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Reconsidering Legal Regulation of Race, Sex, and Sexual Orientation

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RECONSIDERING LEGAL REGULATION OF RACE, SEX, AND SEXUAL ORIENTATION

Ann C. McGinley*

DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013) Pp. 216. Hardcover \$ 29.95.

JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2013). Pp. 416. Hardcover \$ 35.00.

SONU BEDI, *BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY* (2013). Pp. 289. Hardback \$ 99.00.

RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (2013). Pp. 266. Paperback \$ 32.99.

One of my most enjoyable tasks this summer was to read four books that deal in new ways with race, class, gender, sexuality, and legal regulation, and to consider if and how they relate to one another. These books are: 1) *Acting White? Rethinking Race in "Post-Racial" America* by Devon W. Carbado and Mitu Gulati,¹ published by Oxford University Press; 2) *After Civil Rights: Racial Realism in the New American Workplace* by John D. Skrentny,² published by Princeton University Press; 3) *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* by Ruthann Robson,³ published by Cambridge University Press; and 4) *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* by Sonu Bedi,⁴ published by Cambridge University Press. Legal scholars who teach in law schools authored *Acting White* and *Dressing Constitutionally*, while *After Civil Rights* and *Beyond Race, Sex, and Sexual Orientation* were written, respectively, by a scholar in sociology who teaches at a large state university and a political scientist (and lawyer) who teaches at a private university in the Northeast.

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1. DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA* (2013).

2. JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2013).

3. RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (2013).

4. SONU BEDI, *BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY* (2013).

Acting White and *After Civil Rights* focus on the realities of race in employment itself and the limits and strictures of employment discrimination law's prohibition of decision making based on race under Title VII of the Civil Rights Act of 1964. *Beyond Race, Sex, and Sexual Orientation* analyzes the problems caused by current judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution with reference to race, sex and sexual orientation. *Dressing Constitutionally* examines a broad array of criminal and civil laws in Tudor England and the U.S. as well as the U.S. Constitution to demonstrate how English and American societies use dress (and undress) to draw lines based on class and gender.

Read together, these four books tell a fascinating academic tale about the law as universally and inescapably intertwined with race, sex, sexual orientation, class and other identities, but simultaneously ineffective in protecting outsiders—those other than white heterosexual men—from harm. Although the five authors have varying views of whether the law can accomplish such protection and, if so, how it should do so, they all appear to share similar perspectives on law, politics, race, gender, and sexuality. Together, they see the world through progressive eyes, and accept the post-modern notion that identity is socially constructed. For example, race is not a skin color but much more: it consists of society's views of what it means to be black or white, Asian or Latino. Gender, too, is not biological but rather a series of learned behaviors and appearances that may or may not indicate that a person is a particular biological sex. Even sexuality, which many argue is static and immutable, is variable and changeable.⁵ In essence, all of these authors would likely agree that race, gender, and sexuality are in large part a performance rather than a status. It is important to understand this positioning in order fully to comprehend the arguments the authors make.

I. DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA

In *Acting White*, Devon Carbado and Mitu Gulati,⁶ law professors at UCLA and Duke Law Schools, respectively, posit their theory of "Working Identity," which explains the extra burdens employees of color bear in workplaces staffed predominantly by white men and women.⁷ Although all workers—both Insiders and Outsiders⁸—perform their identities to make themselves more palatable⁹ at work, workers of color must engage in

5. *Id.* at 239-41. Sonu Bedi argues that the same-sex marriage movement has an interest in demonstrating that sexuality is immutable in order to convince courts to apply strict scrutiny under the Fourteenth Amendment's Equal Protection Clause to sexuality, but he notes that this understanding privileges some types of gay lives over others. *Id.* at 241. "Rendering marriage constitutive of gay identity essentializes it, stigmatizing . . . non-heteronormative desires and behaviors." *Id.*

6. In the interest of full disclosure, I have co-authored an article with Mitu Gulati and we taught a winter session course at UNLV together. See Tracey George et. al, *The New Old Legal Realism*, 105 NW. U. L. REV. 689 (2011).

7. CARBADO & GULATI, *supra* note 1, at 1.

8. The authors use the term "Outsiders" to refer to persons other than white heterosexual men, who are in the minority as a result of their race, ethnicity, sex, gender, or sexual orientation. *Id.* at 27. They use the term "Insiders" to refer to the "norm": white men in the workplace. *Id.* Because the authors capitalize these terms as well as "Working Identity," I will follow suit throughout this review.

9. "Palatable" is a term of art used by the authors to connote that the person is more acceptable to Insiders.

significantly more performances to counter negative stereotypes and fit in at work.¹⁰ In fact, Working Identity is much more complicated than merely attempting to counter negative stereotypes. Workers of color use various methods to negotiate their identities at work, including racial comforting, strategic passing, exploiting stereotypes, providing discomfort, selling out, and buying back.¹¹

Racial comforting consists of behaviors by Outsiders designed to put Insiders at ease with the Outsiders' status.¹² For example, a Muslim may emphasize that he attended an American college, was a member of a fraternity, and played American team sports. He may also avoid associations with other Muslims, display the American flag prominently, and laugh at jokes about Muslim terrorists.¹³

Strategic passing occurs when an Outsider fools Insiders into believing that he is one of them "by affirmatively identifying or associating with institutions, cultural practices, and social activities that are stereotypically perceived to be white."¹⁴ One example of strategic passing is the black person who "express[es] an affinity for 'stuff white people like,'" including: public radio, indie music, and Whole Foods Markets.¹⁵ The problem with strategic passing is that Insiders tend to see the Outsider who strategically passes as an exception, and, therefore, the Outsider reinforces, rather than destroys, the stereotype.¹⁶ This reaction is termed "racial exceptionalism."¹⁷

Outsiders also exploit stereotypes by using them to their advantage.¹⁸ For example, a Korean American worker may exploit the stereotype of the technically savvy and hard working Asian by working harder in order to gain a promotion.¹⁹ One problem with exploiting stereotypes is that it may help the individual but harm other Korean Americans by reinforcing stereotypes in the workplace.²⁰

Providing discomfort refers to an Outsider's consistently pointing out unfairness in the workplace.²¹ While this behavior may be authentic, it may also be a performance designed to provide legitimacy to the organization by demonstrating how democratic it is.²²

Outsiders may also "sell out" and "buy back."²³ Selling out consists of affirming the view that Insiders prefer.²⁴ An example would be an Outsider who takes the position that a particular situation did not occur because of race.²⁵ Buying back is a strategy used by Outsiders who recognize that they have harmed their (Outsider) communities by using

10. *Id.* at 35.

11. *Id.* at 27-35.

12. *Id.* at 27.

13. *Id.*

14. *Id.* at 29.

15. *Id.* at 29-31 (quoting Christian Lander, *Full List of Stuff White People Like*, STUFF WHITE PEOPLE LIKE, <http://stuffwhitepeoplelike.com/full-list-of-stuff-white-people-like/>). This list of things white people like is tongue-in-cheek, but the authors note that there are stereotypes about what whites and blacks like.

16. CARBADO & GULATI, *supra* note 1, at 31.

17. *Id.*

18. *Id.* at 33.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 33-34.

23. *Id.* at 34.

24. *Id.*

25. *Id.*

racial comforting and other strategies at work. Outsiders, then, may attempt to make amends by buying back, for example, by siding with Outsider interests in a dispute between Outsiders and Insiders.²⁶ One reason Outsiders may engage in buying back is “to retain status in the Outsider community, while simultaneously maintaining a certain amount of legitimacy within the Insider institution.”²⁷

These identity performances pose significant burdens on employees of color. “Working Identity [i]s [w]ork,” after all.²⁸

As Carbado and Gulati explain, the pervasive view in our society that our workplaces and social climates should be colorblind exacts a larger toll on persons of color than on white individuals at work.²⁹ For example, a group of white employees can go out to lunch every day without anyone’s noticing, but if Latino employees go out to lunch together once a week, others will assume that they are “cliquish,” or like to stay with their own kind.³⁰ The authors note that the colorblind norm does not require whites to avoid other whites, but it does require persons of color to avoid other minorities and to spend time with whites.³¹ In this way, ironically, it operates as a “color conscious burden.”³² In institutions, then, persons of color must be more careful about their racial affiliations than white people.³³

Carbado and Gulati explain the implications of their theory: 1) people who work their identities are performing extra work; 2) it is not necessary for employees to believe that their employers are consciously racist for them to perform identities because research shows the prevalence of implicit bias as a source of discrimination and prejudice; 3) phenotype is not the only basis upon which people make racial judgments; 4) most workplaces are structured around the notion of colorblindness, and to the extent that “racial salience” threatens the colorblind norm, Outsiders have an interest in working their identities; 5) there is no claim that there is a particular way to act “white,” but there are stereotypes of what whiteness is; and 6) the model of working identity challenges the traditional concept of employment discrimination law that views discrimination as resulting from a racist employer.³⁴

Working Identity is not limited to racial identity. In chapters three and four, Carbado and Gulati discuss performance at the intersection of race and gender. Working Identity theory derives from intersectionality theory, which recognizes that particular aspects of a person’s identity cannot be disaggregated.³⁵ In other words, black women will suffer a particular discrimination based on their being black women, not separate race and/or gender discrimination. Working Identity takes intersectionality theory one step further in that

26. *Id.*

27. *Id.* The authors identify this motive as a cynical view of the reasons for the Outsider’s behavior. *Id.*

28. *Id.* at 35.

