Barry Law Review

Volume 26 | Issue 1 Article 3

1-12-2021

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INTRODUCTION

Discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons is a common occurrence.[1] It arises within the context of public accommodations, housing, employment, and virtually every other aspect of public life.[2] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin,[3] and the Supreme Court has recently held that "sex" encompasses LGBT status.[4] In so doing, the Court overruled approximately fifty years of case law, interpreted "sex" irregularly, ignored legislative history, and bypassed the traditional legislative process.[5] It also granted key civil rights to millions of deserving Americans.[6] What the Court did *not* do, however, was address whether this new requirement will apply to religious institutions.

This article proposes that courts treat LGBT discrimination as *religious* discrimination. This is because such a construction would prohibit most forms of LGBT employment discrimination,

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[1] This article uses the term "LGBT" for brevity but includes queer, questioning, intersex, asexual, and gender non-conforming persons by implication. *See generally* Matthew Bell, *Take a Letter: The Story of an Escalating Acronym*, SPECTATOR (Nov. 5, 2016, 9:00 AM), https://www.spectator.co.uk/2016/11/why-be-lgbt-when-you-can-be-lgbtiqcapgngfnba/ (discussing the complexity of the term "LGBT"). The term "LGBT status" includes sexual orientation, gender identity, and other non-heterosexual forms of sexual and gender expression. *See LGBTQ Glossary*, JOHNS HOPKINS U., https://studentaffairs.jhu.edu/lgbtq/education/glossary/ (last visited May 30, 2020).

[2] This article focuses on equal employment opportunity. *See generally* Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity, An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014*, WILLIAMS INST. 2, 7 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf (public accommodations and housing).

[3] *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 31, 2011), https://www.eeoc.gov/policy/docs/qanda_religion.html [hereinafter, *EEOC Religious Discrimination Q&A*].

[4] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1753 (2020).

[5] *Id.* at 1755 (Alito, J., dissenting).

[6] *Id.* at 1837 (Kavanaugh, J., dissenting).

while also preserving Title VII's religious institution exception.[7] Part I describes the history of LGBT discrimination, surveys the provisions of Title VII, and documents problems with interpreting "sex" to include LGBT status. Part II argues that LGBT status falls within the definition of religion, because LGBT status entails sincere belief about important aspects of life.[8] Part II also describes constitutional issues that would be avoided through this construction, and policy reasons that weigh in favor of prohibiting LGBT discrimination while still accommodating religious persons. This article concludes that treating LGBT discrimination as religious discrimination—though unorthodox—effectively balances the interests of both religious groups and LGBT workers. As such, courts should adopt this interpretation.

I. THE LGBT DISCRIMINATION PROBLEM

LGBT persons have long suffered from discrimination. Title VII was enacted to prohibit various forms of employment discrimination, but the statute does not expressly prohibit LGBT discrimination. Many courts and commentators have attempted to shoehorn LGBT status into Title VII's prohibition of sex discrimination, but, until recently, this view had not been widely adopted, and it does not effectively balance LGBT and religious interests.

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[7] This exception permits religious institutions to discriminate on the basis of religion even with respect to non-religious personnel, such as janitors, secretaries, or accountants. *E.g.*, 42 U.S.C. § 2000e-1(a) (2018) (stating that Title VII "shall not apply to . . . a religious [entity] with respect to the employment of individuals of a particular religion to perform work connected with the [entity's] activities"); *see also EEOC Religious Discrimination Q&A*, *supra* note 3. Preserving this exception would allow religious institutions, such as the Catholic Church, or the Church of Jesus Christ of Latter-day Saints and its affiliates, to continue discriminating against LGBT job applicants. Secular businesses with religious motivations, such as Chick-fil-A or Hobby Lobby, would not be protected. Alternatively, the Supreme Court could engraft a "religious institution" exception onto the LGBT prong of sex discrimination under Title VII. But such an exception would be conjured entirely out of whole cloth. *Compare* 42 U.S.C. § 2000e-1(a) (religious institution exception), *with id.* §§ 2000e to 2000e-17 (lack of a similar exception in Title VII for sex discrimination).

[8] It is important to note that LGBT status generally does not entail choice, however. Scientific research instead indicates that LGBT status results from complex interactions between genetics, development, upbringing, and other environmental forces. Nonetheless, just as an individual may believe in his or her existence while such existence remains objectively verifiable, an LGBT individual may harbor sincere beliefs regarding the objective fact of his or her LGBT status. *See, e.g.*, Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 MICH. J. GENDER & L. 41, 57 n.63 (2008) (compiling sources discussing the genetic and developmental causes of LGBT behavior); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1481–82 n.62 (2000) (same). *But see* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (assuming that LGBT status involves choice); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); Brandon Ambrosino, *I Wasn't Born This Way. I Choose to Be Gay.*, NEW REPUBLIC (Jan. 28, 2014), https://newrepublic.com/article/116378/macklemores-same-love-sends-wrong-message-about-being-gay (arguing that some individuals exercise control over their sexual identities).

A. History of LGBT Discrimination

1. History of Persecution

Non-heterosexual behavior has been observed in various species, and it stretches back thousands of years in human beings.[9] LGBT persecution stretches back just as far.[10] In the United States during the 1600s and 1700s, LGBT persons were generally isolated, marginalized, and ostracized.[11] During that time, non-heterosexual behaviors were criminalized, and "sodomy" was punishable by death.[12] During the 1800s, LGBT behaviors were often condemned as immoral, and derogatory terms for LGBT persons gained popularity.[13] As the study of psychology developed during the early-1900s, LGBT behaviors were classified alongside disorders like schizophrenia and depression, and LGBT persons were frequently "treated" via electroshock therapy, lobotomization, castration, and institutionalization.[14] LGBT persons were likewise targeted, scapegoated, and persecuted during the mid-1900s, both in foreign countries and in the United States.[15]

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[9] *See, e.g.*, Ludek Bartoš & Jana Holečková, *Exciting ungulates: male-male mounting in fallow, white-tailed and red deer*, *in* HOMOSEXUAL BEHAVIOUR IN ANIMALS: AN EVOLUTIONARY PERSPECTIVE 154 (Volker Sommer & Paul L. Vasey eds., 2006); *see also* Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1345 (Wash. 1977) (LGBT proclivities stretch back to "Biblical times").

[10] *See, e.g.*, David F. Greenberg & Marcia H. Bystryn, *Christian Intolerance of Homosexuality*, 88 AM. J. SOC. 515 (1982) (describing Christianity's traditionally intolerant attitudes toward LGBT behavior); Amy Richlin, *Not Before Homosexuality: The Materiality of the Cinaedus and the Roman Law Against Love Between Men*, 3 J. HIST. SEXUALITY 523 (1993) (anti-LGBT sentiments in the Roman Empire). Some societies have been more accepting of LGBT behavior, however. *See* Richard J. Hoffman, *Some Cultural Aspects of Greek Male Homosexuality*, 5 J. HOMOSEXUALITY 217 (1980) (ancient Greece).

[11] *See, e.g.*, SHERRY WOLF, SEXUALITY AND SOCIALISM: HISTORY, POLITICS, AND THEORY OF LGBT LIBERATION 36 (2009).

[12] I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 8–9 (2008); Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 1 J. HOMOSEXUALITY 277 (1976). Sodomy was not fully decriminalized until 2003. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[13] *See, e.g.*, Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425, 1459 (2009); Vern L. Bullough & Martha Voght, *Homosexuality and Its Confusion with the 'Secret Sin' in Pre-Freudian America*, 18 J. HIST. MED. & ALLIED SCI. 143, 145 (1973).

[14] Patricia A. Cain, *Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1551, 1555 n.21 (1993).

[15] *See, e.g.*, *id.* at 1565–67 (describing the application of McCarthyism to LGBT persons); Erwin J. Haeberle, *Swastika, Pink Triangle and Yellow Star–The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, 17 J. SEX. RES. 270 (1981) (Nazi persecution of LGBT persons); *see also* Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (banning individuals guilty of "sexual perversion" from the federal service).

