use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class …”).

Title VII’s disparate treatment cause of action, which protects only the five listed status categories, thus differs from the Constitution’s equal protection standard, which potentially protects any status group, but requires proof of some level of animus or lack of equal regard, even for classifications — unlike race — that do not raise heightened suspicions of such animus for the Court. See, e.g., Rohmer v. Evans, 517 U.S. 620, 635 (1996) (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”); City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 451 (1985) (“requiring the permit in this case appears to us to rest on an irrational prejudice against the mildly retarded”); New York City Transit Authority v. Beazer, 440 U.S. 568, 588 (1979) (“we are necessarily confronted with the question whether the rule reflects an impermissible bias against a special class” of narcotic users). See generally John Ely, Democracy and Distrust 135-97 (1980).
disproportionate adverse effects on members of a group defined by a protected status. The former is illegal regardless of any business justification, except in rare cases where a protected status (other than race or color) is used as a bona fide occupational qualification. The latter is illegal only where an employer cannot demonstrate an overweighing necessary business goal or the plaintiff can demonstrate an alternate means to achieve such a demonstrated goal without the adverse effects. Under current law, the former warrants legal as well as equitable relief, while the latter warrants only the equitable.

But even the wise men and women on the Supreme Court continue to have difficulty distinguishing the two. In two decisions in the 2014-2015 Term, Young v. United Parcel Service, Inc. and Equal Employment Opportunity Commission v. Abercrombie & Fitch, Inc., the Court seemed to give contradictory answers to an important unresolved conceptual definitional question: Does disparate treatment include assigning members of a protected group based on their protected status to a larger disfavored group that is defined by neutral principles and that includes others who are not members of the protected group? Or does such assignment have only a disparate impact on the protected status group?

In Young, the first of these decisions, all members of the Court, though divided on the appropriate analysis, seemed to assume that consideration of protected status in assigning an individual to a more broadly defined larger disfavored group is not overt disparate treatment. Justice Breyer’s decision for the five-member majority in Young and Justice Alito’s concurring opinion both seemed to agree with Justice Scalia’s

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5 See, e.g., Griggs, supra, at 431-432.
6 The bona fide occupational qualification defense applies only to religion, sex and national origin discrimination, see 42 U.S.C. § 2000e-2(e).
7 The disparate impact cause of action was codified at § 703(k) of Title VII by § 105 of the Civil Rights Act of 1991. See 42 U.S.C. 2000e-2(k). This codification provides that an “unlawful employment practice based on disparate impact is established under this title only if (i) a complaining party demonstrates that … a particular employment practice … causes a disparate impact … and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party [demonstrates a satisfactory “alternative employment practice”] … that “the respondent refuses to adopt.”
11 135 S. Ct. at 1343, discussed TAN 61-71 infra.
12 Id. at 1356, discussed at note 81 infra.
opinion for the three dissenters that the light duty accommodation policy of United Parcel Service (UPS) for disabled drivers could not be treated as overt illegal disparate treatment against the protected category of pregnancy, even though UPS’s policy considered the pregnancy-based origins of Peggy Young’s lifting disability in assigning her disability to a larger residual category of disabilities that UPS did not favor with the accommodation of temporary light duty work.

In *Abercrombie*, however, a conceptually identical case involving alleged religion-based rather than pregnancy-based discrimination, eight members of the Court held that consideration of a protected religious practice under a general policy that defined a larger group to be disfavored is illegal disparate treatment, absent the availability of a statutory defense. These eight members concluded that disparate treatment analysis was appropriate for Abercrombie’s application of its neutral “Look Policy” against the wearing of “caps” to deny employment to Samantha Elauf, a young Muslim woman who wore a hijab scarf to her job interview, despite the fact that the neutral policy defined a larger disfavored group that included non-religious cap-wearers. Only Justice Thomas, in a separate opinion that argued that Abercrombie’s neutral policy could be challenged only for its disparate impact on certain religious practices, maintained consistency with the conceptual definition of disparate treatment apparently accepted by all members of the Court in *Young*.

In my view, the Court’s decision in *Young* was unfortunate. This is not only because the majority opinion, as I will explain below, diluted the Pregnancy Amendment Act (PDA) amendments to Title VII with a confusing opinion that provided incomplete guidance for future cases or even the *Young* case itself on remand. It is also because the opinion weakened the appropriate clarification that the *Abercrombie* decision might have given to the conceptual line between the disparate treatment and disparate impact forms of discrimination proscribed by Title VII.

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13 *Id.* at 1361, discussed TAN 72-84 *infra*.
14 UPS at least purported to accommodate only “(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act (ADA).” 135 S. Ct. at 1344.
15 135 S. Ct. at 2031 (majority opinion of Justice Scalia for seven Justices), 2034 (concurring opinion of Justice Alito).
16 *Id.* at 2037.
17 See TAN 61-71 *infra*.
In the remainder of this essay, I first explain why disparate treatment analysis is appropriate in cases where protected status is taken into account under a more general policy that defines a disfavored group that encompasses but is more inclusive than the protected status. I then use this explanation to defend the use of disparate treatment analysis in Abercrombie and to criticize the Justices for not applying it in Young. My criticism of the Young decision includes a further explanation of the sources of the Justices’ lack of perception, and enables me to conclude with a message of hope for a future perception and clarification not obstructed by the same sources.

II.

