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Legitimacy and Protection Against Sexual Orientation Discrimination Under Title VII

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Until relatively recently federal courts have held that claims of discrimination based in sexual orientation fall beyond the purview of Title VII protection. Even after the landmark holding in *Price Waterhouse* that recognized discrimination based in sex stereotypes and subsequent amendment to Title VII, courts resisted "bootstrapping" sexual orientation claims with sex discrimination claims.[1] The result has been a number of puzzling outcomes—for example, extending Title VII protection to gay men who received adverse employment treatment due to stereotypically "effeminate" mannerism but not to gay men who meet cultural standards of masculinity—rigidly applying the structure of protected categories in Title VII.[2]

The tide may be turning on this trend. Following the Equal Employment Opportunity Commission's (EEOC) decision to recognize sexual orientation discrimination as sex discrimination,[3] a number of cases emerged, claiming discrimination on the basis of sexual orientation under Title VII.[4] The real tension in this new effort to reconsider sexual orientation as a protected status does not lie in the legal reasoning that it requires. This has been relatively clear and has received a fair amount of attention since the Court passed down its decision in *Price Waterhouse v. Hopkins*.[5] The tension lies in the fact that Congress has considered adding sexual orientation to Title VII numerous times in the past decade, but the supporters of the addition have failed to gain passage.[6] While public support for protecting homosexuality under

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1. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 706 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *and on reh'g en banc sub nom*. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014).

2. Soucek, *supra* note 1, at 748.

3. Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015). At the moment, the Trump administration's EEOC is still taking form. Alison Frankel, *EEOC Back Gay Employee in Latest Appellate Battle Over Workplace Rights*, REUTERS (Mar. 16, 2018, 3:41 PM), https://www.reuters.com/article/legal-us-otc-titlevii/eeoc-backs-gay-employee-in-latest-appellate-battle-over-workplace-rights-idUSKCN1GS2M9 [https://perma.cc/5GMQ-3RR7]. The possibility remains, though, that, as the Justice Department did in its decision on school bathrooms, the Trump administration EEOC may reverse course on its interpretation of sex discrimination in *Baldwin*. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Feb. 22, 2017), https://www.justice.gov/crt/page/file/942021/download [https://perma.cc/T4YU-7E22].

4. *See, e.g.*, *Hively*, 830 F.3d 698; Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, 197 F. Supp. 3d, 1334, 1347 (N.D. Fla. 2016) (finding that a sexual orientation discrimination claim was actionable under Title VII); Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015) (finding that sexual orientation, to the extent it is perceived as a deviation from heterosexuality as a gender norm, is actionable under Title VII).

5. 490 U.S. 228 (1989).

6. Ed O'Keefe, *ENDA Explained*, WASH. POST (Nov. 4, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-

Title VII has been strong for more than twenty years,[7] and the legal reasoning supporting extension of Title VII to sexual orientation is evident in legal precedent,[8] many would consider judicial extension of Title VII to sexual orientation protection a usurpation of legislative authority.[9]

This Note examines the implications of judicially extending Title VII protection to claims of sexual orientation and concludes that doing so constitutes a legitimate, if not ideal interpretation. This examination will take place in three parts. Part I includes a review of the history of Title VII as it concerns sexual orientation discrimination and its current status. Part II then quickly suggests the method that the Court could use for extending Title VII, consistent with the plain language and apparent congressional intent. Finally, Part III analyzes the implications for the legitimacy of the Court in recognizing sexual orientation discrimination through the lenses of the counter-majoritarian difficulty and statutory corollaries to the living constitution and originalism. In conclusion, I will suggest that viewed through these lenses, a judicial extension of Title VII to include sexual orientation would be viewed as legitimate and not as the usurpation that has concerned many courts.

I. TITLE VII, SEXUAL ORIENTATION, AND THE PATH TO *BALDWIN V. FOXX*

This Part contains three subparts, which describe the three historical phases of Title VII interpretation. It begins with early application of Title VII, then discusses changes in interpretation brought on by the *Price Waterhouse* and other Supreme Court decisions. The Part, then, concludes with recent developments in Title VII interpretation in the wake of the EEOC's recognition of sexual orientation discrimination in *Baldwin v. Foxx*.

A. Early Title VII Interpretations

There is no question that early in the law's existence, the agency responsible for implementing Title VII and the courts that interpreted it viewed sexual orientation to be beyond the law's scope. The EEOC found, in an early decision under Title VII, that it lacked jurisdiction to hear sexual orientation discrimination claims because sexual orientation did not appear as a protected class in the statute.[10] Based on the evidence in the congressional record, the EEOC determined that Congress intended the term "sex" to refer exclusively to a person's gender.[11] At the time, the EEOC, and a number of courts reviewing the question of sexual orientation under Title VII

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discrimination-act-enda [https://perma.cc/7NAX-UKLZ].

7. *Id.*

8. *Hively*, 830 F.3d at 704 (noting that the *Price Waterhouse* decision permitted successful claims by LBGT plaintiff).

9. This is, primarily, the concern underlying judicial efforts to avoid "bootstrapping" sexual orientation discrimination claims with sex stereotyping claims. *See* Zachary R. Herz, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 423 (2014); Soucek, *supra* note 1, at 748.

10. EEOC Decision No. 76-67, 1975 WL 4475, at *3 (1975) (finding that the commission is without jurisdiction over claims of discrimination based on sexual practices).