2. Modern Developments

Today, more than 11 million Americans identify as LGBT, which is approximately 4.5% of the population.[16] LGBT rights have evolved since the early-1900s, but LGBT discrimination is still a common occurrence.[17] The LGBT civil rights movement in the United States began in earnest after World War II and was buoyed by the African American and women's civil rights movements.[18] In 1958, the Supreme Court granted some legitimacy to the movement when it held that an LGBT publication was not obscene and thus fell within the protections of the First Amendment.[19] During the 1960s and 1970s, numerous demonstrations took place, such as gay pride marches and the Stonewall riots, where LGBT persons resisted police raids on gay bars.[20] LGBT issues gained greater exposure during the 1980s and 1990s, as public attention focused on AIDS, HIV, and the military's Don't Ask, Don't Tell policy.[21] In 2015, after several incremental gains for LGBT rights, the Supreme Court announced the legalization of same-sex marriage in *Obergefell v. Hodges*, declaring that "[t]he Constitution promises liberty to all within its reach."[22]

Despite these advancements, LGBT discrimination remains a pressing issue. In the workplace, LGBT persons are often passed over for vacancies; they receive unequal pay and undeservedly poor performance evaluations; they are harassed; they are retaliated against; and they suffer from various other adverse employment actions because of their LGBT status.[23] States that independently protect LGBT status receive thousands of LGBT discrimination claims each year,

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[16] *E.g.*, Daniel Trotta, *Some 4.5 Percent of U.S. Adults Identify as LGBT: Study*, REUTERS (Mar. 5, 2019, 4:19 PM), https://www.reuters.com/article/us-usa-lgbt/some-4-5-percent-of-u-s-adults-identify-as-lgbt-study-idUSKCN1QM2L6.

[17] *See, e.g.*, Jane Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000).

[18] *See* Carbado, *supra* note 8, at 1478–79.

[19] One, Inc. v. Olesen, 335 U.S. 371, 371 (1958). The Court has not been universally sympathetic to LGBT rights, however. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (LGBT behavior not a fundamental right).

[20] *See, e.g.*, Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCHOL. ASS'N, https://www.apa.org/pi/lgbt/resources/history (last visited May 30, 2020).

[21] Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W.L. REV. 413, 416–18 (2008); Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 328–35 (2004) (public concern surrounding AIDS and HIV).

[22] Obergefell v. Hodges, 576 U.S. 644, 651 (2015); *see also* United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

[23] *E.g.*, M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI.-KENT L. REV. 559, 566–69 (2009). Incidences of discrimination increase when LGBT persons are considered "out" at work. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, WILLIAMS INST. 1–3 (2011), https://escholarship.org/content/qt03m1g5sg/qt03m1g5sg.pdf (37% of LGBT persons who were out were discriminated against, compared to 10% of LGBT persons who were not out).

and courts considering the issue in depth universally conclude that LGBT persons suffer from widespread employment discrimination.[24]

In light of all this, the Supreme Court granted certiorari to address whether Title VII prohibits LGBT discrimination.[25] In 2020, the Court held that LGBT discrimination is prohibited by the sex prong of Title VII, writing that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[26] While this decision represents a landmark victory for LGBT persons, the Court's reasoning has been assailed on several fronts,[27] and its opinion expressly declined to address the potential consequences for religious institutions.[28]

3. The LGBT-Religion Conflict

The debate surrounding LGBT rights is complicated by the issue's interplay with religion. This is primarily because views about LGBT status are often motivated by religious beliefs.[29] While some individuals regard LGBT behavior as harmless or merely biologically- or socially-deviant, religious persons—including corporate religious persons—often see LGBT behavior as inherently sinful or morally wrong.[30] This is politically problematic, and it also presents legal issues with regard to Title VII's religious institution exception and the First Amendment's protections for religion.[31] In addition, it is often difficult for courts to parse whether discrimination against LGBT persons is motivated by sincerely held religious views, or mere animus.[32] Furthermore, LGBT

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[24] *E.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010); JAMES REBBE ET AL., U.S. GEN. ACCOUNTING OFF., SEXUAL ORIENTATION-BASED EXPERIENCE WITH STATUTORY PROHIBITIONS (2002), http://www.gao.gov/new.items/d02878r.pdf; *see also LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes*, WILLIAMS INST. 1–3 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-March-2019.pdf (patchwork of state laws); Exec. Order No. 11,478, 63 Fed. Reg. 30,097 (June 2, 1998) (federal employee sexual orientation); Exec. Order No. 13,672, 80 Fed. Reg. 16,996 (Mar. 31, 2015) (federal employee gender identity). LGBT status is, of course, wholly unrelated to job performance. *E.g.*, Sears & Mallory, *supra* note 23, at 1.

[25] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020).

[26] *Id.* at 1754.

[27] *See id.* at 1754–83 (Alito, J., dissenting); *id.* at 1822–37 (Kavanaugh, J., dissenting); *see also* Part I.C.3.

[28] *Bostock*, 140 S. Ct. at 1754.

[29] *See, e.g.*, Michaelson, *supra* note 8, at 68 (Christianity); *see also* Brenda L. Beagan & Brenda Hattie, *Religion, Spirituality, and LGBTQ Identity Integration*, 9 J. LGBT ISSUES COUNSELING 92, 93–94 (2015) (Islam and Judaism).

[30] *E.g.*, Elizabeth Brown & Inara Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 AM. BUS. L.J. 55, 75–90 (2019) (describing corporate religious views); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 70–72 (2006) (morality of LGBT status).

[31] *See* U.S. CONST. amend. I (Establishment Clause and Free Exercise Clause); 42 U.S.C. § 2000e-1(a) (2018) (religious institution exception); Petruska v. Gannon Univ., 462 F.3d 294, 303–04 (3d Cir. 2006) (ministerial exception); *see also* Part II.

[32] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 770 (Ginsburg, J., dissenting). Courts *are* willing to parse whether religious views are pretextual, however, and whether religious entities' actions comport with their

status and religious beliefs have troublesome similarities. For instance, accepting LGBT persons' attestations regarding sexual orientation or gender identity is similar to evaluating the sincerity of religious persons' beliefs. Likewise, the dignitary harm incurred by LGBT persons who are discriminated against is somewhat comparable to that incurred by religious persons who are forced to employ LGBT workers.[33] Because there are legitimate interests on both sides, the fight between LGBT rights advocates and religious groups is sure to continue.[34]

B. Overview of Antidiscrimination Law

1. History of Title VII

The United States has traditionally operated under an at-will employment regime.[35] Few workplace protections existed prior to the Civil Rights Act of 1964, which was not designed with religious individuals or LGBT persons in mind, and instead focused on racial inequality.[36] In the years leading up to the act, the Supreme Court's jurisprudence gradually evolved to protect African Americans from discrimination, a trend that mirrored the contemporary political landscape.[37] The Senate was likewise slow to enact civil rights protections and it rejected hundreds of bills and filibustered the eventual Civil Rights Act for two months before eventually approving the

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alleged beliefs. Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. 59, 62–64 (2014); *see also* Hussein v. Waldorf-Astoria, 134 F. Supp. 2d 591, 598 (S.D.N.Y. 2001) (plaintiff asserted that beard was religious but shaved frequently).

[33] Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 135 (2006) ("What about the right of conservative Christians to 'live lives of honesty?' If they are 'constantly vulnerable' to forced association with gay people, will this not be 'a deep, intense and tangible hurt' to them?"). The harm to LGBT persons is likely greater, however, in part because such dignitary harms are generally accompanied by economic losses. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

[34] To illustrate the legitimacy of each side's interests, imagine the case of a widow with fifteen or more employees who believes that hiring an LGBT worker will prevent her from seeing her late husband in the afterlife. *Cf.* Smith v. Fair Emp. & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996). On one hand, the widow's beliefs may be pretextual. On the other, the LGBT worker's attestations may be false. The widow will suffer emotional distress if she is forced to act contrary to her beliefs. The LGBT worker will suffer similar distress if the widow withholds employment and will also have to continue searching for jobs. *See* Obergefell v. Hodges, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting) ("Many good and decent people oppose same-sex marriage as a tenet of faith.").

[35] *See generally*, Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB & EMP. L. 65 (2000).

[36] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e-1 to 2000e-17); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431, 441–43 (1966); Craig Westergard, Note, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 215, 221–22 (2019).