It is illuminating to begin with the Court’s resolution of a conceptual distinction of disparate treatment from disparate impact that might be considered the converse of the issue at the core of Abercrombie and Young. The converse question is whether discrimination against a non-protected status category that is totally encompassed within but is not identical with a larger protected status category can be challenged as disparate treatment of the larger category’s protected status or rather must be challenged only for its disparate impact on the protected status. This was the conceptual question at the core of the pre-PDA challenge to the disability plan considered by the Court in General Electric Company v. Gilbert.19 The disability plan challenged in that case paid weekly sickness and accident benefits, but expressly excluded from the plan’s coverage disabilities arising from pregnancy. Since only women can become pregnant, all those disadvantaged were a subset of a Title VII protected status group. Justice Rehnquist’s decision for the Court, however, holds that since there was no finding that General Electric’s exclusion of pregnancy from its plan was based on consideration of the sex of those who might become pregnant, no finding that it was “a simple pretext for discrimination against women,”20 it could be challenged, if at all, only for a disparate impact on women.21 The plan’s exclusion of pregnancy was intentional discrimination against pregnancy, the defining status characteristic considered under the exclusion, but it was not intentional discrimination against women, the protected status that encompassed all those who were not provided benefits.

20 Id. at 136.
21 Id. at 137.
The *Gilbert* decision supported bad public policy and of course was soon reversed by the passage of the PDA. The Court’s pre-PDA resolution of the underlying conceptual question nonetheless made sense. Absent a factual finding that an employer took into account the protected category defining the larger set (women) when deciding to disfavor those in the subset (pregnancy), there is no basis for concluding that the adverse decisions were influenced by some consideration of the protected status of sex, rather than by other considerations, such as cost. Unlike in cases like *Phillips v. Martin Marietta*,\(^ {22} \) condemning discrimination against a subset of all women, that basis cannot be provided in subset discrimination cases like *Gilbert* by locating comparators outside the protected status who share the characteristic defining the disfavored subset. In *Martin Marietta*, the employer hired some women, but not those with preschool aged children, while it did hire men with such children.\(^ {23} \) The latter hiring proved that the employer was influenced in part by protected status in its disfavoring of the subset of women with young children. Such proof of course is not available in the rare case, like *Gilbert*, where the non-protected status, like pregnancy (pre-PDA), cannot be shared by those outside the protected status defining the larger set.

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

Cases like *Young* and *Abercrombie*, where protected status defines the subset but not the set, are distinguishable from cases like *Gilbert*, where protected status defines the set but not the subset. In the former cases, there is no factual dispute over whether protected status – such as pregnancy or

\(^{22}\) 400 U.S. 542 (1971).

\(^{23}\) *Id.* at 543.
the religious practice of wearing head scarves -- has been considered by the employer when assigning individuals defined by such status to a larger set of disfavored individuals defined by unprotected categories. Moreover, as in cases like Martin Marietta, there are readily available comparators to confirm such consideration. There are many favored individuals outside the plaintiff’s protected status group who are in all potentially relevant respects identical to the plaintiff except for the protected status.

Illustration 2 – Young v. United Parcel Service

[Diagram showing the relationship between Disfavored Conditions and Pregnancy-Based Conditions]

Illustration 3 – EEOC v. Abercrombie & Fitch

[Diagram showing the relationship between Wearers of Head Covers and Wearers of Religious Head Covers]

Cases like Young and Abercrombie, where the employer assigns all those in a protected status (the pregnant; women wearing a hijab) to a larger disfavored group (those with disfavored disabilities; those who wear head covers) not defined by such status, also are distinguishable from paradigmatic disparate impact cases where protected status defines neither a set nor a subset of the disfavored and is not considered by the employer when determining disfavored status. For instance, in Griggs v. Duke Power
Co.\textsuperscript{24}, the Supreme Court decision that first pronounced a Title VII disparate impact cause of action, the employer presumably applied high school education and aptitude test score requirements for employment without any consideration of the race-based status disproportionately affected by the neutral requirements. Or in \textit{Dothard v. Rawlinson},\textsuperscript{25} the Court’s first application of the disparate impact to sex discrimination, the employer presumably applied minimum height and weight requirements for prison-guard employment without any consideration of the sex-based status disproportionately affected by the neutral requirements.

\textbf{Illustration 4 – \textit{Griggs v. Duke Power}}

- Workers without High School Diploma in North Carolina
- African American Workers in North Carolina

What makes cases like \textit{Young} and \textit{Abercrombie}, where protected status defines the subset rather than the set, conceptually difficult is the fact that there also are otherwise identical individuals – other comparators -- outside the plaintiff’s protected subset, but within the larger set, who are disfavored. Ultimately, however, the unfavorable treatment of these other comparators should not insulate such cases from disparate treatment analysis. The statutory language in § 703(a)(1) of Title VII on which the disparate treatment cause of action is based makes it “an unlawful employment practice for an employer … to discriminate against any individual … because of such individual’s” protected status.\textsuperscript{26} Such proscribed discrimination can occur where individuals in the plaintiff’s protected class are not the only disfavored individuals; disparate treatment analysis only must determine whether the plaintiff’s protected status made a difference in his treatment. Consider, for example, a national origin discrimination case brought by a Croatian-American against a Serbian-American owned business that the Croatian claimed discriminated against

\textsuperscript{24} 401 U.S. 424 (1971).
\textsuperscript{25} 433 U.S. 321 (1977).
\textsuperscript{26} 42 U.S.C. § 2000e-2(a)(1).
her because of her ethnic background. If the Croatian could present favored Serbian-American comparators, she could establish disparate treatment on the basis of national origin, regardless of whether the employer could present equally disfavored Slovenian-American or Bosnian-American comparators.