11. *Id.* at *2.

concluded that the legislative history provided little useful information about how the term sex should be interpreted.[12] Finding no help in the legislative history, the EEOC and the courts determined that Congress must have intended the word "sex" to have its obvious meaning.[13] Had it intended otherwise, they reasoned, there surely would be some indication in the record. This view corresponds well with the popular understanding of sex discrimination underlying Title VII at the time of its passage, which was narrowly limited to facial disparities in employment opportunities between men and women and not more subtle forms of sex discrimination.[14]

Several cases decided in the mid-1970s contained similar logic in refusing to protect sexual orientation discrimination claims under Title VII. A district court in Georgia granted summary judgment in favor of an employer who refused to hire a male applicant who seemed too "effeminate," finding that Congress did not intend for Title VII protection to extend to "affectational or sexual preference."[15] Similarly, a California district court simply dismissed a claim of discrimination due to homosexuality as failing to state a claim under Title VII.[16] Like the EEOC's finding, these decisions reflected predominate beliefs about the nature and character of sex discrimination and saw Title VII as an effort only to prevent men from achieving greater employment opportunities than women, simply due to gender preferences.[17]

Throughout the late 1980s, lower courts regarded it as settled law that Title VII did not provide sex discrimination protection. In 1979, for example, the Fifth Circuit gave the issue no legal consideration when it affirmed a district court decision in favor of an employer charged with firing an employee because of sexual orientation.[18] The court tersely noted that, "[d]ischarge for homosexuality is not prohibited by Title VII."[19] In a 1989 case, the Eighth Circuit similarly concluded its discussion on the matter, flatly stating, "Title VII does not prohibit discrimination against homosexuals."[20]

B. Price Waterhouse and Sex Stereotyping

A shift away from the strict, category-driven, interpretation of Title VII began with the Court's landmark decision in *Price Waterhouse v. Hopkins*. While the *Price*

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12. *Id.* at *1. *See also* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979), *abrogated by* Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning." (quoting Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977))); Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978) (finding the intent of the Civil Rights Act was to prohibit discrimination between men and women in job opportunities).

13. EEOC Decision No. 76-67, 1975 WL 4475, at *2; *see Smith*, 395 F. Supp. at 1101.

14. Herz, *supra* note 9, at 404.

15. *Smith*, 395 F. Supp. at 1101.

16. DeSantis v. Pac. Tel. & Tel. Co., No. C76 1083 SW, 1976 WL 653, at *1 (N.D. Cal. Sept. 7, 1976), *aff'd,* 608 F.2d 327 (9th Cir. 1979).

17. Herz, *supra* note 9, at 424.

18. Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

19. *Id.*

20. Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989).

Waterhouse Court based its decision in the traditional category of "discrimination because of sex," two important holdings in the case opened the door for a potentially broader interpretation of what "discrimination because of sex" actually means.[21] Often, an adverse employment decision does not have a single impetus. The *Price Waterhouse* court found that in mixed-motive cases, where a permissible and potentially impermissible cause for the employment decision exist, the plaintiff does not have to show "but for" causation.[22] It is only necessary for the plaintiff to demonstrate that sex played a role in the employment decision, at which point the defendant can only avert liability by proving that it would have taken the same action if it had not impermissibly taken sex into account.[23]

Additionally, and most important for potential inclusion of sexual orientation claims, the Court based its finding of discrimination on the defendant's use of sex stereotyping in withholding promotion.[24] Price Waterhouse did not decline to make Hopkins a partner simply because she was a woman. The Court found that it did so because Hopkins was a woman who failed to meet her employer's expectations about women. For example, the partner who explained the company's decision advised Hopkins to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[25] Another suggested that Hopkins take "a course at charm school."[26] The Court concluded, based on these and other remarks, that the company had used sex as a factor in its decision about whether or not to extend partnership to Ann Hopkins.[27] This holding recognized that sex discrimination means more than simple disparate treatment.[28] It encompasses use of stereotypes and gender roles in making employment decisions.[29]

The Court's 1996 decision in *Oncale v. Sundowner Offshore Services., Inc.* staked out additional territory in the "because of sex" category in Title VII. The Court squarely held in *Oncale* that Title VII does not bar a sex discrimination claim simply because the plaintiff and defendant are members of the same sex.[30] In so doing, Justice Scalia noted that preventing or remedying male-on-male sexual harassment could not have been Congress's principal motivation in including sex in Title VII. However, he observed that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[31] This of course is only dicta, but Justice Scalia remarkably treated Title VII as a somewhat flexible tool for addressing discrimination, asserting that "it is ultimately the provisions of our laws rather than the

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21. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
22. *Id.* at 241–42.
23. *Id.* at 242.
24. *Id.* at 250–51.
25. *Id.* at 272 (O'Connor, J., concurring) (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985).
26. *Id.* at 258.
27. *Id.* at 295.
28. *See* Herz, *supra* note 9, at 403.
29. *Id.*
30. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women . . . .").
31. *Id.* at 79.

principal concerns of our legislators by which we are governed."[32] He reasoned that, since Title VII prohibits sexual harassment as a form of discrimination, it must prohibit it in every form.[33] This carries potentially important implications for the scope of discrimination based on sex stereotyping.

Additionally, in 1991, and largely in response to the *Price Waterhouse* decision, Congress amended Title VII, establishing an unlawful employment practice "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[34] By adding motivation to discriminate as an illegal employment practice, Congress effectively codified the *Price Waterhouse* holding—that basing employment decisions on sex is impermissible no matter what other permissible factors may also have played a role.[35] However, it also extends it, making the motivation itself an illegal practice, without respect to outcomes.[36] In fact, the legislative history of the 1991 amendment shows that Congress removed earlier language that required a plaintiff to demonstrate that sex was a "contributing" factor to the current "motivating factor."[37] In making this change, Congress removed the impact requirement, making it illegal to use sex in employment decisions regardless of any actual outcomes.[38]

After the decisions in *Price Waterhouse* and *Oncale* and the 1991 Title VII amendment, many courts began to develop a different approach to claims of sexual orientation discrimination under Title VII. In 1999, the First Circuit affirmed a district court's dismissal of a sexual orientation discrimination claim.[39] On appeal, the plaintiff attempted to refashion the sexual orientation claim as sex stereotype discrimination based on "co-workers mocking [of] his supposedly effeminate characteristics."[40] The court rejected this argument because the plaintiff failed to raise it in the court below.[41] But in so doing, the First Circuit acknowledged that a man can "ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."[42] The Second and Sixth Circuits arrived at similar conclusions, rejecting sex stereotyping arguments originally raised as sexual orientations claims because they were not properly raised at the trial level but opening the possibility that future plaintiffs could succeed in such an argument.[43]

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32. *Id.*

33. *Id.* at 80 ("Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.").