29. *Id.*

30. *Id.* at 38-39.

31. *Id.*

32. *Id.* at 39.

33. *Id.* The authors identify other costs involved with working identity: compromising one’s identity, the costs of poor performances, and backfire costs. *Id.* at 40-41.

34. *Id.* at 42-43.

35. *Id.* at 69-70.

it focuses on intra-racial and gender discrimination.³⁶ Not only are black women potentially discriminated against because of their inseparable race and gender identities, but also there is discrimination against some black women and not others because of their Working Identities.³⁷ For example, if four black women are hired in a particular year as associates in a law firm, it will be nearly impossible for a fifth black female applicant, who is not hired, to prove race and gender discrimination.³⁸ The authors posit, however, that while the first four black women likely worked their identities to conform with white norms and tastes, the fifth black woman may have suffered discrimination because she worked her identity in a different way, or because she failed to work her identity to make herself more appealing to whites.³⁹ Unlike the other black female applicants, she may have an African-sounding name like Tyisha, not straighten her hair, live in a predominantly black neighborhood, and be a single mother. Carbado and Gulati conclude that refusing to hire her because of her Working Identity may still be racial discrimination.⁴⁰ Even if one disagrees that race is a social construction and the Working Identity of the applicant in this case is “not race per se, it remains plausible that an employer could draw upon any one of those Working Identity factors, and certainly all of them together, to conclude that Tyisha is ‘more black’ or ‘too black’ as compared to the other black women.”⁴¹ Thus, Working Identity theory includes intra-race discrimination and explains why differential treatment of individuals because of their failure to work their identities in ways that are pleasing to those in power may constitute discrimination based on race.

In chapter four, Carbado and Gulati address gender performances of white women. Originally, they note, the courts did not see gender performance as relevant to discrimination based on sex, but things changed in *Price Waterhouse v. Hopkins*.⁴² Ann Hopkins sued Price Waterhouse for refusing to make her a partner because her dress and behavior were, in the partners’ eyes, unduly masculine.⁴³ The Supreme Court recognized that failing to promote a woman to partner because she is inappropriately masculine is discrimination because of sex.⁴⁴ Following *Price Waterhouse*, however, the Ninth Circuit, sitting en banc, decided *Jespersen v. Harrah’s Operating Co.*⁴⁵ Darlene Jespersen, a twenty-year veteran bartender, sued Harrah’s for sex discrimination when the employer fired her for refusing to wear makeup.⁴⁶ She alleged that the dress code, which required women, but not men, to wear makeup was facially discriminatory.⁴⁷ The Ninth Circuit, however, held that the Harrah’s appearance code did not violate Title VII because it did not impose an unequal burden on men and women; the court distinguished *Price Waterhouse* because in that case

36. *Id.* at 70.

37. *Id.* at 75-76.

38. *See id.* at 74-77.

39. *Id.* at 76.

40. *Id.* at 76-77.

41. *Id.* at 78.

42. *Id.* at 84; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

43. CARBADO & GULATI, *supra* note 1, at 84.

44. *Id.*

45. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

46. *Id.* at 1108.

47. *Id.*

there was no dress code.⁴⁸ In *Jespersen* the court stated that an appearance code that unreasonably stereotypes women would violate Title VII, but it concluded that requiring makeup does not unreasonably stereotype women.⁴⁹ Carbado and Gulati criticize this holding as unduly limiting the concept of sex stereotyping, and ignoring the history of women and makeup, which became much more prevalent as women entered the workplace, in essence, to reify gender differences.⁵⁰

At first blush, a reader might wonder why this discussion appears in a book about “acting white,” but chapter four demonstrates well how gender, race, and sexuality intersect. Darlene Jespersen is a white woman who is expected to perform her gender, race, and sexuality in a particular way. Moreover, an important question raised by Carbado and Gulati’s analysis is whether *Price Waterhouse* can be used in future race discrimination cases to argue that it is illegal discrimination to require a black employee to work her identity in accordance with “white” dress, grooming, and behavior norms. In the appearance code cases, the courts seem to recognize that we all have to work our identities (although the courts would not use this term), but apparently do not understand the disparate burden that Working Identity may impose on Outsiders. In *Jespersen*, the court justified the result because the appearance code was reasonable and not more burdensome on women than on men.⁵¹ But who decides what is reasonable? What is the norm? Will courts permit different appearance codes for persons of different races, national origins, and religions so long as the code does not impose an unequal burden on different groups (as courts do in gender cases)? All of these questions demonstrate the complexity of the regulation of what some courts see as minimally important appearance codes and the difficulty in distinguishing *Price Waterhouse* from the appearance code cases.

Legal Implications

As the authors point out, Title VII ordinarily does not prohibit performances described as “Working Identity,” nor does it prohibit employers from discriminating against employees of color because of their failure to work their identities in a way that is palatable to white employers and their customers or clients.⁵² One problem is that although the appearance codes differ from much Working Identity in that they comprise regulation imposed by the employer, much of the behavior racial minorities engage in to work their identities is not imposed by the employer.⁵³ Employees of color often “voluntarily” engage in these Working Identities as a preventive measure to assure they will be competitive in the job.⁵⁴ This does not mean, however, that the performance is optional or even conscious.⁵⁵ In fact, while many of the stereotypes that encourage these performances are conscious, others exist in the unconscious of the employer and co-workers.⁵⁶ And, even though

48. CARBADO & GULATI, *supra* note 1, at 86.

49. *Id.* at 86-87.

50. *Id.*

51. *Id.* at 86.

52. *Id.* at 42-44.

53. *Id.*

54. *Id.* at 43-44.

55. *Id.* at 42.

56. *Id.*

many workers of color engage in these performances consciously, others do so unconsciously.⁵⁷ Moreover, as the authors demonstrate, it is very risky for employees to neglect these performances.⁵⁸ Even if the law prohibited an employer's action because of the employee's failure to work his or her identity, the authors assert that it would be very difficult to prove that an employee has engaged in identity performances.⁵⁹

Acting White demonstrates the weakness of anti-discrimination law's model that focuses on the racist employer who engages in discrimination against an individual because of his or her race.⁶⁰ The authors explain that overtly racist behavior in workplaces is not the reality anymore.⁶¹ Instead, Outsiders are forced to engage in much more work than their Insider counterparts to negotiate their identities at work, but the law does not recognize this additional work at all.⁶² The scenario gets more complicated, the authors note, when we recognize the agency of the minority worker.⁶³ And, they admit, it is unclear what the law could do to remedy the issue.

Carbado and Gulati hope to begin a dialogue, and, at the very least, inform Insiders of the extra work that Outsiders need to perform. But it seems that they may be giving up too soon. Although not all Working Identity can be compensated, there are some opportunities where compensation may be had. While it is true that it would be difficult for Outsider employees to recover for engaging in additional work on their identities under Title VII, to the extent an employer refuses to hire an applicant or to promote an employee or fires an employee for failure to live up to Insider standards, Title VII may provide a remedy. Moreover, to the extent that the employer permits harassment of an employee for failing to adhere to Insider standards, Title VII may provide a remedy. Furthermore, "neutral" dress and appearance codes that have a disparate impact on employees or applicants of color may also create a cause of action for Outsiders. A good example is the proposed set of Army regulations that were to go into effect at the end of March, 2014. Known as AR 670-1, the proposed rules were suspended pending a study by Secretary of Defense Chuck Hagel because of the protest of black women.⁶⁴ The proposed rules prohibited twists, braids, cornrows, and dreadlocks. Black women argued that black hair differs from white hair and the proposed standard did not take into account how black hair grows; as a result, it creates a standard for all women based on the texture of white women's hair.⁶⁵ They further argued that the new proposed regulations intentionally targeted black women's hair, and used derogatory terms such as "unkempt" and "matted" to describe

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 42-44.

