

THE SHORTCOMINGS OF TITLE VII FOR THE BLACK FEMALE PLAINTIFF

YVETTE N. A. PAPPOE*

Various United States courts, including the Supreme Court, have decided numerous workplace discrimination cases in the past four decades. Kimberlé Crenshaw introduced and coined the term “intersectionality” 25 years after Congress enacted Title VII. The formal recognition of intersectionality opened the gate for several legal scholars to criticize Title VII jurisprudence related to plaintiffs who bring multidimensional claims—usually women of color plaintiffs—arguing, for example, that “complex discrimination” claimants face both structural and ideological barriers to redress and thus fare even worse when compared to other employment discrimination plaintiffs.

I argue that Black women bear the brunt of these structural barriers to recovery in the current Title VII legal landscape and offer suggestions. This Article examines the way in which the current framework courts employ in individual employment discrimination cases negatively impacts Black female plaintiffs’ chances of success in pursuing employment discrimination claims. I use intersectional theory as a backdrop to analyze a split among several federal appellate circuits regarding whether to resolve claims brought by multi-dimensional plaintiffs through an intersectional lens.

Through a review of legal scholarship, case law, social psychology, and critical race theory literature on Title VII, feminism, and race, this Article suggests three solutions on the executive, legislative, and judicial levels to alleviate the burden Black female plaintiffs carry in bringing employment discrimination claims: 1) the Equal Employment Opportunity Commission should issue clearer guidelines and an analytical framework to guide courts in resolving intersectional claims; 2) Congress should amend the language of Title VII to include “or any combination thereof” to allow for plaintiffs to seek redress by combining two or more protected classes; and 3) the Supreme Court should resolve the circuit split by creating an analytical framework that employs an intersectional lens in Title VII statutory construction.

INTRODUCTION	2
I. BACKGROUND	3
II. INTERSECTIONALITY AND TITLE VII	7
A. An Overview of Intersectionality Theory	7
B. Intersectional Claims: An Empirical Analysis	8
C. Title VII Jurisprudence and Intersectionality Theory.....	10
III. THE SOLUTIONS.....	16
A. Executive Branch: Administrative Changes.....	17

© 2018 Yvette N. A. Pappoe

* Litigation Associate, Miles & Stockbridge, P.C. (Baltimore, MD); J.D., *cum laude*, University of Maryland Francis King Carey School of Law. The views expressed in this Article are purely mine and do not reflect the views of Miles & Stockbridge, P.C. or its clients. I thank my family and Professor Paula A. Monopoli for their continued support and encouragement. I also thank the editorial staff at the *University of Pennsylvania Journal of Law and Social Change*. Above all, I would like to thank my Lord and Savior, Jesus Christ, for in Him I have been enriched in every way—with all kinds of speech and all knowledge.

B. Legislative Branch: Amendment to Title VII.....	20
C. Judicial Branch: Judicial Creation of an Intersectional Framework.....	21
IV. CONCLUSION.....	22

The struggle for recognition is the nexus of human identity and national identity, where much of the most important work of politics occurs. African American women fully embody this struggle. By studying the lives of black women, we gain important insight into how citizens yearn for and work toward recognition.

Melissa V. Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (2011).

INTRODUCTION

In 1964, Congress enacted Title VII of the Civil Rights Act (“Title VII” or the “Act”) to protect individuals from workplace discrimination on the basis of their race, color, sex, or national origin.¹ Nearly 25 years later, Kimberlé Crenshaw coined the term ‘intersectionality’ and criticized Title VII for failing to accommodate the types of discrimination based on the intersection of two or more protected categories—*i.e.* race and sex.² More specifically, Crenshaw and other intersectionality scholars argued that courts have been particularly reluctant to recognize intersectional discrimination against Black³ female plaintiffs for a number of reasons.⁴ As a result, Black female plaintiffs have been required to bisect their identity in order to take advantage of the protection Title VII affords against employment discrimination.

Two diverging cases demonstrate a split among the federal appellate circuits regarding whether to recognize and permit intersectional claims brought by Black women alleging discrimination on the basis of race and sex. In *DeGraffenreid v. General Motors Assembly Division*,⁵ the United States Court of Appeals for the Eighth Circuit refused to combine a Black woman’s race and sex—both protected categories under Title VII—to create a new subgroup because doing so would provide Black women with a “super-remedy” that goes beyond the intent

¹ Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (2018).

² Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*].

³ Like Professor Crenshaw, I also capitalize the “B” in “Black” “to reflect my view that Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun. See MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC’Y 515, 516 (1982) (noting that ‘Black’ should not be regarded ‘as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions’).” See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 (1988).

⁴ See *infra* Part II.A.

⁵ *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff’d in part, rev’d in part on other grounds*, 558 F.2d 480 (8th Cir. 1977).

of Title VII.⁶ By contrast, the United States Court of Appeals for the Fifth Circuit court held in *Jefferies v. Harris County Community Association*⁷ that Black women *are* a sub-group entitled to Title VII protection against employment discrimination on the basis of their race *and* sex because to deny their unique experiences would leave them without a viable Title VII remedy.⁸ Both cases, and other subsequent cases, arguably turn on the use of the word “or” in the language of the Act.⁹ The word “or” has caused confusion about whether Congress intended for Title VII to allow plaintiffs to bring claims alleging discrimination based on more than one protected category.¹⁰ This confusion has fueled courts’ reluctance to embrace intersectional claims.¹¹ The courts that have recognized intersectional claims brought by women of color have done so under the sex-plus rationale, which treats race as a secondary trait.¹² This approach is limited, however, in that it fails to give equal weight to a Black woman’s whole identity.¹³

This Article argues that Title VII’s failure to acknowledge and recognize intersectional discrimination claims disproportionately affects Black female plaintiffs by leaving them with no adequate remedy. I urge courts to adopt intersectionality theory to develop an analytical framework to interpret Title VII to adequately address Black women’s claims based on two or more protected categories. Part I provides an overview of Title VII jurisprudence. Part II provides a brief summary of intersectionality theory scholarship and examines how different courts have analyzed cases involving plaintiffs alleging intersectional claims. Lastly, Part III offers some solutions for the Equal Employment Opportunity Commission (“EEOC”), Congress, and the judiciary to consider implementing to ensure Black female plaintiffs’ claims are adequately represented and protected by Title VII.

I. BACKGROUND

Title VII of the Civil Rights Act of 1964 makes it “unlawful” for any employer to discriminate against an employee based on that person’s race, color, religion, sex, or national origin.¹⁴ Congress enacted Title VII to eliminate all forms of workplace discrimination based on

⁶ *DeGraffenreid*, 413 F. Supp. at 143.

⁷ *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980).

⁸ *Id.* at 1032-33 .

⁹ *See infra* Part II.C.

¹⁰ *See infra* Part II.C.

¹¹ *See infra* Part II.C.

¹² *See infra* Part II.C.

¹³ *See infra* Part II.C.

¹⁴ Section 703(a), 42 U.S.C. § 2000e-2(a), states in relevant part:

It shall be an unlawful employment practice for an employer—

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

such protected characteristics.¹⁵ A person alleging discrimination by an employer under Title VII must generally file a timely charge with the EEOC within 180 days of the violation.¹⁶ Employment discrimination cases typically fall within two categories:¹⁷ disparate treatment, in which an employer intentionally discriminates against an employee based on a protected characteristic, or disparate impact, in which a facially neutral decision or practice has discriminatory effects.¹⁸

To prevail on a disparate treatment claim under Title VII, a plaintiff must establish a *prima facie* case of intentional discrimination using the three-part framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.¹⁹ A plaintiff can establish a *prima facie* case by showing that: (i) she belongs to a racial minority; (ii) she applied and was qualified for a job for which the employer was seeking applicants; (iii) despite her qualifications, she was rejected; and (iv) after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.²⁰ Once a plaintiff has successfully established a *prima facie* case, the burden shifts to the employer to "articulate some legitimate nondiscriminatory reason" for its decision.²¹ An employer is only required to *articulate* a reason, not necessarily prove to the trier of fact that it was the actual reason for the decision.²² If the employer is able to satisfy this burden of production, the burden then shifts back to the plaintiff to show that the employer's stated reason was merely a pretext for the discriminatory decision.²³ The burden of persuasion ultimately remains with the plaintiff.²⁴

The EEOC first articulated the disparate impact principle in 1966.²⁵ The Supreme Court

¹⁵ See Damon Ritenhouse, *A Primer on Title VII: Part One*, ABA GPSOLO (Jan. 2013),

http://www.americanbar.org/publications/gpsolo_ereport/2013/january_2013/primer_title_vii_part_one.html [perma.cc/29WK-PBJT] ("The legislative history of Title VII supports the notion that Congress intended to eliminate all forms of workplace discrimination caused by a person's race, color, sex, religion or national origin.").

