Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections

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REMOVING CATEGORICAL CONSTRAINTS ON EQUAL EMPLOYMENT OPPORTUNITIES AND ANTI-DISCRIMINATION PROTECTIONS

Anastasia Niedrich*

INTRODUCTION · 26
I. TITLE VII, PAST AND PRESENT · 32
   A. The History and Intent Behind Title VII and the Categorical Approach · 32
   B. Title VII: The Statute · 35
II. FEDERAL CASE PRECEDENTS ILLUSTRATING THE FLAWS OF TITLE VII'S CATEGORICAL APPROACH · 38
   A. Defining the "Because of Sex" Provision · 40
   B. Sex Stereotyping Discrimination—Pre-Price Waterhouse v. Hopkins · 42
   C. Sex Stereotyping Discrimination—Hopkins and Beyond · 45
III. ISSUES WITH TITLE VII'S CATEGORICAL APPROACH · 50
   A. Resentment Toward Protected Class Groups · 50
   B. Motives and Maneuvering · 52
   C. Categorical Under-Inclusiveness · 56
      1. Group-Level Under-Inclusiveness · 57
      2. Individual-Level Under-Inclusiveness · 60
      3. Dehumanizing Categorization and Valuation · 62
   D. Categories as Swords and Shields · 65
   E. The Costs of Categorization · 71
IV. REMOVING CATEGORICAL CONSTRAINTS TO ACHIEVE SUCCESS: THE EMPLOYMENT QUALIFICATIONS APPROACH · 73
   A. A New Idea: The Employment Qualifications Approach · 74
   B. EQA Changes to Burdens of Proof and Standards—Disparate Impact · 77
   C. EQA Changes to Burdens of Proof and Standards—Disparate Treatment · 78
   D. EQA Changes to Burdens of Proof and Standards—Mixed Motives · 83
V. THE EFFECTS OF THE EMPLOYMENT

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QUALIFICATIONS APPROACH • 84

A. Potential Benefits of the Employment Qualifications Approach • 85
1. Accomplishing the Goals of Title VII and More • 85
2. Decreased or Eliminated Resentment Toward Protected Classes • 86
3. More Efficient Administration and Forward-Thinking by Congress • 87
4. Economic and Other Benefits for Employers • 88
5. The Benefits of Anti-Classification and Anti-Subordination Schemes and More • 89

B. Potential Drawbacks and Counterarguments to the Employment Qualifications Approach • 92
1. Opposition to Employment Non-Discrimination Protections for Transgender Persons: The Slippery Slope to the “Parade of Horribles” • 93
2. The Risk for Increased Individual Litigation • 95
3. Potential Autonomy Concerns for Employers • 97
4. Stand-Alone Legislation as a Vehicle for Change, Instead of a Reformulated Title VII • 100
5. Opposition to De-Categorization Generally: A Response to Robert C. Post • 105

CONCLUSION • 111

INTRODUCTION

“Far and away the best prize that life offers is the chance to work hard at work worth doing.”

—President Theodore Roosevelt (1858–1919)

The enactment of Title VII1 federal anti-discrimination legislation in 1964 was just as much a symbolic act as a legal one.2 Before its enactment, employers were free to discriminate against individual members of certain classes without fear of legal or social repercussions.3 However, after recognizing the harms fueled by unfettered employment discrimination, Congress radically strayed from American common law

and enacted legislation prohibiting such practices.\textsuperscript{4} Undoubtedly, this legislation was a tremendous step toward equality in 1964. Yet since then, Title VII has seen few changes and, nearly fifty years later, employment discrimination remains pervasive.

Title VII of the Civil Rights Act of 1964\textsuperscript{5} was enacted with the goal of eradicating discrimination in employment. The legislation proscribes discriminatory conduct such as the discharge, refusal to hire, segregation of, classification of, or placing limitations on an employee in any way that would deprive the employee of equal employment opportunities.\textsuperscript{6} Title VII seeks to achieve its noble goals by utilizing a categorical framework to prohibit employment discrimination on the basis of membership in certain class categories: race, color, religion, sex, and national origin.\textsuperscript{7}

The workplace and societal landscapes of 2011 are immensely different from those of 1964. In 1964, discrimination was widely accepted. Today, though discrimination still occurs far too often, it is not nearly as widespread.\textsuperscript{8} The discrimination of today also takes several different forms—the overt and invidious form that almost exclusively comprised workplace discrimination in 1964, discrimination based on misconception or stereotype, and discrimination caused by distractions such as personal characteristics.\textsuperscript{9} Employment discrimination today affects the same groups as it did in 1964 in different proportions, and also affects some groups that were not even heard of by most of the public in 1964 (e.g. transgender\textsuperscript{10} persons).\textsuperscript{11}

\begin{itemize}
  \item \textsuperscript{4} See id.
  \item \textsuperscript{5} 42 U.S.C. § 2000e (1964).
  \item \textsuperscript{6} See 42 U.S.C. § 2000e-2(b) (1964).
  \item \textsuperscript{7} See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964)), available at http://www.eeoc.gov/laws/statutes/titlevii.cfm. A few other types of discrimination, such as discrimination on the basis of age and disability, are covered by separate legislation and are discussed later on, infra.
  \item \textsuperscript{8} See Hirsch, supra note 2.
  \item \textsuperscript{9} Each of these types of discrimination will be further defined, discussed, and explained infra.
  \item \textsuperscript{10} Herein, unless otherwise specified, the term “transgender” is used to encompass all members of the “trans” community, defined as: people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex. . . . transgender people live part-time or full-time as members of the other gender [and include] anyone whose identity, appearance, or behavior falls outside of conventional gender norms. . . . However, not everyone whose appearance or behavior is gender-atypical will identify as a transgender person.” Transsexual persons are transgender persons who undergo surgery or medical procedures to alter their appearance to conform to their “sense of themselves as male or female.”). See Am. Psychological Ass’n, What does transgender mean?, http://www.apa.org/topics/sexuality/transgender.aspx (last visited Apr. 24, 2011).
  \item \textsuperscript{11} See How Do Transgender People Suffer from Discrimination?, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/1508.htm (last visited Nov. 28, 2010).
\end{itemize}
Title VII has failed to eradicate discrimination from the workplace, as evidenced by the 93,277 bias discrimination complaints filed against employers in 2009 alone.\(^\text{12}\) Title VII has made great strides in improving workplace opportunities and mitigating workplace discrimination since its enactment, but change is necessary in order to foster increased successes and to achieve its broad remedial policy goals. Title VII does not protect all workers against wrongful employment discrimination, and it does not adequately or consistently protect the workers that it was supposed to cover, either. Title VII is an admirable and somewhat effective step. Still, it is "but a first step."\(^\text{13}\) Title VII worked in its current form for many years, but in order to address the discrimination of today and potentially eradicate the discrimination of the future, change is needed.

In fashioning a remedy to address all of the different forms and occurrences of workplace discrimination happening in the present day, the "pressing need is not symbolism, but a workable regulatory scheme that actually results in less discrimination" against a wider array of individuals.\(^\text{14}\) Employment is the cornerstone for nearly all other rights and privileges in American society—without employment, an individual likely cannot afford basic necessities such as shelter and nutritious food, cannot hope to obtain a quality education, cannot afford health care, and cannot even contemplate discretionary purchases that enrich and invigorate life. All individuals need equal opportunities to earn a living and to provide for themselves and their dependents. Title VII does not provide such things to all workers as is. For many employees, Title VII is more a symbolic recognition of their situation than substance or support.

Currently, Title VII arbitrarily assigns individuals into classes that time and again are defined and interpreted narrowly to avoid granting employment non-discrimination protections and equal employment opportunities to qualified workers. No regulatory scheme will likely ever eradicate all discrimination in the workplace, but there must be a different regime that would result in less discrimination, and discrimination against fewer individuals and groups of individuals, than Title VII as currently constructed. The unfortunate truth is that discrimination operates in such a way that a categorical approach—adding or redefining

\(^{12}\) Bias discrimination complaints are not the only type of complaints the EEOC receives, and this figure does not include complaints that go unreported or those that are settled prior to EEOC involvement. Thus, the problem of discrimination in employment is far more prevalent than this figure may make it appear. See Emp’r Res. Inst., EEOC: Near-Record Number of Bias Complaints in 2009, CAL. EMPLOYER ADVISOR (Jan. 15, 2010), http://www.employeradvice.com/public/5425print.cfm.

\(^{13}\) Peter Brandon Bayer, Rationality—And the Irrational Underinclusiveness of the Civil Rights Laws, 45 WASH. & LEE L. REV. 1, 3–4 (1988).

\(^{14}\) See Hirsch, supra note 2, at 139.
categories as the sole means by which to provide employment non-discrimination protections—is not now and will never be enough to combat all of the forms of discrimination and protect the victims thereof.

To take just one group as an example, the way in which “because of sex” is narrowly defined disproportionately and severely affects transgender individuals. Because transgender persons are not one of the enumerated categories in the statute and because sex discriminations are construed narrowly, Title VII does not cover transgender persons. Transgender persons face discrimination in many contexts every day, as victims of hate crimes and other forms of prejudice. Although “transgender people face disproportionate amounts of discrimination in all areas of life, [this is] especially [so] in employment.” Currently, in 38 out of 50 states, it is legal for an employer to take adverse employment action against an employee solely because of their gender identity or expression, i.e. because they are transgender. Today, no nationwide federal legislation specifically protects transgender individuals from workplace discrimination by private employers. Thus, the vast majority of transgender employees have no available recourse or remedy when


subjected to discrimination in the workplace. The employment situation for a majority of transgender individuals can be described as follows:

[u]nemployment and under-employment are huge issues for transgender people—and particularly for transsexual people who often lose their jobs during or after their gender transitions. Transgender people who transition after working somewhere for an extended period of time often encounter blatant discrimination from people who do not understand or accept them. Later, when looking for a new job, they may run into the same trouble with potential new employers who find out that they’ve transitioned. Within the transgender community, it is not uncommon to find people dramatically underemployed regardless of their experience or background.

The lack of employment non-discrimination protections creates “multiple liabilities” for transgender individuals, and for others not covered by Title VII’s categorical protection scheme. In the end, the Title VII categorical scheme denies transgender and other persons equal employment opportunities and protections in a manner that is unfair, unjust, and does violence to such persons.

So long as Title VII categories constrain workplace opportunities and are read narrowly to exclude transgender individuals from “because of sex” non-discrimination protections, those individuals will continue to suffer the disproportionate, unfortunate, and widespread effects of workplace discrimination. The lack of Title VII protections for transgender employees means, in real terms, that transgender people face relentless and pervasive discrimination and harassment. They risk their

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20. See Moulton & Seaton, supra note 16.
21. For a comprehensive national survey on the state of employment for transgender persons, and the effects that unemployment and employment discrimination have on transgender individuals, see National Transgender Discrimination Survey, NAT'L CTR. FOR TRANSGENDER EQUALITY (Nov. 2009), http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf.
22. These harms and denial of protections to transgender persons are accomplished in various ways, as is discussed throughout this Article. For example, some courts have claimed that transgender individuals are merely “pretending” to be the other sex, or that Title VII’s “because of sex” provision was not intended to include transgender individuals, or that the provision is aimed at discrimination on the basis of biological sex, but not a change of sex.
23. Although transgender individuals face pervasive and invidious discrimination in all facets of daily life, this Article elects to focus on the treatment of transgender persons in employment because employment is a gateway for many other important rights, resources, and privileges, from housing to health care.
jobs, livelihoods, homes, and families to undergo a gender transition felt necessary to achieve happiness and a state of body in line with their state of mind. If they are fortunate enough to have a job, their job performance will be eclipsed by a characteristic that is completely irrelevant to their qualifications to do the job. No matter how hard they work, or how much they succeed, or how well they lead, they will almost never get that promotion, bonus, or recognition—all because they are transgender. If in such a situation transgender status were replaced by a characteristic currently protected by Title VII’s categorical system, like race or religion, this discrimination would not be tolerated. Yet, this treatment is ratified by Title VII’s exclusion of transgender persons (and many, many others) from its protections. For those not welcomed into the fold of Title VII protections, reality is bitter cold.