Illustration 5 – Croatian-American Hypothetical

This Balkanized hypothetical admittedly does not fully capture the discrimination in the Young and Abercrombie cases because in my hypothetical the employer seems to be disfavoring the Croatian not under a legal neutral policy, but rather under a general policy of discrimination against anyone of at least Southeastern European, non-Serbian descent, a general policy defining the larger set that is itself as illegal a form of national origin discrimination as is any more particularized form of discrimination against the plaintiff’s subset of Croatian-Americans. Indeed, it generally will be true that other disfavored comparators outside the plaintiff’s protected class-defined subset but within a larger encompassing set, also will have a similar cause of action to that of the plaintiff for any form of status discrimination subject to universalistic and symmetrical prohibitions. Such prohibitions, such as those against race, non-pregnancy sex, national origin, and forms of religious discrimination in Title VII, can be invoked in the same manner by all and cut equally in all directions.27 For such prohibitions, it is difficult to imagine realistic cases where larger sets of disfavored workers include comparators who do not have similar causes of

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action to those encompassed within the illegally defined subsets of workers. 

As further explained below, the prohibition of pregnancy discrimination embodied within Title VII’s prohibition of sex discrimination and the prohibition of the type of religious discrimination at issue in Abercrombie, however, are both more like the non-universalistic and asymmetrical prohibitions of age and disability discrimination contained in the ADEA and the ADA respectively. The prohibition of age discrimination in the ADEA is non-universalistic and asymmetrical because the statute protects only those forty and older and does so only against age discrimination that favors younger workers. The prohibition of disability discrimination by the ADA is non-universalistic and asymmetrical because it protects only the limited class of disabled workers and does not protect the non-disabled from any discrimination in favor of the disabled.

The ADEA and the ADA thus may present more realistic testing hypotheticals closer to the facts of Young and Abercrombie. Consider a policy against hiring workers older than age 30. Under such a policy the larger disfavored class would include comparators between the ages of 30 and 40 who would not have a cause of action for age discrimination like the protected subset of disfavored workers over the age of 40. Presumably, this latter subset of workers should and would be able to claim overt disparate treatment on the basis of age despite being included by the employer’s

28 But not difficult for a law professor to imagine unrealistic hypotheticals, like the employer who sincerely hates very curly hair and therefore refuses under this neutral principle to hire anyone that he knows is of African descent regardless of the current length or style of their hair. Even if the neutral principle is not a pretext for the disfavoring of blacks (which of course it realistically would be), the employer’s policy presumably would and should be treated as overt disparate treatment on the basis of race because the disfavored status-protected subset of blacks is included within the larger disfavored set that is defined by a unprotected status, very curly hair.

29 See 29 U.S.C. § 631(a) (limiting protections “to individuals who are at least 40 years of age”); General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004 (holding the ADEA does not prohibit favoring older workers over younger workers).

It is conceptually possible to have a discrimination prohibition that is non-universalistic, but symmetric. This was how the dissenters in Cline, for instance, interpreted the ADEA. See id. at 602 (Justice Thomas, dissenting); id. at 601 (Justice Scalia, dissenting). Such a prohibition, however, cannot function consistently in practice. If the dissenters’ view of the ADEA was correct – if the Act prohibited discrimination against the younger as well as against the older – then an employer could not favor older workers in the 40 and over protected class, but only workers in this protected class could object. Thus, an employer with impunity could have a policy of hiring only those 40 and over because the policy disfavored no workers in the protected class, but the employer could not have a policy of hiring only those 50 and over because such a policy would disfavor protected workers between their 40th and 50th birthdays.
policy within a larger set of workers that includes many who could not claim such discrimination.\footnote{Indeed, the opinions in an ADEA case decided by the Court in 2008, Kentucky Retirement Systems v. EEOC, 554 U.S. 135 (2008), suggest that the current Justices would recognize as ADEA-proscribed disparate treatment the age-based assignment of older workers to a less favorable status under a broader neutrally, defined policy. In this case, the Court considered a challenge to Kentucky’s disability retirement plan, based on the plan’s treatment of some “disabled individuals more generously than it treats some of those who become disabled only after becoming eligible for retirement” and their normal pension, an eligibility that depended in part on age. \textit{Id.} at 138. Justice Kennedy, in a dissent for three other Justices (Scalia, Ginsburg, and Alito) also currently on the Court, \textit{id.} at 150, argued that the Kentucky system was “a straightforward act of discrimination on the basis of age,” \textit{id.} at 152, even though he did not question Kentucky’s good faith attempt to align a disabled worker’s pension with the pension he would have earned had he worked until retirement age without a disability. Justice Kennedy did not find relevant Kentucky’s use of the neutral broader principle of pension eligibility, finding the case no different than one where “an employer divided his employees into two teams based upon age -- putting all workers over the age of 65 on “Team A” and all other workers on “Team B” – and then paid Team B members twice the salary of their Team A counterparts.” \textit{Id.} at 158.

The other five Justices joined in an opinion by Justice Breyer, \textit{id.} at 137, that upheld the Kentucky plan based primarily on the ADEA’s special treatment of pensions, but cautioned “that our opinion in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA. We are dealing today with the quite special case of differential treatment based on pension status, where pension status – with the explicit blessing of the ADEA itself turns, in part, on age.” \textit{Id.} at 147-148.}

Illustration 6 – ADEA Hypothetical

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

Illustration 7 – ADA Hypothetical

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

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

31 See, e.g., Cook v. State of Rhode Island Dep’t of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1992) (finding an impairment because obese woman demonstrated her obesity was caused by a physiological condition).
III.