62. *Id.* at 42.

63. *Id.* at 43-44.

64. Ayana Byrd & Lori L. Tharps, *When Black Hair Is Against the Rules*, N.Y. TIMES (Apr. 30, 2014), http://www.nytimes.com/2014/05/01/opinion/when-black-hair-is-against-the-rules.html?_r=0; Helene Cooper, *Hagel Seeks Review of Military Policies on Hairstyles*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/hagel-seeks-review-of-military-policies-on-hairstyles.html>.

65. *Id.*

black women's hair.⁶⁶ Assuming the applicability of Title VII to the Army's dress regulations, if a lawsuit were brought challenging the new proposed regulations, the plaintiffs would likely have a valid disparate impact cause of action because the policy, though facially neutral, would have had a disparate effect on black women and would not survive legal scrutiny if the Army could not prove a defense.⁶⁷ The plaintiffs also may have had a valid disparate treatment cause of action if they could prove that the Army intentionally targeted black women's hair when they wrote the standards. Fortunately, the Army revised the proposed rules to eliminate reference to "matted" and "unkempt" hair and permitted braids and twists that are uniformly kept.⁶⁸

"Working identity" is not limited to workplaces. We find racial minorities working their identities in politics, and in the town square. The Prologue includes a description of Barack Obama's need to walk the fine line between not being too black (for the white voters) and not being too white (for the black voters).⁶⁹ This task constantly requires a negotiation of Obama's identity as a bi-racial candidate and President.⁷⁰ Chapter two highlights the comment Senate Leader Harry Reid made about Obama when he was first running for President: that he had a good chance of winning because of his "light skin" and because he spoke "with no Negro dialect unless he wanted to have one."⁷¹ These comments demonstrate that one must "talk white" in order to be considered a contender for national political office.

Chapter five explains that African American men must work their identities to avoid the broad assumption that they are criminals.⁷² The authors explain that black parents instruct their sons from early childhood to work their identities in a way that is not threatening to the police and that demonstrates that they are "good blacks."⁷³ This additional work is necessary because of the assumption that most black men are bad.⁷⁴ The "good blacks" are the exception. This issue was particularly highlighted by the death of Michael Brown in Ferguson, Missouri during the summer of 2014 at the hand of a white police officer. Black parents spoke to the press about the difficult conversations they engage in with their sons to protect them from Insiders who assume they are dangerous.⁷⁵

Carbado and Gulati deliver a very thought-provoking book, the strength of which

66. *Id.*

67. Under Title VII law, a plaintiff proves a disparate impact cause of action by demonstrating that a particular neutral employment practice creates a disparate impact upon a protected group. Once this proof is made, the burden of persuasion shifts to the defendant to prove that the neutral employment practice is a business necessity. If the defendant proves business necessity, the burden of persuasion shifts back to the plaintiff to prove that a less discriminatory alternative exists. If the defendant fails to prove business necessity or the plaintiff successfully proves a less discriminatory alternative, the plaintiff prevails. 42 U.S.C. § 2000e-2(k)(1)(A).

68. *Wear and Appearance of Army Uniforms and Insignia*, ARMY PUBLISHING DIRECTORATE, http://www.apd.army.mil/pdffiles/r670_1.pdf (last visited Sept. 15, 2014).

69. CARBADO & GULATI, *supra* note 1, at 10.

70. *Id.* at 10-11.

71. *Id.* at 46 (quoting Chris Cillizza, *Harry Reid Apologizes for "Light Skinned" Remark About Obama*, WASH. POST (Jan. 9, 2010), <http://voices.washingtonpost.com/thefix/senate/harry-reid-apologizes-for-light.html>).

72. CARBADO & GULATI, *supra* note 1, at 96-97.

73. *Id.* at 103.

74. *See id.* at 96-97.

75. Michael Martinez, Stephanie Elam & Erica Henry, *Within Black Families, Hard Truths Told to Sons Amid Ferguson Unrest*, CNN (Aug. 21, 2014), <http://www.cnn.com/2014/08/15/living/parenting-black-sons-ferguson-missouri/>.

lies in its theory, readability, and the excellent examples taken from pop culture and used to explain their theory of Working Identity. Throughout, they refer to Obama, Trayvon Martin, and Dave Chapelle, among others. They make good use of hypotheticals to explain their theory, and make a compelling case that Working Identity is a topic that Insiders need to understand and one that we need to figure out how to remedy. Unfortunately, the book's examples are limited to jobs of upper middle class workers and professionals. The book would have benefitted from discussion of workplaces that employ lower middle and working class individuals. I suspect there may be rich material in those sectors for the next Carbado and Gulati book. John Skrentny's book, *After Civil Rights*, which I review next, includes a valuable chapter on lower middle and working class workers.

II. JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE

John Skrentny is a professor of sociology and the director of the Center for Comparative Immigration Studies at the University of California, San Diego. He understands Title VII law very well, but has a slightly different take on the law than most law professors do. This is a good thing. Throughout his book, Skrentny references the work of scholars of law, management, sociology, anthropology, and other social sciences. The empirical, anecdotal, and theoretical research from all of these disciplines adds significant depth and richness to the book.

Skrentny's thesis is that there is a disconnect between modern employment practices that take race into account in determining qualifications for certain jobs and the law of Title VII, which forbids the use of race to make hiring and promotional decisions.⁷⁶ He argues that there is substantial bi-partisan support for the practice of considering race in hiring.⁷⁷ High-level politicians, for example, openly consult race when they appoint individuals to serve on their staffs, in the Presidential Cabinet, and even on the Supreme Court.⁷⁸ Media, journalism, entertainment, advertising, marketing, education, medicine, law enforcement, and other industries take race into account in hiring even though doing so violates Title VII.⁷⁹

Skrentny calls race-based decision-making in employment "racial realism."⁸⁰ Unlike legal affirmative action under Title VII, which permits employers to make race-based employment decisions to remedy past discrimination, racial realism is forward-looking, and justifies the use of race for a number of reasons.⁸¹ Most particularly, organizations view race as a qualification for certain positions.⁸² Race, in their view, makes the individual better able to perform the requirements of the job.⁸³ Others use race to signal to racial

76. SKRENTNY, *supra* note 2, at 18-19.

77. *See id.* at 92.

78. *Id.* at 93.

79. *Id.* at 11.

80. *Id.* at 10-11. This description is similar to the "new old legal realism" that Tracey George, Mitu Gulati, and I found when we did an empirical study of the Las Vegas casinos' reaction to the case of *Jespersen v. Harrah's Operating Co.* *See* George et. al., *supra* note 6.

81. SKRENTNY, *supra* note 2, at 10.

82. *See id.* at 11.

83. *Id.*

minorities that the organization respects their views or wishes their business.⁸⁴ Still others may use race in hiring to satisfy both goals: hiring more qualified individuals and signaling. Skrentny defines racial realism as “refer[ring] to employer perceptions that workers vary by race in their ability to do certain jobs and contribute to organizational effectiveness, and/or in the kinds of signals their racial backgrounds send to customers and citizens.”⁸⁵ When Skrentny speaks of using racial realism, he is not referring to employers who hire whites because they believe that being white is a qualification for the job or because they are trying to signal to white customers. Rather, his discussion is limited to hiring persons of color into particular jobs.

Skrentny supports his factual assertion with empirical, anecdotal, and historical evidence that a wide variety of employers take race into account in determining whom to hire and/or promote. He has separate chapters demonstrating that racial realism exists in the professions and business,⁸⁶ in politics and government (including education and policing),⁸⁷ in media and entertainment,⁸⁸ and finally, in what he calls the “low-skilled sector.”⁸⁹ He demonstrates that in each of these sectors employers use race as a qualifier and/or signal for hiring, promotion, and placement into jobs. Noting that there is no Bona Fide Occupational Qualification (“BFOQ”) defense under Title VII for racial preferences,⁹⁰ and that the only legitimate use of race under Title VII is a circumscribed affirmative action policy that is remedial in nature, temporary, and does not unnecessarily trammel the interests of whites, he makes clear that most employers’ racial realist decision making is illegal under Title VII.⁹¹ The only area where the judiciary has interpreted Title VII (and the Equal Protection Clause of the Fourteenth Amendment) to permit racial decision-making in employment, he explains, is in policing.⁹² This, however, is a very limited exception—a type of judicially created BFOQ for race.