¹⁶ 42 U.S.C. § 2000e-5(e). The EEOC is the administrative agency that oversees the accomplishment of the Act's purposes. See *id.* at § 2000e-4(g).

¹⁷ U.S. Equal Employment Opportunity Commission (EEOC), *Employment Tests and Selection Procedures* (Sept. 23, 2010), http://www.eeoc.gov/policy/docs/factemployment_procedures.html [perma.cc/5QWA-A5LB] ("Title VII prohibits both 'disparate treatment' and 'disparate impact' discrimination.").

¹⁸ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336-337 n.15 (1977).

¹⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* involved plaintiff Green, a Black man who worked as a mechanic and lab technician and had been laid off by defendant, McDonnell Douglas Corp. *Id.* at 794. Green protested that his firing and McDonnell Douglas's employment practices were racially discriminatory by participating in a stall-in. *Id.* Three weeks later Green applied to a position McDonnell Douglas advertised but was turned down as a result of his participation in the protest. *Id.* at 796. Green filed a Title VII claim, alleging racial discrimination and retaliation based on his race. *Id.*

²⁰ See *id.* at 802.

²¹ *Id.* ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

²² *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (internal citation omitted) ("The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.").

²³ *McDonnell Douglas*, 411 U.S. at 804.

²⁴ *Burdine*, 450 U.S. at 256 ("The plaintiff retains the burden of persuasion.").

²⁵ EEOC, *Shaping Employment Discrimination Law*, <http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> [perma.cc/4YVH-8MYW]. The EEOC issued a set of guidelines on employment testing, prohibiting

adopted the EEOC's position and established a disparate impact burden-shifting framework when it confronted the issue of employment testing in *Griggs v. Duke Power Company*.²⁶ *Griggs* involved a class action suit brought by a group of Black employees against their employer, Duke Power Company ("Duke Power"). The employees alleged that Duke Power's new policy of requiring a high school diploma,²⁷ or passage of a high school equivalency exam, as a prerequisite for employment with the company violated Title VII.²⁸ The Supreme Court, relying on the EEOC's employment testing guidelines, held that Title VII prohibited Duke Power from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in, or transfer to, jobs.²⁹ The Court reasoned that the tests were unlawful because both requirements operated to disqualify Black applicants at a substantially higher rate than white applicants in jobs where racial imbalance persisted as a result of Duke Power's previous overtly discriminatory policy and because neither standard was shown to be significantly related to successful job performance.³⁰ While the Court agreed with the Fourth Circuit's determination that Duke Power had not engaged in intentional discrimination, it created a new framework to provide the *Griggs* plaintiffs with a remedy.³¹

The Supreme Court noted in *Griggs* that Congress intended Title VII to reach the discriminatory effects of an employer's practices, not just its intent.³² To mount a successful complaint under the *Griggs* disparate impact framework, a plaintiff must establish a *prima facie* case showing that a facially neutral employment decision or practice has an adverse impact on a person based on a protected Title VII category. The burden then shifts to the employer to rebut the plaintiff's claim by showing that the challenged decision or practice is job-related and justified by business necessity.³³ An employer's practice violates Title VII if a plaintiff is able to show that there exists an alternative practice that serves the employer's purpose but with a lesser disparate impact on the protected class in question.³⁴

The Supreme Court dealt the *Griggs* disparate impact framework a sufficient blow when it relaxed the business necessity standard,³⁵ and reallocated the evidentiary burden for both the

employers from using neutral tests or selection procedures that have discriminatory effects and could not be justified by business necessity. *Id.*

²⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁷ *Id.* at 427. Prior to this new policy, Duke Power overtly refused to hire African Americans in any department besides the labor department, which paid less than the lowest paying jobs in all of the other departments. *Id.*

²⁸ *Id.* at 426.

²⁹ *Id.* at 434 ("Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.").

³⁰ *Id.* at 432.

³¹ *Id.* ("We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

³² *Id.* ("But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").

³³ *Id.* at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.").

³⁴ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (citing *Griggs*, 401 U.S. at 430).

³⁵ *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

plaintiff, and the defendant,³⁶ in *Wards Cove Packing Company v. Atonio*.³⁷ The Court held, in a 5-4 decision, that the plaintiff's showing of statistical evidence of racial imbalance within a work force was insufficient to establish a prima facie case of discrimination under Title VII.³⁸ The Court determined, instead, that a plaintiff must show the particular employment practice or decision that created the disparity.³⁹ The Court further ruled that the burden of persuasion rests with the plaintiff, thus reversing the *Griggs* theory that required the employer to carry that burden.⁴⁰ The employer's burden then solely became one of producing evidence of business necessity for its decision or practice.⁴¹ In response to the Court's *Wards Cove* ruling, Congress enacted the Civil Rights Act of 1991.⁴² In the 1991 Act, Congress overruled aspects of the *Wards Cove* ruling and restored to the employer the burden of persuasion on the business necessity question.⁴³ Further, the 1991 Act

³⁶ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-86 (1988) (describing the reallocation of evidentiary burdens).

³⁷ 490 U.S. 642 (1989). A class of nonwhite salmon cannery workers brought a disparate treatment and disparate impact Title VII action against their employer, alleging that a variety of the employer's hiring practices created a racial imbalance of the work force, and had denied them noncannery positions because of their race. *Id.* at 647-48.

³⁸ *Id.* at 650.

³⁹ *Id.* at 656.

⁴⁰ *Id.* at 659. The *Wards Cove* decision departed significantly from precedent. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (emphasis added) (stating that plaintiff has the opportunity to show the existence of alternatives "[i]f the employer proves that the challenged requirements are job related"); *Albemarle Paper Co.*, 422 U.S. at 425 (emphasis added) ("[i]f an employer does then meet the burden of proving . . ."); *Griggs*, 401 U.S. at 432 (emphasis added) ("[T]he employer [has] the burden of showing . . . a manifest relationship to the employment in question.").

⁴¹ *Id.*

⁴² Pub. L. No. 102-166, 105 Stat. 1071-1100. In § 2 of the Civil Rights Act of 1991, Congress set forth the factual findings that undergird the statute:

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Civil Rights Act of 1991, § 2, 105 Stat. at 1071. The purposes of the 1991 Act were:

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidance for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. § 3, 105 Stat. at 1071.

⁴³ Section 105 of the 1991 Act provides that a violation is established if the complaining party "demonstrates" the existence of 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." Civil Rights Act of 1991, § 105(a), 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)). According to § 104, "[t]he term 'demonstrates' means meets the burdens of production and persuasion." *Id.* § 104(m), 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e(m)).

reinstated the pre-*Wards Cove* Court's interpretations of what constitutes business necessity and job relatedness.⁴⁴

II. INTERSECTIONALITY AND TITLE VII

A. An Overview of Intersectionality Theory

Kimberlé Crenshaw is credited with introducing intersectionality theory to critical legal scholarship.⁴⁵ Intersectionality seeks to acknowledge the intersection among the various identity categories of women.⁴⁶ Scholars have criticized Title VII for its use of the word “or” in its text, claiming that the “or” has made it difficult for courts to allow plaintiffs to bring a claim on more than one protected category.⁴⁷ While some courts have interpreted the language in the statute to allow a plaintiff to bring a claim under more than one protected category,⁴⁸ other courts have refused to do so, and instead require a plaintiff to choose one of the listed characteristics.⁴⁹ The problem with the latter construction is that women of color who allege employment discrimination based on their status as, for example, Black women, are left without an adequate remedy because of the rigid language of Title VII.⁵⁰ And, unfortunately, Title VII cases that have addressed intersectionality have not picked up enough traction to prompt any changes to the language of the statute or its interpretation.⁵¹

Many scholars have critiqued Title VII's inability to provide adequate relief for women of

⁴⁴ The 1991 Act limits the legislative history that may be relied upon in its interpretation to: “No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove--Business necessity/cumulation/alternative business practice.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075.

⁴⁵ Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 3.

⁴⁶ See Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on what Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67 (2008).

⁴⁷ 42 U.S.C. § 2000e-2(a)(1) (2000). Title VII protects against discrimination on the basis of “race, color, religion, sex, or national origin.” *Id.* (emphasis added).

⁴⁸ See, e.g., *Jefferies*, 615 F.2d at 1032 (arguing “[t]he use of the word ‘or’ evidences Congress’s intent to prohibit employment discrimination based on any or all of the listed characteristics”).