34. 42 U.S.C.A. § 2000e-2(m) (West 2012).

35. Herz, *supra* note 9, at 419.

36. *Id.*

37. 137 Cong. Rec. 28,665 (1991).

38. *Id.*

39. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999).

40. *Id.* at 261.

41. *Id.*

42. *Id.* at n.4.

43. Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (finding that sex stereotyping could extend to discrimination for failure to conform to traditional conceptions of masculinity but that knowledge of homosexuality alone does not meet such a requirement);

The Third, Seventh, Eighth, and Ninth Circuits have also passed down judgments favorable to plaintiffs asserting sex stereotyping claims on the basis of gender nonconformity.[44] The Seventh Circuit reversed summary judgment in favor of an employer, finding that the harassment that the plaintiff suffered resulted from his coworkers' perception of the plaintiff as feminine because the plaintiff wore an earring.[45] The Ninth Circuit found that an openly homosexual restaurant employee raised a cognizable claim under Title VII, explicitly disregarding the plaintiff's sexual orientation and basing its finding on his claim of gender nonconformity.[46]

Courts, to this point, though, have been reluctant to consider sexual orientation discrimination in and of itself as a form of sex stereotyping.[47] In a number of cases, this has led courts to parse the various sources of alleged discrimination in an effort to determine whether sex stereotyping or sexual orientation truly served as the basis for the discrimination.[48]

C. Baldwin v. Foxx *and the EEOC's Recognition of Sexual Orientation Discrimination*

The most recent development in potential recognition of sexual orientation discrimination in the workplace has emerged through the EEOC's interpretation of Title VII sex discrimination and the explicit connection it has drawn between sex stereotyping and sexual orientation discrimination. Courts and commentators first took note of the EEOC's change in direction in *Macy v. Holder*.[49] There, the commission found the sex stereotyping theory "a valid method of establishing discrimination 'on the basis of sex' in scenarios involving transgender individuals."[50]

The EEOC extended this logic in *Baldwin v. Foxx*.[51] In that decision, the commission decided, in no uncertain terms, that sexual orientation discrimination claims are

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Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (declining to consider sex stereotyping claim because it was not raised in the district court but acknowledging that relief would be available on that basis).

44. *See* Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033 (8th Cir. 2010); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Doe by Doe v. City of Belleville, 119 F.3d 563, 569 (7th Cir. 1997), *cert. granted, judgment vacated sub nom*. City of Belleville v. Doe *ex rel.* Doe, 523 U.S. 1001 (1998) *and abrogated by* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

45. *Doe* ex rel. *Doe*, 119 F.3d, at 580.

46. *Rene*, 305 F.3d at 1063–64.

47. *See, e.g.*, *id.* at 1063 (finding that sexual orientation "neither provides or precludes a cause of action" under Title VII); *Prowel*, 579 F.3d at 292 (reversing summary judgment when review of the record found facts to create a reasonable question as to whether discrimination was based on gender nonconformity rather than sexual orientation).

48. *See* Soucek, *supra* note 1, at 760.

49. Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

50. *Id.* at *7.

51. Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

cognizable as sex discrimination under Title VII.[52] The commission arrived at this decision, reasoning that discrimination based on sexual orientation is inextricably linked to assumptions and stereotypes about sex identity generally.[53] This includes the sorts of discrimination that courts had previously acknowledged when they found that mannerisms often associated with homosexuality do not conform with gender norms.[54] It also includes associational discrimination that occurs when employers discriminate against gay or lesbian employees because of who they date or marry.[55] Finally, because sexual orientation refers to the sex of the individuals to whom one is attracted, it fundamentally implicates sex stereotyping because the employee suffers discrimination because he or she is romantically or sexually attracted to someone of the same sex contrary to popular norms and expectations.[56]

The Seventh Circuit directly addressed the EEOC's new position in *Hively v. Ivy Tech Community College* and, in the initial panel decision, declined to apply it to a sexual orientation discrimination claim.[57] In the panel opinion, Judge Rovner noted that the momentum behind LGBT rights in America makes it unlikely that the status quo on employment discrimination and sexual orientation will persist very long, but insisted that extension of Title VII protection to sexual orientation must wait for new legislation from Congress or a ruling from the Supreme Court.[58]

The Seventh Circuit, then, granted rehearing en banc and largely adopted the EEOC's reasoning in *Baldwin* in recognizing discrimination based on sexual orientation as sex discrimination.[59] The court based its decision on two principals. First, the court concluded that sexual orientation, on a comparative basis, is sex discrimination because, holding all factors constant and changing only the plaintiff's sex, a woman who is attracted to other women, in contravention of gender stereotypes, would receive different treatment than a man who, in conformity with gender norms, is attracted to women.[60] Second, the court finds associational discrimination because the alleged adverse employment decision reflects the employer's disapproval of the sex of the individuals with whom the employee associates romantically.[61] The court holds that both the comparative and associational claims constitute sex discrimination because in either situation, sex ultimately serves as the deciding factor.[62] That is

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52. *Id.* at *5.

53. *Id.*

54. *Id.* at *7.

55. *Id.* at *6.

56. *Id.* at *5.

57. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 706 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *and on reh'g en banc sub nom*. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

58. *Id.* at 718.

59. *Hively*, 853 F.3d at 345 (noting that Hively's claim of discrimination based on sexual orientation constitutes a sex discrimination claim, in the first instance because it is based in gender nonconformity, and in the second, because it is based in the plaintiff's associational choices).

60. *Id*. at 345–46.

61. *Id.* at 349.

62. *Id.* ("No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or

to say, had the employee's sex been different, the employment decision also would have been different.