Skrentny also examines the empirical support for employers’ beliefs that persons of color may be more qualified for certain jobs. While it is clear that the employers who engage in racial realism in employment decision-making believe that race is an important qualifier for certain jobs, Skrentny explains that the empirical support for these beliefs is mixed. He faithfully describes the studies pointing in different directions and ultimately concludes that, in most areas, there is some slight support for the employers’ beliefs.⁹³ But, clearly, the support is not as strong as employers assert. Moreover, it seems that many of these industries and jobs fall into different categories that are diversely affected by the history of slavery and racism in the U.S. For example, in education and medicine, there is support for the belief that black teachers are better for black children and that black doctors

84. *Id.* at 13-14.

85. *Id.* at xi.

86. *Id.* at 38.

87. *Id.* at 89.

88. *Id.* at 153.

89. *Id.* at 216.

90. *Id.* at 15-16.

91. *Id.* at 81-82.

92. *Id.* at 135-42.

93. *Id.* at 46-50 (medicine); 54-56 (journalism); 70-71 (marketing); 110-12 (judging); 119-20 (policing); 130-33 (teaching).

order better treatment for black patients.⁹⁴ Of course, it is difficult to separate the effects of racism on these results from the lack of training of white teachers and white doctors, but there is no doubt that an implicit bias exists, and it is not surprising that black children and patients may do better with black professionals.

In analyzing the empirical research, Skrentny gives interesting historical background. For example, he reports on the history of integrated schools in the northern part of the U.S. in the early twentieth century.⁹⁵ This is a fascinating, little-told account. In the early twentieth century, schools in the North were integrated; black children and white children regularly attended school together and were taught by white teachers.⁹⁶ Because white teachers and students often mistreated black children, black leaders such as W.E.B. DuBois aligned with black parents and argued for segregated schools for black children with black teachers.⁹⁷ Despite this history in the North, by the middle of the twentieth century, the black community shifted positions and began to argue for racial integration in the South in order to improve the condition of blacks, including black children in the schools.⁹⁸

In the marketing sector, Skrentny explains how early in the twentieth century a number of companies used black sales professionals to sell products to the black consumer market.⁹⁹ Notably, Pepsi-Cola attempted to appeal to black customers by using black salesmen exclusively to sell to blacks and by using blacks in advertisements.¹⁰⁰

Considering Skrentny and Carbado & Gulati Together

Skrentny's argument regarding the prevalence of racial realism appears to contradict the assertion Carbado and Gulati make in *Acting White* that colorblindness is a broad notion that governs in contemporary organizations. If colorblindness does exist as an operating principle in most organizations, how can these same organizations practice racial realism? At first blush, it seems that there is a conflict between Carbado and Gulati's underlying premises and those of Skrentny. But the books actually present similar views. Where Carbado and Gulati see "colorblindness" as a goal based on the false premise that America is post-racial, and that colorblindness is actually possible and beneficial to all, Skrentny indicts Title VII for turning its back on the reality that employers consult race on a daily basis to make employment decisions. Carbado and Gulati demonstrate how colorblindness may have the opposite effect of its purported goal: it can create "color conscious" behavior when applied to racial minorities in workplaces whose employees are predominantly white, while fooling white employees into believing that the workplace is race-neutral.¹⁰¹

Carbado and Gulati speak of the underlying and invisible burdens and pressures that

94. *Id.* at 47, 130-33.

95. *Id.* at 121-29.

96. *Id.* at 121.

97. *Id.* at 122-23.

98. *Id.* at 121-24.

99. *Id.* at 70-71.

100. *Id.* at 62.

101. *See* CARBADO & GULATI, *supra* note 1, at 58-62.

Outsiders bear in workplaces, while white employers and employees simultaneously congratulate themselves on reaching a colorblind workplace.¹⁰² In essence, Carbado and Gulati, while falling short of making a proposal for legal reform, argue that race does matter in workplaces as they currently operate, even though many of us do not realize it. They speak of the invisible burden of race and Outsider status in organizations, while Skrentny highlights the employers' views about the importance of race to their organizations.

These approaches may represent the opposite sides of the same coin. Skrentny presents significant empirical evidence demonstrating that there is a serious question as to whether race-based qualifications really make a difference. In other words, does a black schoolteacher understand black children and teach them better than a white teacher? Do black medical doctors do a better job referring black patients to specialists and getting treatment for their patients? Do black police officers do a better job than their white counterparts in law enforcement in black neighborhoods? Skrentny suggests that the empirical research is mixed on all of these questions. There is likely some support for the conclusion that race may be a qualifier in these positions, but it is not as strong as employers seem to believe it is.

Moreover, Skrentny recognizes that using race as a qualification has two side effects on persons of color. First, this practice actually increases the number of racial minorities hired into organizations, certainly a good thing.¹⁰³ By the same token, those hired are often pigeonholed in "minority-only" positions and have difficulty rising in the ranks of the organization.¹⁰⁴ This fact suggests a connection with Carbado and Gulati's performance theory. It may be that Outsiders who are hired because their employers see race as a qualification for the job will have to work their identities in ways that make them palatable as representatives of the minority communities. So, in addition to the burden of being forced to remain in an Outsider-oriented job, these minority employees may also bear the burden of performing their race in ways that are not natural to them.

Furthermore, Carbado and Gulati's examples pertain mostly to upper-middle class workplaces that are predominantly white. Skrentny, on the other hand, includes a chapter on the low-skills sector. This is perhaps his best chapter. It demonstrates that while racial realism may have some benefits in other sectors, use of racial realism in the low-paid market is troubling. In this market, employers prefer Latinos and Asians (and particularly immigrants) to native African American workers.¹⁰⁵ The empirical evidence he presents demonstrates that this preference is nationwide.¹⁰⁶ Skrentny gives examples of workplaces in which employers have intentionally encouraged black employees to leave by putting more pressure on them and speeding up production.¹⁰⁷ In these workplaces, the employers replace the blacks with Latinos or Asians. In jobs where Latinos predominate, employers permit the employees to speak Spanish, thus creating a wedge between Spanish-speaking and black employees. The black employees are often overwhelmed and uncomfortable

102. *See id.* Carbado and Gulati are not judgmental—this is my language.

103. SKRENTNY, *supra* note 2, at 270.

104. *Id.* at 77-78.

105. *Id.* at 219, 222-37.

106. *Id.*

107. *Id.* at 231.

because they do not speak the language.¹⁰⁸

Skrentny documents that employers see Latinos and Asians as particularly hard-working and prefer these groups because they work hard without complaining.¹⁰⁹ Employers perceive that the problem with blacks is that they know their labor rights and insist upon them. Asians and Latinos, on the other hand, are often undocumented or afraid of losing their jobs. Consequently, they can be exploited. In essence, then, employers prefer them because their condition is one that makes them exploitable. This behavior, Skrentny notes, “is often supported by local governments in rural southern areas of the country that give manufacturers major tax incentives to relocate their plants from the Midwest to their towns.”¹¹⁰ Employers’ preference for Asians and Latinos, combined with tax incentives to relocate, create an interest in hiring illegal, undocumented workers and exploiting them.

Ironically, Skrentny’s account demonstrates that Title VII has failed to recognize the “brown-collarization” of American industry as a violation of the statute.¹¹¹ Brown-collarization refers to the movement of certain plants, particularly in the meatpacking industry, from highly paid, unionized jobs occupied by whites to low-paid, dangerous, non-unionized jobs occupied by immigrants, particularly Latinos.¹¹² Skrentny discusses how the Midwestern meatpacking industry went from unionized, predominantly white employees to non-unionized, predominantly Latino employees.¹¹³ As these jobs were de-unionized and taken up by Latinos, wages dipped drastically and jobs became significantly more dangerous. The law has been ineffective in protecting both the white unionized workers and the salary scales and working conditions of the vulnerable Latino replacement workers.¹¹⁴

Moreover, Skrentny explains that there are whole pockets of industries, occupied almost exclusively by Asians, whose owners ordinarily use word-of-mouth hiring to employ.¹¹⁵ The Equal Employment Opportunity Commission (“EEOC”) has brought claims arguing that using word-of-mouth hiring has a disparate impact on black employees, but the courts have held that there was no cause of action because word-of-mouth hiring constitutes passive behavior for which the employer is not liable.¹¹⁶ In *E.E.O.C. v. Consolidated Service Systems*, for example, Judge Richard Posner, writing for a majority of a panel in the Seventh Circuit, held that a Korean immigrant employer who hired a vast majority of Koreans in his workforce did not discriminate against applicants of other races even though the employer’s expert testified that it was “natural” for a recent immigrant from Korea to hire other Koreans.¹¹⁷ While the EEOC argued that this testimony was an admission that the employer took race into account in hiring his Korean employees, Judge

108. *Id.* at 245.