[37] *E.g.*, *Civil Rights Act of 1964*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/civil-rights-act.htm (last visited May 30, 2020).

legislation.[38] President Lyndon B. Johnson then signed the Civil Rights Act into law on July 2, 1964, marking the birth of what is still the most important civil rights statute in the United States.[39]

2. Substantive Provisions of Title VII

Title VII of the Civil Rights Act prohibits discrimination in the terms, conditions, and privileges of employment because of race, color, religion, sex, or national origin.[40] To state a claim for discrimination under Title VII, plaintiffs must show: first, that the employer has at least fifteen employees; second, that they themselves belong to a protected class; third, that they are qualified to perform the essential functions of the position in question; fourth, that they have suffered a materially adverse employment action; and fifth, that the action was taken *because of* their race, color, religion, sex, or national origin.[41] The act did not initially define the term "discriminate," or the degree of causation necessary to state a claim, but courts have since held—and Congress has affirmed—that discrimination encompasses both disparate treatment and disparate impact theories, and that protected attributes cannot be adverse factors in employment decisions at all.[42]

Title VII treats religion somewhat differently from race, color, sex, and national origin, however. To begin with, Title VII requires employers to reasonably accommodate religious employees.[43] This requirement was introduced by the Equal Employment Opportunity Commission (EEOC) in the 1960s and was added to Title VII when the statute was amended in 1972.[44] Title VII also contains two important exceptions for religious institutions. The first permits religious institutions to discriminate on *any* basis in employing "ministers," a phrase that is construed broadly.[45] The second permits religious institutions to discriminate on the basis of *religion* in all employment decisions, even as to non-religious personnel.[46]

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[38] *E.g.*, Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, But Title VII Has Not Reached Its True Potential*, 89 ST. JOHN'S L. REV. 693, 785–92 (2016).
[39] *Id.* at 792–93.
[40] 42 U.S.C. § 2000e-2(a)(1). Sex also includes certain related characteristics, like pregnancy. *Id.* § 2000e(k).
[41] *See, e.g.*, Craig Westergard, Note, *Unfit to Be Seen: Customer Preferences and the Americans with Disabilities Act*, 34 BYU J. PUB. L. 179, 186–87 (2020).
[42] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k), (m)) (recognizing disparate impact discrimination and repudiating stringent causation requirements); Griggs v. Duke Power Co., 401 U.S. 424, 431, 436 (1971).
[43] 42 U.S.C. § 2000e(j). Employers may escape this obligation by demonstrating undue hardship, which is a relatively slight burden. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
[44] Susannah P. Mroz, Note, *True Believers: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145, 147–48 (2005).
[45] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012). This exception is not actually contained within the text of Title VII but was instead developed by courts as a matter of constitutional avoidance. *See, e.g.*, *id.*
[46] 42 U.S.C. § 2000e-1(a); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337–38 (1987).

3. Burden-shifting Framework

Courts have also developed a burden-shifting framework for addressing employment discrimination claims.[47] Plaintiffs must first make out a prima facie case by demonstrating the elements described above.[48] The burden then shifts to employers to counter plaintiffs' allegations by articulating at least one legitimate, nondiscriminatory reason for the adverse employment action.[49] Then, the burden shifts back to plaintiffs to prove that the articulated rationale is pretextual and to persuade the factfinder of the unlawful discrimination's ultimate reality.[50]

C. Problem of LGBT Discrimination as Sex Discrimination

1. "On the Basis of Sex"

The ordinary meaning of sex generally does not include LGBT status. "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[51] Contemporary here generally means when a statute was enacted rather than when it is interpreted.[52] Dictionaries from 1964 do not lend themselves to an interpretation of sex that encompasses LGBT status.[53] During the early-1960s, LGBT persons were frequently isolated and marginalized, and many segments of society believed that they were psychopaths or criminals, making such a broad reading both unlikely and contrary to Title VII's merit-promoting purposes.[54] In addition, transgender surgeries did not take place in the United States until 1966, and so it is unlikely that sex would have been generally understood to include transgender status two years before it became a medically viable option.[55]

Contemporary dictionaries are likewise unsympathetic to this reading of "sex." The English Oxford Dictionary contains the following definitions of sex: "sexual activity, including specifically

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[47] *See, e.g.*, McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1973).
[48] *E.g.*, Carla A. Ford, *Gender Discrimination and Hostile Work Environment*, 57 U. S. ATT'Y BULL. 1–3 (2009), https://www.justice.gov/sites/default/files/usao/legacy/2009/05/07/usab5702.pdf (coverage, protected status, qualification, adverse employment action, and causation).
[49] *E.g.*, *id.*
[50] *E.g.*, *id.* This framework differs slightly for disparate impact cases. *See, e.g.*, Robert Beltont, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 231–32 (1990).
[51] *E.g.*, Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014) (internal quotation marks omitted); Perrin v. United States, 444 U.S. 37, 42 (1979). *But see, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring) ("[I]nterpretation can mean giving a fresh meaning to a statement . . . that infuses the statement with vitality and significance today.").
[52] *E.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020); *Sandifer*, 571 U.S. at 227.
[53] *E.g.*, *Hively*, 853 F.3d at 360–62 (Sykes, J., dissenting) (consulting various dictionaries).
[54] *See* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 335 (2017); Part I.A.
[55] *See, e.g.*, Emily Skidmore, *Constructing the "Good Transsexual": Christine Jorgensen, Whiteness, and Heteronormativity in the Mid-Twentieth-Century Press*, 37 FEMINIST STUD. 270, 272 (2011).

sexual intercourse," as well as "either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions."[56] LGBT status may, in some instances, relate to sexual intercourse, but this is an alternative definition, not an ordinary one. LGBT status may also be fairly regarded as a category into which human beings are separated, but this categorization would be on the basis of sexual orientation or gender identity rather than reproductive functionality. Moreover, LGBT status is probably not one of the "two main categories" mentioned in the dictionary, given that the categories are expressly identified as male and female and less than one-twentieth of the population identifies as LGBT.[57]

There is also evidence in Title VII's statutory history to suggest that "sex" should be read narrowly. First, the statute enumerates other categories that overlap with each other, as in its prohibitions against discrimination on the basis of race and color.[58] Like race and color, sex and LGBT status substantially overlap with each other, and one could be said to encompass the other. But LGBT status is not included in the statute. This indicates that Title VII tends to spell out specific protected classes rather than implying some classes within others.[59] Second, Congress has subsequently included prohibitions against discrimination because of gender identity and sexual orientation in other statutes, indicating that such classes tend to be enumerated alongside sex instead of being subsumed by it.[60] Third, Congress has amended Title VII numerous times, showing that it is well aware of how to do so, and it has specifically amended the definition of sex to include other characteristics, such as pregnancy.[61] Thus, the ordinary meaning of sex probably does not include LGBT status.

2. Legislative History of Sex

The legislative history of Title VII's prohibition against sex discrimination is sparse, but the record does not suggest that Congress believed sex encompassed LGBT status.[62] The historical

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[56] *See* OXFORD ENGLISH ONLINE DICTIONARY (2019), https://en.oxforddictionaries.com/definition/us/sex (last visited May 30, 2020).
[57] *E.g.*, Trotta, *supra* note 16.
[58] *See* 42 U.S.C. § 2000e-2(a)(1) (2018).
[59] *See, e.g.*, United States v. Barnes, 222 U.S. 513, 518–19 (1912) (expressio unius est exclusio alterius).
[60] *Compare* 42 U.S.C. § 2000e-2(a)(1), *with id.* § 13925(b)(13)(A) (prohibiting certain entities from discriminating "on the basis of actual or perceived race, color, religion, national origin, *sex, gender identity*, . . . *sexual orientation*, or disability") (emphasis added), *and* 18 U.S.C. § 249(a)(2)(A) (prescribing heightened punishments for injuring "any person, because of . . . religion, national origin, *gender, sexual orientation, gender identity*, or disability") (emphasis added). *See also* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 364 (7th Cir. 2017) (Sykes, J., dissenting) (providing additional examples). While courts often allege that Congress may choose to use a belt and suspenders to accomplish its purposes, this is akin to saying that Congress purposefully employs surplusage. *See, e.g.*, McEvoy v. IEI Barge Servs., Inc., 622 F.3d 671, 677 (7th Cir. 2010).
[61] *See* 42 U.S.C. § 2000e(k).
[62] *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–64 (1986) (discussing Title VII's relative lack of legislative history with regard to sex discrimination).

context of the sex provision was of women entering the workforce in rapidly increasing numbers.[63] In the early-1900s, about 5 million women were employed in the United States, accounting for about 18% of the workforce; in 1966, about 27 million women were employed, accounting for about 36%.[64] Today, there are approximately 75 million women working in the United States, which is close to half the nation's workforce.[65] As such, there has been an increasing need for civil rights statutes protecting women.