⁴⁹ See, e.g., *DeGraffenreid*, 413 F. Supp. at 143 (holding that “this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both”).

⁵⁰ See Rosalio Castro & Lucia Corral, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159, 162 (1993) (noting that a Black female could lose her Title VII claim that she was not hired based on her status as a Black female if the employer defends its case by showing that it has hired Black men and that it has hired White women).

⁵¹ See Bradley A. Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, GEO. MASON U. C.R. L.J. 199, 214 (2006) [hereinafter Areheart, *Revisiting a Wrinkle in Title VII*] (“Despite a number of court decisions that have validated intersectional claims, none of these decisions have generated enough publicity or been handed down by a court with sufficient authority to set a genuine precedent in an area lacking clear guidance”); see also Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 727 (2015) (“Despite the integral role of intersectional experiences in informing the origins and early development of Title VII, court opinions that acknowledged, much less discussed, intersectionality were few and far between.”).

color because it forces plaintiffs to define their identity based on a single characteristic.⁵² Scholarship by Kimberlé Crenshaw, Judith Winston, Peggy Smith, and Judy Ellis has been critical of the rigid categorical framework of Title VII. Kimberlé Crenshaw was one of the first scholars to examine the consequences of anti-discriminatory laws' tendency to treat race and gender as mutually exclusive categories.⁵³ Crenshaw theorized that Title VII's categorical framework tends to benefit those it was designed for—white women and Black men⁵⁴—and thus, it marginalizes Black women,⁵⁵ and “guarantees that their needs will seldom be addressed.”⁵⁶ Peggy Smith seems to agree.⁵⁷ Similar to Crenshaw's analysis, Smith argued that the current single-issue framework of Title VII, “fails to recognize that racism and sexism interact inextricably to harm Black women.”⁵⁸ She similarly suggested that courts broaden their interpretation of Title VII to accommodate the intersection between race and gender.⁵⁹ Judith Winston similarly discussed the extent to which Title VII fails to recognize the intersectionality between race and gender.⁶⁰ She argued that because the Act fails to acknowledge discrimination based on more than one protected category, Black women in particular are more likely to be left with no adequate relief.⁶¹ As a result, courts tend to either dismiss the case for lack of a showing of discrimination or force plaintiffs to choose one form of discrimination over another.⁶² In the context of sexual harassment in the workplace, Judy Ellis elaborated on the uniqueness of Black women's experiences while advocating for the adoption of a sex-race category of discrimination.⁶³ In doing so, Ellis discussed how important it is for courts to recognize the unique position that Black women are in when faced with sexual harassment in the workplace in order to eradicate discrimination like Title VII was intended to do.⁶⁴

B. Intersectional Claims: An Empirical Analysis

In addition to the criticism that Title VII fails to provide an adequate remedy to plaintiffs

⁵² See Castro & Corral, *supra* note 50 (noting that Title VII's problem is the rigidly categorical framework within which individuals must work to advance their claims); Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B.C. L. REV. 771, 777 (1996) [hereinafter Wei, *Asian Women and Employment Discrimination*].

⁵³ Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 3.

⁵⁴ *Id.* at 151.

⁵⁵ *Id.*

⁵⁶ *Id.* at 150.

⁵⁷ See Peggie R. Smith, *Separate Identities: Black Women, Work and Title VII*, 14 HARV. WOMEN'S L.J. 21, 21 (1991) (emphasis added) [hereinafter Smith, *Separate Identities*] (“No other group in America has so had their identity socialized out of existence as have black women. We are rarely recognized as a group separate and distinct from black men, or as a present part of the larger group ‘women’ in this culture. . . . When black people are talked about the focus tends to be on black *men*; and when women are talked about the focus tends to be on *white* women.”).

⁵⁸ *Id.* at 23.

⁵⁹ *Id.*

⁶⁰ Judith A. Winston, *An Anti-discrimination Legal Construct That Disadvantages Working Women of Color*, 25 CLEARINGHOUSE REV. 403, 412 (1991).

⁶¹ *Id.* at 413.

⁶² *Id.*

⁶³ Judy Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 32 (1981).

⁶⁴ *Id.* at 44.

alleging intersectional claims, scholars posit that these types of claimants tend to fare worse in court than those who allege discrimination based on a single protected category.⁶⁵ In 2004, Kevin Clermont and Stewart Schwab surveyed how plaintiffs fared bringing employment discrimination claims in federal court.⁶⁶ In general, employment discrimination plaintiffs tend to proceed to trial more often⁶⁷ and lose a greater proportion of cases than plaintiffs alleging other types of claims in both federal district courts and on appeal.⁶⁸ In another study, Minna Kotkin sampled a group of employment discrimination summary judgment cases and found that plaintiffs who alleged discrimination based on multiple categories lost 96 percent of their cases, compared to that of 73 percent of cases alleging general discrimination claims.⁶⁹ Based on the results and her own “anecdotal impression,” Kotkin suggested that multiple claims fare worse than single claims because judges lack a clear doctrinal framework through which to analyze the multiple claims and are thus likely to conclude that the more claims asserted, the less likely they are to be grounded in fact.⁷⁰

Researchers have found more evidence to substantiate the argument that intersectional plaintiffs have slimmer victorious litigation outcomes than other plaintiffs in a more recent study.⁷¹ Rachel Kahn Best and her team randomly sampled more than 1,000 judicial opinions of federal employment discrimination cases. The study found that non-white women are less likely to win their cases compared to other demographics and that plaintiffs who allege intersectional claims are only half as likely to win their cases—15 percent, as compared to 31 percent of other types of plaintiffs.⁷² The study also found that out of all the groups that brought employment discrimination claims, white women were more likely to prevail.⁷³ The study concluded that based on its findings, anti-discrimination law provides little protection for plaintiffs who are subject to discrimination based on the intersection of two or more protected categories.⁷⁴ Moreover, this lack of protection limits the propensity of civil rights laws to effect social change.⁷⁵

⁶⁵ See, e.g., Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 992 (2011) [hereinafter Best et al., *Multiple Disadvantages Empirical Test*]; Mayeri, *supra* note 51, at 714; Areheart, *Revisiting a Wrinkle in Title VII*, *supra* note 51, at 231; Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1440 (2009).

⁶⁶ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004).

⁶⁷ *Id.* at 440. More non-employment discrimination cases—59%—end early in the litigation process than employment discrimination cases—39%. *Id.*

⁶⁸ *Id.* at 441. See also Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127-29 (2009) for a similar study with updated numbers and similar results.

⁶⁹ Kotkin, *supra* note 65, at 1440, 1458-59.

⁷⁰ *Id.* at 1457-58.

⁷¹ Best et al., *Multiple Disadvantages Empirical Test*, *supra* note 65.

⁷² *Id.* at 1009.

⁷³ *Id.* at 1012. White women are 38% more likely to prevail, compared to 31% for white men; 15% for nonwhite men; and 11% for nonwhite women. *Id.*

⁷⁴ *Id.* at 1019.

⁷⁵ *Id.*

C. Title VII Jurisprudence and Intersectionality Theory

Courts have not developed or adopted a single legal framework to address intersectional claims under Title VII. Currently, courts are split on whether or not to acknowledge and allow intersectional race and sex claims brought under Title VII. *DeGraffenreid v. General Motors Assembly Division* is the seminal case on courts' refusal to acknowledge the intersectionality of race and gender in Title VII claims. In *DeGraffenreid*, five Black women brought a Title VII action against their former employer, General Motors Corporation ("GM"), alleging that GM's seniority system and its "last hired-first fired" layoff policy perpetuated past discrimination against Black women and thus violated Title VII.⁷⁶ Prior to 1964, GM had not hired any Black women.⁷⁷ The district court granted summary judgment in favor of GM and ruled that the plaintiffs could assert separate claims for race or sex discrimination, but not a combination of both.⁷⁸ In finding for GM, the court noted that while the plaintiffs are entitled to a remedy if they have suffered discrimination, they should not be permitted to create a "super-remedy" by combining two causes of action to create a new special sub-category.⁷⁹ The court explained that to allow that would be to provide relief to the women "beyond what the drafters of [Title VII] intended."⁸⁰ In analyzing the sex and race discrimination claims separately, the court reasoned that because GM had hired (white) female employees before 1964, the plaintiffs' claim that GM's policy perpetuated past discrimination was without merit.⁸¹ In sum, the *DeGraffenreid* court concluded that Title VII was not meant to protect Black women as a category.⁸² Consequently, the *DeGraffenreid* approach leaves Black women to define their claims based on the impact the complained about practice or policy has on white women or Black men.⁸³

Courts' reluctance to acknowledge intersectionality has led to the creation of a loophole for employers to escape liability under Title VII.⁸⁴ For instance, in *Moore v. Hughes Helicopter, Inc.*,⁸⁵ the United States Court of Appeals for the Ninth Circuit affirmed a decision declining to certify Tommie Moore, a Black woman, as the class action representative in a sex discrimination suit for women employed by Hughes Helicopters, Inc. ("Hughes") due to "inadequate representation."⁸⁶ Moore brought the class action suit against Hughes on behalf of all Black female

⁷⁶ *DeGraffenreid*, 413 F. Supp. at 143.