109. *Id.* at 222-27.

110. *Id.*

111. See Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L. J. 961 (2006).

112. See generally *id.* (discussing issues and theories associated with the “brown-collarization” of the workforce).

113. SKRENTNY, *supra* note 2, at 232-37.

114. *Id.*

115. *Id.* at 252.

116. *E.E.O.C. v. Chi. Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991).

117. *E.E.O.C. v. Consol. Serv. Sys.*, 989 F.2d 233, 237 (7th Cir. 1993).

Posner disagreed.¹¹⁸ Most of these workplaces avoid hiring black employees. So, the law has also failed in preventing discrimination against black job applicants.

Unlike Carbado and Gulati, Skrentny offers a number of reform proposals. Given the state of Congress and the more conservative Supreme Court, some of these proposals are more practical than others. Skrentny's reforms are so plentiful that it is not possible to recount all of them here, but his book is full of interesting ideas. The legal reforms he calls for are less practical and realistic than his other ideas. For example, he argues that Title VII should be amended to permit the use of race to go beyond affirmative action.¹¹⁹ However, there is a serious question, at least in the public sector, as to whether this amendment would be constitutional under the Equal Protection Clause. His most interesting ideas are to use public relations campaigns to demonstrate that employers who relocate are harming employees.

He encourages the country to debate racial realism and consider the following reform principles: 1) to keep jobs open to all even though there is some racial realism in hiring—to not exclude anyone because of race; 2) in the high skilled sector, to permit racial realism as well as affirmative action, but to go beyond remedying past discrimination; and 3) to reform Title VII explicitly to allow voluntary racial realism as an update to voluntary affirmative action rules in existence.¹²⁰ Skrentny argues that the law should explicitly give employers more freedom to use race in hiring. There are serious questions as to whether such a law would be constitutional, but Skrentny argues that conservative judges would approve of this proposal because it would give employers more freedom to run their businesses as they see fit.¹²¹

Reading *Acting White* and *After Civil Rights* together raises some interesting questions. Skrentny seeks to expose the fallacy of the colorblind approach in U.S. workplaces and would permit employers to consider race in certain jobs as qualifications and/or as signaling. Carbado and Gulati would likely agree that colorblindness as a goal is not a good idea because, even if employers are unaware of color conscious behavior, employees of color must be color conscious in order to appear colorblind. Skrentny's solution, however, might actually exacerbate the problems raised by Carbado and Gulati. It may be that if employers are given leeway to consider race of minority candidates when determining whether a person is qualified for a job or an important symbol to potential consumers, they may engage in exactly the type of discrimination Carbado and Gulati discuss. Employers may decide to hire only those employees of color who are willing to perform their racial identities in a manner consistent with the employer's perceived goals. Thus, it may be that Skrentny's approach would encourage the type of intra-racial discrimination that Carbado and Gulati identify. On the other hand, an open debate in society that leads to legal reform giving employers the option to choose employees of color over white employees may open up employment to persons who perform their racial identities in more authentic fashions. Given the rapid shift in society concerning the rights of gays and transgender individuals and their acceptance by younger people, perhaps an open dialogue would reveal to employers that young people may be much more open to a variety of racial, gender, and sexual

118. *Id.*

119. SKRENTNY, *supra* note 2, at 33.

120. *Id.* at 37.

121. *Id.* at 83.

identities at work.

Skrentny has authored a fascinating book that is filled with law, information about how employers operate notwithstanding the law, and empirical evidence that supports and, at times, contradicts some employers' beliefs about the usefulness of employing race as a qualifier for jobs. This empirical research should be useful to lawyers who litigate these cases using Title VII. And Skrentny comes up with a cross-disciplinary approach to solving problems. Not all of his solutions are politically or constitutionally possible, but the legislative solutions he suggests are interesting and innovative, and, perhaps in the future, may be effective.

III. SONU BEDI, BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY

Unlike the previous two books, which focused almost entirely on Title VII, Professor Bedi, a political theorist at Dartmouth College, suggests a new interpretation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Bedi argues that the Supreme Court's jurisprudence, which relies on three tiers of scrutiny, is not only ineffective in protecting racial and sexual minorities, but is also harmful. While the current approach to the Equal Protection Clause concludes that states may not discriminate on account of certain protected characteristics such as race, national origin or sex, unless there is a compelling governmental interest, Bedi's approach argues that the Equal Protection Clause limits the states' power to act for certain reasons.¹²² He argues "that if a law is based on animus or a certain conception of the good life, the state exceeds its power in enacting it."¹²³

Bedi proposes looking at the motive behind the challenged legislation to determine whether it should withstand constitutional scrutiny.¹²⁴ Thus, he would jettison the three-tiered approach and apply the same analysis to all classifications. Under the "powers review" that he suggests, the law will violate the Equal Protection Clause if it is based on animus, hostility,¹²⁵ or a conception of the good life.¹²⁶ This proposal—to consider the legitimacy of the purpose behind the law—Bedi argues, would be beneficial because a "powers review" does not require the identification of suspect classes.¹²⁷ Consequently, "it avoids placing the Court in a position of determining which groups are constitutionally 'in' and which are 'out.'"¹²⁸ In fact, it does not matter which group is affected by the law; if the law is passed for illegitimate reasons, it goes beyond the power of the State to enact it.¹²⁹ When using the current tiered approach, the Court, he argues, is perceived as political, and the current test has little substance to help judges make decisions. By removing the Court from this position, the "powers review" increases the legitimacy of the Court

122. BEDI, *supra* note 4, at 15.

123. *Id.* at 16.

124. *Id.* at 17.

125. *Id.*

126. *Id.* at 16.

127. *Id.*

128. *Id.*

129. *Id.*

and moves away from charges of judicial activism.¹³⁰

Second, Bedi argues that a “powers review” is preferable because it “mitigate[s] the sting of the counter-majoritarian difficulty because the Court [does] not invalidat[e] [a] law on behalf of a particular identity group,” but does so on behalf of the public itself.¹³¹ Third, he argues that if the Court focuses on invalidating laws because of their hostile purpose, strict scrutiny is not necessary.¹³² Bedi claims that a focus on the motive or purpose behind the legislation will make obvious the distinction between benign legislation such as affirmative action and legislation animated by hostility such as Jim Crow laws.¹³³ The courts, he believes, will have little trouble seeing the difference if they focus on the purpose or intent behind the bill.¹³⁴ Fourth, Bedi argues that the “powers review” resists the subjective nature of the “compelling purpose” and “narrowly tailored” tests currently in use.¹³⁵ These tests, he claims, invite judges to make decisions based on their own ideology.¹³⁶

It is important to understand that Bedi’s approach is not to return to the original intent of the legislature when passing the law. Instead, he considers the motive that led to the passage of the Act to see if it is unacceptable. In doing so, one does not ordinarily look at what the legislators said as they passed the law, but at the law itself. If the statute demonstrates animus or hostility toward a particular group or embodies a moral or religious conception of the “good life,” the state, he argues, has no power to enact it, and it must be struck down.¹³⁷

Bedi notes that the current tiered approach requires particular identity groups to prove that they are a “discrete and insular minority” with little political power, which requires the group to appeal to the Court to act as the group’s protector.¹³⁸ This sets up a response from majority groups claiming that *they* are the victims of court actions that are meant to protect minority groups.¹³⁹ This “special rights” argument by the majority creates a counter-majoritarian difficulty, making the Court appear an anti-democratic institution that selects among groups’ rights.¹⁴⁰ It is preferable, he argues, to conceive of the Equal Protection Clause as a limit on state power to enact any legislation that violates the State’s purpose for law.¹⁴¹

Bedi does not create his argument out of whole cloth. He carefully looks at the history of the interpretation of the Equal Protection Clause to demonstrate that under a number of circumstances, the Court has engaged in the analysis that Bedi prefers. In essence, his “powers review” forecloses any use for an identity analysis. For example, he discusses

130. *See generally id.*

131. *Id.* at 16-17.

132. *Id.* at 17.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 72.

138. *Id.* at 60-62.

139. *Id.* at 63.

140. *Id.* at 61-62.