It has been the “historical tendency of anti-discrimination law to use categories to define protected classes of people.” This Article challenges the categorical approach and seeks to change that limited framework. This Article focuses on the flaws with Title VII’s categorical approach and discusses why there is a desperate need for change to combat the different types and targets of workplace discrimination today, focusing on the transgender community as one example.

After discussing the current framework and operation of Title VII, this Article analyzes the insurmountable flaws inherent in the categorical approach to anti-discrimination law, and specifically considers Title VII’s failures to the transgender community as exhibited by case precedents. Then, this Article refutes the categorical approach and proposes a de-categorized reformulation of Title VII, a concept that, to the Author’s

24. See generally supra note 21.

knowledge, has never before been proposed. This new category-less approach would replace relevant parts of Title VII’s text with language focusing on an individual's objective qualifications for employment. Under this new proposal, the determination of whether that individual is the “most qualified” for the job is the key question, and employment decisions based on factors other than job qualifications are strictly prohibited. The culmination is the “Employment Qualifications Approach” (“EQA”). Penultimately, this Article addresses the possible benefits and drawbacks that might attend implementation of the EQA. Finally, this Article asserts that the EQA is the best hope and means by which to afford currently unprotected employees, including transgender persons, equal employment opportunities and non-discrimination protections through the law.

I. Title VII, Past and Present

A. The History and Intent Behind Title VII and the Categorical Approach

Congress enacted Title VII with the aim of exterminating discriminatory employment practices. The statute imposes certain obligations on employers, grants certain rights to employers and employees, and also establishes an administrative entity (the Equal Employment Opportunity Commission (“EEOC”)) to enforce parties’ rights. Title VII proscribes discriminatory conduct such as the discharge of, refusal to hire, segregation of, classification of or placing limitations on an employee in any way that would deprive the employee of equal

26. Although one scholar has advanced a “traditional equity” conception of anti-discrimination law and Title VII, see John Valery White, The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law, 53 Mercer L. Rev. 709, 709 (2002), and another scholar has proposed a “totality of the circumstances” framework, see Mark S. Bandsuch, Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework), 37 Cap. U. L. Rev. 965, 966 (2009), both of these still operate within and utilize categorical constraints. According to the Author’s research, this is the first academic publication to suggest de-categorization within the context of anti-discrimination law.


28. Although the information is important for parties to know, the administrative and procedural processes through which parties file charges and bring claims is not the focus of this Article. For more detailed information, please see 42 U.S.C. § 2000e-5 (1988).
employment opportunities. To be clear, although Title VII prohibits certain discriminatory conduct on the basis of sex or other characteristics, it does not require employers to act to rectify existing imbalances in group or class representation within the workforce (e.g. with affirmative action programs). Title VII’s purpose is not to standardize employment workforces or match workforce demographics with the general population, but rather, its purpose is to equalize employment opportunities.

"As originally conceived, Title VII was to operate as a vehicle by which minorities would enter the mainstream of American life assured of the opportunity to compete for jobs on a nondiscriminatory basis" and "to promote hiring based on qualifications rather than on the basis of [characteristics]."

Title VII employs a categorical framework, but the genesis of and reasoning behind the framework is unclear. This Author posits that the Reconstruction Amendments, specifically the Fourteenth and Fifteenth Amendments to the U.S. Constitution, may be the genesis of the categorical framework in anti-discrimination law. Section One of the Fifteenth Amendment explicitly lists categories and prohibits voting discrimination on those bases: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

The Fourteenth Amendment also speaks in terms of categories, but on less explicit terms, stating in relevant part:

Representatives shall be apportioned among the several States according to their respective numbers ... But when the right to vote at any election ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens

30. See 42 U.S.C. § 2000e-2(j) (1964) (“Nothing contained in this subchapter shall ... require any employer ... to grant preferential treatment to any individual or group.”). However, other legal provisions do state such requirements. See, e.g., Exec. Order No. 11246, 30 FR 12319, 12935, 3 CFR, 1964–1965 Comp., 339. (1965).
31. See Griggs, 401 U.S. at 429–30 (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group ... over other employees.”).
33. See Anjali Chavan, The “Charles Morgan Letter” and Beyond: The Impact of Diversity Initiatives on Big Law, 23 GEO. J. LEGAL ETHICS 521, 531 (2010).
34. U.S. CONST. amend. XIV; U.S. CONST. amend. XV.
35. U.S. CONST. amend. XV § 1 (emphasis added).
of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in proportion. 36

The Fourteenth and Fifteenth Amendments, enacted in 1868 and 1870 respectively, were the first instances of federal legislation to speak in terms of categories of specific individuals. Other pieces of civil rights legislation were enacted in the intervening period between the Reconstruction Amendments and the Civil Rights Movement era, including The Civil Rights Act of 1871 37 (and its well-known Section 1983 38) and The Lloyd-La Follette Act of 1912. 39 However, these pieces of legislation did not refer to categories of individuals by their characteristics. It was not until the Civil Rights Era, and The Equal Pay Act of 1963 40 and the Civil Rights Act of 1964 41 (and its Title VII), that characteristic-based categories reemerged in legislation. 42 Thus, it appears that the Fourteenth and Fifteenth Amendments were the origin of the categorical framework in anti-discrimination law generally and in Title VII specifically—a framework which has continued throughout history largely unaltered and unquestioned, until now. 43

36. See U.S. Const. amend. XIV § 2 (emphasis added).
37. 17 Stat. 13 (1871).
40. 29 U.S.C. § 206; see also 29 U.S.C. § 206(d)(1) (2007) ("No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work.").
42. Though not legislation, Executive Order 8802 of June 25, 1941 prohibited racial discrimination in the national defense industry, stating in relevant part: "it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin." See Exec. Order No. 8802, 6 FR 3109 (1941).
43. Over time, countless scholars and legislators have proposed amendments to Title VII's substance, or stand-alone legislation separate from Title VII, in order to grant additional groups employment non-discrimination protections. See, e.g., Palmer, supra note 25, at 892; J. Banning Jasiusnas, Note, Is ENDA the Answer? Can a "Separate But Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?, 61 OHIO St. L.J. 1529, 1556-57 (2000). However, all such proposals still utilize Title VII's categorical framework. Some academics have criticized the categorical framework for various reasons. See, e.g., Rosalio Castro & Lucia Corral, Comment, Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims, 6 La Raza L.J. 159, 161 (1993) (criticizing Title VII's categorical approach "because it fails to recognize that racism and sexism interact inextricably"). Nonetheless, according to the Author's research, this is the first academic publication to suggest a reformulation of Title VII outside of categorical constraints.
B. Title VII: The Statute

Title VII of the Civil Rights Act of 1964 utilizes a categorical framework, prohibiting employment discrimination on the basis of membership in certain class categories: race, color, religion, sex, and national origin. Title VII applies to all private employers, state and local governments, and educational institutions that employ fifteen or more individuals. Title VII states in relevant part:

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In order to consider the practical operation of Title VII's categorical framework and its effect on uncovered individuals (i.e. transgender persons and others), it is helpful to consider a specific class category. Therefore, this Article will focus on Title VII's protections against discrimination "because of sex." Within Title VII the phrases "because of sex" and "on the basis of sex" are defined as follows:

Definitions

For the purposes of this subchapter—...
(k) The terms "because of sex" or "on the basis of sex" include,

*but are not limited to*, because of or on the basis of pregnancy,

childbirth, or related medical conditions; and women affected by

pregnancy, childbirth, or related medical conditions shall be treated

the same for all employment-related purposes.  

The prohibitions against discrimination "because of sex" in Title VII were a final-hour addition to the statute, and as such, there "is a dearth of legislative history" on the meaning, scope or intended effect of the provision. Initially, Title VII was primarily aimed at excising race-based discrimination, before other protected classes (including sex) were added. Title VII's "because of sex" provision was offered as a floor amendment in the House of Representatives, "without any prior legislative hearings or debate." Allegedly, the measure was proposed by an actual opponent of Title VII, a Southern congressman whose strategy was to "clutter up" Title VII to entirely prevent its passage. However, some scholars have argued that this was not the case. In any event, since its inception, the "because of sex" provision has caused confusion and disagreement among courts attempting to interpret the scope and meaning of the phrase.

Title VII does more than proscribe discriminatory conduct; it provides a remedial scheme designed "to make persons whole for injuries suffered on account of unlawful employment discrimination." As dis-

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49. See Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977), overruling recognized by Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).
52. See Harvard Law Review, supra note 32, at 1166 (citing 110 Cong. Rec. 2581 (1964) (statement of Congresswoman Green)).
cussed in *Albermarle Paper Co. v. Moody*, Title VII seeks to afford "complete justice" for the personal harm suffered because of discrimination, as well as "necessary relief" for the economic harm that resulted from discrimination. Title VII reflects a retrospective review and acknowledgment of discriminatory practices throughout history, as well as a prospective aim to discourage and eliminate discriminatory practices in the future. As stated in *Albermarle*, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Discrimination takes many forms. Generally, two types of discrimination are actionable under Title VII: "disparate treatment" and "disparate impact." Disparate treatment discrimination occurs when "the defendant had a discriminatory intent or motive" in taking adverse employment action against an individual. On the other hand, disparate impact discrimination occurs when "a facially neutral practice, adopted without discriminatory intent [has] effects that are indistinguishable from intentionally discriminatory practices." Stated another way, the key distinction between disparate treatment and disparate impact discrimination is the presence or absence of overt discriminatory intent (disparate treatment discrimination possesses overt discriminatory intent and disparate impact discrimination does not).

As is the case with numerous other statutes, with Title VII, a complainant must exhaust administrative avenues when seeking relief before turning to the courts. Once an aggrieved individual turns to the courts for remedy, some requirements, like establishing standing to sue, remain constant in any case, but the burdens of proof and other elements necessary for the plaintiff to succeed with his or her claim differ depending on whether the discrimination was "disparate treatment" or "disparate impact."

If a plaintiff successfully proves a Title VII claim, and the court finds that the employer discriminated against the individual, "the court may enjoin the [employer] from engaging in such unlawful employment practices and order such affirmative action as may be appropriate,"

55. 422 U.S. 405, 418 (1975).
56. See 422 U.S. at 418.
57. See 422 U.S. at 418.
58. See 422 U.S. at 418 (citing La. v. United States, 380 U.S. 145, 154 (1965)).
61. See Watson, 487 U.S. at 978.
including but not limited to "restatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." For disparate treatment cases, courts may also order attorneys' fees and compensatory and punitive damages (up to certain capped amounts) against the employer.6

Now that there has been consideration of Title VII's history, intent, framework, text, and operation, a more detailed discussion of the issues with Title VII's categorical approach will take place, utilizing the experience of transgender individuals as the foundation for examination.

II. Federal Case Precedents65 Illustrating the Flaws of Title VII's Categorical Approach

In order to consider the flaws inherent in Title VII's categorical framework and its effect on uncovered individuals, it is instructive to consider how federal courts have treated one specific group of individuals: transgender persons. This Article examines discrimination against transgender persons in employment because discrimination against transgender individuals discretely articulates and exemplifies the flaws with Title VII's current paradigm. Thus, a retrospective analysis of transgender case precedent occurs here, followed in subsequent sections by a prospective journey through the new proposed Employment Qualifications Approach in an attempt to understand where Title VII has taken us and where the EQA could enable us to go in the future.

Discrimination takes many forms, and occurs for different, specific reasons. These facets of discrimination can be sorted into several types, which explain almost the entire spectrum of discriminatory conduct. In sum, regardless of form, what is happening is that categorical discrimination results in an inability to see past an individual’s personal characteristics and realize the individual's true qualifications for employment. In broad strokes, discrimination (in employment or otherwise) can be classified as: invidious, distracted, or misinformed.