The issue presented and directly decided by the Court in *Abercrombie* was not the conceptual distinction of disparate treatment discrimination that I am treating in this essay. The Court instead granted certiorari in *Abercrombie* to resolve a split in the Courts of Appeals on whether an employer’s duty under Title VII to not treat adversely an employee or applicant for employment because of her religious practice applies only when the employee or applicant has informed the employer that the practice is religion-based and thus might require some accommodation.\(^{33}\) Justice Scalia’s opinion for a seven Justice majority holds that the employer’s duty is not so conditioned, that an employee or applicant can “show disparate treatment without first showing that an employer has “actual knowledge” of the applicant’s need for an accommodation.”\(^{34}\) It is sufficient for a plaintiff to demonstrate that the employer was motivated by its agent’s consideration of the plaintiff’s religious practice, whether or not it knew that the practice actually was based on religion. Justice Scalia founded the holding primarily on the wording of the statutory provision that expresses Title VII’s prohibition of disparate treatment discrimination on the basis of religion, or of race, color, sex, and national origin. That provision, § 703(a)(1) of the Act, Justice Scalia stressed, requires only that the plaintiff prove that a discriminatory motive caused the adverse employment decision, such as the failure to hire, about which the plaintiff complains.\(^{35}\) The provision does not include any kind of knowledge requirement.

This interpretation of § 703(a)(1) has little import for most status discrimination cases. An employer cannot be motivated to treat an employee or applicant adversely on the basis of some protected status, such as race or sex, of which it is not aware. The same is true for the status of religious affiliation or belief. However, Title VII defines the status category of religion to include “all aspects of religious observance and practice, as well as belief,”\(^{36}\) and employers may treat employees or applicants differently because of some practice, such as the wearing of particular clothing, without

\(^{33}\) Compare *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993), with *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).

\(^{34}\) 135 S. Ct. at 2032.

\(^{35}\) Id. at 2032-2033.

being told or knowing for certain the reason for the practice. So for cases like *Abercrombie* that involve alleged discrimination against a religious practice, the holding is important.

It probably does not mean, however, that an employer can be liable for discrimination against a religious practice without the plaintiff showing that the employer had some reason at least to be suspicious that the practice might be religion-based. As Justice Alito argued in his concurring opinion, there certainly was such a showing in this case.\(^\text{37}\) The record indicated that the Abercrombie employee who interviewed Samantha Elauf thought she wore a scarf to the interview for religious reasons,\(^\text{38}\) and this belief was communicated to the district manager who told the interviewer to not hire her.\(^\text{39}\) Without an employer’s agents having some reason to think a practice might have a religious basis, it is hard to discern a motive to treat religion adversely. As Justice Alito argued, there would not be “any blameworthy conduct.”\(^\text{40}\) It thus was not surprising that Justice Scalia in a footnote allowed, while declining to resolve “by way of dictum,” that “it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice.”\(^\text{41}\)

The need for some level of suspicion of a religious basis for the disfavored practice on which to base the employer’s culpability seems particularly important because, as noted, Justice Scalia expressly treated Abercrombie’s rejection of Elauf as “disparate-treatment” rather than disparate impact discrimination under the statutory provision on which disparate treatment analysis is based. Indeed, the Court could not have used disparate impact theory to review the Court of Appeals’ decision to overturn a jury award of damages based on disparate treatment.

Justice Thomas was the only member of the Court to dissent from Justice Scalia’s acceptance of disparate treatment analysis in the case. To Justice Thomas, it was “a classic case of an alleged disparate impact” because Abercrombie “did not treat religious practices less favorably than similar secular practices.”\(^\text{42}\) Justice Thomas did not need to know whether Abercrombie had any suspicion of whether Elauf had a religious motivation

\(^{37}\) 135 S.Ct. at 2034.  
\(^{38}\) *Id.* at 2031.  
\(^{39}\) *Id.*  
\(^{40}\) *Id.* at 2036.  
\(^{41}\) *Id.* at 2033, n.3  
\(^{42}\) *Id.* at 2037, 2038.
before applying its Look Policy to her because Abercrombie would have applied the same policy to secular comparators. Justice Thomas failed to perceive any difference between a case, like Abercrombie, where an employer considers a protected status as a basis for assigning an employee to a larger set of disfavored workers, and a paradigmatic disparate impact case, like Griggs, where an employer’s challenged practice merely has a disproportionate effect on a protected group without any direct consideration of protected status.

Justice Scalia included two responses to Justice Thomas in his majority opinion. The second of these responses was not alone persuasive, as it did no more than note that Title VII’s protection of religious “practice” is asymmetrical and not universalistic. Thus, Justice Scalia’s assertion that Title VII “does not demand mere neutrality with regard to religious practices,” but rather “gives them favored treatment”43 not given to religious practices, merely explained why Title VII’s protection against religious discrimination, like the ADA and the ADEA prohibitions discussed above, is more likely to pose the conceptual problem that is the subject of this essay; it did not explain why it should be answered differently than does Justice Thomas.

Justice Scalia includes in this second response an assertion that “Title VII requires otherwise-neutral policies to give way to the need for an accommodation.”44 But the accommodation requirement is not relevant to the question of whether differential treatment of someone because they engaged in a practice that turns out to be religious is Title VII disparate treatment when that same treatment would be given to the practice if it were secular. The provision upon which Title VII disparate treatment is based, § 703(a)(1), treats discrimination on the basis of religion the same as the prohibition of the other prohibited forms of discrimination and it contains no reference to accommodation. The only mention of accommodation is in the affirmative defense provided to employers in the definition of religion to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate ... without undue hardship on the conduct of the employer’s business.”45 The accommodation-undue hardship defense thus is only relevant to determining what is protected as religion under Title VII’s

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43 Id. at 2034.
44 Id.
disparate treatment provision; it does not define the conceptual scope of disparate treatment.