141. *Id.* at 19-20.

recent cases such as *Romer v. Evans*¹⁴² and *Lawrence v. Texas*¹⁴³ to prove his point. In both of these cases, the individuals challenging the law were gay men who are not yet considered members of a suspect class by the Court. Nonetheless, the Court struck down legislation that arbitrarily limited their freedom without analyzing whether homosexuals should be a protected class. In *Romer*, the Court struck down an amendment to the Colorado State Constitution that forbade localities from passing legislation that made discrimination against homosexuals illegal.¹⁴⁴ The Court did not declare homosexuals to be members of a protected class that deserves strict scrutiny.¹⁴⁵ Instead, it concluded that the only reason for such legislation is animosity toward gays and lesbians, and that a “bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government[] interest.”¹⁴⁶ In *Lawrence*, the Supreme Court struck down a state law criminalizing gay sex and invoked the individuals’ right to privacy.¹⁴⁷ As Bedi points out, however, the Court noted that moral reasons alone are constitutionally insufficient to support lawmaking under a rational review standard.¹⁴⁸ Moreover, the Court stated that the mere fact that a majority in a state has traditionally viewed particular behavior immoral is not sufficient to uphold a law.¹⁴⁹

Bedi analogizes this reasoning to the interpretation of the Establishment Clause, which prohibits government from favoring a certain religion or from favoring a religious life over a non-religious one.¹⁵⁰ Bedi also explains that the Court’s analysis in *Romer* is similar to that in *Yick Wo v. Hopkins*,¹⁵¹ which was decided by the Court in 1886. In *Yick Wo*, the Court concluded that San Francisco violated the Equal Protection clause when it granted licenses to run laundries to white-owned businesses but not to those owned by Chinese immigrants.¹⁵² The Court did not use a strict scrutiny or racial classification analysis. Rather, as Bedi points out, the Court considered the purpose behind the regulation, which could be nothing other than hostility, and struck it down.¹⁵³ Thus, Bedi demonstrates that there is a line of cases going back more than a century that uses the analysis he proposes.

Bedi also emphasizes that the State cannot justify its legislation by presenting a false purpose or motive in bad faith.¹⁵⁴ He states that a “powers review” requires the Court to analyze the law’s actual purpose.¹⁵⁵ As Bedi puts it, “a conceivable purpose is constitutionally inadmissible.”¹⁵⁶ Thus, a “plausible” purpose would not support the legislation.¹⁵⁷

142. *Romer v. Evans*, 517 U.S. 620 (1996).

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

144. BEDI, *supra* note 4, at 63; *see Romer*, 517 U.S. at 623.

145. *See Romer*, 517 U.S. at 620.

146. BEDI, *supra* note 4, at 88 (quoting *Romer*, 517 U.S. at 634).

147. *Lawrence*, 539 U.S. at 578.

148. BEDI, *supra* note 4, at 76.

149. *Id.* at 7.

150. *Id.*

151. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

152. *Id.* at 374.

153. BEDI, *supra* note 4, at 87-88.

154. *Id.* at 97.

155. *Id.*

156. *Id.*

157. *Id.*

This appears to be one weakness of Bedi's approach, but perhaps it can be resolved through judicial factfinding at the district court level. It seems that in order to find out what a particular piece of legislation's actual purpose is (rather than that it is supported by a plausible purpose), there should be factfinding at the trial court level on which the court of appeals and the Supreme Court can rely. If not, there is some question about how the appellate courts can find the purpose. Bedi does not seem to contemplate this problem. Instead, he appears to argue that the motives supporting a statute enacted due to hostility or a particular conception of the good life will be obvious to the Court.¹⁵⁸ While it seems obvious to the modern mind that Jim Crow laws are based in hostility, there may remain a question about other laws the Court would confront.¹⁵⁹ As will be discussed later, Bedi seems to conclude that if there is no reasonable purpose, the motive is hostile and the defense of the law occurs in bad faith.¹⁶⁰

In Part II, Bedi argues that strict scrutiny is not necessary to strike down racist classifications, and the standard "even perversely affirms the very racist beliefs [the Court] seeks to counter."¹⁶¹ Bedi believes that because the Court strictly scrutinizes a racial classification, it implies that racial classifications have justifications at least in some instances.¹⁶² This dangerous assumption underlies the strict scrutiny test—that racism or racist beliefs may be rational. Bedi defines racism not as an unconscious or implicit bias but as a dislike or hostility toward a racial group.¹⁶³ For example, he states that the belief that one race is superior to another is a racist belief.¹⁶⁴ However, he notes that when the Court scrutinizes racist laws more carefully, "[i]t suggests that racist laws and policies are based on something other than animus or mere prejudice."¹⁶⁵ Moreover, he argues that affirmative action advocates place themselves in an unnecessary bind. By agreeing to the strict scrutiny test that is unnecessary for racist laws, they then have to deal with the use of strict scrutiny to examine remedial affirmative action laws and policies.¹⁶⁶

Bedi criticizes the Court's current affirmative action doctrine, which treats affirmative action legislation and policies the same as laws with a racist intent.¹⁶⁷ Bedi criticizes the Court's formal equality approach to race-based laws and policies.¹⁶⁸ He differs, however, from the anti-subordination scholars who believe that courts should grant more leeway to the use of race to accomplish affirmative action.¹⁶⁹ These scholars, Bedi argues, make a dangerous concession by acknowledging the acceptability of the strict scrutiny test for racist legislation that does not have an affirmative action purpose.¹⁷⁰ Bedi claims that anti-subordination scholars make a mistake because under his theory of looking at motive

158. *See id.* at 99.

159. *Id.* at 113.

160. *Id.* at 99.

161. *Id.* at 121.

162. *Id.* at 123-24.

163. *Id.* at 123.

164. *Id.*

165. *Id.*

166. *Id.* at 124.

167. *Id.* at 125.

168. *Id.* at 130.

169. *Id.* at 125-26.

170. *Id.* at 131.

of the law, it would not be difficult for the Court to distinguish racist laws from well-intentioned ones, and it would be unnecessary to become bogged down in a discussion of race as a protected class.¹⁷¹

In Part III, Bedi argues that intermediate scrutiny that is applied to sex discrimination cases is based on the belief that men and women are different.¹⁷² He refutes this notion and adopts a post-modern perspective, which sees gender as socially constructed rather than a result of biology. He argues that we should question the constitutionality of sex-segregation and male-only military conscription because such legislation is based on an “idea that males must act or be a certain way (aggressive or warlike) and females must act or be another way (passive or sheltered).”¹⁷³

Part III is perhaps the most interesting section of the book in that Bedi confronts the criticism that his argument would lead to court approval of polygamous and incestuous marriages. Bedi concludes that once the courts approve of gay marriage, there is a slippery slope.¹⁷⁴ Here, he agrees with the harshest critics of same-sex marriage in that once same-sex marriage is state-sanctioned, it will be unreasonable for the state to draw a line between same-sex marriage and polygamous or incestuous marriages among adults.¹⁷⁵ He admits that his argument should lead to the disestablishment of marriage as a state-sanctioned relationship because marriage is based on the conception of what the good life is.¹⁷⁶ To the extent this is true, following his argument in previous chapters, Bedi opines that the state should not be in the business of marriage at all.

Bedi’s analysis of “purpose” or “motive” behind the law becomes much clearer in this section. He engages in a type of reasoning that appears to require 100 percent congruity between the law’s stated purpose and its effect. To the extent that there is not 100 percent congruity, he concludes that the law is based in animus and hostility and that the state’s defense of the law is in bad faith.¹⁷⁷ For example, when he discusses laws against plural marriage, he says there are two primary justifications for such laws: to prevent harm to women and children and to ensure that wealthy men do not monopolize women in the community.¹⁷⁸ Noting that these concerns do not apply to all plural marriages—e.g., plural marriages of three gay men—a “powers review” would invalidate at least some of the limitations on these types of marriages. He argues that, in fact, the justification for the law against plural marriage is really an after-the-fact justification.¹⁷⁹ The constitutional question should be the *actual* reason for the law. Because there is a categorical ban of all types of plural marriage, he concludes that the actual reason for the ban is an illegitimate one—it is not to protect women, children, or the community.¹⁸⁰ Banning all plural marriages does not accomplish these goals. Therefore, he concludes that the law is based on nothing

171. *Id.* at 143.

172. *Id.* at 178.

173. *Id.* at 177.

174. *Id.* at 211.

175. *Id.* at 209.

176. *Id.* at 209-10.

177. *Id.* at 221.

178. *Id.* at 222-23.

179. *Id.* at 223.

180. *Id.* at 222.

other than moral considerations—a motive that is illegitimate.¹⁸¹ If the law values a certain way of life over another, a state does not have the power to enact it.¹⁸² This type of reasoning seems to require all laws to be super-efficient or judged as unconstitutional. In other words, if the justification for the law does not work in every possible application, the justification is inadequate. But, even if there is not a 100 percent correlation between the goal and the effect of a law, does this mean that legislators are not honestly engaged in trying to protect women and children when they vote against plural marriage? And, is a law necessarily illegitimate if it reaches situations that do not create the problems that may have been contemplated by legislators?