In the early 1960s, President John F. Kennedy repeatedly called for civil rights legislation, but the bills that were introduced did not address sex directly.[66] As such, Title VII did not originally prohibit sex discrimination, and the term "sex" was instead added in an amendment proposed by Representative Howard Smith, a noted opponent of the legislation.[67] Commentators have questioned Representative Smith's motives in offering the amendment, but modern scholars generally agree that such concerns are overstated and overshadowed by the influence of women's rights groups.[68] Once it became clear that the Civil Rights Act would become law, however, Representative Smith and other opponents of the act expressed concern that Title VII would require employers to favor African American women over white women, and even showed support for the provision.[69] Thus, the history surrounding Title VII's enactment shows that Congress was principally concerned with addressing discrimination against females, not discrimination against LGBT persons, when it added the term "sex" to Title VII.

In addition, Congress amended Title VII in 1978 to specify that sex includes discrimination because of pregnancy and related conditions.[70] Congress did not consider whether sex encompassed LGBT status during the lead up to either Title VII or this amendment, however.[71] In fact, members of Congress have introduced separate legislation prohibiting LGBT discrimination in every session of Congress since 1973, save one—legislation that remains unenacted.[72] From Congress's repeated lack of consideration for LGBT discrimination and its deliberate amendment of the term "sex," courts have generally concluded that Title VII's legislative history does not

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[63] Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 305 (1968).
[64] *Id.*
[65] Mark DeWolf, *12 Stats About Working Women*, DEP'T OF LABOR BLOG (Mar. 1, 2017), https://blog.dol.gov/2017/03/01/12-stats-about-working-women.
[66] *See* Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 166–68 (1991).
[67] *See, e.g.*, Kanowitz, *supra* note 63, at 311.
[68] *E.g.*, Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 410 (2009).
[69] *See* 110 CONG. REC. 2583 (1964).
[70] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2018)).
[71] I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1168 (1991).
[72] *See, e.g.*, Eskridge, *supra* note 54, at 341 n.73.

support the argument that sex includes LGBT status.[73] When there are no indications that the statutory definition of a term deviates from its ordinary meaning, that ordinary meaning should govern unless there are persuasive policy reasons to depart from it.[74]

3. Circuit Split and the Supreme Court

Until recently, the Circuit Courts of Appeal were united in holding that the word "sex" in Title VII does not encompass LGBT status.[75] This holding originated shortly after the passage of Title VII and has been reiterated numerous times.[76] Courts adopting this construction have relied on the ordinary meaning of sex,[77] statements of legislators pertaining specifically to women,[78] legislative inaction,[79] and policies favoring judicial conservativism, consistency, and predictability in the law.[80] After the EEOC reversed its previous guidance in 2015, however, some circuits chose to follow its lead by reversing existing precedent.[81] In the face of this emerging split, the Supreme Court granted certiorari in several cases addressing whether LGBT status implicates sex, which

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[73] *E.g.*, Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) ("The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage . . . ."); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661–62 (9th Cir. 1977) (similar); *see also* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); Powell v. Read's, Inc., 436 F. Supp. 369, 370–71 (D. Md. 1977).

[74] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 70 (2012) ("One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise.").

[75] *See, e.g.*, Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 86 (2019).

[76] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341–42 (7th Cir. 2017) (collecting cases).

[77] *E.g.*, DeCintio v. Westchester Cty. Med. Ctr., 807 F.2d 304, 306–07 (2d Cir. 1986).

[78] *E.g.*, Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 749–50 (4th Cir. 1996).

[79] *E.g.*, Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005).

[80] *E.g.*, Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255–57 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).

[81] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576, 579 (6th Cir. 2018); Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d Cir. 2018); *Hively*, 853 F.3d.; *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-protections-lgbt-workers (last visited June 23, 2020). *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference."), *with* General Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (finding EEOC guidance unpersuasive), *and* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second-Class Agency?*, 60 OHIO ST. L.J. 1533, 1574, 1549–50 (1999) (finding that the Supreme Court defers to the EEOC approximately 54% of the time, compared to 72% of the time for other agencies).

were consolidated in *Bostock v. Clayton County*.[82] In *Bostock*, the Court held that the text of Title VII alone shows that sex encompasses LGBT status —and that it does so *unambiguously*.[83]

The Court's analysis does not quite live up to this assertion, however. Instead, its argument boils down to a single example, where an employer fires one of two otherwise identical employees, a male and a female, both of whom are attracted to men.[84] The Court first attempted a similarly situated analysis, reasoning that: "[i]f the employer fires the male employee for no reason other than the fact he is attracted to men," it takes action that it would not have taken against his female coworker.[85] Second, the Court reasoned that both the man's orientation and his sex were but-for causes of the adverse employment action, and Title VII prohibits sex from being even *a* factor in the decision.[86]

The Court's reasoning is flawed, however. First, its similarly situated analysis changes both the sex and the orientation of the male employee —making it difficult to tell whether sex, LGBT status, or both were responsible for the adverse employment action.[87] Second, its causation analysis assumes that sex and LGBT status cannot be disentangled.[88] But that is not true. An employer that requires job applicants to check a box indicating whether they are LGBT may discriminate solely on that basis.[89] And even though sex and LGBT status may be somewhat related, not everything that is related to sex *is* sex. Viewing sex as a legal cause of LGBT discrimination just because an employer is aware of an employee's sex invites courts to do the

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[82] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020).
[83] *See id.* at 1737, 1743, 1749. The fact that courts had, for over fifty years, uniformly held that sex does *not* encompass LGBT status likely mitigates in favor of the opposite conclusion. *Id.* at 1832–33 (Kavanaugh, J., dissenting). At the very least, this disagreement shows that reasonable minds may differ on this issue, and that the text is therefore ambiguous. *Compare Hively*, 853 F.3d at 360–62 (Sykes, J., dissenting) (arguing that LGBT discrimination involves hetero-homo distinctions while sex discrimination involves male-female distinctions), *with* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U.L. REV. 197, 234 (1994) (arguing that LGBT discrimination is inextricably intertwined with traditional gender roles).
[84] *Bostock*, 140 S. Ct. at 1741.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1762 (Alito, J., dissenting).
[88] *See id.* at 1746.
[89] *Id.* at 1758 (Alito, J., dissenting); *see also* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 360–62 (7th Cir. 2017) (Sykes, J., dissenting) (conceptualizing discrimination against gay and lesbian individuals as discrimination on the basis of orientation instead of discrimination on the basis of sex).

same for other sex-linked factors, such as dress, appearance, or aggression.[90] Where to draw the line becomes a matter of policy.[91]

The ordinary meaning of the word "sex," the legislative history of Title VII, the previous unanimity of the circuit courts, policies favoring stability and predictability in the law, and the constitutional separation of powers each mitigate in favor of holding that sex does not encompass LGBT status.[92] But the reasons for prohibiting LGBT discrimination are also persuasive, and so a judicial remedy for LGBT discrimination may still be desirable.[93]

Near the end of the Court's opinion in *Bostock*, it briefly addressed religion: "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[94] The Court wrote that the Religious Freedom Restoration Act, the ministerial exception, and the religious institution exception may require different results in cases involving religious employers, but it reserved these questions for another day.[95] That day is fast approaching. There are many good reasons to prohibit LGBT discrimination, but there are also many good reasons to preserve exceptions for religious employers.[96] In light of the Supreme Court's opinion in *Bostock*, the question then becomes: are there other, more nuanced means of providing LGBT persons with a federal remedy for employment discrimination?

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[90] *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (dress and grooming); Janet S. Hyde, *How Large Are Gender Differences in Aggression? A Developmental Meta-Analysis*, 20 DEVELOPMENTAL PSYCHOL. 722, 730 (1984) (finding that less than 5% of the variance in aggression between individuals is attributable to gender differences). Disciplining an employee for showing aggression should probably not be considered sex discrimination. *Cf.* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (difficulty of analyzing increasingly tenuous causal factors).