⁷⁷ *DeGraffenreid*, 558 F.2d. at 482. Prior to 1970, GM had only hired one Black woman who served as a janitor. *Id.*

⁷⁸ *See DeGraffenreid*, 413 F. Supp. at 143.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 144.

⁸² *Id.* at 145.

⁸³ *Id.* The court alluded to the fact that allowing Black women to prevail on a claim based on their status as Black women would give them "greater standing than, for example, a black male." *Id. See also* Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 3, at 143.

⁸⁴ *See* Areheart, *Revisiting a Wrinkle in Title VII*, *supra* note 52, at 209 (discussing the creation of a loophole for employers to escape the law that results from courts' refusal to allow plaintiffs to plead intersectional claims).

⁸⁵ 708 F.2d 475 (9th Cir. 1983).

⁸⁶ *Id.* at 480.

employees, alleging both sex and race discrimination in Hughes's promotion practices.⁸⁷ The court reasoned that Moore was an inadequate representative because she had not claimed that "she was discriminated against as a female, *but only as a black female*," and thus she could not represent *all* female employees.⁸⁸ Moore was foreclosed from using statistical evidence that showed that Hughes's policy disparately impacted all Blacks (including males) and/or all women (including whites)⁸⁹ and was instead only allowed to use evidence of discrimination against Black women specifically.⁹⁰ As a result, Moore was unable to establish a *prima facie* case of *significant* discriminatory impact against Black women.⁹¹ *Moore* further demonstrates that Black women's ability to successfully mount a Title VII claim is heavily dependent on the experiences of white women and Black men⁹² and that a court's failure to acknowledge the intersectionality of race and sex renders a Black woman plaintiff's complaint presumptively "groundless."⁹³

Other courts have elected to follow the single-factor analysis established in *DeGraffenreid* and *Moore* in response to plaintiffs' intersectional claims. In *Lee v. Walters*,⁹⁴ plaintiff Patricia P. Lee alleged that she was discriminated against based on her race, sex, *and* national origin.⁹⁵ Ms. Lee was an Asian-American female doctor at the Veterans Administration Medical Center, where she claimed she was denied a promotion to a higher salary level.⁹⁶ Lee, unlike Moore, was found to have established a *prima facie* case of discrimination based on her national origin and prevailed on that claim.⁹⁷ However, the court noted that Lee had not sufficiently met her burden of proof for race

⁸⁷ *Id.* at 478.

⁸⁸ *Id.* at 480 (emphasis added).

⁸⁹ *Id.* at 479. Between January 1976 and June 1979, the percentage of white males occupying first-level supervisory positions ranged from 70.3 to 76.8%, Black males from 8.9 to 10.9%, white women from 1.8 to 3.3%, and Black females from 0 to 2.2%. The overall male/female ratio in the top five labor grades ranged from 100/0% in 1976 to 98/1.8% in 1979. The white/Black ratio was 85/3.3% in 1976 and 79.6/8% in 1979. The overall ratio of men to women in supervisory positions was 98.2 to 1.8% in 1976 to 93.4 to 6.6% in 1979; the Black to white ratio during the same time period was 78.6 to 8.9% and 73.6 to 13.1%. For promotions to the top five labor grades, the percentages were worse. Between 1976 and 1979, the percentage of white males in the top five labor grades ranged from 85.3 to 77.9%; Black males 3.3 to 8%; white females from 0 to 1.4%, and Black females from 0 to 0%. Overall, in 1979, 98.2% of the highest-level employees were male. *Id.*

⁹⁰ *See id.* at 484–86 (explaining Moore's failure to produce sufficient evidence to demonstrate that Black women were disparately impacted by employer's promotion practices).

⁹¹ *Id.* at 484. The court concluded that Moore was "relying on little more than an inference of discrimination from the bare absence of black female employees." *Id.* Because Moore was not certified to represent white women or Black men, she was unable to use general statistical evidence that showed sex and racial disparities as required for a disparate impact claim. As a result, Moore was limited to using statistics only of Black women who were qualified to fill the openings for the high-level jobs, which significantly shrunk the relevant statistical pool necessary to prove her disparate impact case and consequently shrunk her chances of winning against her employer. *Id.*

⁹² *See Crenshaw, Demarginalizing the Intersection of Race and Sex, supra* note 3, at 145-146.

⁹³ *Id.* at 146.

⁹⁴ 1988 WL 105887 (E.D. Pa. Oct. 11, 1988).

⁹⁵ *Id.* The plaintiff introduced direct evidence showing that she was denied the promotion because the decisional staff determined that her experience as a professor in Taiwan was not comparable to what was required in America. *Id.*, at *4-6. The court focused mainly on the plaintiff's national origin as the relevant protected category in its analysis. *Id.*, at *7.

⁹⁶ *Id.*, at *2. This higher salary level is referred to as "chief grade." *Id.*

⁹⁷ *Id.*, at *7. "The evidence as to the proffered 'relevancy' explanation and comparability of her Taiwanese

and sex discrimination because “there were (white) females and [A]sian[] (men) in chief grade positions on the Professional Standards Board.”⁹⁸ Thus, similar to *DeGraffenreid* and *Moore*, the *Lee* court relied on the experiences of white women and non-Caucasian men as reason to disprove Lee’s claim of discrimination based on her status as an Asian woman.

The approach taken in *Chaddah v. Harris Bank Glencoe-Northbrook, N.A.*⁹⁹ was not much different. Plaintiff, Kooi Lin Chaddah, alleged that her employer constructively discharged and denied her an opportunity for promotion at her bank because of her age, race, and color.¹⁰⁰ Chaddah also alleged that it was the “pattern and practice” of her employer to only promote young, white employees.¹⁰¹ The court, in true *DeGraffenreid* fashion, considered her claims separately and determined that she had failed to offer evidence of harassment based on her age because all of the evidence she offered referred to race or color.¹⁰² In addition, the court found that Chaddah failed to provide sufficient evidence to establish the company’s pattern or practice because she did not show that “other person[s] in her age category or of her racial background suffered similar discrimination” or that there were “few or no Asian or older bank officers.”¹⁰³ Accordingly, Chaddah was unable to successfully claim that she was discriminated against as an *older Asian woman*, not just as a person of Asian descent, a woman, or an older person, because the court refused to consider her claims as intersectional.

Despite cases like *DeGraffenreid*, *Moore*, *Lee*, and *Chaddah*, some courts have recognized intersectional claims of race and sex discrimination under Title VII. The Fifth Circuit led the way in departing from the *DeGraffenreid* approach with its opinion in *Jefferies v. Harris County Community Action Association*.¹⁰⁴ Jefferies, a Black woman, brought a discrimination suit alleging that her employer, Harris County Community Action Association (“Harris”), discriminated against her based on her race and sex by denying her a promotion.¹⁰⁵ She applied for and was denied several promotions within the company between 1970 and 1974.¹⁰⁶ In 1974, Jefferies applied for two recently posted vacant positions for which she was not selected.¹⁰⁷ Instead, Harris selected a white woman and a Black man to fill the positions.¹⁰⁸ The trial court dismissed Jefferies’s claims because she failed to prove a prima facie case for either race or sex discrimination.¹⁰⁹ The court reasoned

professorship, together with that relative to her accented speech, sustains plaintiff’s burden of proving that but for her national origin she would have been promoted to chief grade.” *Id.*

⁹⁸ *Id.*, at *7 n.7. The Professional Standards Board was comprised of six or seven chief grade members and included “women and non-Caucasians.” *Id.*, at *2.

⁹⁹ 1994 U.S. Dist. LEXIS 2693 (N.D. Ill. Mar. 8, 1994), *aff’d*, 42 F.3d 1391 (7th Cir. 1994).

¹⁰⁰ *Id.*, at *1. Chaddah also claimed that other bank employees racially harassed her. *Id.*, at *7.

¹⁰¹ *Id.*, at *16.