The first type is invidious discrimination. In the context of transgender persons, this presents itself as different and detrimental treatment of transgender individuals compared to non-transgender individuals solely because they are transgender. Another kind of discrimi-

65. For more information on the application of state law to sex discrimination in employment, see, e.g., Debra T. Landis, Annotation, Application of State Law to Sex Discrimination in Employment, 87 A.L.R.3d 93 (1978).
The employment qualifications approach is that due to distraction, a focus on visible personal characteristics that are unrelated and irrelevant to job ability or qualifications, but that some employers are unable to see beyond. For example, distraction discrimination might involve concerns regarding a transgender person's appearance or physical presentation, or the effect that a transgender employee might have on other employees in bathroom or other workplace situations. One other variety of discrimination occurs purely due to misinformation or misconception. Discrimination because of misinformation or misconception might include assumptions about a transgender employee's health or sexual orientation—additional irrelevancies untied to job ability or performance. Invidious, distraction, and misconception discrimination encompass the vast majority of discrimination against transgender employees in the workplace. These issues afflict the transgender community in employment, but these troubles vex other uncovered individuals as well, demonstrating the trials and failures of Title VII in its attempt to regulate the wide array of discrimination in employment.

Thus far, courts have attempted to deal with employment discrimination against transgender individuals under Title VII's "because of sex" provision. This has resulted in almost no success for the transgender victims of discrimination. Each of the cases discussed below illustrates a way in which a court decided a case involving a transgender individual, exposing and exemplifying different problems with Title VII's categorical scheme and issues with Title VII's "because of sex" provision.

Title VII proscribes employment discrimination on several categorical bases, including "because of . . . sex." This seemingly straightforward edict has been very challenging for courts to interpret. This may be due to the lack of legislative history, intent, or discussion on the provision. This difficulty may also be attributable to the wide diversity of identities on the human sexuality spectrum or, as the court put it in Schroer v. Billington:

[t]he factual complexities that underlie human sexual identity . . . . stem from real variations in how different components of biological sexuality—chromosomal, gonadal, hormonal and

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neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender.  

This Part discusses these challenges utilizing real-life case studies, analyzing court decisions that have discussed and attempted to reckon with the diverse spectrum of discriminatory activity against transgender individuals. Courts have traditionally focused on three factors in interpreting the “because of sex” provision and deciding claims of sex-based discrimination against transgender persons: (1) the lack of legislative history surrounding the provision; (2) the “plain meaning” of the statute (i.e. “sex” held to cover only biological males or biological females, individuals who were assigned a sex at birth and continue to identify with that sex); and (3) congressional inaction (failure to adopt legislation that adds gender identity or sexual orientation to the list of protected characteristics).  

While numerous types of cases have discussed the treatment of transgender individuals in cases involving discrimination “because of sex,” sex stereotyping cases represent the majority of Title VII cases involving transgender individuals and are therefore the focus of this section. Discussion of key federal court cases interpreting the “because of sex” provision, as it applies to transgender individuals, proceeds below.

A. Defining the “Because of Sex” Provision

The first federal court case to examine whether transgender discrimination claims fall within the purview of Title VII’s “because of sex” provision, and the most prominent federal case on the question, was Holloway v. Arthur Andersen & Co. Ramona Holloway began work at the Arthur Andersen firm as Robert Holloway. While working at the firm, Ramona (then Robert) informed a supervisor of her intent to undergo a gender transition. Holloway was advised to seek employment elsewhere, where her transsexual status would be unknown and she might be “happier.” At Holloway’s request, her employee records were

70. Schroer 424 F. Supp. 2d at 212.
71. See Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977); Mary Kristen Kelly, Note, (Trans)forming Traditional Interpretations of Title VII: “Because of Sex” and the Transgender Dilemma, 17 Duke J. Gender L. & Pol’y 219, 224 (2010).
73. Holloway, 566 F.2d at 661.
74. Holloway, 566 F.2d at 661.
changed to reflect her post-transition name and soon after that, Holloway was terminated. Holloway filed suit, arguing that discrimination against her because she was a transsexual was unlawful discrimination "because of sex" under Title VII.

With a cursory discussion of each, the Holloway court discussed all three of the aforementioned factors in its decision: the scarcity of legislative guidance or history regarding the "because of sex" provision, a "plain meaning" interpretation of "sex," and Congress's failure to adopt legislation broadening the definition of "sex" within the provision. The Holloway court relied on the "dearth of legislative history" on the "because of sex" provision to dismiss the idea that Congress could have intended Title VII to protect employees discriminated against "because of sex" for reasons other than their biological sex. Then, without giving detailed consideration to other possible interpretations, the court narrowly interpreted the "plain meaning" of the statute and concluded "that Congress had only the traditional notions of 'sex' in mind" (i.e. biological sex). Interestingly, the court did not define or support its assertion regarding what constitutes a "traditional notion of 'sex.'" Finally, the court used a lack of legislative activity on the issue as evidence that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning. . . . [T]his court will not expand Title VII's application [to cover transsexual individuals] in the absence of congressional mandate." Thus, the Holloway court held that a "transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate." The decision signified the Holloway court's refusal to extend Title VII protections to transsexuals because the court deemed transsexual discrimination to be on account of gender, not "sex," narrowly defining "sex" within Title VII.

75. Holloway, 566 F.2d at 661.
76. Holloway, 566 F.2d at 661.
77. Holloway, 566 F.2d at 662.
78. Holloway, 566 F.2d at 662.
79. Holloway, 566 F.2d at 662.
80. Holloway, 566 F.2d at 662.
81. Holloway, 566 F.2d at 663.
82. Holloway, 566 F.2d at 664.
83. See Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).
Several precedents have held that sex stereotyping claims, or claims involving discrimination against an individual because he or she fails to conform to gender stereotypes traditionally associated with the sex assigned to them at birth, fall under the umbrella of Title VII's "because of sex" provision.

One of the first circuit courts to consider whether Title VII's "because of sex" protections applied to transgender employees was the Eighth Circuit in Sommers v. Budget Mktg., Inc. Audra Sommers (formerly Timothy Cornish) was a clerical staff member at Budget Marketing whose employment was terminated after it came to light that Sommers was transgender. Budget Marketing stated that Sommers was terminated "because she misrepresented herself as an anatomical female when she applied for the job . . . [and] the misrepresentation led to a disruption of the company's work routine . . . [F]emale employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel." Sommers exhausted available administrative remedies and brought suit, alleging discrimination "because of sex" under Title VII. Sommers argued for an expansion of the definition of "sex" under Title VII, beyond the "plain meaning of the term." In a cursory three-page opinion, the Eighth Circuit affirmed summary judgment against Sommers, citing the "plain meaning" of "sex," the lack of obvious congressional intent to define the term to include transgender persons and privacy concerns as the reasons for its holding.

The Seventh Circuit examined whether transgender individuals are covered under Title VII's "because of sex" provision in the notable and oft-cited decision Ulane v. Eastern Airlines, Inc. The Ulane decision represented the first time that a circuit court overruled a lower court decision in which the lower court recognized that discrimination against

84. Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982).
85. Sommers, 667 F.2d at 748.
86. Sommers, 667 F.2d at 748-49.
87. Sommers, 667 F.2d at 749.
88. Sommers, 667 F.2d at 749.
89. Sommers, 667 F.2d at 749-50.
90. Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (herein referred to as "Ulane").
an employee because they are transgender constituted discrimination “because of sex” under Title VII. 91

Kenneth Ulane was a male airline pilot who was fired after beginning a gender transition to become Karen Ulane. 92 Ulane was terminated by the employer airline despite the facts that the State of Illinois issued Karen Ulane a revised birth certificate indicating a female gender and the Federal Aviation Administration certified Ulane for flight status as a female.93 In reversing the lower court decision that held for the plaintiff, the Seventh Circuit remarked on the incomplete nature of gender transitioning that transsexuals undergo (i.e. inability to alter genetic makeup or fertility) 94 and the distinctions between sexual orientation and gender identity, among other matters. The Seventh Circuit shrouded itself in textualism, 95 pronouncing that a “maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning” decided the question:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.96

92. Ulane, 742 F.2d at 1082.
93. Ulane, 742 F.2d at 1083.
94. Ulane, 742 F.2d at 1083 nn.3–6.
96. Ulane, 742 F.2d at 1085.
As did the Ninth Circuit in *Holloway*, the Seventh Circuit in *Ulane* also noted and relied on the "dearth of legislative history" on the provision, finding that the absence of legislative history "strongly reinforces the view that the section means nothing more than its plain language implies." Also, as the *Holloway* court did, the *Ulane* court placed significant weight on Congress's failure to amend Title VII to prohibit discrimination based upon other bases, such as gender identity. The Seventh Circuit also cloaked itself in originalism and cited a duty to refrain from so-called "judicial activism" in refusing to liberally construe Title VII, although it is a remedial statute.

98. *Ulane*, 742 F.2d at 1085 ("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 of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation."); see also *Ulane*, 742 F.2d at 1086 ("If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide.").
99. See *Holloway*, 566 F.2d at 663.
101. *Ulane*, 742 F.2d at 1086 ("Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. . . . For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. See *Gunnison v. Comm'r*, 461 F.2d 496, 499 (7th Cir. 1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute. This we must not and will not do.").
The tide turned in 1989, with the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*.\(^{102}\) For the first time, the Court recognized sex stereotyping as actionable sex discrimination under Title VII's "because of sex" provision.\(^{103}\) In the decisive case, Ann Hopkins, the sole woman being considered for partnership with the firm that year, was denied partnership.\(^{104}\) Partners who reviewed Hopkins's work performance cited her "macho," "overly aggressive" nature among other traits, and one partner even stated that Hopkins needed "a course at charm school."\(^{105}\) Another partner suggested that Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to make partner, and that these reasons were among the reasons Hopkins was not made partner that year.\(^{106}\) The Supreme Court found that Hopkins was not promoted, at least in part, because she failed to conform to feminine sex stereotypes.\(^{107}\) The Court held that an employer that acts on the basis of a belief about what is appropriate for one sex has acted in violation of Title VII's prohibition of discrimination "because of sex."\(^{108}\) It became evident that the tide had turned for sex-based discrimination under Title VII with the Court's statement, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."\(^{109}\) Although the opinion did not involve a transgender person, the *Hopkins* opinion is relevant and noteworthy because it manifested the sex stereotyping theory of sex discrimination, and it marked one of the first successful uses of the theory by a gender non-conforming plaintiff to obtain relief. This is important because transgender persons are discriminated against precisely because they fail to conform to the employer's limited idea of what a "man" or "woman" should be.

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103. *Kelly*, *supra* note 71, at 226.
The Ninth Circuit reversed course after Hopkins and overruled its prior Holloway decision in Schwenk v. Hartford.\textsuperscript{110} In Schwenk, a transgender prisoner (formerly Douglas Schwenk, now Crystal Schwenk) sued under state law and 42 U.S.C. § 1983 after repeated sexual assaults by a guard.\textsuperscript{111} Schwenk alleged several claims, including a claim of discrimination because Schwenk was a pre-operative transsexual.\textsuperscript{112} Citing the Hopkins precedent, and discussing its interpretation of Title VII, the Ninth Circuit stated clearly:

The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse. In Price Waterhouse, which was decided after Holloway and Ulane, the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed “to act like a woman”—that is, to conform to socially-constructed gender expectations.\textsuperscript{113}

The Schwenk court went on to note that under the Hopkins analysis, discrimination “because of sex” occurs when, “in the mind of the perpetrator the discrimination is related to the sex of the victim.”\textsuperscript{114} Because the guard’s discrimination was based on his belief that Schwenk was a man who failed to conform to stereotypes about how men should act, the guard’s discrimination was “because of sex.”\textsuperscript{115} As the Ninth Circuit declared, after Hopkins, “‘sex’ under Title VII encompasses both sex—meaning the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”\textsuperscript{116} Thus, under Schwenk, transgender people should be protected from sex-based discrimination under Title VII.