Justice Scalia’s first response to Justice Thomas, however, seems a more direct rejection of Justice Thomas’s answer to the underlying conceptual question. Justice Scalia states that Justice Thomas might be correct “if Congress had limited the meaning of “religion” in Title VII to religious belief --- so that discriminating against a particular religious practice would not be disparate treatment though it might have disparate impact.”46 But since “religious practice is one of [Title VII’s] protected characteristics,”47 differential treatment of someone engaged in the practice can constitute disparate treatment, regardless of whether that differential treatment is consistent with more general policies.

In his response to Justice Thomas in his concurring opinion, Justice Alito takes the same position more directly.48 In order to prove discrimination under Title VII’s disparate treatment provision, asserts Justice Alito, a “plaintiff need not show … that the employer took the adverse action because of the religious nature of the practice. … Suppose, for example, that an employer rejected all applicants who refuse to work on Saturday, whether for religious or nonreligious reasons. Applicants whose refusal to work on Saturday was known by the employer to be based on religion will have been rejected because of a religious practice.”49 Justice Alito then supports this conclusion by noting that there would be no need to provide the reasonable accommodation-undue hardship “defense” in the definition of religion if the disparate treatment provision – the provision covering all forms of Title VII discrimination – did not have this meaning.50

Thus, had it stood alone in the 2014-2015 Term of the Court, EEOC v. Abercrombie & Fitch Stores would have provided strong support for a conceptual definition of Title VII disparate treatment to include assigning members of a protected status group to a larger disfavored group that includes others who are not members of the protected group. Abercrombie did this by assigning Muslim women engaging in a religious practice to the larger disfavored group of “cap” wearers. But Abercrombie did not stand

46 135 S. Ct. at 2033.
47 Id.
48 Id. at 2037.
49 Id. at 2036.
50 Id.
alone as a case relevant to the conceptual definition. Two months before Abercrombie, in Young v. UPS, the Court had seemed to assume a different conceptual definition of Title VII disparate treatment in a case involving the application of the Pregnancy Discrimination Act (PDA) amendment to Title VII.

IV.

The PDA added a definition of sex, right after the definition of religion, in the definitional section of Title VII. The first clause of this definition states that “‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”\(^5\) By folding pregnancy discrimination into the category of sex, this clause effectively expanded from five to six the categories covered by Title VII’s prohibitions of discrimination, including the employer disparate treatment prohibition, § 703(a)(1).\(^2\) Had a majority of the Justices in Young interpreted the latter prohibition in the same manner that they interpreted it two months later in Abercrombie, the answer to the conceptual question posed in this essay would be clear.

UPS required Young, a part-time driver, to stay home without pay, causing an eventual loss of medical coverage, during most of her pregnancy when she could not lift the minimum weight that UPS required its drivers to be able to lift. UPS denied Young’s request to be accommodated with help on the lifting of heavy packages. It based its denial on the cause of Young’s lifting restriction, her pregnancy, deciding that this cause did not fit any of the three categories of disability causes that it accommodated under its general personnel policy. Under that policy, UPS accommodated (1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certification as drivers, and (3) those who suffered from a disability covered by the ADA.\(^3\) Young’s pregnancy disabled her off the job, did not cause her to lose her DOT certification as a driver, and was not covered as a disability at that time under the ADA because it was only temporary. Thus, UPS considered Young’s protected status of pregnancy in placing her in a larger set of neutrally defined disfavored workers, just as Abercrombie considered Elauf’s religious head scarf in placing her in a larger set of neutrally defined disfavored workers.

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\(^3\) 135 S. Ct. at 1344.
In both cases, of course, there were other members of the disfavored set – secular cap-wearers in *Abercrombie*; workers with other off-the-job caused lifting restrictions in *Young* – who were not provided accommodations under neutral company policy. These other disfavored workers would continue to be disadvantaged even if discrimination against the religious and the pregnant were eliminated. This was not a problem in *Abercrombie* because, as noted above, Title VII’s prohibition of discrimination against religious practice is both non-universalistic and asymmetrical; Title VII does not protect secular practices and it does not prohibit accommodations favoring religious practices over secular practices. It need not have been a problem in *Young* either, however, because the Court already had held that the PDA’s prohibition of pregnancy discrimination also is both non-universalistic and asymmetrical; the PDA does not protect other conditions or disabilities and it does not prohibit employers from favoring pregnancy.

The Court rendered this holding in *California Federal Savings and Loan Association v. Guerra*, a decision that could have guided the decision in *Young*, but was not part of the central analysis of any opinion in the case. *Guerra* involved a preemption challenge to a California law that required employers to provide female employees an unpaid pregnancy disability leave of up to four months, but did not require the provision of such leave to workers disabled for other reasons. The plaintiff employer argued that this California law conflicted with the federal PDA because the state law allowed employers to provide a type of preferential treatment for pregnancy that the employer construed the PDA to prohibit. The Court rejected the preemption challenge in part because it rejected the employer’s construction of the PDA to prohibit. The Court agreed “with the Court of Appeals’ conclusion that Congress intended the PDA to be a “floor beneath which pregnancy disability benefits may not drop --- not a ceiling above which they may not rise.” An employer who

54 See TAN 43.
56 Id. at 275-276.
57 The Court also stated that even if the PDA prohibited preferential treatment of pregnancy, the PDA would not preempt the California law under the narrow conflict-based preemption provision in Title VII, 42 U.S.C. § 2000e-7, because employers could comply with both the federal and state law by providing the four month disability leave for all disabilities. 479 U.S. at 290-291.
58 Id. at 275-276. For an argument that *Guerra*’s interpretation of the PDA as asymmetric should be limited to pregnancy disability cases like *Guerra* and *Young*, see Noah Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B. U. L. Rev. 1155, 1176-1177 (2015).
complied with the California law thus would not be in violation of the PDA if it did not provide comparable benefits to other disabilities.