¹⁰² *Id.*, at *11.

¹⁰³ *Id.*, at *17 (emphasis added).

¹⁰⁴ 615 F.2d 1025 (5th Cir. 1980).

¹⁰⁵ *Id.* at 1028. The plaintiff’s original claim included age discrimination but it was not considered on appeal. *Id.* at 1030.

¹⁰⁶ *Id.* at 1029. Jefferies was first employed as Secretary to the Director of Programs and was promoted to Personnel Interviewer in 1970. *Id.* at 1028-29.

¹⁰⁷ *Id.* at 1029.

¹⁰⁸ *Id.*

¹⁰⁹ *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 425 F. Supp. 1208, 1213 (S.D. Tex. 1977).

that because Harris chose a Black man to fill the position and a white woman previously held the position, there was insufficient evidence to prove her claim.¹¹⁰ On appeal, the Fifth Circuit initially analyzed Jefferies's claims separately.¹¹¹ But, ultimately, the court analyzed her claims together and held that "when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff."¹¹² The *Jefferies* court recognized intersectional claims of race and sex by employing the "sex-plus" analysis established in the dissenting opinion in *Phillips v. Martin Marietta Corp.*¹¹³ The court argued that failing to recognize Black women as a separate and distinct class would, in effect, leave them without a viable Title VII remedy.¹¹⁴ Moreover, the *Jefferies* court leaned heavily on Title VII's legislative intent and history to determine that Congress's use of the word "or" in the statute "evidences [its] intent to prohibit employment discrimination based on any or all of the listed characteristics."¹¹⁵ Thus, under the *Jefferies* analysis, Black women are considered a protected class because both race *and* gender are listed as protected categories under Title VII.¹¹⁶

The United States Court of Appeals for the Tenth Circuit adopted the *Jefferies* approach

¹¹⁰ *Id.*

¹¹¹ *Jefferies*, 615 F.2d at 1030-32. The court affirmed the trial court's finding that Jefferies had failed to prove her race discrimination claim and vacated and remanded the district court's finding that she failed to prove her sex discrimination claim. *Id.*

¹¹² *Id.* at 1034.

¹¹³ 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting), *aff'd*, 400 U.S. 542 (1971). A female plaintiff brought a sex discrimination suit against an employer that had a policy, which forbade the hiring of women with pre-school age children. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 2 (5th Cir. 1969). The Fifth Circuit affirmed the district court's decision that no sex discrimination existed. *Id.* at 4. Judge Brown vehemently refuted the majority's decision and recognized the "coalescence" between being a woman and being a mother. *Phillips*, 416 F.2d at 1260. The "sex-plus" theory has become heavily grounded in Title VII and allows courts to determine that sex discrimination has occurred if the employer treats women or men who possess an additional immutable factor differently, even where all women and all men are not treated differently.

¹¹⁴ *Jefferies*, 615 F.2d at 1032-33.

¹¹⁵ *Id.* at 1032. The court also noted that the House of Representatives refused an amendment that would have added the word "solely" to clarify that a plaintiff could only bring her case under one protected characteristic. *Id.* (citing 110 CONG. REC. 2728 (1964)).

¹¹⁶ *But see Judge v. Marsh*, 649 F. Supp. 770, 780 (D.D.C. 1986) (criticizing the *Jefferies* court's decision as far reaching and allowing plaintiffs to attempt to combine too many protected categories). The *Judge* court found the *Jefferies* position problematic, arguing that it turned employment discrimination into a "many-headed Hydra" and would lead to protection for every possible combination of protected categories. *Id.* To prevent that fear from manifesting, the *Judge* court limited the *Jefferies* analysis to sex plus *one* other protected immutable trait. *Id.* Scholars argue that *Judge*'s limitation of *Jefferies* detrimentally affects Black women because a Black female plaintiff would have already exhausted her plus allowance with her race allegation and would thus be foreclosed from alleging other traits, such as being pregnant. See Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1472 (1989). See also Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793, 803-804 (1980) (criticizing *Jefferies*' use of a sex-plus analysis to create a subclass of Black women); Areheart, *Revisiting a Wrinkle in Title VII*, *supra* note 51, at 222-223 (same); Mary Elizabeth Powell, Comment, *The Claims of Women of Color Under Title VII: the Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV. 413 (1996) (same).

in the context of a hostile work environment claim.¹¹⁷ In *Hicks v. Gates Rubber Co.*, a Black woman brought suit against her employer alleging racial and sexual harassment that created a hostile work environment.¹¹⁸ Citing *Jefferies*, the *Hicks* court held that Title VII permits a court to aggregate evidence of racial and sexual harassment to sustain a hostile work environment claim.¹¹⁹ The court adopted the *Jefferies* reasoning that Congress intended the “or” in the language of Title VII to mean that a plaintiff is permitted to bring a claim based on a combination of the protected categories.¹²⁰

Recent cases have provided a more concrete approach to addressing and acknowledging intersectional claims. *Lam v. University of Hawaii*¹²¹ is considered the “high water mark” within the intersectionality and Title VII jurisprudence landscape.¹²² In *Lam*, the Ninth Circuit was faced with a claim against a university for discrimination based on a plaintiff’s race, sex, and national origin.¹²³ Lam was a woman of Vietnamese descent, who applied for and was denied a position as Director of the Pacific Asian Legal Studies Program at the University of Hawaii Law School (the “University”).¹²⁴ She filed suit alleging the University discriminated against her during both stages of the hiring process.¹²⁵ The district court granted summary judgment to the University for two reasons: 1) there was insufficient proof to attribute prejudice to the members of the faculty committee;¹²⁶ and 2) the University favorably considered two other candidates for the position—an Asian man and a white woman.¹²⁷ The Ninth Circuit, citing both Kimberlé Crenshaw¹²⁸ and Judith Winston,¹²⁹ criticized the district court’s treatment of Lam’s claims as mathematical and determined that, in using the mathematical approach, the trial court missed the mark.¹³⁰ The court reasoned that,

¹¹⁷ *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). See also *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999); *Domb v. Metro. Life Ins. Co.*, 2003 U.S. Dist. LEXIS 13790, at *1, *18 (S.D.N.Y. July 30, 2003).

¹¹⁸ *Hicks*, 833 F.2d at 1408. The plaintiff alleged that she had been subject to racial slurs and jokes, as well as sexual harassment. *Id.* at 1409-10.

¹¹⁹ *Id.* at 1416-17.

¹²⁰ *Id.* See also *Graham v. Bendix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (“Under Title VII, the plaintiff as a black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out black females for less favorable treatment does not defeat plaintiff’s case by showing that white females or black males are not so unfavorably treated.”); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 944 n.34 (D. Neb. 1986).

¹²¹ 40 F.3d 1551 (9th Cir. 1994). I do not intend to conflate the experiences of Asian women with those of Black women. However, because there are so few major cases that have touched on this particular concept of alleging intersectional claims, I use cases like *Lam* only as a reference point to provide context and to build my argument.

¹²² Kotkin, *supra* note 65, at 1475.

¹²³ *Lam*, 40 F.3d at 1551.

¹²⁴ *Id.* at 1554. The University conducted two searches to fill the position; Lam applied for and was denied both. *Id.*

¹²⁵ *Id.* The district court found that Lam had established a prima facie disparate treatment claim as required by *McDonnell Douglas*. *Id.* at 1559.

¹²⁶ *Id.* at 1560.

¹²⁷ *Id.* at 1561.

¹²⁸ Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 3.

¹²⁹ Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981 and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 (1991).

¹³⁰ The Court of Appeals explained:

In assessing the significance of these candidates, the [district] court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman

because two bases of discrimination “cannot be neatly reduced to distinct components[,] . . . the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.”¹³¹ The *Lam* court ultimately held that it is necessary for courts to consider a plaintiff’s claim of discrimination based on a combination of two or more protected categories rather than focus solely on whether an employer discriminates based on one category *or* another.¹³²

Other courts have adopted the *Lam* model.¹³³ In particular, the court in *Jeffers v. Thompson*¹³⁴ noted that some protected categories “fuse inextricably . . . [and] indivisibly intermingle.”¹³⁵ In *Jeffers*, a Black woman sued her employer for alleged discrimination based on her race-and-gender combined and her age.¹³⁶ In affirming her ability to bring a combined claim, the *Jeffers* court reasoned that, similar to other intersectional claimants, Black women are subject to unique stereotypes and biases as a group that neither Black men nor white women face.¹³⁷ Thus, “[d]iscrimination against African-American women necessarily combines (even if it cannot be dichotomized into) discrimination against African-American[] [men] and discrimination against women—neither of which Title VII permits.”¹³⁸

Courts have yet to agree upon a settled approach to addressing intersectional claims. Some courts have been unwilling to accommodate intersectionality within Title VII claims and, instead, choose to analyze claimants’ identities separately. The courts that have found intersectional claims permissible and protectable under Title VII have failed to gain much traction.¹³⁹ These cases, while a step in the right direction, have not articulated a clear, substantive analytical framework or

became a simple matter of performing two separate tasks: looking for racism “alone” and looking for sexism “alone,” with Asian men and white women as the corresponding model victims. The court questioned Lam’s claim of racism in light of the fact that the Dean had been interested in the late application of an Asian male. Similarly, it concluded that the faculty’s subsequent offer of employment to a white woman indicated a lack of gender bias. We conclude that in relying on these facts as a basis for its summary judgment decision, the district court misconceived important legal principles.