Forty years after the passage of the Civil Rights Act of 1964 and Title VII, Smith v. City of Salem\textsuperscript{117} represents one of the first times that a federal court of appeals ruled in favor of a transgender plaintiff with their Title VII sex stereotyping claim. Jimmie Smith was a lieutenant in

\textsuperscript{110.} Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).
\textsuperscript{111.} Schwenk, 204 F.3d at 1192–94.
\textsuperscript{112.} Schwenk, 204 F.3d at 1192–94.
\textsuperscript{113.} Schwenk, 204 F.3d at 1202 (citing Hopkins, 490 U.S. at 240).
\textsuperscript{114.} Schwenk, 204 F.3d at 1202.
\textsuperscript{115.} See Schwenk, 204 F.3d at 1202.
\textsuperscript{116.} Schwenk, 204 F.3d at 1202.
\textsuperscript{117.} Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
the Salem Fire Department for seven years. Smith was assigned a male sex at birth, but always identified as female and was eventually diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. After her GID diagnosis, Smith began expressing a female gender identity on a full-time basis, including at work. As a result, Smith's co-workers made derogatory remarks, including that Jimmie's "appearance and mannerisms were not 'masculine enough.'" Smith notified her superiors of her condition and the work situation, and her superiors violated confidentiality promises and devised plans designed to cause Smith to resign. One party involved called the Defendants' scheme a "witch hunt." Smith was suspended from her position and then sued as a male with GID, alleging Title VII sex discrimination and retaliation claims among others. The district court dismissed Smith's claims, stating that Smith was alleging sex stereotyping discrimination when in reality, Smith's claim was one of transgender discrimination, a claim "for which Title VII does not provide protection." The Sixth Circuit reversed the lower court decision, holding that under Hopkins, gender discrimination (including transsexual discrimination) was prohibited by Title VII's proscription against discrimination "because of sex." The Smith court went further though, finding that Holloway, Ulane and other precedents had all erroneously based their decisions on the idea that Title VII's "because of sex" discrimination provision did not include gender discrimination, too. Moreover, the Sixth Circuit astutely noted that in such decisions, "courts superimpose classifications such as 'transsexual' on a plaintiff, and then legitimate discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." However, after Hopkins, an employer who discriminates against a woman for being too "macho" should be liable for discrimination "because of sex," just as much as an employer who

118. Smith, 378 F.3d at 568.
120. Smith, 378 F.3d at 568.
121. Smith, 378 F.3d at 568.
122. See Smith, 378 F.3d at 568.
123. See Smith, 378 F.3d at 569.
124. See Smith, 378 F.3d at 569.
125. See Smith, 378 F.3d at 569.
126. Smith, 378 F.3d at 571.
127. See Smith, 378 F.3d at 571–72.
128. See Smith, 378 F.3d at 573.
129. Smith, 378 F.3d at 574.
discriminates against a man for not being "macho enough." The Smith decision was the first successful case involving a transgender individual's sex stereotyping discrimination claim under Title VII. Unfortunately, while Smith was not the last successful decision of its kind, it is one of very few successful decisions on the issue.

Since Hopkins, there have been numerous setbacks with efforts to secure transgender employment protections under Title VII's "because of sex" provision. One such setback occurred in the case of Etsitty v. Utah Transit Authority. Krystal (formerly Michael) Etsitty applied for and accepted a job offer as a male, although she was undergoing a gender transition in her private life and had been for some time prior to her employment as a bus driver with the Utah Transit Authority ("UTA"). Etsitty eventually informed her supervisor of her gender transition and intent to present as female (Krystal) at work. Initially, Etsitty's supervisor was supportive and Etsitty wore makeup, jewelry and other feminine items to work. Etsitty also started using women's public restrooms while on duty. However, once the UTA operations manager became aware of the situation, he met with Etsitty and expressed concern over Etsitty's use of female restrooms while still biologically (gonadally) male, and the potential liability this presented for the UTA. Etsitty was placed on mandatory administrative leave before being terminated, and informed that she could reapply for rehire after completing sex reassignment surgery. Etsitty filed a suit asserting Equal Protection Clause and Title VII gender stereotyping claims. Despite the Hopkins precedent, the trial court found and the Tenth Circuit affirmed a finding that Title VII's "because of sex" provision did not cover transsexual employees. The Tenth Circuit relied on the Seventh Circuit's Ulane precedent and cited that decision and the "plain meaning" approach to defining "sex" in support of its decision. Thus, while there have been significant

130. See Smith, 378 F.3d at 574.
132. Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).
133. Etsitty, 502 F.3d at 1218-19.
134. Etsitty, 502 F.3d at 1219.
135. Etsitty, 502 F.3d at 1219.
136. Etsitty, 502 F.3d at 1219.
137. Etsitty, 502 F.3d at 1219.
138. Etsitty, 502 F.3d at 1219.
140. Etsitty, 502 F.3d at 1218.
141. Etsitty, 502 F.3d at 1222 ("[T]here is nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protec-
strides in Title VII "because of sex" protections for transgender persons, there have also been disappointments and reversions to pre-Hopkins reasoning along the way.

As these cases demonstrate, discrimination's various forms (characterized by employers' invidious, distracted, or misinformed motives), operate in a nuanced way that Title VII's categorical approach is not equipped to handle. The categorical approach worked reasonably well for years, eradicating some and mitigating other employment discrimination. However, employment discrimination occurring today is not the same as employment discrimination occurring in 1964, or even 1991. Employment discrimination today tends to be much less overt, and its lines are less clearly-defined than discrimination was in the past. It is no longer always possible to say for certain that an employee did not receive a job because they fit into one and only one category, or possessed a single characteristic (e.g. being a member of a certain racial group); and unlike in 1964, the employer will not always be so explicit about their reasoning. Today, an employer might generally cite a job applicant's "appearance" as their reason for not hiring the candidate, when they really chose not to hire the candidate because they are transgender, and/or are a single parent, and/or because of their political party affiliation. A discriminatory employer might also make an adverse employment decision, such as failing to promote a candidate, for one stated reason (e.g. an unfriendly attitude), when really the reason was based on a category-based stereotype such as race or sex. Employers have had nearly fifty years to become aware of all of Title VII's nooks and crannies, faults and weak points, and have learned how to aptly navigate around them. All the while, discrimination occurs with assistance from sometimes witting and other times unwitting courts, which cite judicial restraint and a lack of congressional guidelines as the reason to deny equal employment protections to the most vulnerable and needy employees, even under a broad, remedial statute. Discrimination today operates in a fashion such that adding categories and working within a categorical framework like Title VII will never be sufficient to effectively combat discrimination. Title VII achieved positive results for many years. However, times have changed, and revision to the scheme is necessary in order to keep up with the changing face of employment discrimination and the changing character of employee candidates. The next Part of this Article addresses the issues with Title VII's categorical approach in greater detail.

III. Issues with Title VII's Categorical Approach

As of the time this Article was written, it has been forty-seven years since the passage of the Civil Rights Act of 1964 and Title VII. This is significant for several reasons. One reason is because of the relatively great amount of time that employers have known of these statutes and their requirements. Another reason is that although employment non-discrimination efforts have come a long way for many groups in those years, for groups like transgender individuals there has been little to no improvement in equal employment opportunities or non-discrimination protections. To be clear, Title VII is important legislation that has done much good and continues to strive for lofty, admirable goals. But Title VII is also plagued by shortcomings and has largely failed the transgender community, among others, as is.

This section discusses some of the shortcomings of Title VII, utilizing transgender employment discrimination as the foundation for analysis. The flaws intrinsic to Title VII's categorical approach include: resentment toward protected class groups; categorical under-inclusiveness at the group and individual levels; valuation and dehumanization of individuals; the use of the categories as swords and shields to deny and afford protections at the whim of those wielding the power to define the categories; and Title VII's categorical structure frequently resulting in immense costs to employers. Each flaw is discussed in turn.

A. Resentment Toward Protected Class Groups

The esteemed U.S. Supreme Court Justice Oliver Wendell Holmes once said, "the longer we live, the more we find we are like other persons." Unfortunately, it seems Americans have not lived long enough yet to fully observe all of the similarities among themselves. A significant body of social science research has studied Americans’ focus on "the difference between classes," and recognized a sense of resentment on the part of employees and employers toward those individuals traditionally protected by Title VII’s categories.


143. See also Deana A. Pollard, Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege, 74 WASH. L. REV. 913, 933 (1999) (“Title VII’s convoluted analytical history . . . has contributed toward resentment toward Title VII plaintiffs because it is confusing and fails to
Some social science scholars argue that the mere existence of "groupness," or the differentiation and classification of individuals into groups based on certain possessed characteristics, "exacerbates and generates various types of intergroup biases." One scholar analyzed various studies on point and found that the practical effects of "dividing people along group-based lines will 'cause people to favor ingroup members in the allocation of rewards, in the evaluation of performance, in memory for positive versus negative behaviors, and in the attribution of success or failure.'" Once "the concept of 'groupness' is introduced, subjects perceive members of their group as more similar to them, and members of different [groups] as more different from them, than when those same persons are simply viewed as noncategorized individuals." These sorts of stratifications predictably lead some to resent individuals who are not members of the same group, and to misperceive their protections, which some would call "special rights." There is such "group bias" resentment of Title VII protected classes happening today, and it is invidious, widespread and not always superficially apparent. As Supreme Court Justice Thomas has recognized, this group bias and resentment is harmful to those in the protected groups and those outside of them because granting preference in employment based on

instruct defendants on how to avoid liability"); see generally Jessica Fink, Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants, 38 N.M. L. REV. 333 (2008).


148. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (asserting that programs granting preference in employment based on membership in protected group(s) "undermine the moral basis of the equal protection principle . . . [a principle that] reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society"). In his opinion, Justice Thomas further recognized that such classifications and preference programs based on them (i.e. affirmative action) "teaches many that because of chronic and apparently immutable handicaps,
membership in a protected group "undermine[s] the moral basis of the equal protection principle . . . reflect[ing] our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." Thus, in an unfortunate turn of irony, Title VII's categorical approach, which classifies and divides individuals according to their characteristic differences, may actually cause and worsen discrimination in the workplace based on those characteristics—the very discrimination Title VII aims to eliminate.  

B. Motives and Maneuvering

The saying goes "where there is a will, there is way." Unfortunately, even after the enactment of Title VII, numerous amendments and hundreds of case opinions interpreting and refining Title VII's provisions, employers who seek to discriminate against employees still find ways to do so, and get away with it. Employers have had nearly fifty years under Title VII. By now, most employers are "sufficiently savvy" to maneuver through Title VII to discriminate if they seek to do so, and congressional machinery is not able to completely prevent them. So long as employers promulgate and enforce policies that "appear credible and lacking in animus," then courts are usually "reluctant to second-guess" them. The way in which employers maneuver around Title VII protections and other problems with the class-based nature of Title VII are discussed in turn.

One problem with the class categories of Title VII is that the structure delineates objective standards that are ill-equipped to handle the subjective nature of employment discrimination. Title VII proscribes discrimination against individuals for membership in certain classes—an objective standard. However, Title VII fails to ensure a way to accurately ascertain the basis on which an employer made an employment decision, which is decidedly subjective. This can result in an end-run

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minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of [class characteristics]." See id. at 241.


151. See id.

152. Scholars have recognized that subjective employment decisions can be based on covert discrimination with other justifications. "In the early years . . . of Title VII, courts
around Title VII protections for those discriminatory employers savvy enough to do the maneuvering and who offer a lawful justification for an unlawful employment action. Although Title VII provides mechanisms for dealing with intentional discrimination based on mixed motives,\(^{153}\) this is insufficient to prevent maneuvering by employers intent on discriminating.