Despite these open questions, Professor Bedi has written an impressive account of a new theory for interpreting the equal protection clause. His is a clear proposal for a new vision of how to interpret the law. His vision differs from that of Carbado and Gulati and Skrentny because he eschews the use of race, sex, or sexual orientation to interpret the law. (Of course, he is interpreting the Constitution, whereas they are interpreting Title VII, which refers to race and sex explicitly). But he is not advocating a false colorblindness that they criticize. They seek a dialogue about how to reform the law or to reinterpret it, as he does, but their reforms would likely require more discussion of race and sex (and sexual orientation), whereas Bedi seeks to avoid the problems that arise from a race- or sex-based approach. His book is well-written and organized and a very interesting read, and it may present a viable means of re-interpreting the Fourteenth Amendment.

IV. RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES

Ruthann Robson, a professor at CUNY Law School, has authored a fascinating book that demonstrates her breadth of knowledge when it comes to constitutional and Title VII law, as well as the history of the law seen through the lens of dress and other apparel. This book differs from the others reviewed here most starkly because its purpose is not to suggest law reform, although it certainly raises many areas in which the law should be reformed. *Dressing Constitutionally* is an intellectual feast supported by fastidious research on a broad range of issues grouped together under the concept of dress. But this does not mean there is no thesis. There is. Robson demonstrates how the laws regulating dress and undress define and regulate hierarchy and class and reinforce society's strict gender norms.

The author engages in substantial legal analysis concerning governmental and private dress and appearance regulation. Her analysis crosses many legal disciplines and demonstrates that dress regulation often is used to create and maintain hierarchies, to establish conformity, to reduce friction, and to deny religious rights. For example, the book demonstrates that when the regulation deals with employers and employees, the employer usually wins, and despite the individual's First Amendment right to freedom of expression, public schools have fairly wide leeway to regulate how students and teachers appear.

The book's scope is broad temporally and substantively. It ranges from a discussion of appearance regulation in Tudor England, to dress regulation in the Colonial era, to contemporary dress and appearance regulation in U.S. workplaces and prisons. Among many

181. *Id.* at 224.

182. *Id.*

other topics, Robson discusses First Amendment expressive speech, Equal Protection Clause interests in classifications based on sex/gender and race, laws criminalizing indecent exposure, Eighth Amendment proscriptions relating to dress in criminal and prison contexts, and how free trade agreements enable the rise of sweatshops overseas and undermine American workers in the U.S.

The book is divided into seven chapters: 1) Dressing Historically; 2) Dressing Barely; 3) Dressing Sexily; 4) Dressing Professionally; 5) Dressing Disruptively; 6) Dressing Religiously; and 7) Dressing Economically. Each one of these chapters contains sufficient material for a lengthy discussion that would far exceed the word count of this review, but Robson demonstrates throughout the book that whether we are dressing “barely,” “sexily,” “professionally,” “disruptively,” or “religiously,” the government and the Constitution have a good deal to say about our ability to dress (or undress) in ways we desire.

In “Dressing Historically,” Robson discusses the dress code laws in Tudor England that were used to maintain hierarchy. At first, the purpose of these laws was to distinguish the Irish and the Scots from the English. Later, the dress and appearance laws required the Irish and the Scots to assimilate.¹⁸³ Colonists in America regulated dress and appearance in a way that emphasized their concerns about hierarchy, sexuality, and democracy.¹⁸⁴ Persons were marked as criminals or moral deviants by enforcement of dress requirements. Moreover, the colonies rebelled against England in large part because of a dispute over wool. As England suffered economically, the colonial towns dedicated their commons to sheep grazing to produce wool to be shipped to England. In return, England would turn the raw wool into woolen fabrics that the colonies imported from England. The British imposed taxes on the imports through a number of acts that the colonists resented.¹⁸⁵

“Dressing Barely” discusses the law regarding dress and undress—constitutional doctrine regarding strip searches—and laws that prohibit obscenity and public nudity. In both cases, Robson demonstrates that the laws were written and enforced more harshly against less powerful groups. Strip searches raise a number of constitutional questions. Courts look to whether there is at least a reasonable suspicion that there might be evidence of a crime hidden on the person’s body.¹⁸⁶ Courts will also look to whether the search is done in an “abusive fashion.”¹⁸⁷ Robson describes the physical violence involved in a search. For example, in *Evans v. Stephens*, police forced plaintiffs to disrobe, inserted an unsanitized baton into the plaintiffs’ anuses, and used the same club to lift the plaintiffs’ testicles.¹⁸⁸ This behavior was punctuated with racial slurs and threats. The court found that given the totality of circumstances—physical force, anal penetration, unsanitariness, racist language, and lack of privacy—the plaintiffs established a constitutional violation, especially given that there were no exigent circumstances.¹⁸⁹

On the other hand, in *Florence v. Board of Chosen Freeholders*, the Supreme Court upheld the strip search of a man accused of a minor crime and placed into the general

183. ROBSON, *supra* note 3, at 18.

184. *Id.* at 20.

185. *Id.* at 28-31.

186. *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc).

187. ROBSON, *supra* note 3, at 35.

188. *Id.*

189. *Id.*

prison population because of the concern that even those accused of minor offenses may smuggle contraband into the prison.¹⁹⁰ Albert Florence was a finance executive for a car dealership who described his search in graphic terms. As he was naked in front of guards, they told him to “spread your cheeks.” A big man, Florence found the experience humiliating. “It made me feel less than a man. It made me feel not better than an animal.”¹⁹¹ The strip searches of Florence and Evans are reminiscent of sexual harassment and assault of men and boys in workplaces and schools performed by groups of their male cohorts. Masculinities research demonstrates that men prove their masculinity to other men at work and school by participating in group harassment of less powerful men.¹⁹² The purpose is to reinforce the masculinity of the individual members and to preserve the masculinity of the job or program, and of the group. The courts, however, often describe this behavior as “roughhousing” or “hazing” without recognizing that it is gendered.¹⁹³ *Florence* and the cases in workplaces and schools permit the use of strip searches and “roughhousing” to reinforce the gendered expectations of men in society, at work, and at school. But courts ignore that the male group members who engage in strip searches and sexual assaults engage in this behavior as a performance of their masculinity.

Robson points out that *Florence* may leave men in a more vulnerable position than women when it comes to strip searches.¹⁹⁴ In *Safford Unified School District No. 1 v. Redding*,¹⁹⁵ the Court invalidated the strip search of a young girl in school who authorities believed had prescription painkillers in her underwear. The Court took into account the sex and age of the victim in determining that the search was unlawful.¹⁹⁶

Robson notes that strip searches occur to look for weapons, but also for less justifiable reasons such as a desire to humiliate a prisoner, as an interrogation technique (combined with the imposition of pieces of clothing, such as women’s underwear on men), and discipline.¹⁹⁷

In an interesting switch, Robson also discusses the laws against public nudity and how they attempt to regulate sexuality, particularly female sexuality and homosexuality. She demonstrates that these laws have historically made pariahs of women who are considered to be homosexuals or excessively sexual.¹⁹⁸ This chapter also discusses legal regulation of nudity, pornography, and obscenity, and demonstrates the doctrinal inconsistency in this area. For example, Robson argues that the “secondary effects” (such as increased crime) justification for banning nude dancing is not clearly supported by empirical evidence showing a link between nudity and secondary effects.¹⁹⁹ She concludes that the law on nude dancing is logically inconsistent and based on class hierarchy. Moreover, she explains that there is no equality in the regulation of men and women, and that the

190. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

191. ROBSON, *supra* note 3, at 36.

192. See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1192 (2008).

193. *Id.* at 1227-30.

194. ROBSON, *supra* note 3, at 36.

195. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2010).

196. ROBSON, *supra* note 3, at 38.

197. *Id.* at 41.

198. *Id.* at 45.