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

Nonetheless, none of the opinions in Young used Guerra as guiding precedent to decide the case under the first clause of the PDA. Each opinion assumed, perhaps encouraged by a surprising concession from Young’s attorney, that Young would lose her case if she had only the first clause on which to rely. Each assumed that the case instead turned primarily on the meaning of a second clause that states “and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” This second clause does not modify disparate treatment principles, but simply clarifies that these principles apply in cases where pregnancy affects or is regarded as affecting the ability to work. It was in the opinions’ interpretation of this clause that all of the Justices seemed to accept a different conceptual definition of intentional discrimination than that assumed by eight Justices in Abercrombie.

Justice Breyer’s opinion for the majority in Young expressly rejects an interpretation of the second clause offered by Young that would have interpreted the PDA consistently with the interpretation that the Court in Abercrombie seemed to give to Title VII’s general disparate treatment prohibition in § 703(a)(1). Justice Breyer’s opinion rejects Young’s contention “that the second clause means that whenever “an employer accommodates only a subset of workers with disabling conditions,” a court

59 Petitioner’s Brief at 22-24.
60 42 U.S.C. § 2000e(k).
61 The clause also clarifies that the appropriate comparators for determining disparate treatment are non-pregnant persons “similar in their ability to work” – in other words, those whose similar ability or inability to work have causes other than pregnancy.
should find a Title VII violation if “pregnant workers who are similar in the ability to work” do not “receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.”

This rejected interpretation is conceptually the same as the Court’s assumption in Abercrombie about the meaning of the disparate treatment prohibition of discrimination against religious practices.

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

Justice Breyer claims that the second clause cannot grant a “most-favored-nation” status because it would mean that an employer could not grant greater accommodations to some workers because of “the nature of their jobs, the employer’s need to keep them working, their ages, or any other criteria …” If Congress intended to allow differences in treatment arising out of special duties, special service, or special needs, why would it not also have wanted courts to take account of differences arising out of special causes…?”

Justice Breyer’s claim is baffling because the answer to his question is obvious: Congress, by requiring employers to treat the pregnant as well as comparators whose work limitations had other causes, prohibited discrimination against a particular cause of an inability to work, pregnancy, and in favor of other such causes; it did not prohibit discrimination favoring those who performed particular jobs, or favoring those who are particularly valuable to an employer, or favoring those who are older. Presumably, Justice Breyer and other members of the Court would have no difficulty granting the Croatian-American “most-favored-nation” status in a case where he challenged a Serbian receiving twice the Croatian’s pay for the same work, even though the Croatian could not claim

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62 135 S. Ct. at 1349.
63 Id.
64 Id. at 1350.
65 See note 61 and TAN 60-61 supra.
discrimination if the Serbian’s better treatment was because of his “special duties, special service, or special needs.”

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

Justice Breyer’s consequent interpretation of the second clause of the PDA in order to ensure the overruling of Gilbert will be hard for lower court judges to understand. On the one hand, Justice Breyer’s opinion seems to do no more than explain how an employer’s intent to treat pregnancy worse than other similar causes of a disability could be uncovered through use of the framework first set forth by the Court for § 703(a)(1) cases in McDonnell Douglas Corp. v. Green to uncover covert discriminatory intent through proof that an ostensibly neutral reason is a pretextual cover for proscribed intentional discrimination. If this is all Justice Breyer means, however, the opinion ultimately adopts a reading of the second clause of the PDA that does not after all expand on the narrowly interpreted first clause, but rather

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67 *Id.*  
simply confirms the first clause’s directive that pregnancy be added to the five original protected status categories.

On the other hand, Justice Breyer’s opinion might be read to merge the balancing of disparate impact analysis into the \textit{McDonnell Douglas} framework to make proof of pretext easier in pregnancy discrimination cases than in other disparate treatment cases. The opinion even rejects, at least “normally,” as “legitimate, nondiscriminatory reasons,”\textsuperscript{69} the quite credible rationales of expense and convenience.\textsuperscript{70} Then, borrowing a justification-based balancing analysis from disparate impact law, the opinion states that a “plaintiff may reach a jury” on the issue of pretext “by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and the employer’s “legitimate, nondiscriminatory” reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.”\textsuperscript{71} An interpretation of the second clause of the PDA to make proof of pretext easier than in other § 703(a)(1) cases, however, has absolutely no support in the language of that clause, and is a policy-based compromise more appropriate for Congress than for the Court. As part of the compromise, it also provides an unclear direction to lower courts to treat differently, and unpredictably, pregnancy discrimination cases depending on the number of other workers accommodated and the reasons for such accommodations.