[91] Perhaps acknowledging this, the Court attempts to prop up its textual arguments with ill-fitting appeals to precedent. *See Bostock*, 140 S. Ct. at 1743–44. One case the Court cites deals with straightforward sex discrimination; another is a per curium opinion that has since been obviated by the Pregnancy Discrimination Act; and the last is cited merely to show that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *See id.* at 1774 (Alito, J., dissenting). Inviting judges to decide what constitutes a "reasonably comparable evil" for purposes of Title VII likewise invites judicial policy-making — a role which some circuit judges have embraced. *See Hively*, 853 F.3d at 352–59 (Posner, J., concurring) (overtly embracing "statutory updating"); *cf.* John Sibley Butler, *Homosexuals and the Military Establishment*, 31 SOC'Y 13, 17 (1993) ("Where did [LGBT and other] people drink water during the days of segregation? If the answer is that they drank from the 'Whites Only' fountain, instead of the 'Coloreds Only' fountain, then their oppression should be seen in a different historical light than that of black Americans."); Part II (arguing that courts should interpret religion to include LGBT status because such an interpretation would preserve Title VII's religious institution exception).

[92] *See* Part I.C.I; Part I.C.2. *See generally* Kira Fuchs & Florian Herold, *The Costs and Benefits of a Separation of Powers—An Incomplete Contracts Approach*, 13 AM. L. & ECON. REV. 131 (2011) (benefits of separation of powers).

[93] *See* Part II.B.1.

[94] *Bostock*, 140 S. Ct. at 1754.

[95] *Id.*

[96] *See* Part II.B.1; Part II.B.2.

II. LGBT DISCRIMINATION AS RELIGIOUS DISCRIMINATION

LGBT discrimination may be actionable under Title VII even if it is not treated as sex discrimination. This is because it is cognizable as religious discrimination. LGBT status meets the Supreme Court's test for religion because it generally entails "sincere belief" about important life topics like sexual orientation and gender identity. Construing religion to encompass LGBT status also avoids conflict with the First and Fourteenth Amendments, reduces unfairness and inefficiency, and balances the interests of religious and LGBT persons alike.

A. Religion Under Title VII

1. Ordinary Meaning of Religion

At first glance, the ordinary meaning of religion probably does not include LGBT status. LGBT status is not as far removed from religion as some may assume, however. During the 1960s, religion was increasingly characterized by "a new sense of freer social relations, particularly in sexual matters."[97] Dictionaries from this time define religion as "[o]ne of the prevalent systems of faith and worship," such as Christianity or Islam, but also as "[h]uman recognition of superhuman controlling power" and "[a]ction that one is bound to do."[98] Such definitions of religion conceivably encompass LGBT behavior since LGBT persons often feel compelled to engage in actions consistent with their individual consciences and sexual desires.[99] Modern dictionaries likewise lend support to a broad reading of religion as a "pursuit or interest followed with great devotion."[100]

In addition, several textual canons of construction support a liberal interpretation of religion. To begin with, race, color, sex, and national origin—as well as other protected attributes like age and disability—are broad, general categories.[101] As such, the broad meaning of religion may be

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[97] Daniel Bell, *Religion in the Sixties*, 38 SOC. RES. 447, 447–48 (1971); *see also* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1069 (1978) (describing the "spiritual explosion" of the 1960s and 1970s).

[98] *Religion*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1029 (1964); *see also* Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566–67 (2012) (consulting dictionaries).

[99] *See, e.g.*, Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 212 (2010); *see also* Part II.B.2 (classifying LGBT status as religion would require sacrifice on the part of both LGBT advocates and religious persons).

[100] *Religion*, OXFORD ENGLISH ONLINE DICTIONARY (2019), https://en.oxforddictionaries.com/definition/us/religion (last visited May 30, 2020).

[101] *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2018).

inferred from its association with these terms.[102] In addition, the Civil Rights Act as a whole prohibits irrational intolerance in various forms.[103] The act generally prohibits making decisions based on non-meritorious factors within the context of public accommodations, housing, employment, education, and other areas.[104] As such, a broad definition of religion likely comports with the rest of the statute.[105] Finally, while Title VII originally defined religion to include only beliefs, this definition has since been expanded, such as when it was amended in 1972 to include "all aspects of religious observance and practice, as well as belief."[106] The definition of religion thus seems expansive, and so LGBT status may fall within the ordinary meaning of religion under Title VII.

2. Legal Meanings of Religion

While reasonable people may differ about whether LGBT status falls within the ordinary meaning of religion, LGBT status likely satisfies alternative definitions of religion promulgated by the Supreme Court and the EEOC.[107] Before the 1960s, the Supreme Court generally required a nexus with deity for beliefs to be deemed religious.[108] Several cases decided in the 1960s removed this requirement, however, and the Court now requires only a "sincere belief" regarding an important life topic. While preoccupation with God and organized religion sometimes still infects the inquiry into whether beliefs or practices are religious, this focus has not been sanctioned by the Supreme Court or the EEOC.[109]

The first important case in this line was *United States v. Seeger*, which was decided in 1965.[110] There, the Supreme Court considered whether several individuals who believed in moral, cosmic, and spiritual principles, but who did not confess a belief in deity, qualified for a military service

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[102] *E.g.*, Yates v. United States, 574 U.S. 528, 544–45 (2015) (noscitur a sociis). *But see* United States v. Barnes, 222 U.S. 513, 518–19 (1912) (expressio unius est exclusio alterius). By this same token, of course, sex may also include LGBT status. *See* Part I.C. There are compelling policy reasons for interpreting religion to encompass LGBT status, however, because doing so would preserve Title VII's religious institution exception. *See* Part II.B.2.

[103] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253; *see also* John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) (whole act rule).

[104] *Cf.* Eskridge, *supra* note 54, at 331–32.

[105] *See, e.g.*, Law v. Siegel, 571 U.S. 415, 422 (2014).

[106] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)); Laura E. Watson, Note*, (Un)reasonable Religious Accommodation: The Argument for an "Essential Functions" Provision Under Title VII*, 90 S. CAL. L. REV. 47, 55 (2016).

[107] The law often uses terms in ways that are not quite ordinary. *See, e.g.*, Bostock v. Clayton Cty., 140 S. Ct. at 1738–39; Smith v. United States 508 U.S. 223, 225 (1993) (criminal defendants who trade guns for drugs "use" firearms within the context of an enhanced penalty statute). As such, the Supreme Court's definitional gloss for the term "religion" should be controlling. *See infra*.

[108] *Compare* Davis v. Beason, 133 U.S. 333 (1890) (requiring religion to refer to the belief in and worship of a deity), *with* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (rejecting this requirement).

[109] *See, e.g.*, Brown v. Pena, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977); Mroz, *supra* note 44, at 172–75.

[110] 380 U.S. 163 (1965).

exemption.[111] The Court first reviewed the evolution of conscientious objector laws, which initially applied only to "well-recognized" and "organized" religions with specific belief systems, but later evolved to encompass "personal scruples."[112] The Court then recognized the "richness and variety of spiritual life" and "broad spectrum of religious beliefs" found in the United States, as well as the "ever-broadening understanding of the modern religious community."[113] These facts led the Court to acknowledge that while some individuals may believe in deity, "others think of religion as a way of life."[114] In light of these considerations, the Supreme Court defined religion as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God."[115] Thus, beliefs and practices may be religious if they are sincere, meaningful, and important in an individual's own scheme of things.[116]

The second case in this line was *Welsh v. United States*, which was decided in 1970.[117] The Court again considered the problem of conscientious objectors and held that even expressly nontheistic beliefs may be religious.[118] The Court reasoned that religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."[119] The Court also stated that so-called religious beliefs may be derived from "beliefs on matters of public policy"

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[111] *Id.* at 166–68. The exemption did not apply to those raising "essentially political, sociological or economic" objections to military service because, the Court reasoned, such "judgments have historically been reserved for the Government." *Id.* at 173.

[112] *Id.* at 171.

[113] *Id.* at 174, 180, 183; *see also id.* at 192 (Douglas, J., concurring) ("I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities."); Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 477 (2009) ("[T]here is astonishing diversity to what people connote by the concept of 'religion.'").

[114] *Seeger*, 380 U.S. at 174; *see also* Charles C. Lemert, *Non-Church Religion*, 16 REV. RELIGIOUS RES. 186, 187 (1975) (acknowledging that religion may be conceptualized as one's world view, ideology, value-system, or even culture). The Supreme Court also quoted one eminent theologian who defined religion as "what you take seriously without any reservation." *Seeger*, 380 U.S. at 187 (emphasis deleted).