To illustrate the way in which an employer intent on discriminating can maneuver, it is useful to consider a hypothetical. For example, assume that an employer is interviewing candidates for a position. For the sake of simplicity, assume that there are only two candidates: a Black gay man with tattoos and a white heterosexual man who is a registered member of the Republican party. Further assume that both candidates are equally qualified for the position. Title VII proscribes discrimination "because of . . . race." An employer knows that they cannot make an employment decision on the basis of the applicants' races. However, the employer also likely knows that Title VII does not prohibit employment discrimination on the basis of sexual orientation or appearance (among numerous other bases). If the employer seeks to discriminate against the Black applicant because he is Black, the employer can do so and evade Title VII's protections—the employer merely needs to make it appear that the employment decision was on a basis or bases not covered by Title VII. The employer can claim, and it would be nearly impossible to establish otherwise (especially at the interviewing stage of employment), that the employer discriminated against the Black applicant because he was Black, the employer can do so and evade Title VII's protections—the employer merely needs to make it appear that the employment decision was on a basis or bases not covered by Title VII. The employer can claim, and it would be nearly impossible to establish otherwise (especially at the interviewing stage of employment), that the employer discriminated against the Black applicant not because he was Black, but because he was gay, or because of his appearance. Even if the employer subjectively made the employment decision "because of race," the employer is permitted to make the employment decision on

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153. Cases of intentional discrimination under Title VII consist of one of two types (or a combination of the two): pretext cases or mixed motives cases. Pretext cases are those in which the defendant's offered reason for the employment action is not true, but rather is a pretext for discrimination. Mixed motives cases are those in which the defendant's stated reason for the employment action is only one of the reasons for the action, and one of the other motivating reasons behind the decision was the plaintiff's membership in a class protected from discrimination under Title VII. See Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017–18 (8th Cir. 2005). Whether the intentional discrimination claim is based on pretext or mixed motives influences the standards of liability and available remedies. See Richard T. Seymour, *Current Evidentiary Problems in Employment Cases*, SP003 ALI-ABA 1101, 1116 (July 24–26, 2008) (discussing different types of claims and cases, citing *Strate*, 398 F.3d at 1017–18).
the other two bases, neither of which are protected from discrimination by Title VII, and the employer's discrimination is lawful. There is a multitude of imaginable examples like this one that evidences this shortcoming with Title VII's categorical approach.

While it is true that there is a mixed motives analysis under Title VII, designed specifically to deal with such situations, it is not able to ensure completely that situations like the hypothetical above do not occur. Desert Palace, Inc. v. Costa154 clarified the mixed motives analysis after Hopkins and discussed Section 107 of the Civil Rights Act of 1991,155 which amended Title VII to cover mixed motives cases. As amended, Title VII states in relevant part: “an unlawful employment practice is established 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.”156 However, as previously substantiated by “Hypothetical A,” this demonstration is not always possible or simple to make, and what constitutes a sufficient “demonstration” warranting a mixed motives instruction varies from court to court.157 Even if a plaintiff does successfully prove that an impermissible basis was among the mixed motives behind the discriminatory employment action, the employer can limit the remedies available to the plaintiff by demonstrating that it would have reached the same decision absent the discrimination. In “Hypothetical A” above, if the employer conducting the application process disliked both Blacks and gays, and would have refused to hire the applicant on either basis, the employer can still escape or limit liability. This is because he would have made the same decision (not to hire the applicant) on a basis not prohibited by Title VII (i.e. that the applicant was gay) because the plaintiff will likely be unable to make a sufficient “demonstration” about the employer's impermissible race-based motivation for the employment decision.158 Thus, this flaw in Title VII's categorical approach remains.

157. See Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) (“[T]he various circuits have about as many definitions for ‘direct evidence’ as they do employment discrimination cases.”); see also John Valery White, The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law, 53 MERCER L. REV. 709, 803 (2002) (“[T]here exists no definition of discrimination to allow the plaintiff to prove or defendant to disprove... [T]he parties always face uncertainty that, not only might their definition differ from that of the other party or the judge, but it might differ from the jury's.”).
158. See White, supra note 157. In disparate treatment cases,
Even if it were simple to consistently determine an employer's true motivations behind a given employment decision under the mixed motives provision of Title VII, transgender employees would still be susceptible to another type of "mixed motives" problem. In order to discern whether discriminatory action was based on a permissible or impermissible basis, some courts separate employment practices into those involving mutable characteristics and those involving immutable characteristics, and hold that only immutable traits are protected from discrimination under Title VII. This is problematic for transgender individuals and others on the LGBTQIA spectrum because there is not widespread agreement about whether gender identity is (or other characteristics of LGBTQIA persons are) immutable (i.e., that gender identity is innate but later brought to the surface by way of surgery, hormones or other measures), or if gender identity is mutable (a choice). So long as the mutability-immutability debate over gender identity and other currently unprotected characteristics continues, and assuming the plaintiff can show pretext, the difficult part of the case has only just begun. Proving discriminatory intent becomes a significant and shifting hurdle. The plaintiff might seek evidence that the situation resembles [other discriminatory episodes]; or pursue evidence that the particular decision maker harbored prejudiced views.

See id. at 776. None of this would likely be easy for a plaintiff.


161. "LGBTQIA" is an acronym which stands for: lesbian, gay, bisexual, transgender, queer or questioning, intersex, or asexual. Even this lengthy acronym, which incorporates the majority of the "queer" community, does not include all groups within the queer community. See LGBTQIA Glossary, UNv. OF CAL., DAVIS LESBIAN GAY BISEXUAL TRANSGENDER RES. CTR., http://lgbcenter.ucdavis.edu/lgbt-education/lgbtqia-glossary.

162. This is often most problematic in disparate impact cases. See generally Gonzales, supra note 160, at 2218 (citing Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), rev'd on other grounds sub nom. Alexander v. Sandoval, 532 U.S. 275 (2001); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980)).
courts utilize this analysis, transgender people and others will remain unprotected under Title VII.

Thus, Title VII is flawed in that it fails to protect all employees, including transgender persons, from employers discriminating via various types of mixed motives or maneuvering. Furthermore, because employers promulgate and enforce policies that appear facially neutral, courts refuse to question those employers' motives or actions. The consequence is that savvy discriminators continue to skate through the gaping holes in Title VII protections, and individuals suffer as a result.

C. Categorical Under-Inclusiveness

At least one scholar adjudged Title VII and similar civil rights laws "irrationally underinclusive" because "[r]ather than according civil rights protection to all individuals under all applicable circumstances, the statutes protect limited groups of individuals."\(^\text{163}\) "[There is] a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," but only those in enumerated classes.\(^\text{164}\)

The under-inclusive nature of Title VII's categories is threefold: (1) at the group level, Title VII classes are under-inclusive because the categories only afford non-discrimination protections to some categories of persons on certain bases (e.g. protecting against discrimination because of race but not marital status); (2) at the individual level, Title VII classes are under-inclusive because even some individuals who are members of protected classes are excluded from non-discrimination protections by definition or court interpretation;\(^\text{165}\) and (3) at the indi-

\(^\text{163}\) See Bayer, supra note 13, at 52.

\(^\text{164}\) See Bayer, supra note 13, at 53 (citing Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2405 (1986)).

vidual level, the classification system itself values characteristics in an inequitable manner, relegating some individuals to second-class status and dehumanizing those individuals.

1. Group-Level Under-Inclusiveness

First, Title VII is under-inclusive because only individuals held to be members of one of its protected categories receive non-discrimination protections. Although membership in Title VII's classes may initially appear straightforward, that is not always the case. If Title VII's purpose is to eradicate arbitrary discrimination in employment, then its classes are immensely under-inclusive because all but a few select subgroups of employees are unprotected from discrimination by Title VII (protecting employees only on the basis of "race, color, religion, sex, or national origin"). As the Supreme Court stated, the "whole purpose of Title VII was to deprive employers of their 'traditional business freedom' to discriminate." Despite Title VII, discrimination still occurs, in droves, for a variety of reasons—as evidenced by the 68,710 charges of
discrimination under Title VII that the EEOC received in fiscal year 2009 alone.\textsuperscript{171} Thus, Title VII's protections for only certain classes have not achieved their broad purpose and do not make sense because, as one scholar put it:

there is no rational basis to protect certain classes from arbitrary discrimination in areas such as employment and housing, while withholding protection from those who are treated equally irrationally but on the basis of classifications different from those set forth in the statutes as unlawful.\textsuperscript{172}

Additionally, this group-level under-inclusiveness is responsible for great administrative burdens and costs for Congress, as well as unacceptably high costs for uncovered individuals (i.e. a lack of protection for potentially years in the future, if they are ever granted categorical protection at all). The categorical approach requires Congress to amend Title VII any time it seeks to redefine the types of individuals protected by Title VII, or enact stand-alone legislation any time it desires to protect a class of persons not currently protected under Title VII. Both actions are inefficient and difficult to accomplish. Several examples illustrate this point.

Since its passage, Title VII has been amended on several occasions by Acts including: the Equal Employment Opportunity Act of 1972, the Pregnancy Discrimination Act of 1978, the Civil Rights Reformation Act of 1987, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993.\textsuperscript{173} In order to pass each Act and each amendment to Title VII redefining employment non-discrimination protections, a significant outlay of congressional resources has been required. Any attempt to add a group to the list of protected classes in Title VII has "unleashed furious debate."\textsuperscript{174} Hundreds of hours of congressional time have been spent debating and implementing amendments to Title VII. This method of legislating is inefficient and does not employ a forward-thinking approach (i.e. an approach that would anticipate and meet the needs of currently unprotected groups of individuals suffering discrimination

\textsuperscript{172} See Bayer, supra note 13, at 56.
before the discrimination against such individuals is widespread and more difficult to remediate).

Furthermore, when attempts to redefine extant categories of protected individuals under Title VII have failed, efforts have been made to pass stand-alone legislation to protect those individuals. However, stand-alone legislation usually takes years to pass, if the legislation ever actually achieves passage. The Disability Rights Movement preceded the successful enactment of the Americans with Disabilities Act of 1990 by decades, just as the Gay Rights Movement preceded the first of many unsuccessful attempts (in 1974) to pass the Employment Non-Discrimination Act ("ENDA"), which would have granted employment non-discrimination protections upon LGBT employees. These are merely a few examples of the ways in which congressional action to broaden employment non-discrimination protections is often unsuccessful, and when such efforts are successful, it can take decades—leaving thousands of individuals without equal employment opportunities in the meantime. Some academics contend that even if ENDA did pass, it would be insufficient. These scholars argue that only by amending Title VII to be more inclusive can especially vulnerable groups, such as transgender individuals, obtain adequate employment non-discrimination protections. This is so because "federal courts have demonstrated a continued reluctance to afford protection to LGBT individuals, [so] they will be less likely to read a free-standing piece of legislation as expansively as [an amended] Title VII." Thus, the categorical approach is intolerably

175. See, e.g., Jeannette Cox, "Corrective" Surgery and the Americans with Disabilities Act, 46 SAN DIEGO L. REV. 113, 118 (2009) ("In the decade following Title VII's enactment, civil rights advocates attempted to amend Title VII to add 'disability' to Title VII's protected categories. . . . [T]hey ultimately achieved their goal to prohibit employment discrimination based on disability three decades after Title VII's passage. . . .") (emphasis added) (citing H.R. 14033, 92d Cong. (1972) (discussing an attempt in 1972 to add "physical or mental handicap" to the list of protected classes under Title VII of the Civil Rights Act of 1964); S. Rep. No. 96-416, at 1 (1979) (discussing a similar attempt in 1979)).


179. See Palmer, supra note 25, at 892 (citing Jasiunas, supra note 43, at 1557). Although this Author once believed that passing ENDA would be the better, more desirable, and efficacious means by which to achieve workplace equality for LGBT individuals, the Author now believes that the EQA is the best means to achieve that end. See generally Niedrich, supra note 177, at 7.
inefficient and is not forward-thinking, to the continuing detriment of thousands of qualified employees, transgender and otherwise.