Not surprisingly, Justice Scalia has a great deal of fun in his dissent ridiculing Justice Breyer’s creative, but vulnerable opinion, especially the apparent merging of disparate impact and disparate treatment analysis. Justice Scalia is not easily fooled by sleights of hand. He fully understands that any reading of the second clause of the PDA to merge disparate impact balancing analysis into the \textit{McDonnel Douglas} framework finds no support in the language of that clause and that without such a reading, Breyer’s opinion has “just marched up and down the hill” claiming the second clause is not redundant and superfluous: “If the clause merely instructed courts to consider a policy’s effects and justifications the way it considers other circumstantial evidence of motive, it \textit{would} be superfluous. So the Court’s balancing test must mean something else. Even if the effects and justifications of policies are not enough to show intent to discriminate under

\textsuperscript{69} 575 U.S. at 1354, quoting \textit{McDonnell Douglas}, 411 U.S. at 802.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
ordinary Title VII principles, they could (Poof!) still show intent to discriminate for purpose of the pregnancy same-treatment clause. Deliciously incoherent.”

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

Having thus charred what no one argued, Justice Scalia thereby reasonably concludes that the “same-treatment,” second clause of the PDA must condemn only distinguishing “between pregnant women and others of similar ability because of pregnancy.” But Justice Scalia seems blind to what he perceived in Abercrombie, that the same because of language in § 703(a)(1) can encompass consideration of a protected status under a more general neutral policy, as well as consideration of a protected status without

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72 Id. at 1365.
73 Id. at 1361.
74 Id. at 1362
75 Id.
76 See TAN 63-66.
77 135 S.Ct. at 1362. A corporate director and a mechanic are of course not “similar in their ability to work,” regardless of the cause of either’s disability. More generally, an employer can pay a white male corporate officer better than a black female mechanic without raising any suspicion of race or sex discrimination. Justice Scalia’s pension example is equally misleading. Pension eligibility can be based on older age, but eligibility based on disability cannot disfavor pregnancy disability.
78 Id.
reference to such a policy. Thus, perhaps in part because the majority failed to advance the more expansive definition of intentional discrimination Justice Scalia later embraced in *Abercrombie*, he asserts that the only reasonable interpretation of the PDA requires a rejection of Young’s disparate treatment case.

Apart from its inconsistency with his *Abercrombie* opinion, Justice Scalia’s narrow reading of the PDA is even more troubling than Justice Breyer’s incoherent reading. This narrow reading forced Justice Scalia to interpret the Congressional intent to overturn *Gilbert* to be limited to ensuring a favorable result in the easier case the *Gilbert* dissenters described to argue their pre-PDA case for sex discrimination: where an employer “singled out” only pregnancy-related conditions for exclusion from some disability benefit. Justice Scalia thereby adopts what is in effect a “least-favored-nation” interpretation of the PDA. An employer engages in actionable pregnancy discrimination only when it treats pregnancy-related disabilities less favorably than all, or perhaps in pretext analysis almost all, other disabilities.

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

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79 *Id.* at 1364.
80 See TAN 55-58 *supra*.
81 A failure to appreciate the implications of the *Guerra* decision also led Justice Alito in his concurring opinion in *Young*, 135 S.Ct. at 1356, to adopt a forced interpretation of the second clause of the PDA. Justice Alito asserts that the clause cannot mean that pregnant women must be treated as other employees similar in their ability or inability to work because in cases like *Young* not all other such employees are treated the same; some are favored with accommodation and some are not. *Id.* at 1358. Justice Alito therefore asserts it is necessary to insert an additional two words in the clause, “similar in relation to the ability or inability to work,” and that these two words somehow justify his conclusion that the clause allows employers to discriminate against pregnant women and in favor of others “unable to work for different reasons” as long as it has some “neutral business reason for treating them differently” other than concern
It is indeed possible that the Court’s use of a different conceptual definition of disparate treatment in Young from that embraced two months later in Abercrombie derived in part from the unwillingness of a majority of the Justices to reaffirm Guerra’s interpretation of the PDA. Absent the reaffirmation of Guerra’s holding that the PDA is symmetrical, Young posed a more difficult case; if -- contrary to the Guerra decision – the PDA prohibits discrimination in favor of pregnancy symmetrically with its prohibition of discrimination against pregnancy, then granting pregnancy “most-favored-nation” status would require employers to treat all conditions equally well, regardless of cause. This is because pregnancy would have to be treated as well as a favored condition and a disfavored condition would have to be treated as well as pregnancy. This might have seemed to the Justices excessively restrictive of employer discretion because the PDA certainly does not universally prohibit discrimination between other types of disabilities, as Title VII universally prohibits all forms of race or national origin or color discrimination.

The Court easily could have avoided a more burdensome restriction on employers, however, without its inconsistent conceptual framing of the disparate treatment cause of action, by reaffirming Guerra’s holding that the PDA was intended to be asymmetrical as well as fully non-universalistic. It is hard to imagine why Congress would want employees with other conditions to have a cause of action against more favorable treatment of pregnancy when they would not have a cause of action against more favorable treatment of other conditions. Not surprisingly, there are no other

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with expense or convenience. Id. at 1359. The best characterization of Justice Alito’s reasoning requires borrowing a word from Justice Scalia: Poof!

82 Some might speculate that Justice Ginsburg in particular was not comfortable with the favoring of pregnancy after her pre-judicial career of Supreme Court advocacy against laws that stigmatized women. See, e.g., Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (holding a provision of the Social Security Act unconstitutional because it provided special benefits to widows but not widowers caring for minor children); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding unconstitutional requiring husbands of servicewomen but not wives of servicemen to present proof of financial qualifications); Ruth Bader Ginsburg, Muller v. Oregon: One Hundred Years Later, 45 Willamette L. Rev. 359, 377 (noting – without taking sides – how Guerra divided the feminist community) (2009); Deborah A. Widiss, Gilbert Redux: The Interaction of the Pregnancy Discrimination Act the American with Disabilities Act, 46 U.C. Davis L. Rev. 961, 998-1001 (recounting the opposition of some feminists to an asymmetric interpretation of the PDA).