Lam, 40 F.3d at 1561.

¹³¹ *Id.* at 1562.

¹³² *Id.*

¹³³ See *Nagar v. Found. Health Sys.*, 57 F. App’x 304, 306 (9th Cir. 2003) (quoting *Lam*, 40 F.3d at 1562); *Core-Boykin v. Boston Edison Co.*, 17 Mass. L. Rptr. 577, 581-82 (Mass. Sup. Ct. 2004) (citing *Lam*, *Moore*, *Hicks*, and *Jefferies* to support decision to permit combination discrimination claims); *Fucci v. Graduate Hosp.*, 969 F. Supp. 310, 316 n.9 (E.D. Pa. 1997) (noting that “[a] Title VII claim may be premised on alleged discrimination based on a combination of impermissible factors” (citing *Lam*, 40 F.3d at 1562)).

¹³⁴ 264 F. Supp. 2d 314 (D. Md. 2003).

¹³⁵ *Jeffers*, 264 F. Supp. 2d at 326.

¹³⁶ *Id.* at 324-25. *Jeffers* claimed she was denied a promotion to two newly announced vacant positions, which were filled by a white male and female. *Id.* at 320.

¹³⁷ *Id.* at 326 (citing Smith, *Separate Identities*, *supra* note 56, at 21).

¹³⁸ *Jeffers*, 264 F. Supp. 2d at 326.

¹³⁹ See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2496 (1994) (“*Jefferies* itself has not proved a durable precedent in securing judicial recognition of intersectional claims.”); Areheart, *Revisiting a Wrinkle in Title VII*, *supra* note 51, at 214 (explaining that even though a number of courts have validated intersectional claims, none of them have had the authority to set binding precedent). He also notes that the Supreme Court cited *Jefferies* in a footnote in *Olmstead v. L.C.*, 527 U.S. 581, 598 n.10 (1999) but neglected to give it any further analysis. *Id.*

conceptual rationale for evaluating intersectional discrimination in the employment context.¹⁴⁰ Some scholars have criticized *Jefferies* in particular for neglecting to provide answers to complex, yet crucial questions that explain intersectional discrimination.¹⁴¹ Other scholars find *Jefferies* problematic because of its reliance on the sex-plus rationale. They argue that the use of the theory as an analytical framework to rationalize the recognition of the intersectionality of race and gender misconstrues the type of discrimination Black women experience by assuming that their race is secondary to their sex.¹⁴² Moreover, the use of sex-plus analysis in addressing the claims brought by Black women reinforces the notion that Black women are a subclass because they deviate from the white male norm.¹⁴³ Lastly, the use of the sex-plus rationale further supports the notion that anti-discrimination doctrine is centered on the experiences of white women and/or Black men.¹⁴⁴ While intersectional scholars acknowledge that *Jefferies* signaled a shift toward recognizing multiple claims in Title VII jurisprudence, they seem to agree that the use of sex-plus analysis does not afford Black women adequate protection under the statute.¹⁴⁵

III. THE SOLUTIONS

The enactment of Title VII has changed the face of the American workplace. However,

¹⁴⁰ See Winston, *supra* note 129, at 799; Abrams, *supra* note 138, at 2498.

¹⁴¹ Kathryn Abrams believes the *Jefferies* court failed to give attention to the following questions:

First, should the discrimination against black women be regarded as distinct because it is quantitatively greater - as they suffer a combination of what black men and white women receive - or because it is qualitatively different? Second, if this difference is qualitative, is the discrimination suffered by black women utterly distinct, or can it be related, even in its particularity, to the discrimination suffered by other groups of women? The *Judge* court's description of a "many-headed Hydra" suggests that the claims of each subgroup are highly particularized and lack common threads with the race or gender discrimination suffered by other subgroups; the *Jefferies* opinion offers little ground for assessing this suggestion. Finally, how should one describe the relationship between this intersectional form of discrimination and those previously addressed under the statute? Are those forms of discrimination that target a subgroup less important - as *Judge*'s imposition of arbitrary limits suggests - than those that target the group as a whole? Are those forms of discrimination frequently regarded as general really as universal as they seem, or do they simply target a subgroup - white women which is not often recognized as a subgroup?

See Abrams, *supra* note 139, at 2497-98.

¹⁴² See Scarborough, *supra* note 116, at 1470-73 (discussing how the *Jefferies* court's reliance on the sex-plus rationale fails to acknowledge the whole personhood of a Black woman); Powell, *supra* note 116, at 421-22 (suggesting the *Jefferies* court should not have used the sex-plus rationale to analyze a Black woman's claim).

¹⁴³ Crenshaw, *supra* note 3, at 143 n.12. See also Powell, *supra* note 116, at 423 (arguing that the *Judge* court "made it clear that a woman of color can only deviate so far from the norm of a White male before the claim is viewed as too obscure").

¹⁴⁴ *Id.* at 143. See also Scarborough, *supra* note 116, at 1472 (arguing that courts would not construe a white woman's age as a plus factor because society tends to value whiteness over blackness).

¹⁴⁵ See Areheart, *supra* note 51, at 222 ("While sex-plus analysis is somewhat helpful in the intersectional context, it still often relegates a Title VII-protected category to the level of a plus factor."); Abrams, *supra* note 139, at 2498 ("*Jefferies* may have opened the door to the protection of a particular intersectional category, but because it fails to describe the conception of intersectional discrimination that animates this protection or how that conception relates to more traditional understandings of discrimination under Title VII, the protection it offers is neither transformative nor, ultimately, even stable."); Scarborough, *supra* note 116, at 1472 ("Forcing Black women to use their single plus factor on race prevents them from fairly addressing other issues that may contribute to their discrimination.").

despite the progress made, employment discrimination persists.¹⁴⁶ And, despite the immense amount of scholarly research on intersectionality theory, courts have been unwilling to incorporate the theory in analyzing combined claims of more than one protected category for one reason or the other.¹⁴⁷ Each branch of government should consider the following suggestions to ensure that intersectional claimants, those who arguably need the most protection from discrimination, are afforded an adequate remedy.

A. Executive Branch: Administrative Changes

In 2006, the EEOC acknowledged “intersectional discrimination” when it issued its Compliance Manual Section on Race and Color Discrimination to clarify its race and color discrimination guidelines.¹⁴⁸ The section, in relevant part, reads:

Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them “even in the absence of discrimination against Asian American men or White women.” The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute – e.g., race and disability, or race and age.¹⁴⁹

While the EEOC cited both *Jefferies* and *Lam* in support of recognizing intersectional discrimination as a viable cause of action, it offered no guidance to courts in interpreting Title VII to allow for an actionable intersectional claim. Rather, it only identified that there is such a claim and gave an example for context. The EEOC once again acknowledged intersectional claims when it launched its Eradicating Racism and Colorism from Employment (E-RACE) initiative.¹⁵⁰ It explained that:

[n]ew forms of discrimination are emerging. With a growing number of interracial marriages and families and increased immigration, racial demographics of the workforce have changed and the issue of race discrimination in America is multi-dimensional. Over the years, EEOC has received an increasing number of race and color discrimination charges that allege *multiple or intersecting prohibited bases* such as age, disability, gender, national origin,

¹⁴⁶ Jenny Yang, *Job discrimination still a challenge*, MIAMI HERALD (July 1, 2015), <http://www.miamiherald.com/opinion/op-ed/article26010319.html> [https://perma.cc/Z7E9-LKFP].

¹⁴⁷ See *supra* Part II.

¹⁴⁸ EEOC, OFFICE OF LEGAL COUNSEL, DIRECTIVES TRANSMITTALS, EEOC COMPLIANCE MANUAL 3, 8–9 (Apr. 19, 2006), <https://www.eeoc.gov/policy/docs/race-color.html#IVC> [https://perma.cc/VE94-2KF3].