Title VII, as currently written, is impermissibly flawed and the current language of the statute does not make it simple to improve or change it. Legislative change is difficult to accomplish and wrought with political obstacles, and it is also slow-going and riddled with loopholes, no matter how well-intentioned or thorough Congress attempts to be. It would be prudent to adopt a revised version of Title VII that does not make change difficult (or necessary so often), especially considering the nature of the ever-expanding LGBTQIA community and its definition of "sex." Further, it would be prudent to adopt an amended version of Title VII that does not enable would-be discriminators to maneuver through loopholes by enumerating discrete and incomprehensive categories of persons that courts then define as desired in order to exclude protections.

2. Individual-Level Under-Inclusiveness

Second, Title VII classes are under-inclusive because even some individuals who are (by almost any definition) members of protected classes are excluded from non-discrimination protections by court interpretation. Notwithstanding the lack of congressional discussion, history or intent regarding the late addition of the "because of sex provision," the text of the provision does not seem as clear-cut as the pre-Hopkins courts would make it seem. Within Title VII, the phrases "because of sex" and "on the basis of sex" are defined to "include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical

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180. For example, transgender and intersex persons have existed since time immemorial, but society did not gain consciousness of their existence until relatively recently. The same can be said for gay, lesbian, and bisexual individuals. The existence of transgender and intersex individuals only recently became known on a widespread basis within even the LGBT community, and such expansions in the community, and recent additions thereto, support an inclusive, broad and adaptable Title VII to afford these and other individuals employment protections. The language of Title VII will be most efficient if it can adapt to changes in society and the workplace without constant need for revision. Although the need for change may not seem to present itself frequently, the LGBT community and the interracial community provide evidence to the contrary—before the era of Loving v. Virginia, fifty or so years ago, many would have thought it ridiculous to consider the need for employment protections from discrimination "because of race" for interracial persons.

181. See Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977), overruling recognized by Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).
conditions." It seems all too apparent that the phrase "but are not limited to" signifies that conditions aside from strict binary, biological gender were envisioned falling under the umbrella of "sex" in Title VII. Unfortunately, the majority of courts have latched on to the word "sex" out of this context, ascribing a narrow binary definition to the term that is also unsupported by the congressional record. As a result of courts' interpretations in this manner, transgender persons have found themselves all but sex-less and gender-less, excluded from Title VII's protections and suffering the traumatic consequences of the exclusion, despite having a distinct biological and psychological sex and gender identity.

Even individuals covered by Title VII's class-based framework often find it difficult to bring or succeed with Title VII class action employment discrimination litigation. In some Title VII class actions, courts have narrowly defined classes in a manner detrimental to individual plaintiffs. Some such courts have narrowed the classes of persons alleging Title VII violations to the point where individual plaintiffs "find it impossible to bring an individual suit or narrow class action even when [they have] a meritorious claim" due to cost, practicality, proof problems, or other reasons. In instances in which classes are able to bring Title VII class actions, like all class action proceedings, courts become...

183. See, e.g., Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Holloway, 566 F.2d at 662. All of these cases narrowly interpreted "sex" despite the lack of congressional record, discussion, or stated intent one way or another.
186. See generally id.
187. See id. at 626.
bogged down by administrative and adjudicative difficulties concomitant with the scale and unique demands of class actions. For example, recently the Ninth Circuit certified a class of female workers against Wal-Mart Stores, Inc., alleging discrimination in employment conditions and pay under Title VII’s “because of sex” provision. It is estimated that the class might “include more than 1.5 million women.” The matter is the largest ever employment discrimination case to date. The case is so large that the defendant asserted “that the number of litigants that the lawsuit purports to represent is too big to defend.”

For those who are fortunate enough to have coverage under Title VII, the statute’s categorical approach is problematic in that its categories are oftentimes defined narrowly to exclude claimants with valid claims, and at other times are so broadly defined that it results in little to no relief for the respective individuals in the categorical class. Thus, the categorical nature of Title VII as it is currently written is unacceptably under-inclusive at the individual level, denying both covered and uncovered aggrieved individuals the opportunity to bring and succeed on meritorious claims.

3. Dehumanizing Categorization and Valuation

Third, Title VII’s categorical approach is unsatisfactory because, at the individual level, the classification system itself values characteristics in an inequitable manner. Both textually and by interpretation, it relegates some individuals to second-class status, dehumanizing those individuals in several ways. One of the ways that Title VII’s categorical approach dehumanizes individuals is by omitting broad segments of the general population from its protections, many of whom are “similarly situated” to those covered under Title VII (e.g. a transgender male-to-female person who by nearly all objective measures, is just as much a woman as a “biological”-born woman) and “similar to them in terms of

188. See, e.g., Earle K. Shawe, Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a), 19 WM. & MARY L. REV. 469 (1978) (generally discussing the “explosion” in the amount, size and demands of Title VII class action litigation).
190. Id.
192. Jones, supra note 189.
193. See Bayer, supra note 13, at 56.
the purpose of the law." As at least one prominent constitutional scholar has recognized, "classifications degrade the worth of individuals and ultimately intensify social stigma." Whether one considers gender or gender identity elected or immutable, other characteristics—both the immutable, such as race, and the elected, such as religion—that are equally as central to an individual's identity as their gender, are protected under Title VII. It is irrational to afford employment opportunities and non-discrimination protections to some qualified individuals with certain person-centric traits and deny the same to others with highly similar, meaningful, and analogous traits. Title VII's classifications are neither integral nor sufficient to achieve the purposes of the statute, and they serve to degrade those who are not afforded the benefits of Title VII protection—transgender individuals chiefly among them. Even where Title VII does grant employment non-discrimination protections, the statute does so inexplicably inconsistently. Title VII claims to prohibit discrimination according to the nature of the discrimination (e.g. discrimination based on race), but in reality, Title VII's categorical system permits or prohibits discrimination based on certain select personal characteristics. The same discrimination based on the same stereotypes or motivations is protected or unprotected based on the type of person—for example, the same exact sex stereotyping and harassing actions taken against a biological female would be prohibited, while the actions would be permitted against a transgender female. Thus, one of the ways in which Title VII's categorical framework dehumanizes individuals is to exclude them from protections and relegate them to second-class status for arbitrary reasons, protecting the same acts of discrimination taken against others solely because they possess different characteristics.

Title VII's categorical structure serves to dehumanize transgender persons specifically in several ways. One of the ways in which Title VII's "rigid categories of normal sex and sexuality bullies [and degrades] transgender people" is by forcing transgender persons "into articulating

194. See Bayer, supra note 13, at 56. (citing Rotunda, Nowak and Young, 2 CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 18.2 at 320 (1986)).
196. See Bayer, supra note 13, at 56.
197. See Romer v. Evans, 517 U.S. 620, 633, 642 (1996) (discussing the way in which members of the LGBT community suffer unconstitutional discrimination based on certain characteristics unlike any other groups).
their identities in a way that conflicts with their sense of self."198 Moreover, the courts interpretations of and definitions of the contours of Title VII’s categories to exclude transgender persons dehumanizes them by making unconventional gender expression or identity “synonymous with willful deceit”199 or by utilizing the language of monstrosity to describe transgender persons and their bodies.200 Title VII’s categorical structure leaves wide latitude for courts to use offensive language to relay why certain individuals do not fit into an enumerated category. This categorical framework also sanctions discriminatory employers’ and courts’ prejudices against transgender individuals by ratifying adverse employment decisions made solely on the basis of an individual’s transgender status. These are just some of the many ways in which Title VII’s categories intolerably serve to deprive transgender persons of their humanity.

With the passage of Title VII in 1964, and with subsequent amendments, Congress made policy decisions and performed valuations that ratified discrimination against some in an attempt to eradicate discrimination against others.201 Title VII’s categorical scheme values some individuals above others by certifying those protected individuals’ discrimination claims as more deserving than others. At the same time, this categorical scheme also allows employers to elevate certain aspects of a


[The law recognizes two sexes . . . and provides protection based on sex in a limited way. . . . To] get standing under the laws that protect against sex discrimination, a transgender person would need to articulate his or her . . . “sex” in a way that falls under recognized legal categories [and in a way that may not align with the transgender person’s sex or sense of self as they identify it]. This does a kind of violence to transgender people.

Id. at 157.

199. See Lloyd, supra note 198, at 169.

200. See Lloyd, supra note 198, at 162–63 (discussing the language used by the Seventh Circuit in the Ulane case, including: “Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes . . . it may be that society . . . considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case”) (citing Ulane, 742 F.2d at 1087 (footnote omitted)).

201. See Mark R. Bandsuch, The NBA Dress Code and Other Fashion Faux Pas Under Title VII, 16 VILL. SPORTS & ENT. L.J. 1, 28–29 (2009) (discussing the way in which some scholars and courts have evaluated the relative abhorrence of historical discrimination against certain groups, valuing and assigning federal employment anti-discrimination protections to them in a sort of ranking system, with “the protections afforded each [category of persons] respectively in descending order . . . (1) race or national origin; (2) sex; (3) age; (4) religion; and, (5) disability”) (citing William R. Corbett, The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law, 14 DUKE J. GENDER L. & POL’Y 153, 168 (2007)).
person above their qualifications, making employment decisions (positive or adverse) based on personal characteristics rather than ability. It could be inferred that Congress considers discrimination against a person because of their religion more repugnant than discrimination against a person because of their gender expression, political affiliation, marital status, appearance, military service record, or other unlisted characteristics, and Congress considers certain characteristics more or less important than qualifications or merit. Unfortunately, as a result, individuals are put into classes; those who are afforded anti-discrimination protections based on arbitrary values are safeguarded while all others are dehumanized, subjected to pervasive employment discrimination, and prevented from providing for themselves or bettering their circumstances through gainful employment. Therefore, Congress’s categorical approach is intolerably dehumanizing because it amounts to a ratification of discrimination against individuals who are not deemed members of protected classes, placing a lower value on their suffering from discrimination because of who they are as a person.

D. Categories as Swords and Shields

Yet another issue with the class-dependent nature of Title VII is that the categories are often used as swords and shields in whichever manner is convenient for an employer or necessary for a court to obtain a desired result—at the detriment to transgender and other employees.

202. Congress initially selected certain groups for employment non-discrimination protections on the basis of historical suffering, discrimination, and disadvantage. The validity of those groups’ experiences is not in dispute. See Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (noting Title VII protected classes’ subjection to “a history of purposeful unequal treatment” and relegation to a “position of political powerlessness” warranting protections). If the basis for justifying group protections of this sort is historical suffering, discrimination, and disadvantage, then the LGBT community’s history and experience as a group also justifies employment non-discrimination protections. See Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (discussing numerous experts’ findings of historically widespread, hateful, and horrific discrimination and prejudice against members of the LGBT community).


204. See Jill D. Weinberg, Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act, 44 U.S.F. L. Rev. 1, 1 (2009) (asserting that a close examination of Title VII cases involving allegations of employment discrimination against transgender persons “because of sex” supports that “courts were acting purposively by applying different
As some scholars and transgender rights activists have recognized, it is a fact that "[n]o matter how a transgender plaintiff articulates his injury, he is likely to encounter a court that draws a line in a way that makes him a stranger to all of the laws that could have protected him."\(^{205}\) Since the first instance a transgender person brought suit for sex discrimination under Title VII thirty-five years ago,\(^{206}\) courts and bigoted employers have cited the same few arguments for denying transgender individuals protections from employment discrimination.\(^{207}\) The arguments against transgender employment protection from discrimination "because of sex" take three basic forms: (1) that a lack of congressional discussion, instruction, or stated intent as to the scope and meaning of "sex" requires a narrow interpretation of "sex" that excludes transgender persons; (2) transgender status does not implicate sex stereotype concerns or discrimination; and (3) transgender sex reassignment does not involve true sex, but merely a change of sex. The use of these arguments as swords and shields is explained further below.