83 Doing so, as the Court explained in Guerra, see 479 U.S. at 291, and Justice Ginsburg could have understood, would not have stigmatized women in any way. As the Guerra Court recognized, Congress intended that women, who generally face the same range of other burdens as do men, not be disadvantaged by the special burden of pregnancy. See Widiss, supra, at 995-998 (discussing legislative history).
discrimination prohibitions that share such a symmetrical and semi-universalistic nature.\textsuperscript{84}

V.

Notwithstanding the failure of any opinion in \textit{Young}\textsuperscript{85} to provide an adequate interpretation of the PDA, there remains reason for hope that the conceptual problem presented by \textit{Young} and \textit{Abercrombie}, and addressed in this essay, will be resolved by the Court in the future with a more expansive and appropriate scope for disparate treatment analysis. In the first place, \textit{Abercrombie} was decided after \textit{Young} and was a more direct interpretation of the meaning of § 703(a)(1), the provision on which the disparate treatment cause of action is based. The Justices in \textit{Abercrombie}, unlike in \textit{Young}, were not distracted by the need to interpret an ambiguous secondary clause in an amendment to Title VII or by specious arguments about most favored nations. Perhaps the very incoherence and unpredictable meaning of Justice Breyer’s majority in \textit{Young} may make it more likely that the Court will have to decide another PDA case\textsuperscript{86} in which advocates for a more expansive interpretation of the statute will get a second chance to argue for a broader definition of disparate treatment in line with the \textit{Abercrombie} Court’s treatment of the religious discrimination proscribed by Title VII.\textsuperscript{87}

\textsuperscript{84} Cf. Note 29 \textit{supra}.

\textsuperscript{85} In addition to the majority opinion, Justice Scalia’s dissent, and Justice Alito’s concurrence, the only other opinion was a short statement from Justice Kennedy. 135 S.Ct. at 1366. This statement expressed sympathy with “societal concern” “that women who are in the work force --- by choice, by financial necessity, or both --- confront a serious disadvantage after becoming pregnant,” \textit{id.} at 1367, but joined Justice Scalia’s opinion interpreting the PDA in a manner that effectively failed to address this concern.

\textsuperscript{86} Legislation was introduced in 2015 in the Senate, S.1512, 114th Cong., 1st Sess., and House, H.R. 2654, 114th Cong., 1st Sess., to require all employers covered by Title VII to make it illegal to: (1) fail to make reasonable accommodations to known limitations related to the pregnancy, childbirth, or related medical conditions of job applicants or employees, unless the accommodation would impose an undue hardship on such an entity’s business operation; (2) deny employment opportunities based on the need to make such reasonable accommodations; (3) require such job applicants or employees to accept an accommodation that they choose not to accept, if such accommodation is unnecessary to perform the job; (4) require such employees to take paid or unpaid leave if another reasonable accommodation can be provided to their known limitations; or (5) take adverse action in terms, conditions, or privileges of employment against an employee requesting or using such reasonable accommodations. The prospects for legislation of this sort are not great, however, absent a significant change in the composition of Congress.

\textsuperscript{87} Justice Breyer suggested that amendments to the ADA “made after the time of Young’s pregnancy may limit the future significance” of the Court’s interpretation of the PDA because those amendments require employers to accommodate disabilities defined by limitations on a broad set of life activities, including lifting, standing, and bending, even if the limitations are temporary, as they normally would be if caused by pregnancy. \textit{Id.} at 1348. The amended ADA, however, even if it requires reasonable work accommodations of the kind sought by Young for pregnancy-caused disabilities, may not cover all types of benefit discrimination against the pregnant, including the type addressed in \textit{Gilbert} under a disability plan that paid
It may be more likely, however, that the issue addressed in this essay will arise again under one of the other two principal federal antidiscrimination statutes, the ADA and the ADEA, both of which share with religious practice and pregnancy discrimination under Title VII, the asymmetric and non-universalistic characteristics that make defining disparate treatment most difficult. The 2008 amendments to the former statute 88 may render it especially likely to present a case where an employer discriminates against a protected group, defined by disability status, by including the protected group within a larger, neutrally defined disfavored group. The 2008 amendments (ADAAA) make this more likely because they enlarge the ADA’s class protected from employment discrimination — in contrast to those due reasonable accommodation -- to include anyone with an impairment, regardless of any limitation of a major life activity. 89 Since regulations under the ADA define impairment to include “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more body systems” or “[a]ny mental or psychological disorder,”90 an employer’s disfavoring of the overweight or the underweight or the short or the tall or the less mentally adroit or physically attractive almost certainly will discriminate against a subset of protected impaired individuals. An employer that refuses to employ the physically unattractive for certain public interface jobs, for instance, might assign anyone with a “cosmetic disfigurement” to this larger disfavored class.91 The Court then may be confronted again, perhaps more directly and with greater focus, with arguments that such discrimination should be treated as intentional discrimination under disparate treatment analysis, rather than merely as the disparate impact of a neutral policy.

89 The ADAAA effects this enlargement by defining the category of “regarded as having … an impairment” protected from discrimination as a disability to include those having “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A), as amended by ADAAA, § 4. The ADAAA, however, also clarifies that this enlargement does not extend to the definition of those due reasonable accommodation. See 42 U.S.C. § 12201(h).
90 29 C.F.R. § 1630.2(h).
91 For another example, see TAN 31-32 supra.