¹⁴⁹ *Id.*

¹⁵⁰ EEOC, *The E-RACE (Eradicating Racism and Colorism from Employment) Initiative* (2008), <https://www1.eeoc.gov/eeoc/initiatives/e-race/index.cfm> [https://perma.cc/GPH4-DZM7].

and religion.¹⁵¹

Once again, the EEOC neglected to provide any guidance or clarification for how a court or the Commission might approach and analyze such a case.

That said, the EEOC should issue clear, concrete guidelines for courts to follow. The acknowledgment of intersectional discrimination is a step, but it is merely informative, instead of instructive. As discussed above, while *Jefferies* and *Lam* are persuasive models for courts to adopt, neither sets a binding precedent that requires courts to follow it.¹⁵² Moreover, the Supreme Court has neither analyzed nor interpreted Title VII to permit an actionable intersectional claim.¹⁵³ Congress previously demonstrated its power to influence the way courts interpret laws when it enacted the Civil Rights Act of 1991 in response to the *Wards Cove* decision.¹⁵⁴ Congress sought to overturn the *Wards Cove* ruling because it was more deferential to employers and deviated significantly from a previous, more favorable standard set in *Griggs*.¹⁵⁵ Perhaps the EEOC could shape the way courts analyze intersectional claims with a similar approach by issuing clear guidelines that not only acknowledge the possibility of intersectional discrimination, but also provide an analytical framework informed by the theory that Black women *do* experience discrimination that is indeed different from that experienced by white women and Black men.¹⁵⁷ The Commission can do so by incorporating the sociopolitical history of Black women in its guidelines to provide a reference point for courts to accurately conceptualize Black women as their whole selves when analyzing their claims.¹⁵⁸ Moreover, it is important for the EEOC to emphasize that Title VII was intended to protect employees from discrimination based on *any* of the listed protected categories, and it should do so *regardless* of whether it is based on one or all of the categories.¹⁵⁹

¹⁵¹ EEOC, *Why Do We Need E-RACE?* (2008), https://www1.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm [<https://perma.cc/6R3P-WTP4>] (emphasis added).

¹⁵² *Judge* is a good example of what little precedential value *Jefferies* has. 649 F. Supp. at 780.

¹⁵³ See *supra* note 140 (noting the Court cited to *Jefferies* but in passing and lacking analysis).

¹⁵⁴ In May 2018, the Supreme Court declined to hear a challenge to an Eleventh Circuit ruling that an employer did not violate Title VII by not refusing to hire a Black woman because of her dreadlocks. See *EEOC v. Catastrophe Mgmt. Sols.* 138 S. Ct. 2015 (Mem); *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030-31 (11th Cir. 2016) (holding that Black plaintiff's dreadlocks were not an immutable characteristic and thus, grooming policy banning dreadlocks was race neutral and not in violation of Title VII).

¹⁵⁵ See *supra* note 43 (discussing Congress's response to the *Wards Cove* ruling).

¹⁵⁶ See Barbara T. Flagg, *Fashioning a Title VII Remedy*, 104 YALE L.J. 2009, 2020-22 (2009) (discussing the *Wards Cove* decision and Congress's response); Philip S. Runkel, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity*, 35 WM. & MARY L. REV. 1177 (1994) (discussing the amendments and compromise that led to the enactment of the Civil Rights Act of 1991). But see Amon N. Jones & D. Alexander Ewing, *The Ghost of Wards Cove: The Supreme Court, The Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 172 (2005) (arguing that Congress failed to successfully overturn *Wards Cove*).

¹⁵⁷ Crenshaw, *supra* note 3, at 140 ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.").

¹⁵⁸ Scarborough, *supra* note 116, at 1474.

¹⁵⁹ See *Jefferies*, 615 F.2d at 1032 (citing 110 CONG. REC. 2728 (1964) to support the argument that Congress intended for Title VII to prohibit discrimination on the basis of any or all of the protected categories).

The EEOC should be prepared to defend its choice to issue such guidelines. Some courts and critics would arguably be skeptical of recognizing intersectional discrimination as actionable under Title VII for a few reasons. First, courts might hesitate to recognize intersectional discrimination because of the fear articulated in *Judge*. The *Judge* court, in applying the sex-plus analysis from *Jefferies*, criticized it as far-reaching and overbroad because “it turns employment discrimination into a many-headed Hydra, impossible to contain within Title VII’s prohibition.”¹⁶⁰ While it agreed that the recognition of Black women as a distinct subgroup protected by Title VII was “logical,”¹⁶¹ the *Judge* court sought to avoid creating protection for subgroups of every conceivable combination of protected traits by holding that plaintiffs could only allege sex-plus one additional immutable protected trait.¹⁶² To counter this fear, the EEOC needs to explicitly clarify the intention of the sex-plus doctrine. The sex-plus doctrine was developed to allow for protection from discrimination based on sex, a protected category, plus a neutral trait, such as being married or pregnant.¹⁶³ To assume protection for Black women under the sex-plus rationale is to relegate race to the status of a secondary trait, even though it is clear that the statute equally prohibits both race and sex discrimination.¹⁶⁴ It is unfair to Black women for courts to have to construe race as a secondary trait in order to grant them protection under the statute. Given that the statute was intended to prohibit discrimination based on either category, Black women should not be required to choose which “category” of their identity should be given more weight. True recognition of intersectionality theory requires each trait upon which discrimination is based to be given equal weight and consideration.¹⁶⁵

Second, critics could argue that the recognition of intersectional claims creates new subgroups that would receive special treatment.¹⁶⁶ Scholars have argued that this fear is unfounded, considering that plaintiffs alleging intersectional claims are still required to produce evidence to substantiate their claims.¹⁶⁷ In fact, intersectional claimants carry a heavier burden, since their allegation of discrimination is based on a unique combination of traits.¹⁶⁸ Moreover, courts may exercise discretion when analyzing a plaintiff’s claim based on its merits and should not feel in any way obligated to grant relief to plaintiffs who appear to be alleging “kitchen sink” claims.¹⁶⁹

¹⁶⁰ *Judge*, 649 F. Supp. at 780.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See Phillips*, 416 F.2d at 1258–59.

¹⁶⁴ *See infra* Part II.C.

¹⁶⁵ *See Crenshaw, Demarginalizing the Intersection of Race and Sex, supra* note 3.

¹⁶⁶ The *DeGraffenreid* court reasoned that Black women should not be permitted to bring claims as such because doing so would create a new “super-remedy” beyond what the drafters of the statute intended. 413 F. Supp. at 143. The court further explained that allowing claimants to bring combined claims “raises the prospect of opening the hackneyed Pandora’s box.” *Id.*

¹⁶⁷ Wei, *Asian Women and Employment Discrimination, supra* note 51, at 808–09; Areheart, *Revisiting a Wrinkle in Title VII, supra* note 50, at 233.

¹⁶⁸ *See Jeffers*, 264 F. Supp. 2d at 327 (“[T]he more specific the composite class in which the plaintiff claims membership, the more onerous that ultimate burden [of persuasion] becomes.”).

¹⁶⁹ *See, e.g., Michael Bologna, Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment*, 19 Empl. Discrimination Rep. (BNA) 595 (Dec. 4, 2002) (quoting federal District Court Judge Ruben Castillo of the N.D. Ill., who criticized plaintiffs’ lawyers “for filing wide-ranging claims alleging discrimination on multiple levels – a strategy akin to ‘throwing a plate of spaghetti at the wall to see what sticks’”).

B. Legislative Branch: Amendment to Title VII

The language of Title VII is partly responsible for courts' reluctance to acknowledge intersectional claims. The statute prohibits an employer from discriminating against an employee on the basis of race, color, religion, sex, *or* national origin.¹⁷⁰ The use of the word "or" in the Act has led to opposing interpretations, with some courts insisting that it demonstrates Congress's intent for the Act to prohibit discrimination based on one category *or* another,¹⁷¹ and others arguing that Title VII's legislative history begs the converse approach.¹⁷² Intersectional scholars and some courts have cited to Congress's refusal to pass an amendment that would have added "solely" to modify the listed categories as evidence of its intent to allow protection for discrimination based on more than one protected category.¹⁷³ However, others have noted that, like the EEOC guidelines, the legislative history of the statute does not provide a clear framework for analyzing intersectional claims.¹⁷⁴

Rosalio Castro & Lucia Corral have suggested Title VII be amended to include the phrase "or any combination thereof" so that the statute effectively reads:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin *or any combination thereof*.¹⁷⁵

Such an amendment, they argue, would rid the courts of the ambiguity about whether women of color are permitted to bring combined claims and resolve the division among the circuits.¹⁷⁶ Law professor Bradley Allen Areheart agrees and argues that such a change would clearly express Congress's intent to permit plaintiffs to allege intersectional claims.¹⁷⁷ This amendment could also possibly reduce instances of intersectional discrimination by serving as a caution to employers. Considering the immense costs of workplace discrimination to employers¹⁷⁸

¹⁷⁰ 42 U.S.C. § 2000e-2(a)(1).