II. SEXUAL ORIENTATION DISCRIMINATION COGNIZABLE UNDER TITLE VII

While the prevailing application of Title VII to sex stereotyping claims provides a decent modicum of protection for lesbian, gay, and bisexual employees who suffer discrimination tied to gender nonconformity,[63] it also presents logical gaps and inconsistencies. Most prominent among these is the fact that plaintiffs who more noticeably and physically do not conform to gender norms and stereotypes tend to have much greater success under Title VII than those who are simply known to be gay, lesbian, or bisexual.[64] This follows rather naturally from the language and traditional application of Title VII. The text of the law prohibits discrimination based on sex, and it does not feature any protection for discrimination based on sexual orientation.[65] Since sex stereotyping is the theory available to victims of sexual orientation discrimination, those who can present clear, visible, and perceptible divergence from gender norms allow courts to clearly distinguish between a class named in the statute, sex, through gender nonconformity, and one that is not, homosexuality.[66]

Yet this approach to discrimination claims presents meaningful concerns under Title VII. First, it represents a significant departure from standard application of discrimination law.[67] This is because courts reviewing gender nonconformity cases insist on confining their review to a plaintiff's characteristics that are observable on the job.[68] Unlike other categories of discrimination featured in Title VII, in gender nonconformity cases, employers are permitted to make adverse employment decisions based on an employee's life outside of work.[69] This is at odds with how the courts have dealt with, for example, sex discrimination against mothers who were perceived to be more likely to shirk work responsibilities to care for their children.[70] While that sort of discrimination is considered an impermissible stereotype, courts have, conversely, considered knowledge of a homosexual's failure to conform to

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religion been different." (emphasis in original)).

63. *See* Soucek, *supra* note 1, at 787 (suggesting that rather than renewing efforts to pass ENDA, the fact that some LGBT employees receive protection under Title VII sex stereotyping theory may lead to relaxation of efforts).

64. *Id.* at 748; *see also Hively*, 830 F.3d at 710 (noting that plaintiffs who "look, act, or appear to be gender non-conforming" obtain better results under Title VII than plaintiffs who do not exhibit gender nonconforming characteristics and experience discrimination because they are known or perceived to be homosexual).

65. 42 U.S.C.A. § 2000e-2 (West 2012) (making it impermissible to based employment decisions or to use as a motivating factor in employment decisions considerations of race, color, religion, sex, or national origin).

66. *See* Soucek, *supra* note 1, at 748.

67. *Id.* at 766–68.

68. *E.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006); Soucek, *supra* note 1, at 766.

69. Soucek, *supra* note 1, at 766–67.

70. *See* Chadwick v. WellPoint, Inc., 561 F.3d 38, 48 (1st Cir. 2009) (noting that denial of promotion based on a belief that mothers are less attentive to employment responsibilities is impermissible sex stereotyping).

gender stereotypes outside of the workplace a valid reason for employment discrimination.[71]

Second, while the distinction between gender nonconformity and sexual orientation provides a reasonable legal distinction, it raises questions about exactly why one form of discrimination should be protected and the other should not. This gets to the very heart of Title VII, and the goal of eliminating employment decisions based on immutable characteristics unrelated to job performance.[72] With respect to race, for example, any type of racial consideration is impermissible, not just some of them. Discriminating against a black job applicant is just as illegal as discriminating against one who is Asian or Hispanic.[73] If Title VII were to succeed with respect to race, race would lose all relevancy in the workplace.[74] Sex stereotyping, as it applies to potential cases of sexual orientation discrimination, operates in reverse. Sexual orientation discrimination has become something of an affirmative defense for employers, who reduce their chances of an impermissible employment consideration by paying more attention to an employee's sexual preferences.[75] The incentive is to place more emphasis on the immutable characteristics rather than eliminating them from employment decisions.

Sex stereotyping has a well-established place in the law as a theory of sex discrimination. However, as the discussion in the preceding paragraphs demonstrates, its application to gender nonconformity claims with overlapping sexual orientation implications departs from normal Title VII review. The best way to resolve these issues is to adopt the EEOC's approach in *Baldwin v. Foxx*.[76] This is because, under the *Baldwin* approach, sexual orientation itself is the gender nonconforming characteristic that forms the basis for an impermissible sex stereotype.[77] Courts would no longer need to concern themselves with the observable mannerisms that have thus far made the difference between successful and unsuccessful claims because any employment decision based on sexual orientation is itself based on a sex stereotype, and employers no longer could use private behavior in employment decisions. In the same way, using the *Baldwin* approach would eliminate employers' incentives to make their decisions based on immutable characteristics. Both the visible, gender nonconforming homosexual employee, and the gender-conforming employee who is only known to be homosexual would receive the same protection under Title VII.

The Seventh Circuit followed this approach in *Hively* when it found that discrimination on the basis of sexual orientation is, itself, sex discrimination.[78] Closely tracking the reasoning of *Baldwin*, if not explicitly, the court concluded that comparative

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71. *Vickers*, 453 F.3d at 763 (finding that coworkers' notions about and employee's sexual practices that occurred outside of the workplace that did not conform to gender stereotypes did not implicate Title VII protection).

72. *See* Soucek, *supra* note 1, at 770–73.

73. *Id.* at 769–70.

74. *Id.*

75. *Id.* at 771.

76. *See supra* note 52 and accompanying text.

77. *Supra* note 53 and accompanying text.

78. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017).

and associational discrimination are sex discrimination because they require an accounting of the employee's sex when making the employment decision.[79] This approach eliminates the inconsistencies of the prevailing application of Title VII sex discrimination to claims of gender nonconformity when sexual orientation is involved.

III. PROTECTION FOR SEXUAL ORIENTATION UNDER TITLE VII AND ITS IMPLICATIONS FOR JUDICIAL LEGITIMACY

This Note, so far, has focused on the status of sexual orientation discrimination under Title VII, the logical inconsistencies in Title VII's application to those claims, and the best methods for addressing those inconsistencies. Though adoption of the EEOC's approach would be a natural extension of Title VII precedent and serve to resolve inconsistencies in the current approach,[80] doing so would still represent a significant move for the court on a statutory issue that raises important questions about the legitimacy of such a decision. This Part addresses the legitimacy question from two perspectives, the counter-majoritarian difficulty as well as statutory versions of common law constitutionalism and originalism. Through these lenses, I will argue that judicially extending Title VII protection to include sexual orientation would be momentous and, ultimately, can be viewed as legitimate.