[115] *Seeger*, 380 U.S. at 176.

[116] *Id.* at 185; *EEOC Religious Discrimination Q&A*, *supra* note 3; *see also* Captain Drew A. Swank, *Cold Fusion Confusion: The Equal Employment Opportunity Commission's Incredible Interpretation of Religion in* LaViolette v. Daley*,* ARMY LAW. 74 (2002) (discussing an EEOC decision holding that beliefs on cold fusion and other scientific topics were religious). Needless to say, the Supreme Court's definition of religion is exceedingly broad.

[117] 398 U.S. 333 (1970).

[118] *Id.* at 335–38. While plaintiffs are not required to classify their beliefs as religious, *see id.* at 342–43, such classifications may still be viewed favorably by some courts. *See, e.g.*, Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1022–23 (E.D. Wis. 2002) (discussing importance of white supremacist plaintiff's subjective characterization of belief as religious).

[119] *Welsh*, 398 U.S. at 339; *see also* United States v. Meyers, 906 F. Supp. 1494, 1500 (D. Wyo. 1995) ("[C]ourts cannot rely on their perhaps biased and traditional ideas about what constitutes a religion.").

or views with "a substantial political dimension."[120] Thus, religious beliefs need not be theistic or traditional and may even be somewhat political in nature.[121]

Courts applying *Seeger* and *Welsh* have found various beliefs to be religious.[122] For instance, the Supreme Court has indicated that Native American beliefs about sacred landmarks and religions like Buddhism, Taoism, Ethical Culture, and Secular Humanism qualify.[123] Lower courts have found that beliefs pertaining to witchcraft, meditation, white supremacy, vaccinations, cold fusion, and other topics can be religious.[124] Few courts have examined whether LGBT status qualifies as religion, but those that have have impermissibly focused on extraneous factors like history, ceremonies, and holidays.[125]

Like the Supreme Court, the EEOC has adopted a broad definition of religion.[126] The agency defines religion as a sincere and meaningful belief that pertains to ultimate ideas about life, death, or purpose.[127] Such beliefs may be nontheistic, moral, or ethical.[128] The EEOC has further

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[120] *Welsh*, 398 U.S. at 342.

[121] Other factors affecting the Supreme Court's definition of religion likely include the Constitution's guarantees for the free exercise of religion, equal protection, and due process of law, since a narrow definition of religion may establish certain religions over others or deprive religious persons of equal protection or due process. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 728 (1871) ("The law . . . is committed to the support of no dogma, the establishment of no sect."). Constitutional considerations may thus compel a broad reading of religion so that the government does not favor some species of religion over others. *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 501–04 (1979); John C. Knechtle, *If We Don't Know What It Is, How Do We Know if It's Established?*, 41 BRANDEIS L.J. 521, 528–30 (2003).

[122] *See infra* notes 123–24.

[123] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988); Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

[124] Kaufman v. McCaughtry, 419 F.3d 678, 681–82 (7th Cir. 2004) (atheism); Dettmer v. Landon, 799 F.2d 929, 931–32 (4th Cir. 1986) (witchcraft); Malnak v. Yogi, 592 F.2d 197, 213–14 (3d Cir. 1979) (meditation); Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (Scientology); Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1022–23 (E.D. Wis. 2002) (white supremacy); Doty v. Lewis, 995 F. Supp. 1081, 1084–86 (D. Ariz. 1998) (Satanism); Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 92–94 (E.D.N.Y. 1987) (anti-vaccination beliefs); Swank, *supra* note 116 (cold fusion and other scientific topics).

[125] Sevier v. Lowenthal, 302 F. Supp. 3d 312, 321–22 (D.D.C. 2018) (declining to view homosexuality as religion because it lacks the "trappings" of religion, such as a comprehensive system of beliefs, ceremonies, and holidays) (plaintiff sought removal of LGBT pride flags from hallways outside Congressional offices); Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (declining to view belief in the validity of homosexual relationships as religion because belief system was not "comprehensive" and lacked history, literature, clergy, a wide following, and ceremonies). *But see* United States v. Seeger, 380 U.S. 163, 176 (1965) (religion is "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God").

[126] *E.g.*, *EEOC Religious Discrimination Q&A*, *supra* note 3 ("Title VII . . . defines religion very broadly."); *see also* 29 C.F.R. § 1605.1 (2020) ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.").

[127] *Notice No. 915.003, EEOC Compl. Man.: Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, 6–9 (July 22, 2008), https://www.eeoc.gov/policy/docs/religion.pdf.

[128] 29 C.F.R. § 1605.1 (2020).

elaborated that beliefs or practices may be religious even when they are not affiliated with particular religious groups and when there are few to no other adherents.[129]

Because of the broad and encompassing definitions adopted by the Supreme Court and the EEOC, LGBT status may be fairly categorized as a religious belief for the following seven reasons. First and most importantly, sexual orientation and gender identity are not far removed from sincerely held beliefs about other important aspects of life, such as the sanctity of marriage, fidelity to one's partner, divorce, chastity, tolerance, and love.[130] Second, it would be somewhat illogical for the law to *prohibit* discrimination against persons who believe that LGBT behavior is immoral, while at the same time *permitting* discrimination against persons who believe that LGBT behavior is moral and acceptable.[131] Third, LGBT status often functions as religion in the lives of LGBT persons, shaping many of the activities in which they participate, their peer groups, and their worldviews.[132] Fourth, LGBT status is often framed as a moral or ethical issue by anti-LGBT advocates, who contend that LGBT behavior is unnatural and harmful, and by LGBT persons, who contend that LGBT behavior is ordinary, benign, or perhaps even desirable.[133] Fifth, even if LGBT

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[129] *See EEOC Religious Discrimination Q&A*, *supra* note 3.

[130] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (LGBT marriage "embodies the highest ideals of love, fidelity, devotion, sacrifice, and family," where individuals "become something greater than once they were" in "a love that may endure even past death."); Wisconsin v. Yoder, 406 U.S. 205, 217 (1972) (similarity between "religious beliefs" and "lifestyle"); Feldblum, *supra* note 30, at 63 (recognizing certain "commonalities between religious belief liberty and sexual orientation identity liberty"). Construing religion to encompass LGBT status may be criticized as a definition with "no discernible or defensible boundaries." Texas v. Johnson, 491 U.S. 397, 417 (1989). Such a construction does not mean, however, that religion can be anything and everything. *See, e.g.*, Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469, 1503 (1999) (discussing the fallacies inherent in slippery slope arguments). Religion includes sincerely held beliefs about particularly important aspects of life, and sexuality, sexual orientation, and gender identity pertain to the "big decisions in life that go to the core, essential aspects of our selves." Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What* Lawrence *Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115, 139 (2006). If there is a flaw in this line of argumentation, it lies in the broad definition promulgated by the Supreme Court. It should not be surprising, however, that the definition of religion is broader today than it was in 1620, 1790, or 1965.

[131] *See* Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069, 1080–86 (D. Colo. 2004) (company discriminated on the basis of religion by refusing to accommodate employee's refusal to sign diversity policy requiring him to "value" homosexual coworkers); *cf.* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345–47 (7th Cir. 2017).

[132] *See, e.g.*, Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1259 (11th Cir. 2017) (Pryor, J., concurring); Stephen Cox & Cynthia Gallois, *Gay and Lesbian Identity Development: A Social Identity Perspective*, 30 J. HOMOSEXUALITY 1, 23 (1996).

[133] *Compare Bryan Fischer: Homosexuality is "Immoral" Based on "God's Perspective"*, HUFFPOST (Apr. 3, 2013, 11:22 AM), https://www.huffpost.com/entry/bryan-fischer-homosexuality-immoral_n_3007024 (asserting that LGBT behavior is unnatural and immoral), *and* Matt Slick, *Are Homosexuality and Homosexual Marriage Moral Issues?*, CHRISTIAN APOLOGETICS & RES. MINISTRY, https://carm.org/homosexuality-moral (last visited May 30, 2020) (same), *with* Daniel Cox et al., *A Shifting Landscape: A Decade of Change in American Attitudes About Same-Sex Marriage and LGBT Issues*, PUB. RELIGION RES. INST. (Feb. 26, 2014), https://www.prri.org/research/2014-lgbt-

status is viewed as a social or political issue, beliefs on these issues are similar to traditional religious beliefs on how things "ought to be" and how individuals "should" behave.[134] Sixth, if courts are willing to defer to the EEOC's definition of sex in deciding whether sex encompasses LGBT status, or the EEOC's guidance on other matters, they should also adhere to the EEOC's broad definition of religion.[135] Seventh and finally, because courts have traditionally been unwilling to second-guess whether beliefs are religious and sincerely held, they should also generally accept LGBT persons' claims regarding the sincerity and meaningfulness of LGBT status.[136] Thus, courts should treat LGBT discrimination as religious discrimination.