¹⁷¹ See, e.g., *DeGraffenreid*, 413 F. Supp. at 143 (holding that "this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both").

¹⁷² See, e.g., *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (citing 110 CONG. REC. 2728 (1964) to support the argument that Congress intended for Title VII to prohibit discrimination on any or all of the protected categories).

¹⁷³ See *id.* See also Wei, *Asian Women and Employment Discrimination*, *supra* note 52, at 776; Scarborough, *supra* note 116, at 1466-67.

¹⁷⁴ See Scarborough, *supra* note 116, at 1466-67; Wei, *supra* note 52, at 776 (citing Scarborough, *supra* note 116); *Jefferies*, 615 F.2d at 1035 n.7.

¹⁷⁵ Castro & Corral, *supra* note 50, at 172.

¹⁷⁶ *Id.*

¹⁷⁷ Areheart, *supra* note 51, at 234.

¹⁷⁸ Center for American Progress, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* (Mar. 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf

and the push to improve diversity and inclusion in the workplace, perhaps employers will be more diligent in ensuring that they are not discriminating against their employees based on one or multiple protected categories. Ultimately, equality in the workplace would become a more attainable goal and the purpose of Title VII would be satisfied.

C. Judicial Branch: Judicial Creation of an Intersectional Framework

It is time for courts to shift away from the traditional notion that discrimination falls squarely on the basis of discrete characteristics. Some scholars argue that Title VII was never meant to be interpreted through a single-issue framework.¹⁷⁹ They contend that Title VII has intersectional origins, and that the concept of intersectionality predated the enactment of Title VII.¹⁸⁰ That said, courts should consider taking into account the sociopolitical history of Black women when creating and using an intersectional framework to analyze their claims.¹⁸¹ The Supreme Court has demonstrated that it is capable of considering the history of oppression of a group in deciding whether said group is being discriminated against in cases like *Brown v. Board of Education*,¹⁸² *Frontiero v. Richardson*,¹⁸³ and *United States v. Virginia*.¹⁸⁴ Federal appellate and district courts are

[<https://perma.cc/65J8-GQP6>].

¹⁷⁹ See *infra* notes.

¹⁸⁰ Mayeri, *supra* note 51, at 718. Pauli Murray, a Black female lawyer, wrote a memo in support of amending Title VII as it was written to include prohibition of discrimination based on sex. Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex (Apr. 14, 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) [hereinafter Murray, Title VII Memorandum]. Murray’s memo specifically argued in support of the amendment because she believed that the protection against sex discrimination would fully protect “Negro women.” Murray, Title VII Memorandum. For more discussion on Title VII’s intersectional origin see SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011) (examining the roots of feminist legal advocacy in intersectional experience); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 117-54 (2006) (recognizing the pivotal role of African American feminists in shaping the early history of Title VII); CARRIE N. BAKER, THE WOMEN’S MOVEMENT AGAINST SEXUAL HARASSMENT *passim* (2008) (chronicling Black women’s pivotal roles as activists, plaintiffs, and government officials in the struggle against sexual harassment); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 226-33, 240-48, 262-68, 277-80, 283-88 (2001) (discussing evolving views about the relationship between race and sex discrimination in the 1960s and 1970s); Eileen Boris, *The Gender of Discrimination: Race, Sex, and Fair Employment*, in WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION AND PRACTICE 273, (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003) (describing neglect of “interactive discrimination” faced by Black women); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 801 (2004) (exploring feminists’ “dual constitutional strategy” and its relationship to “the interconnectedness of race and sex equality”).

¹⁸¹ Courts have previously taken the social, political, and economical history of an oppressed group into consideration when analyzing whether laws disparately impact said group. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero*, the Supreme Court recounted the “long and unfortunate” history of sex discrimination in striking down a military benefits policy that had different proof requirements for women and men. *Id.* at 684-91. The Court is especially notorious for considering history when engaging in Equal Protection Clause analysis. See also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁸² 347 U.S. 483.

¹⁸³ 411 U.S. 677.

¹⁸⁴ *United States v. Virginia*, 518 U.S. 515 (1996).

not exempt from adopting such an analytical canon of construction to analyze employment discrimination claims brought by Black women. From a practical standpoint, the Supreme Court is charged with resolving splits among the circuits. Given the lack of agreement about whether intersectional claims are actionable and whether those claims deserve to be given equal weight as singular claims, it would be helpful if the high Court took the opportunity to resolve the split amongst the federal circuits.

It will likely be difficult for courts to simply “create” a framework without clear, established legal authority.¹⁸⁵ However, if the Court were to take up this cause of creating a multiple issue framework, it should refrain from building its argument around the sex-plus rationale. The Court can use the sex-plus rationale as a starting point, but as discussed above, the sex-plus rationale does not adequately address the concerns of Black women.¹⁸⁶ The Court should carefully craft a framework that both adequately conceives of Black women’s intersectional claims and addresses the logistical fears about which courts seem to be concerned.¹⁸⁷ The framework should mirror aspects of the *Lam* decision by ensuring that courts refrain from using a mathematical approach in recognizing combined claims, and that they recognize the unique stereotypes and barriers that Black women have faced and continue to face in the workplace.¹⁸⁸ The creation and adoption of such framework would aid in furthering Title VII’s goal of eradicating workplace discrimination based on protected categories.

IV. CONCLUSION

Since the passage of Title VII, the EEOC has made considerable progress in reducing racial discrimination in the workplace.¹⁸⁹ However, despite that progress, employment discrimination based on race persists.¹⁹⁰ Over the years, the EEOC and the judiciary have developed different frameworks for analyzing Title VII claims.¹⁹¹ Scholars have criticized the traditional Title VII and anti-discrimination doctrine as lacking protection for plaintiffs—more specifically, Black female plaintiffs—who desire to assert intersectional claims.¹⁹² Because of Title VII’s language and the absence of an established framework with which to analyze intersectional claims, courts are left to arbitrarily decide how or whether to adjudicate such cases.¹⁹³

¹⁸⁵ Judge Randall was wary of the majority’s recognition of a combined claim of race and sex as actionable because she thought the court was not in the position to deviate from the traditional framework and essentially create a new one. She also noted the lack of legal authority to support the recognition of such a claim and pointed to the opposing view that is *DeGraffenreid*. See *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1034 n.7 (5th Cir. 1980).

¹⁸⁶ See *supra* Part II.C.

¹⁸⁷ See *supra* Part II.C.

¹⁸⁸ See Powell, *supra* note 116, at 432-33 (discussing why the *Lam* decision is a good model for analyzing intersectional discrimination claims). Powell also points out some issues with *Lam* for courts to consider. *Id.* at 433-34.

¹⁸⁹ See *supra* note 147.

¹⁹⁰ EEOC, *Press Release, EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data: Retaliation, Race Discrimination and Harassment Persist; Disability Charges Increase* (Feb. 11, 2016), <https://www1.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm> [https://perma.cc/HM6G-HHL3].

¹⁹¹ See *supra* Part II.C.

¹⁹² See *supra* Part II.B.

¹⁹³ See *supra* Part II.C.

Courts should permit Black female plaintiffs to bring claims alleging discrimination based on their race *and* gender because refusing to do so leaves them without an adequate remedy for the discrimination that they have experienced. The EEOC can assist courts by issuing clear guidelines on interpreting Title VII to not only acknowledge intersectional discrimination as a cause of action, but to adequately analyze such a claim to ensure that Black female plaintiffs are not left without a remedy because of their unique position in society. Congress can also assist courts in building a framework by amending Title VII to include the words “or any combination thereof” at the end of the listed protected categories. This amendment to the language of the statute would explicitly demonstrate Congress’s intent to permit claims based on multiple characteristics, and possibly deter employers from discriminating against their employees based on one or more categories. Lastly, the judiciary itself can create and apply a canon to interpret intersectional claims that is informed by the social, political, and economic history of Black women in America in a way that effectively redresses their claims. These solutions would hopefully close the loopholes in Title VII that leave Black women in the metaphorical dust of employment discrimination.