A. Sexual Orientation in Title VII and the Counter-Majoritarian Difficulty

The counter-majoritarian difficulty has attracted consistent attention from constitutional scholars since it emerged in the literature more than fifty years ago.[81] It raises questions about the legitimacy of judicial review when unelected federal judges unilaterally invalidate a law that popularly elected legislators have enacted.[82] In this way, a nondemocratic branch of government effectively overrides the will of the people reflected in the acts of a democratically appointed legislature.[83]

While the inclusion of sexual orientation protection in Title VII would not invalidate an act of Congress, it raises the same concerns because it adds protection that Congress did not explicitly include in the statute. This could be considered a usurpation of the democratic process by a nondemocratic branch. However, there are three reasons that judicial inclusion of sexual orientation protection in Title VII should be considered legitimate as it concerns the counter-majoritarian difficulty. First, inclusion of sexual orientation in Title VII may not be "counter-majoritarian" at all because the public has consistently expressed support for protecting gay, lesbian, and bisexual citizens from employment discrimination.[84] Second, there is good evidence to indicate that extension of Title VII to include sexual orientation at this point in

79. *Id.* at 345.

80. *See supra* notes 66–74 and accompanying text.

81. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

82. *Id.* at 16.

83. *Id.*

84. *See Infra* Part III.A.1.

history would be a relatively normal and predictable action for the judiciary to take.[85] Finally, since this is not a constitutional issue, Congress and the people will have an opportunity to reverse judicial decisions to recognize sexual orientation discrimination under Title VII if it does not comport with the will of the people.[86]

1. Popular Support for Sexual Orientation Protection in Title VII

The status of sexual orientation in Title VII at this juncture in history, to some extent, turns the counter-majoritarian difficulty on its head. Employment protection for lesbian, gay, and bisexual employees has garnered consistent popular support over the years, yet Congress has consistently failed to amend Title VII to include the protection.[87] In one poll conducted by Greenberg, Quinlin, Rosner on behalf of the Human Rights Campaign, sixty-nine percent of likely voters indicated that they would support a federal nondiscrimination act that prevents employment discrimination based on sexual orientation.[88] Even more tellingly, a 2013 poll for Americans for Workplace Opportunity leading up to a 2013 Senate vote on employment nondiscrimination found that a majority of American's assumed that such a law already existed.[89] That fifty-state survey revealed majority backing throughout the country, with Nebraska registering the lowest support for employment nondiscrimination at fifty-seven percent.[90]

These figures should not come as a surprise given the steady normalization and acceptance of homosexuality in our society.[91] In fact, twenty-two states and the District of Columbia have laws prohibiting employment discrimination based on sexual orientation.[92] Support for employment nondiscrimination for gays and lesbians actually appears to have gained traction in American society much earlier than marriage equality. In 1994, a poll by Time and CNN found that sixty-two percent of Americans support laws that "protect 'homosexuals' against job discrimination."[93] In that year, a solid majority of Americans still opposed recognition of same sex marriage.[94]

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85. *See Infra* Part III.A.2.

86. *See Infra* Part III.A.3.

87. O'Keefe, *supra* note 6.

88. HRC Staff, *New HRC Poll Shows Overwhelming Support for Federal LGBT Non-Discrimination Bill*, HUM. RTS. CAMPAIGN (Mar. 17, 2015), http://www.hrc.org/blog/new-hrc-poll-shows-overwhelming-support-for-federal-lgbt-non-discrimination [https://perma.cc/E63T-8A6C].

89. Maggie Haberman, *Poll: Anti-Discrimination Law Support*, POLITICO (Sept. 30, 2013, 5:05 AM), http://www.politico.com/story/2013/09/poll-big-support-for-anti-discrimination-law-097540 [https://perma.cc/P7CD-UF8J].

90. *Id.* (follow "the poll" hyperlink).

91. *See Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/ [https://perma.cc/G42Z-GK7W] (polling data showing steadily increasing support for legalization of gay marriage over the course of ten years).

92. O'Keefe, *supra* note 6.

93. O'Keefe, *supra* note 6.

94. *Changing Attitudes on Gay Marriage*, *supra* note 91.

Yet, Congress has consistently failed to perform its majoritarian function on this issue. Since 1994, and most recently in 2013, an employment nondiscrimination law has come before Congress eight times.[95] Each time it has failed, and five times the legislation never passed through committee for a floor vote.[96] Given relatively strong public support for sexual orientation protection in Title VII and the failure of Congress to implement it, it would be hard to consider judicial inclusion of sexual orientation protection "counter-majoritarian."

2. Federal Courts During Political Gridlock

While the failure to pass employment nondiscrimination spans more than two decades, now, the current impasse comes in the midst of a more systematic political stalemate. Anecdotal evidence of the relative inability of the political branches to produce meaningful legislation abounds. Beginning in the summer of 2011, the debt ceiling, which previously received little, if any, attention in the media, became a regular political issue.[97] Law makers' inability to come to an agreement led Standard & Poor's to lower the United States' credit rating in August of 2011[98] and eventually culminated in government shut down in October of 2013.[99] In 2015, Congress passed its first budget in six years,[100] and although Republicans control both houses, Congress could only manage a continuing resolution for fiscal year 2017.[101]

Under prevailing political conditions, members of Congress have been unable to translate the popular will of the American people into effective legislation. This state of congressional "gridlock" or "stalemate" occurs from time to time for a number of reasons and creates opportunities for an expanded policy role for the judiciary. Robert Dahl, for example, suggested that a lack of prevailing or dominant political coalition would lead to a relatively inactive legislature, permitting courts to pursue a more independent policy program.[102] Mark Tushnet conceives of this phenomenon slightly differently, noting that divided government may prevent Congress from

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95. O'Keefe, *supra* note 6.

96. *Id.*

97. *See, e.g.*, *Debt Ceiling: Timeline of Deal's Development*, CNN POL. (Aug. 2, 2011, 5:55 PM), http://www.cnn.com/2011/POLITICS/07/25/debt.talks.timeline [https://perma.cc/4GNC-7DGZ].