3. Legislative History of Religion

The legislative history of religion under Title VII is sparse and somewhat inconclusive, but it suggests that religion should be understood broadly. Before 1964, Congress considered numerous bills that used the word "creed" instead of religion.[137] The definition of creed refers to a discrete set of formalized beliefs rather than to the broader principles entailed by religion, and so Congress seems to have intended Title VII's definition of religion to be somewhat expansive.[138] Like in the case of sex, there was little legislative debate over the meaning of religion or its inclusion within Title VII.[139] The only clues as to the legislature's conception of the term come from two defeated amendments, one exempting religious schools and corporations from Title VII and the other permitting discrimination against atheists.[140] While the amendment dealing with religious

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survey/ (finding that 43% of Americans believe that intercourse between adults of the same sex is morally acceptable). *See also* Sonja J. Ellis, *Moral Reasoning and Homosexuality: The Acceptability of Arguments about Lesbian and Gay Issues*, 31 J. MORAL EDUC. 455 (2002) (framing LGBT issues in moral terms); Vincent J. Samar, *A Moral Justification for Gay and Lesbian Civil Rights Legislation*, 27 J. HOMOSEX. 147 (1994) (same).

[134] *See* Welsh v. United States, 398 U.S. 333, 342 (1970).

[135] *See* Part I.C.3.

[136] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 771–72 (Ginsburg, J., dissenting). Courts generally do not inquire into whether a belief is religious. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) ("Determining whether a belief is religious is 'more often than not a difficult and delicate task,' one to which the courts are ill-suited.") (quoting Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981)); *see also* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say what is a religious practice or activity."); *EEOC Religious Discrimination Q&A*, *supra* note 3 ("[C]ourts generally resolve doubts about particular beliefs in favor of finding that they are religious."). Courts do not generally question the sincerity of religious beliefs either, though they are more willing to parse individual actions for consistency with alleged religious beliefs. *See* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Religious experiences which are as real as life to some may be incomprehensible to others."); *see also* Adams & Barmore, *supra* note 32, at 62–64.

[137] *See* Vaas, *supra* note 36, at 431.

[138] *Creed*, OXFORD ENGLISH ONLINE DICTIONARY (2019), https://en.oxforddictionaries.com/definition/us/creed (last visited May 30, 2020).

[139] Russell S. Post, Note, *The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177, 181 n.11 (1997). This is because the legislature was focused on remedying racial discrimination. *See, e.g.*, *id.* at 180; Vaas, *supra* note 36 at 431–32.

[140] Post, *supra* note 139, at 180 n.10.

institutions may connote a more traditional view of religion—since LGBT entities were virtually nonexistent in 1964—it certainly does not preclude other conceptions of religion.[141] Similarly, the rejection of an amendment limiting the protections of Title VII to theists may indicate a narrow understanding of religion, or it may simply indicate the legislature's rejection of this view. Drawing definitive conclusions from the negative actions of legislatures is often a futile undertaking.[142]

B. Policy Analysis

1. Nondiscrimination Justifies Liberal Construction

While construing religion to encompass LGBT status may be an unorthodox reading of religion, nondiscrimination justifies interpretive devices. The Supreme Court has long construed statutes to achieve beneficial policy goals even in the face of plain statutory language.[143] Moreover, the Court has specifically construed Title VII to further the act's broad remedial purposes, such as when it recognized disparate impact discrimination, when it recognized sexual harassment, and when it extended the latter doctrine to cover same-sex harassment.[144]

Construing religion to prohibit LGBT discrimination constitutes sound public policy, because discrimination is unfair and inefficient.[145] Discrimination is unfair for three overarching reasons. First, discrimination is morally wrong. This is because individuals are of equal moral worth and possess "inherent dignity that requires . . . respect."[146] Adverse employment actions based on sexual orientation or gender identity offend these dignitary interests because they disregard

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[141] *See* Vaas, *supra* note 36, at 439–40.
[142] *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring).
[143] *See, e.g.*, Green v. Bock Laundry Machine Co., 490 U.S. 504, 510 (1989); United States v. Kirby, 74 U.S. 482, 485–87 (1868) (holding that a sheriff arresting a postal carrier wanted for murder did not "willfully obstruct . . . the passage of the mail" because laws are to be construed to avoid "injustice, oppression, or an absurd consequence"). While conceptualizing LGBT discrimination as sex discrimination rather than religious discrimination would implicate many of the same policies, such a construction would not preserve exceptions for religious objectors. *See Bostock v. Clayton Cty.*, 140 S. Ct. at 1753–54; Part II.B.2 (discussing why these exceptions should be preserved).
[144] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78–82 (1998) (recognizing same-sex harassment); Meritor Savings Bank v. Vinson, 477 U.S. 57, 63–73 (1986) (harassment); Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971) (disparate impact); *see also, e.g.*, Hart v. J.T. Baker Chem. Corp., 598 F.2d 829, 831 (3d Cir. 1979) ("[B]road remedial legislation such as Title VII is entitled to the benefit of liberal construction.").
[145] While a legislative solution to the problem of LGBT discrimination may be preferable, Congress has shown that it is probably too gridlocked to act. *E.g.*, Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html (describing Congress's "near-permanent state of gridlock"). In addition, interpreting the meaning of the law is "emphatically the province and duty of the judicial department," and courts may be better equipped to respond to changing circumstances with detachment and objectivity. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[146] Deborah Hellman, *Discrimination: When Is It Morally Wrong and Why*, 4 DARTMOUTH L. J. 3, 5 (2006); *see also, e.g.*, Samar, *supra* note 133.

individual worth in favor of parochial conceptions of identity.[147] Second, discrimination distinguishes between individuals on the basis of *immutable* traits that are disconnected from merit, and it is generally unfair to discriminate on the basis of factors that are not within a person's control.[148] Third, because distinctions based on other immutable, non-meritorious factors are impermissible, it is also unfair to single out LGBT status for exclusion from the protections of antidiscrimination law.[149]

Discrimination is also inefficient. This is because, first, intentional discrimination is generally motivated by animus rather than rational considerations, and so it leads to suboptimal decision-making by employers.[150] Second, employees also make suboptimal decisions from a labor market perspective when they weigh the risk of suffering unwarranted adverse employment actions in deciding whether to seek new employment.[151] Third, discriminatory employment decisions create emotional turmoil and uncertainty for both LGBT employees and bystanders, which decreases workplace productivity.[152] Fourth, discrimination unnecessarily increases employee turnover, reducing opportunities for worker specialization.[153] And fifth, discrimination requires employers

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[147] *See, e.g.*, Hellman, *supra* note 146, at 5–6.

[148] *See, e.g.*, Michaelson, *supra* note 8, at 57 n.63 (immutability of LGBT status). Because people generally have some control over religious beliefs, it is more equitable to require them to sublimate anti-LGBT preferences than to require LGBT persons to repress their identities. James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1034 (2004) (noting religion's awkward placement in Title VII alongside attributes which are generally considered immutable).

[149] *See* 42 U.S.C. § 2000e-2(a) (2018) (race, color, religion, sex, and national origin); *id.* § 12112(a) (disability); *see also* 29 U.S.C. § 623(a) (age). *See generally* Sophia R. Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L. REV. 291 (2004).

[150] *See, e.g.*, Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 21, 26 (1991) (describing various irrational assumptions underlying discrimination); Larry Alexander, *What Makes Wrongful Discrimination Wrong: Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 169–70 (1992) (discussing irrationality and false beliefs).

[151] *See, e.g.*, *Efficiency in Perfectly Competitive Markets*, KHAN ACADEMY, https://www.khanacademy.org/economics-finance-domain/microeconomics/perfect-competition-topic/perfect-competition/a/efficiency-in-perfectly-competitive-markets-cnx (last visited May 30, 2020).

[152] *E.g.*, Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1642, 1656–57 (2018).