199. *Id.* at 52-53.

failure to treat men and women equally tends to maintain sexual hierarchies.²⁰⁰

“Dressing Sexily” analyzes government regulation of male and female dress as a means of enforcing gender norms—that men and women are biologically different and that these differences must be reinforced. Judges have upheld city ordinances that forbid men or women from cross-dressing in public. Even recently, the courts have upheld the criminalization of cross-dressing but have refused to apply these laws to persons who are transgender or are in the process of transitioning to the opposite sex. As Robson points out, the courts’ response to laws criminalizing cross-dressing differentiates between those who “innocently” cross-dress (because of their “illness”) and those deviants who do not; however, the latter group is deviant only because of society’s rigid enforcement of a gender order.²⁰¹

In “Dressing Professionally,” Robson attacks the world of private employment and the courts’ willingness to interpret Title VII to permit different dress regulations for men and women, so long as there is no undue burden on either group. This approach clearly contradicts the language of Title VII, which prohibits discrimination because of sex, but reinforces gender norms accepted in society. Unfortunately, however, people like Darlene Jespersen,²⁰² who, as mentioned earlier, lost her job after 20 years as a bartender because of her failure to wear make-up, are punished for their inability to comply with gender norms even though the law appears to protect discrimination based on sex.

“Dressing Disruptively” discusses the use of dress to express one’s protest or rebellion and the protection, or lack thereof, of the First Amendment to do so. Robson discusses the early cases where students in schools wore armbands to protest the Vietnam War,²⁰³ and moves to what is perhaps the most interesting part of the chapter—the discussion of laws in municipalities banning “saggy pants.”²⁰⁴ These bans on saggy pants in both schools and municipalities have led to challenges arguing that the wearing of sagging pants is protected by the First Amendment freedom of expression clause.²⁰⁵ But, the courts have concluded that in order to challenge the saggy pants bans, the plaintiffs must show a specific expression that the wearer intended to convey.²⁰⁶ The problem is that as saggy pants become more popular, the courts are less likely to recognize First Amendment protection because the message becomes less apparent to those who view the pants as a fashion trend.²⁰⁷ A problem, of course, is that saggy pants are associated with young black boys, and even if they are not prohibited by school rules or municipal codes, police use saggy pants as part of an articulable suspicion of criminal activity when stopping and frisking black male teenagers. As Robson explains, “the constitutional concern is that saggy pants can operate as a proxy for race, as well as youth, and allow for ‘racial profiling’ without

200. *Id.* at 59.

201. *Id.* at 60-63.

202. *See Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (holding that Harrah’s did not violate Title VII when it fired Jespersen for failing to wear makeup even though men in her job were not required to wear makeup).

203. *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969).

204. ROBSON, *supra* note 3, at 103.

205. *Id.* at 121.

206. *Id.*

207. *Id.*

the explicit use of race.”²⁰⁸ I would add that it is not only a proxy for race and youth, but also is gendered because it is black *boys* who wear saggy pants and who the police stop, not black *girls*.

In “Dressing Religiously,” the book examines religious garb and its relationship to the Constitution. Robson explains that while restrictions on religious garb and grooming most often raise questions about the Free Exercise Clause of the First Amendment, issues also arise concerning the Establishment Clause. She concludes that religion has favored status in U.S. constitutional law, but argues that this conclusion is not supported by the text of the Constitution.²⁰⁹ In essence, she agrees with Justice Stevens that government preference for religion, as opposed to a lack of religion, is forbidden by the First Amendment.²¹⁰

This chapter examines a variety of cases—from a serviceman seeking to wear a yarmulke with his military garb, to Muslim women who challenged driver’s license rules requiring that a woman expose her face for the photograph, to employees who wish to wear various types or relics of religious garb, to prisoner cases involving various clothing and hair requirements.²¹¹ Robson concludes that generally religion trumps a lack of religion in constitutional law, but that Muslims fare worse in the prison system than members of other religions and that employers tend to trump all religions when their regulation of dress and appearance has an effect on religion.²¹² Clearly, this chapter demonstrates the varying hierarchies present in constitutional law and how such law addresses issues concerning religious claims.

Finally, in “Dressing Economically,” Robson examines the production of clothing and the constitutional issues surrounding the labor used to produce clothing. She discusses the relationship between slavery and the production of cotton, the Lochner era struggles in clothing manufacturers and textile mills, and the more recent movement of clothing production to sweatshops in third world countries.²¹³ She explains the influence of free trade agreements in destroying clothing manufacturing in the U.S. and in permitting the rise of sweatshops in third world countries.²¹⁴ Robson examines local and state laws that have procurement rules concerning fair working conditions, but, using the example of New York, she demonstrates that the courts have found that the most restrictive local laws are preempted by state law. She argues that federal courts would likely find that the state law is preempted by the federal law that is much less protective.²¹⁵

As is obvious from this short description, Robson’s book is a comprehensive examination of the various constitutional and legal issues surrounding the production of clothing and the regulation of dress by public and private entities. Her book demonstrates that the law surrounding the production of clothing and appearance regulation establishes hierarchies in gender, race, and class in the U.S. and abroad.

208. *Id.*

209. *Id.* at 129-30.

210. *Id.* at 130.

211. *Id.* at 149-50.

212. *See id.* at 151.

213. *Id.* at 153.

214. *Id.* at 171.

215. *Id.* at 178-79.

Applying Bedi's Approach

An interesting test of Bedi's proposal may apply to Robson's example of equal protection challenges to sex-based dress codes in public places, workplaces, and schools. These codes distinguish between dress and appearances permitted for males and females; some municipalities prohibit cross-dressing in public.²¹⁶ As Robson notes, the courts tend to ignore that these regulations are openly discriminatory based on sex.²¹⁷ Title VII jurisprudence has added a judicially-created exception to the law that permits differential dress codes so long as they do not impose an unequal burden on one group or another.²¹⁸ But even though there might not be an unequal burden on a particular *group*—men or women—there may be a serious burden placed on the *individual* who does not conform to the society's binary view of gender and sex.²¹⁹ Even the best of these regulations ordinarily requires a transgender individual to dress according to the rules for the sex to which he or she is transitioning, thereby assuming erroneously that all persons are either male or female or engaged in a transition to maleness or femaleness.²²⁰ Under the Equal Protection Clause, courts have upheld dress codes that distinguish between male and female dress.²²¹

Would Bedi's approach remediate these problems in public institutions whose regulations are challenged under the Equal Protection Clause? Rather than arguing that men or women are at a disadvantage, Bedi would claim that the government does not have the power to enforce the regulation because it is motivated by improper considerations—animus and/or a certain conception of the good life.²²² The government, he would argue, has no power to regulate citizen behavior and dress based on these motivations.²²³ This argument has some benefits over the typical equal protection argument that would need to convince a judge that a particular “female” or “male” dress code creates unequal treatment. Instead, it avoids the question of the comparison of the codes—the concept of unequal burdens. It focuses instead on the reason for creating the differentiation. Based on Robson's observation that courts are often blind to gender-based arguments in this area because their view of gender is so entrenched,²²⁴ Bedi's argument could go either way. Courts could quickly reject Bedi's argument based on common sense notions that there are biological differences between men and women that drive the differential dress codes. But with proper expert testimony, and access to Robson's and Bedi's books, a court might recognize that gender-based dress codes are as arbitrary as the Colorado constitutional amendment struck down by the Supreme Court in *Romer v. Evans*, which forbade localities from passing legislation that made discrimination against homosexuals illegal.²²⁵ Robson's book demonstrates the importance of dress code regulation, which has often been underestimated by courts, while Bedi's book provides a mode of analysis that should lead courts to strike these regulations down as violative of the Equal Protection Clause.

216. *See id.* at 60-64.

217. *See id.* at 60.

218. *Id.* at 150.

219. *See id.* at 62.

220. *See id.*

221. *Id.* at 67-68.

222. BEDI, *supra* note 4, at 16.

223. *Id.*

224. ROBSON, *supra* note 3, at 73.

225. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

V. CONCLUSION

All four of these books deal with the importance of legal regulation and interpretation in shaping and/or reinforcing society's views concerning hierarchy, especially with reference to race, gender, class, and sexuality. *Acting White* demonstrates that despite Title VII law, individuals of color must engage in identity performances that are palatable to whites to compete in workplaces and other arenas. *After Civil Rights* describes a new legal realism that demonstrates that law and legal interpretation may have little effect on the actual behavior of employers' hiring and promotion practices. *Beyond Race, Sex, and Sexual Orientation* argues that we should avoid class based analysis by making equal protection claims that challenge the motivations behind the regulation in question and arguing that the government has no power to enact the regulation. *Dressing Constitutionally* demonstrates that legal interpretation and enforcement of dress codes is very much intertwined with concepts of hierarchy, class, and gender. Each of these books articulates an important theory of race, gender, and/or sexuality and law while suggesting reform. As a group, these books contribute to the literature in important ways. They provide new theory about how the law should treat race, class, gender, and sexuality, and an abundance of empirical data and doctrinal analysis that should assist practicing lawyers, policy experts, judges, and academics to further understand how law has the capacity to either protect Outsiders or to impose significant burdens on them.