98. Damian Paletta & Matt Phillips, *S&P Strips U.S. of Top Credit Rating*, WALL ST. J. (Aug. 6, 2011), https://www.wsj.com/articles/SB10001424053111903366504576490841235575386 [https://perma.cc/7AN9-2Q6C].

99. Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html [https://perma.cc/F476-54B4].

100. Tom Howell Jr., *Congress Passes First Budget in 6 Years,* WASH. TIMES (May 5, 2015), http://www.washingtontimes.com/news/2015/may/5/senate-clears-way-final-passage-congress-budget/ [https://perma.cc/K5FF-TUTH].

101. *See* Thomas Kaplan & Jennifer Steinhauer, *Senate Democrats Relent, Averting Government Shutdown*, N.Y. TIMES (Dec. 9, 2016), http://www.nytimes.com/2016/12/09/us/politics/government-shutdown-congress.html [https://perma.cc/ATV2-Z2T6].

102. Robert A. Dahl, *Decision-Making in Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957).

building sufficient support for legislation in response to judicial decisions.[103] Others have noted that very strong party unity can function like divided and gridlocked government because members are less willing to move across the ideological divide and support another party's legislation.[104] Sarah Binder of the Brookings Institution, for example, conducted a quantitative analysis on the most recent Congresses and concluded that gridlock primarily emerges during periods of heightened party polarization.[105] This provides courts with more freedom to exercise policy preferences.[106]

Dahl asserted that our government, broadly speaking, is composed of "relatively cohesive alliances that endure for long periods of time."[107] According to Dahl, the Supreme Court exists within the prevailing governing alliance, which sets the rough boundaries for Court decisions.[108] The Court, then, has a unique policymaking role that remains legitimate to the extent that its statutory and constitutional interpretations fall reasonably within the "basic policy goals of the dominant alliance."[109] Its legitimacy may falter when those decisions oppose the policy goals of the governing alliance.[110]

The takeaway from Dahl's analysis is that the Court has very little independent policy-making discretion under normal circumstances. It will render decisions promoting the views of the dominant alliance or risk losing credibility and legitimacy as an institution. Dahl notes that, from time to time, though, the governing coalition will become unstable in certain policy areas, allowing the Court to independently institute its own policies.[111] In particular, Dahl notes that the Court will not exist within an alliance, and will have greater policy latitude, during periods of transition between one governing coalition and the next.[112] Dahl points out that this is likely the explanation for the Court's success in promoting civil rights in the period leading up to the *Brown* decision.[113]

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103. Mark Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 FORDHAM L. REV. 755, 768 (2006).

104. Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 137–38.

105. SARAH BINDER, BROOKINGS INST., POLARIZED WE GOVERN? (2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf [https://perma.cc/3GQP-L22L]. Binder's analysis measures Congressional activity on issues of public salience by comparing the number of times an issue appears in unsigned editorials in the *New York Times* and then reviews subsequent media coverage and congressional documents to determine whether Congress addressed the issue. *Id.* at 5. Binder's research finds the 112th Congress (the most recent Congress then available for study) to be the most dysfunctional in history, leaving nearly three-fourths of the issues salient to the public unaddressed. *Id*. at 10.

106. Pildes, *supra* note 104, at 137.

107. Dahl, *supra* note 102, at 293

108. *Id.* at 294.

109. *Id.* at 293–94.

110. *Id.* at 280.

111. *Id.* at 294.

112. *Id.* at 293.

113. *Id.* at 294.

Tushnet emphasizes that the Supreme Court has latitude to create policy that its majority favors during times of divided government.[114] When different parties control the presidency and at least one house of Congress, the Court's decisions on statutory issues will prevail if at least a third of representatives or senators support it because it takes two-thirds of elected law makers to either pass a veto, proof law, or overcome a veto if an initial bill gets passed.[115]

While the scenarios that Dahl and Tushnet describe leave room for independent action on the part of the Court during unstable periods, in the absence of political cohesion, others have noted that very strong unity within the political branches may present the Court with an opportunity to promote its own policies.[116] This is because Congress and the President rely upon new legislation to counter judicial decisions inconsistent with their own goals. However, even if a majority of both houses and the President oppose a decision, Senate filibuster rules make it very difficult to pass cloture and bring a bill to a vote. It has been more than thirty years since either party held the sixty seats necessary in the Senate to break a filibuster.[117] As a result, normal Senate rules may insulate judicial decisions that contravene the will of the prevailing alliance when political unity is strong and no members of the minority party are willing to cross the aisle and vote for cloture.[118]

Other observers suggest that, in fact, cooperation between the majorities in the political branches and the judiciary may create an environment that allows the judiciary to pursue its policy agenda.[119] Mark Graber notes that the governing alliance may actually look to the courts to rule on a matter when addressing the issue in the political environment could upset the majority coalition.[120] This arrangement gives courts some autonomy in deciding the issue and shields political actors from a messy public disagreement.[121] Keith Whittington suggests that a similar dynamic may also provide the court leeway in making policy when a governing coalition hopes to overcome an entrenched interest resistant to change that a prevailing alliance favors or when federalism prevents a national coalition from addressing disfavored state policies.[122] In any of these scenarios, the judiciary essentially takes the invitation to make policy on an issue that the governing alliance cannot reach or would prefer not to address.[123]

There are a number of normal and predictable political scenarios, then, in which the counter-majoritarian difficulty may actually function in reverse, including the current period of heightened political polarization and legislative gridlock. The branch of government that is responsible for representing the will of the people, Congress, is unable to address many of the electorate's concerns. As a result, the

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114. MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 33 (2003).

115. *Id.*

116. Pildes, *supra* note 104, at 137.

117. HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTIC ON AMERICAN POLITICS, 2005-2006, at 38–39 (2006).

118. Pildes, *supra* note 104, at 137.

119. *Id.*

120. *Id.* at 137–38.

121. *Id.*

122. *Id.* at 138–39.

123. *Id.* at 139.

federal courts may end up creating protection for sexual orientation under Title VII in the absence of congressional action. The environment in which such a decision would arise should ease counter-majoritarian concerns. Given the structural dynamics at work, this type of decision should be considered a normal and predictable event, at least in certain circumstances.