[153] *See, e.g.*, Robert J. Flanagan, *Discrimination Theory, Labor Turnover, and Racial Unemployment Differentials*, 13 J. HUM. RESOURCES 187, 204–05 (1978) (discrimination increases turnover); Larry Alton, *5 Reasons Modern Businesses are Turning to Specialization*, FORBES (Dec. 20, 2016, 11:58 AM), https://www.forbes.com/sites/larryalton/2016/12/20/5-reasons-modern-businesses-are-turning-to-specialization/#273243624a29 (benefits of worker specialization).

to forego many of the positive effects of diversity.[154] Because LGBT discrimination is both unfair and inefficient, Title VII should be construed to minimize these effects.[155]

2. Balancing LGBT and Religious Interests

While protecting LGBT persons from discrimination is a worthwhile goal, there are also legitimate reasons to protect religion. First, religious persons who sincerely believe employing LGBT persons is sinful suffer dignitary harms comparable to those suffered by LGBT persons who are discriminated against.[156] Second, some religious beliefs are social "goods" which promote stability and independently beneficial behaviors.[157] There are valid reasons for protecting even undesirable religious beliefs so that desirable beliefs may be accorded the breathing space they need to survive.[158] Third, freedom of religion promotes the pursuit of truth, and inhibiting this freedom likewise infringes upon the breathing space needed for this endeavor.[159] Fourth, the difference between attacking religious beliefs and attacking conscience is relatively small, and permitting the former could have unforeseen consequences for the latter.[160] In addition, preserving Title VII's religious exceptions would avoid direct conflict between Title VII, the Religious

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[154] *See, e.g.*, Craig Westergard, *Haply a Minority's Voice May Do Some Good: Diversity at the United States Supreme Court*, 29 J. JUD. ADMIN. 174, 174 (2020).

[155] Furthermore, the costs of nondiscrimination are generally slight. *See* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 848 (2001). The costs of judicial administration for LGBT claims are unlikely to increase dramatically since courts already dismiss numerous LGBT discrimination claims each year and are experienced in administering Title VII. Any such costs would also be likely to subside as compliance increasingly replaces discrimination.

[156] *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018) (describing employer's sincere belief that permitting an employee to "deny their sex" while acting in an official capacity would require complicity in "violating God's commands"); *see also* Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018) (sincere belief that serving LGBT patrons would be sinful); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 164–74 (2008) (importance of respecting religious beliefs). Of course, the dignitary harm suffered by religious persons comes without the corresponding economic hardship that is incipient in LGBT discrimination.

[157] *E.g.*, Brett G. Scharffs, *Why Religious Freedom: Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 BYU L. REV. 957, 959 (2018); Patrick Fagan, *Why Religion Matters: The Impact of Religious Practice on Social Stability*, HERITAGE FOUND. (Jan. 25, 1996), http://thf_media.s3.amazonaws.com/1996/pdf/bg1064.pdf (religious beliefs are correlated with strong families, marital stability, socioeconomic mobility, and physical and mental health, as well as with lower rates of suicide, drug abuse, alcoholism, and crime).

[158] *See* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But . . . these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

[159] *E.g.*, Scharffs, *supra* note 157, at 958.

[160] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 605 (1992) (Blackmun, J., concurring) ("There is no doubt that attempts to aid [or attack] religion . . . jeopardize freedom of conscience."); *see also* Scharffs, *supra* note 157, at 980–88.

Freedom Restoration Act, and the Constitution,[161] and it would promote consistency within Title VII and other areas of the law.[162]

While treating LGBT discrimination as religious discrimination would permit discrimination by *religious institutions* as to both religious and non-religious personnel, it would not permit this kind of discrimination by secular businesses. Religious institutions would remain free to discriminate on any basis in the employment of individuals who hold themselves out as "ministers" and teach religious doctrine as part of their job responsibilities.[163] This is because the Constitution "protects a religious group's right to shape its own faith and mission through its appointments" and "prohibits government involvement in such ecclesiastical decisions."[164] Religious institutions would also remain free to discriminate on the basis of religion in the employment of non-religious personnel.[165] This is the primary benefit of construing Title VII to forbid discrimination against LGBT persons under the statute's religion prong.[166] However, this construction would not protect ordinary, secular businesses, such as public universities, cake decorators, etc.[167] Courts have articulated a number of factors—including whether an entity's purpose, transactions, products, services, ownership, financial supporters, and constituents are religious—which differentiate religious institutions from ordinary businesses, and these factors probably exclude funeral homes, marriage counselors, and similar entities.[168]

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[161] Welsh v. United States, 398 U.S. 333, 339; *see also* United States v. Meyers, 906 F. Supp. 1494, 1500 (D. Wyo. 1995).

[162] *See EEOC Religious Discrimination Q&A*, *supra* note 3 (ministerial and religious institution exceptions to Title VII); Scharffs, *supra* note 157, at 960–65 (describing religious exceptions in other areas of the law, such as the Religious Freedom Restoration Act).

[163] *See, e.g.*, Katherine Hinkle, Note, *What's in a Name: The Definition of "Minister" in* Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 34 BERKELEY. J. EMP. & LAB. L. 283 (2013).

[164] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012); *see also* Feldblum, *supra* note 30, at 121–22 ("[T]he harm to the enterprise in having its inculcation of values to its members significantly hampered . . . outweighs the harm to the excluded LGBT members.").

[165] 42 U.S.C. § 2000e-1(a) (2018) (religious institution exception); *see also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (upholding and construing this provision); Koppelman, *supra* note 33, at 134–35 ("[C]onspicuously religious discriminators are so likely to prevail in their defenses that they are unlikely to be sued in the first place . . . [and] there are unlikely to be huge numbers of them.").

[166] Preserving this exception would require sacrifice by LGBT persons.

[167] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (college passing over adjunct professor for full time position); *see also* Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (cake decorating business declining to serve gay couple) (public accommodations case). Limiting the exception in this manner would require sacrifice by religious persons.

[168] *See, e.g.*, LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–27 (3d Cir. 2007) (summarizing factors); *see also Amos*, 483 U.S. at 329, 339.

Permitting religious institutions to discriminate against LGBT persons is unlikely to be received warmly by LGBT rights advocates.[169] Likewise, forcing secular employers with religious mores to treat LGBT persons equally may be received poorly in religious circles.[170] As the saying goes, "a good compromise leaves everyone unhappy."[171] Nonetheless, as one scholar put it, "[t]he great attraction of regulation-plus-exemptions is that it lowers the stakes and makes possible a legislative compromise that does not threaten the deepest interests on either side."[172] Viewing LGBT status as religion is admittedly an unorthodox interpretation that could alienate advocates on both sides; it does, however, make possible a *judicial* compromise that effectively balances the interests of both LGBT persons and religious groups.

CONCLUSION

LGBT discrimination is an ongoing problem in the United States. In the not-so-distant past, LGBT behavior was criminalized and treated as a psychological disorder, and LGBT persons were subject to medieval medical treatments, institutionalization, and even death. Today, LGBT persons are still discriminated against in the workplace. While Title VII prohibits discrimination on the basis of sex, courts have traditionally not read this provision to encompass LGBT status—for textual, constitutional, and pragmatic reasons. Treating LGBT discrimination as religious discrimination resolves many of these concerns. First, LGBT status satisfies the Supreme Court's definition of religion because it necessarily entails "sincere belief" about important aspects of life. Second, treating LGBT discrimination as religious discrimination is less likely to implicate constitutional protections found in the First and Fourteenth Amendments. Third and most importantly, preserving exceptions for religious entities provides a Title VII remedy for LGBT discrimination while also accommodating the deepest interests of religious persons. As such, courts should treat LGBT discrimination as religious discrimination.

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[169] *See, e.g.*, Michelle Garcia, *ACLU, NCLR, and More Groups Drop Support of ENDA*, ADVOCATE (July 8, 2014, 4:23 PM), www.advocate.com/enda/2014/07/08/breaking-aclu-nclr-and-more-groups-drop-support-enda.

[170] *See, e.g.*, Cynthia Brougher, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 As It Applies to Religion and Religious Organizations*, CONG. RES. SERV. 6 (2011), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1809&context=key_workplace ("[R]eligious organizations that have religious objections to homosexuality object to hiring requirements that would conflict with these beliefs.").

[171] *E.g.*, Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 66 (2008).

[172] Koppelman, *supra* note 33, at 135.