3. Congress Can Reverse the Judiciary on Statutory Matters

It appears, then, that judicially extending Title VII protection to sexual orientation discrimination would comport with the popular will of the people and the function of courts during times of political gridlock. However, Congress still holds the final say in legislative matters. As it did in 1991, following the *Price Waterhouse* decision, Congress can pass legislation to clarify the application of a court opinion to the law;[124] or, if the public and the legislature simply disagree with the outcome, Congress can pass a law reversing it. In this way, the majoritarian structure of the constitution remains intact in matters of judicial review and statutory interpretation.

B. Sexual Orientation Protection Under Title VII Viewed from the Perspectives of Common Law Constitutionalism and Originalism

Popular support, of course, is not the only basis for legitimacy. This part will review the prospect of judicial extension of Title VII to include sexual orientation from the perspective of common law constitutionalism and originalism. At the outset, it is worth noting that these are theories of constitutional, not statutory, interpretation. However, the concepts that form the basis of each theory can easily translate to statutory interpretation. I will continue to use "common law approach" or "common law tradition" to refer to the common law or living constitution approach to interpretation and "originalism" or "original intent" to refer to originalism. Review under each approach will demonstrate that extension of Title VII to include sexual orientation can be viewed as a legitimate judicial act.

1. The Common Law Approach

The common law approach is closely associated with living constitutionalism, which conceives of a constitution that changes to meet societal, technological, or economic changes that the framers of the constitution could not have predicted.[125] In the common law tradition, then, the Supreme Court and the lower federal courts interpret constitutional provisions through analysis of previous decisions interpreting that provision.[126] One could not hope to understand what "equal protection under the law" means, for example, without consulting decisions interpreting that phrase. Common law constitutionalism is attractive because it permits courts to adapt the law to current conditions without the requirement of a constitutional amendment.[127]

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124. 42 U.S.C.A. §2000e-2(m) (West 2012).
125. DAVID A. STRAUSS, THE LIVING CONSTITUTION 34–35 (2010).
126. *Id.* at 33–35.
127. *See id.*

This does not simply mean constitutional amendment by fiat, though. The common law tradition acknowledges that concepts and terms that had a particular meaning at the time the Constitution was written may mean something different in a modern society.[128]

This method of interpretation can also apply to statutory interpretation, and the EEOC's proposed use of Title VII to protect against sexual orientation discrimination illustrates common law statutory interpretation as well.[129] In 1964, when Title VII first went into effect, discrimination as a concept and the reality of sex discrimination in the workplace were very different than what we see today. In 1964, discrimination based on sex really applied to ascriptive sexism.[130] At its inception, the law was primarily concerned with categorical disparities between men and women in the workforce.[131] Sexism today is not often so overt and easy to identify.[132] The *Price Waterhouse* decision acknowledged this reality to some extent when it identified the discriminatory effect of sex stereotyping and the possibility that an adverse employment decision may be based on both permissible and impermissible factors.[133]

The EEOC was careful to note in its decisions in *Macy* and *Baldwin* that protection for transgender individuals and homosexuals does not add a category to the Title VII framework.[134] That is clearly a legislative function. Protection for sexual orientation, as the EEOC explained, updates the statutory interpretation to match society's current understanding of what gender, sex, and workplace discrimination actually mean in daily life.[135] Perhaps Judge Posner articulated the common law approach addressed to sex discrimination most directly in concurring with the majority opinion in *Hively*:

> I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that en-

128. *See id.*

129. Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *4–9 (July 15, 2015) (applying the sex stereotyping theory of sex discrimination to sexual orientation by review of recent cases).

130. Herz, *supra* note 9, at 403–04.

131. *See* EEOC Decision. No. 76-67, 1975 WL 4475, at *3 (1975).

132. Herz, *supra* note 9, at 400 ("[W]orkplace discrimination now largely arises in contexts in which plaintiffs simply cannot prove a violation of Title VII as traditionally understood.").

133. *See id.* at 408–09.

134. Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (noting that protection for transgendered employees does not create a new class, but would "simply be the result of applying the plain language of a statute . . . to practical situations in which such characteristics are unlawfully taken into account"); *Baldwin*, 2015 WL 4397641, at *9 (clarifying that new legislation is not necessary to include sexual orientation protection because it does not create a new class).

135. Herz, *supra* note 9, at 413–16 (analyzing instances of relatively obvious sex stereotyping that were not protected under Title VII but likely would be under a broader reading of *Price Waterhouse*).

> acted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch.[136]

While protection against sexual orientation discrimination may appear on its face to simply add a new class to Title VII, under the common law tradition, it would be a logical application of precedent interpreting sex discrimination to a different set of legal facts.[137] Protection of sexual orientation under Title VII, then, seems to be rather natural and certainly legitimate when viewed from the common law perspective.

2. Originalism and Sexual Orientation Under Title VII

Proponents of originalism will likely find protection for sexual orientation in Title VII much less natural than advocates of the common law tradition. We should acknowledge up front, in fact, that a true originalist would almost certainly decline to apply the EEOC's approach to sexual orientation and Title VII in the absence of a statutory amendment. However, there is still a good argument to be made for the legitimacy of sexual orientation protection under Title VII on originalist grounds. While an originalist would probably not choose to implement the EEOC's approach, he or she may still find reason to accept its implementation as legitimate.

Originalism looks to the meaning of the text as it was understood at the time it was written.[138] This approach was on display when the Supreme Court incorporated Second Amendment rights in *District of Columbia v. Heller*.[139] There, Justice Scalia went to great lengths to demonstrate what the words of the Second Amendment would have meant to the people of postcolonial America at the time it was written.[140] Judge Sykes succinctly articulated the originalist approach to statutory interpretation in her dissent in *Hively*: "When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment."[141]

This approach is reflected in the early interpretations of Title VII. When the EEOC probed the legislative history of the 1964 Civil Rights Act and found no grounds to give the term "sex" anything other than its common meaning, it based its decision on an originalist interpretation.[142] Similarly, the *Blum* and *De Santis* courts relied on originalist interpretations of Title VII, focusing exclusively on the common meaning of the classes listed in the statute.[143]

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136. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring).

137. *See* Baldwin, 2015 WL 4397641, at *9.

138. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989).

139. 554 U.S. 570 (2008).

140. *Id.* at 576–92.

141. *Hively*, 853 F.3d at 360.

142. EEOC Dec. No. 76-67, *2 (1975).

143. Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); DeSantis v. Pac. Tel. & Tel. Co., No. C76 1083 SW, 1976 WL 653, at *1 (N.D. Cal. Sept. 7, 1976), *aff'd*, 608 F.2d 327 (9th Cir. 1979).

While the text of Title VII itself leaves little room for interpretation as to the meaning of "sex," the 1991 amendment to Title VII as well as legislative history surrounding recent attempts to pass employment nondiscrimination laws provides justification for inclusion of sexual orientation in Title VII that originalists may find, if not ultimately convincing, at least acceptable.

The Civil Rights Act of 1991 provides the best basis for the legitimacy of sexual orientation protection in Title VII on originalism grounds. This legislation came almost immediately in the wake of the *Price Waterhouse* decision. Three important things happened as part of the 1991 amendment. First, Congress did not repudiate the *Price Waterhouse* decision. This is significant because *Price Waterhouse* marked a relatively dramatic expansion of the potential scope of sex discrimination within Title VII.[144] It, in fact, established a new form of recognized discrimination.[145] By amending Title VII shortly after the landmark sex discrimination case and leaving the decision intact, Congress passed on the opportunity to repudiate *Price Waterhouse*, indicating that it did not view the decision as an invalid interpretation of the law.[146]

Not only did Congress leave the *Price Waterhouse* decision intact, it expanded it to some extent by giving plaintiffs in discrimination cases a basis for recovery when bias motivated an employment decision.[147] By changing the language from "contributed" to "motivated" Congress explicitly adopted the language from the *Price Waterhouse* opinion.[148] This shifted the analysis from employment outcomes to evaluative criteria used in employment. Specifically, it appears that Congress changed the language to create a cause of action that focused on whether ideas about the proper roles of men and women play a role in an employer's decisions.[149] These factors mark a fairly strong endorsement of the underlying reasoning that the *Price Waterhouse* Court employed and its shift in focus toward implicit forms of discrimination and harassment.

Additionally, while Congress's resistance to explicit statutory inclusion of lesbian, gay, and bisexual employees as protected classes in Title VII could be interpreted as opposition to such protection, the Court's approach to similar evidence in the past and the reasons that law makers have offered for declining to add additional classes to the statute caution against drawing that conclusion. First, the Supreme Court has declined to use failed attempts to amend a statute as a tool for interpreting that law.[150] The Court has specifically noted that "[c]ongressional inaction lacks 'persuasive significance'" due to the many alternative inferences that one could draw

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144. *See* Herz, *supra* note 9, at 402–03.

145. *Id.*

146. *See id.* at 418–19 (noting that the 1991 act aimed to resolve issues with recent Title VII Supreme Court cases and that little of the discussion leading up to the bill involved the *Price Waterhouse* decision).

147. *See* 42 U.S.C. § 2000e-2(m) (2012).

148. Herz, *supra* note 9, at 418–19.

149. *See* 137 CONG. REC. H3920 (daily ed. June 5, 1991) (remarking on the change in language, Rep. Fawell noted the new emphasis on the manner rather than outcome in discrimination cases).

150. *See* Rapanos v. United States, 547 U.S. 715, 749–50 (2006).

from such an outcome.[151] In the case of adding classes to Title VII to include sexual orientation protection, this appears to be exactly the case. The legislation enjoyed broad bipartisan support when Democrats reintroduced it in 2007.[152] However, it appears that the addition of transgendered individuals as a class, alongside sexual orientation protection, turned many law makers against it.[153] Interpreting the recent failure to amend Title VII to explicitly include sexual orientation as a protected class, then, as congressional opposition to employment protection against sexual orientation discrimination would appear to be incorrect and meaningful to an originalist.

Additionally, a number of legislators indicated during debate over the Employment Nondiscrimination Act (ENDA) in 2007 and 2013 their belief that such additional statutory language was unnecessary because Title VII already included sexual orientation protection.[154] Speaker Boehner consistently asserted his belief that ENDA was unnecessary because such workplace protection already existed.[155] In both of the most recent attempts to pass ENDA, members of Congress declined to support the bill because they believed Title VII already prohibited discrimination against LGBT persons.[156] Given that the *Price Waterhouse* theory of sex stereotyping is the only protection that LGBT employees have available under Title VII, it is reasonable to conclude that members of Congress opposed to ENDA have endorsed application of *Price Waterhouse* to claims of sexual orientation discrimination.[157] Based on the reaction in Congress to the *Price Waterhouse* decision and the many members of Congress who express their belief that Title VII already protects against sexual orientation discrimination, express extension of such protection by the judiciary could be viewed as legitimate on originalist grounds.

CONCLUSION

As Judge Rovner wrote in the initial panel decision for *Hively*, "[i]t seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry."[158] Indeed, it seems almost certain that the contradictions in the application of sex stereotyping to sexual orientation and gender nonconformity cases will become too obvious to ignore and that the momentum behind LGBT rights in our country will eventually usher in a change in Title VII protection. Yet there is a real question as to whether Congress will be able to amend the law to

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151. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (quoting U.S. v. Wise, 370 U.S. 405, 411 (1962)).

152. Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 285 (2014).

153. *Id.*

154. Reed, *supra* note 152, at 291.

155. *Id.*

156. *Id.*

157. *See id.*

158. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 718 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *and on reh'g en banc sub nom*. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

include explicit sexual orientation protection. The reasoning from *Price Waterhouse* and the EEOC's application of it in *Baldwin* as employed by the *Hively* court create a rational method for doing this. If sexual orientation finds sustained and sanctioned protection in Title VII through the courts rather than the legislature, that decision will rest on a legitimate basis in public opinion and in the law.