Employers seeking to justify discrimination against transgender individuals have long invoked, and courts have long hidden behind, the argument that a lack of congressional guidance or action on the scope and meaning of "sex" in Title VII requires a narrow interpretation that excludes protections on the basis of gender identity (or sexual orientation). The case of Holloway v. Arthur Andersen & Co.\(^{208}\) represents one such instance. In Holloway, the aggrieved plaintiff’s employer terminated her for undergoing a gender transition at work.\(^{209}\) Holloway filed suit for transsexual discrimination "because of sex" under Title VII and lost.\(^{210}\) The Ninth Circuit in Holloway relied on several considerations, all flowing from the lack of congressional guidance on the definition and scope of "sex" in Title VII, in upholding the discrimination by Holloway’s employ-
er. The factors included the "dearth of legislative history" on the "because of sex" provision, an assumption "that Congress had only the traditional notions of 'sex' in mind" (i.e. biological sex) regarding the provision, and a lack of legislative activity on the issue as evidence that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning." Despite the seemingly open-ended definition of "sex" in Title VII, and numerous precedents from the United States Supreme Court and circuit courts counseling for a broad interpretation of the remedial statute, the Holloway court still employed a narrow approach to the provision to exclude transgender persons from the scope of Title VII's sex protections. The Holloway court, like so many other courts, was notified of a claim, decided that Title VII would be the applicable statute, and in interpreting the statute, narrowly construed all of the words in the remedial statute so as to deny protection, asserting a lack of congressional guidance as the reason.

In these aforementioned ways, the congressional guidance/action argument has been used as a sword by employers and a shield by courts to deny transgender employees protections from discrimination "because of sex" under Title VII.

Employers have also argued that taking adverse employment action because of transgender status does not impermissibly involve sex

211. Holloway, 566 F.2d at 662.
212. As referred to here, the "lack of legislative activity" means Congress's failure to add a category of protections to Title VII, failure to redefine "sex" under Title VII, and failure to pass the Employment Non-Discrimination Act, to grant protections to transgender persons or others in the LGBT community.
213. Holloway, 566 F.2d at 663.
214. The very text of Title VII's "because of sex" provision, and the way in which it is defined in the statute, support a broader interpretation of "sex" than merely biological sex. The statute specifies that pregnancy and "related medical conditions" are also included in the definition of "because of sex," among other things. See 42 U.S.C. § 2000e(k) (1964) (defining "because of sex" and "on the basis of sex"). There is no evidence one way or another suggesting that Congress did or did not intend transgender individuals to be covered under Title VII's sex protections. However, the language covering "related medical conditions" suggests that although Congress might not have been thinking primarily of transgender discrimination when it enacted Title VII, it might not have intended to exclude protections for transgender individuals either.
215. Several cases decided prior to Holloway on the subject of Title VII's purpose and its correct interpretation counsel for a broader interpretation than the Holloway court gave the "because of sex" provision. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974) (holding that in order to effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction); Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977) (same); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1340-42 (D.C. Cir. 1973) (same); Tipler v. E.I. duPont de Nemours and Co., 443 F.2d 125, 131 (6th Cir. 1971) (same).
stereotypes in violation of Title VII's "because of sex" provision, and courts have agreed. Although one post-Hopkins circuit court used this reasoning to hold that Title VII's "because of sex" provision did protect transgender individuals from sex stereotyping discrimination in employment,\(^{216}\) the vast majority of courts considering the question have cited this argument for the contrary proposition. For example, in the case of *Oiler v. Winn-Dixie Louisiana*,\(^ {217}\) another post-Hopkins federal court decision applied the same argument and precedents to reach a contrary result. In *Oiler*, the plaintiff was a truck driver who was fired after mentioning to his superior that he occasionally dressed as a woman at home.\(^ {218}\) Oiler was terminated due to his transvestite status, even though he never expressed a transgender or female gender identity in the workplace.\(^ {219}\) Oiler sued under Title VII, alleging sex stereotyping discrimination under the "because of sex" provision and the Hopkins precedent.\(^ {220}\) The federal district court affirmed summary judgment for the employer, arguing that the Ulane precedent was still usable after Hopkins,\(^ {221}\) distinguishing between "an employee of one sex exhibiting characteristics associated with the opposite sex" (*Hopkins*) and "pretending" to be the other sex (*Oiler*).\(^ {222}\) The *Oiler* court held that "Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, [but] the phrase 'sex' has not been interpreted to include sexual identity or gender identity disorders."\(^ {223}\) Hence, the sex stereotyping argument has been used as another type of sword by employers, and a shield by courts, to deny transgender employees protections from sex stereotyping discrimination under Title VII.

The last way in which employers and courts have used categories to achieve a desired result—exclusion of transgender individuals from Title

\(^{216}\text{See Smith v. City of Salem, 378 F.3d 566, 571–72 (6th Cir. 2004).}\)


\(^{218}\text{Oiler, 2002 WL 31098541, at *1.}\)

\(^{219}\text{Oiler, 2002 WL 31098541, at *2.}\)

\(^{220}\text{Oiler, 2002 WL 31098541, at *1.}\)

\(^{221}\text{See Oiler, 2002 WL 31098541, at *6 (claiming that the Ulane precedent is viable even after Hopkins, as "sex" in Title VII and sex stereotyping in Hopkins refer only to biological sex).}\)

\(^{222}\text{See Oiler, 2002 WL 31098541, at *6. The Oiler court put it thusly:}\)

\[\text{Plaintiff's actions are not akin to the behavior . . . in Price Waterhouse. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man. . . . This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex.}\]

\(^{223}\text{Oiler, 2002 WL 31098541, at *6.}\)
VII’s protections — is by finding that transgender sex reassignment does not involve sex itself, but is merely a process of change. The Holloway and Ulane cases provide two examples. In Holloway v. Arthur Andersen & Co., the Ninth Circuit held that a “transsexual individual’s decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII.” Without much discussion of its reasoning, the court defined the issue in such a way as to deny protections to the transgender plaintiff:

Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, consistent with the determination of this court, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII. Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII and is certainly not in violation of the doctrines of Due Process and Equal Protection.

Additionally, in Ulane v. E. Airlines, the Seventh Circuit held that discrimination against transsexual employees does not constitute discrimination “because of sex” under Title VII, in part because the court found that the sex reassignment process does not completely transform an individual from a male to a female. The Seventh Circuit took note of, in its view, the incomplete nature of gender transitioning. The court commented:

Ulane began taking female hormones as part of her treatment, and eventually developed breasts from the hormones. In 1980, she underwent ‘sex reassignment surgery.’ After the surgery, Illinois issued a revised birth certificate indicating Ulane was female, and the FAA certified her for flight status as a female. Ulane’s own physician explained, however, that the operation would not create a biological female in the sense that Ulane

225. Holloway, 566 F.2d at 664.
226. Holloway, 559 F.2d at 664.
228. See Ulane, 742 F.2d at 1084.
229. See Ulane, 742 F.2d at 1083, nn.3–6 (remarking on the incomplete nature of gender transitioning that transsexuals undergo (i.e. inability to alter genetic makeup or fertility)).
230. Ulane, 742 F.2d at 1083, nn.3–6.
would 'have a uterus and ovaries and be able to bear babies.' Ulane's chromosomes, all concede, are unaffected by the hormones and surgery. Ulane, however, claims that the lack of change in her chromosomes is irrelevant.  

In both of these cases, the courts narrowly identified the issues and focused on one aspect of the transgender individual's experience to interpret Title VII in a manner that excluded transgender persons from Title VII's "because of sex" protections. The malevolent intent of such actions by employers and "unbiased" courts becomes apparent when one considers that a change of religion (another category protected under Title VII) would still render an individual protected under Title VII, and yet with a change of sex, courts and employers perform analytical gymnastics to avoid that result.

Further, it is disingenuous to narrow sex-based protections to this level, because chromosomes or the possession of ovaries is not otherwise taken into account in sex discrimination cases involving non-transgender plaintiffs. Unlike Karen Ulane's claim, the validity of Ann Hopkins's "because of sex" discrimination claim was not disputed because of her chromosomes, ovaries, or other female-identifying biological characteristics, which were never even considered. Thus, as did the Holloway and Ulane courts, employers and courts frequently use different facets of individuals' experiences and identities as swords and shields, defining processes and statuses as necessary to deny transgender individuals protection from employment discrimination "because of sex" under Title VII.

231. Ulane, 742 F.2d at 1083.

232. See, e.g., Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985). In Blalock, an employee met a future associate in a prayer group and was hired, but after changing his religious views, was terminated. Id. at 704-05. In reversing and remanding the lower court's finding for employer, the Sixth Circuit stated:

Blalock's change in his religious views was at least a factor in the discharge. . . . When an employer expresses an enhanced tolerance of an employee's performance because of his religion, but lowers its level of tolerance when the employee's previously agreeable religious views change, the employer has engaged in intentional differential treatment based on religion.

Blalock, 775 F.2d 703 at 709.

233. See Ulane, 742 F.2d at 1083.
E. The Costs of Categorization

Title VII's prohibitions against category-based employment discrimination costs employers a great deal of money. Employers incur costs for both Title VII compliance and non-compliance. Since the Executive Order 11246 of September 24, 1965, employers and contractors who do over $10,000 in annual business with the federal government have been prohibited "from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin." Further, Executive Order 11246 requires such entities "to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment," including a requirement to develop a written affirmative action program for such employers with 50 or more employees and $50,000 or more in government contracts. Private employers are also currently prohibited from discriminating on the basis of an individual's membership in any class enumerated in Title VII. When an employer violates Title VII, the employer is sometimes subject to costly monetary penalties of thousands of dollars or, on rare occasion, of millions or hundreds of millions of dollars.

Above and beyond the cost of Title VII non-compliance, employers incur costs in attempts to achieve Title VII compliance. In the aggregate, employers spend enormous amounts of capital to ensure that staff members are trained on non-discrimination laws and policies, and to design and operate programs to ensure workplace diversity and other costly measures. Furthermore, it is a common perception, and sometimes
true, that employers sustain immeasurable costs when "made to hire or promote"239 a "less qualified"240 candidate because of the candidate's membership in a certain protected class. Affirmative action programs require employers to take into account an individual's membership in a protected category and achieve a certain outcome in regard to diversity proportions. Sometimes this requires an employer to bypass hiring or promoting the most qualified candidate in order to achieve these category-dictated ends.241 While these costs are only incurred sometimes by some employers, these costs can be high and are entirely attributable to Title VII's categorical structure and related requirements (e.g. affirmative action programs). These costs may be justified on principle,242 but the costs are incurred nonetheless. Thus, Title VII's categorical approach can result in costly expenditures of money and other resources to employers that would not otherwise have those expenses but for the regime.

To sum up Part II, some of the insuperable and unacceptable flaws of Title VII's categorical approach include: the regime causes resentment toward protected class groups; the approach is categorically under-inclusive at the group and individual levels; the categorical structure itself places a value on, and therefore dehumanizes, individuals; the categories are used as swords and shields in order to grant protections as discriminatory employers and biased courts see fit; and Title VII's categorical

VII-compliant promotional examination for its firefighters, at an estimated expense of over $100,000, City officials failed to successfully walk this line and the Supreme Court held against them.

239. Employers are usually not forced or "made" to make any certain employment decision. The phrase "made to hire or promote" as it is used here connotes the social, governmental, or other pressures that some employers may experience in making an employment decision, where the pressure is usually to make a decision benefiting an individual who is a member of a discrete minority group or Title VII protected class.

240. See Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (noting that such programs and class-based legislation are "perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their [membership in a class group]").

241. See, e.g., Johnson v. Transp. Agency, Santa Clara Cnty., Ca., 480 U.S. 616, 625 (1987) ("The District Court found that Johnson [the non-minority group member applicant] was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the 'determining factor in her selection.' . . . The court acknowledge that . . . the Agency justified its decision on the basis of its Affirmative Action plan.") (emphasis in original). Both candidates were found qualified for the job in question. Id. at 623. Despite that, the Johnson case still provides one example of an instance in which an individual's membership in a protected class resulted in a different employment decision justified in order to achieve class-based ends. See id.

242. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995) (Stevens & Ginsburg, JJ., dissenting) ("As a matter of constitutional and democratic principle, a decision . . . [may be made] to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.").
structure can, and often does, result in massive costs to employers of money and other resources.

IV. Removing Categorical Constraints to Achieve Success: The Employment Qualifications Approach

As explicated, Title VII's categorical approach is problematic for numerous reasons. Among those reasons, Title VII's enumerated categories of protected persons are ill-fitting because the categories grant protections against discrimination in the workplace based on membership in classes that bear no rational relation to an individual's ability to do a job. The categories are also under-inclusive in that Title VII's protections grant employment non-discrimination protections to some and deny them to others even though workplace discrimination affects individuals who would "fit into" more than just those enumerated classes. The categories are also vexed by some parties' maligned attempts to

243. This conclusion is rooted in common sense, practical experience, and academic theory. See, e.g., Evan H. Pontz, Comment, What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act, 74 N.C. L. Rev. 267, 306 (1995) ("Title VII's protected classes and ability are unrelated.").

244. Title VII protections are normally conferred on an individual based on their membership in a denominated protected class. However, some employers and courts make adverse employment decisions based on an individual's non-membership in a Title VII protected class, thus the "transferred intent" denomination. Such adverse employment decisions negatively affect not only transgender employees, but also many others. See Kerri Lynn Stone, Ricci Glitch? The Unexpected Appearance of Transferred Intent in Title VII, 55 Loy. L. Rev. 751 (2009). Title VII categories are also under-inclusive in that even when an individual is a member of two protected classes, courts disaggregate their compound discrimination claims and force the plaintiff to choose which theory of discrimination on which to proceed. See Bradley Allan Areheart, Intersectionality and Identity: Revisiting a Wrinkle in Title VII, 17 Geo. Mason U. C.R. L.J. 199, 209–11 (2006); Castro & Corral, supra note 43, at 160–61. There is some dispute over whether Congress intended Title VII to apply to compound cases involving employment discrimination against an individual who is a member of more than one category. Some interpret the "or" in "based on race, color, religion, sex or national origin" (emphasis added) to mean that only claims involving one category may be brought, while others interpret the phrase to mean that claims involving the enumerated classes or even possibly unlisted classes (e.g. transgender persons) may be brought under Title VII. See Virginia W. Wei, Note, Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin, 37 B.C. L. Rev. 771, 775–76 (1996) (citing Cathy Scarborough, Note, Conceptualizing Black Women's Employment Experiences, 98 Yale L.J. 1457, 1466–67 (1989) (citing James C. Oldham, Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ, 23 Hastings L.J. 55, 61 (1971))).
shape and define the classifications in an attempt to achieve discriminatory ends. Moreover, at the individual level, the classification system itself values characteristics in an inequitable manner, relegating some individuals to second-class status in a way that tends to dehumanize them. In order to better achieve the goals of Title VII, restructuring is necessary. This Part proposes and discusses one method to achieve these ends—the “Employment Qualifications Approach” (“EQA”). The EQA seeks to reframe the existing debate and restructure Title VII by changing the debate from one focusing on class membership, to one zeroed in on an individual's true, objectively-discernible qualifications for employment. This Author's hope is that the EQA would remove barriers to equal employment protections and result in a better-qualified, more fairly treated and more effective workforce, benefiting employers and employees alike.

A. A New Idea: The Employment Qualifications Approach

The Employment Qualifications Approach proposes to analyze employment decisions by focusing on an employee's qualifications for a position while deemphasizing the inquiry into the employer's subjective (often discriminatory) intent, in a category-less framework. The EQA would alter the language of several provisions of Title VII, as well as the burdens of proof to establish a Title VII violation in disparate impact, disparate treatment, and mixed motives cases. The EQA seeks to ensure that Title VII is interpreted and enforced in a manner that is in line with the statute's broad remedial goals, and also takes into account changes in the forms and targets of employment discrimination over time.

In order to implement the EQA, amendments to the language of Title VII will be necessary. I propose to amend Title VII as follows (changes in italics):

42 U.S.C. § 2000e—DEFINITIONS

“For the purposes of this subchapter—

... [deleting provisions (j) and (k) defining “religion” and “because of sex,” respectively]
(o) The term “employment” means any activity, business, or industry affecting commerce taking place in whole or part within a “State” of the United States of America as the term “State” is defined in 42 U.S.C. § 2000e(i).

(p) The term “qualifications,” except as that term is used in 42 U.S.C. §§ 2000e(f) and 2000e-4(a) to refer to voters or General Counsel of the EEOC, means legally eligible, competent or able to perform an employment position, purpose, job, occupation, or task that an individual holds or seeks, taking into account legitimate considerations of training, education, experience, competence, skill, professionalism, or other requirements for the employment.

(1) An employee is “qualified” to obtain or hold employment if the employee has the “qualifications” for the employment, as “qualifications” is defined herein.

(2) An employee is the “most qualified” to obtain or hold employment if the employee has objectively superior “qualifications” for the employment as “qualifications” is defined herein, as determined by a “reasonable person” as “reasonable person” is traditionally defined by the tort law of a “State” defined in 42 U.S.C. § 2000e(i).

(3) Persons with disabilities as defined in the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101–12213 (2000), should not be deemed un “qualified” or not the “most qualified” or deemed failing to meet the “qualifications” necessary for employment because of their disability status if such a person would be deemed to meet the “qualifications” necessary for employment, and able to perform the “essential functions” of the employment with “reasonable accommodation”, as the terms “essential functions” and “reasonable accommodation” are defined in the ADA.247

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247. The ADA currently contains provisions that, left unchanged, might undermine the text, scope and purpose of the EQA. Currently, the ADA excludes from coverage “gender identity disorders not resulting from physical impairments.” See Jennifer Levi, Protections for Transgender Employees, Am. Bar Ass’n Section of Individual Rights and Responsibilities, http://www.abanet.org/irr/hr/summer03/protections.html. As a result, “most transgender people may not bring claims of disability discrimination
Elsewhere in Title VII, all references to “race, color, religion, sex or national origin” shall be replaced with “any ground, factor, reason, rationale, pretext, motive, or justification, other than the employee's qualifications” to read, for example, as follows:


(a) Employer practices. It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of any ground, factor, reason, rationale, pretext, motive, or justification other than the employee's qualifications; or

(2) to limit, segregate, or classify his employees or applications for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of any ground, factor, reason, rationale, pretext, motive, or justification other than the employee's qualifications.

Still elsewhere in Title VII, word phrasing and tense would be altered to ensure grammatical correctness and to give effect to the substance of these changes, without otherwise substantively altering the text or meaning of Title VII.

Within this definition and the statute as changed under the EQA, the specific employment qualifications for a position must be defined in order for a court to determine whether an employer considered only an individual's “qualifications” for employment and selected the “most qualified” individual available. This inquiry should be easily manageable for courts of the EEOC, as most employers post the qualifications necessary for a position, or the qualifications an applicant must possess to perform the job well. In any event, courts and the EEOC make similar determinations under the current categorical regime, and should be just as able to make such determinations under the EQA.

under federal antidiscrimination laws.” See id. In order to ensure consistency across federal law, it is assumed that the EQA would also amend the ADA and any similar provisions in other federal laws that might conflict with the EQA.
Along with these changes to the text of Title VII itself, under the EQA, corresponding changes would need to be made to the burdens of proof and standards for establishing a Title VII violation for disparate impact, disparate treatment, and mixed motives cases. Each will be considered in turn, beginning with disparate impact violations of Title VII.

I propose to amend the disparate impact burden of proof standard as follows:


(a) Employer practices. It shall be unlawful employment practice for an employer—

... 

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is

established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of any ground, factor, reason, rationale, pretext, motive, or justification, other than the employee's qualifications; ... 

One of the first instances in which the U.S. Supreme Court interpreted the disparate impact violation was in the matter of Griggs v. Duke Power Co.248

Griggs held that employment practices must have a “manifest relationship to the employment in question.”249 Employment practices must be related to job performance or a “business necessity,” or else “the practice is prohibited.”250 An employer can raise a defense to disparate impact liability by demonstrating that an employment practice is “consistent with

249. See Griggs, 401 U.S. at 432.
250. See Griggs, 401 U.S. at 431.
business necessity," but the plaintiff may still succeed by demonstrating that the employer has failed to adopt an available alternative employment practice with a less discriminatory impact that serves the employer's legitimate business needs.252

After amendments to 42 U.S.C. § 2000e-(k)(1)(A) and other relevant provisions of Title VII, the disparate impact standard would not be practically workable. In order to determine whether discrimination caused a discriminatory impact, categorization would have to occur, and there first has to be a group defined in order to determine whether a disparate impact resulted from an adverse employment action taken against that group. Providing for a disparate impact standard in this context would re-invite entry of a form of the categorical approach and its attendant flaws. Furnishing a disparate impact standard along with the EQA would also enable employers and courts seeking to do so to narrowly define groups in ways that would eliminate disparate impact claims entirely. These difficulties render a disparate impact standard under the EQA, in whole or in part (e.g. a modified disparate impact standard), unfeasible. Thus, other standards, such as the standard for disparate treatment, will have to serve in place of the disparate impact standard and subject discriminating employers to scrutiny and liability as appropriate.

C. EQA Changes to Burdens of Proof and Standards—Disparate Treatment

The standard for disparate treatment discrimination in employment would also require modification under the EQA. Currently, a disparate treatment plaintiff must establish "that the defendant had a discriminatory intent or motive" for a certain employment practice or decision.253 The plaintiff can make this demonstration via any of various forms of direct or circumstantial evidence.254 Because employers do not usually openly acknowledge intentional discrimination, and the plaintiff therefore does not have direct evidence, most plaintiffs attempt to prove that they suffered disparate treatment discrimination via circumstantial evidence. The Title VII complainant carries the initial burden of estab-

251. The disparate impact standard likely originated when the Supreme Court recognized the proof problems and other difficulties inherent in establishing (often entirely subjective) disparate treatment discrimination. This is further evidence of the insufficiency of Title VII's categorical approach. See Griggs, 401 U.S. at 431–32.
lishing a prima facie case of employment discrimination. Under the *McDonnell Douglas* framework, the plaintiff may make this prima facie showing by establishing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.  

The next part of *McDonnell Douglas*'s three-part framework shifts the burden of proof to the employer “to articulate some legitimate, non-discriminatory reason for the [employment decision].” The third part of the framework shifts the burden of proof back to the plaintiff, who is given an “opportunity to demonstrate by competent evidence that the presumptively valid reasons for [the employment decision] were in fact a cover-up for a racially discriminatory decision.” If a plaintiff successfully meets the requirements set forth in *McDonnell Douglas Corp. v. Green*, the plaintiff may proceed with, and might succeed on their disparate treatment claim. Nonetheless, there is one notable exception—at present, Title VII permits a form of disparate treatment discrimination in situations where an employer can establish as a defense that a given discriminatory employment action based on “religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

Under the EQA, a plaintiff would be able to establish disparate treatment discrimination by establishing “that the defendant had a discriminatory intent or motive” and by demonstrating that the plaintiff was the “most qualified” individual for the position, but the employer still took adverse employment action against them (i.e. that despite being the most qualified applicant for an open position or promotion, someone other than the plaintiff was selected for the position). Thus,

256. See *Green*, 411 U.S. at 802.
257. See *Green*, 411 U.S. at 802.
258. See *Green*, 411 U.S. at 805.
260. This “most qualified” requirement differentiates the EQA standard from that espoused in the *Burdine* case. See generally *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Supreme Court vacated and remanded the Fifth Circuit's holding requiring that the defendant "prove by objective evidence that the person hired or promoted was more qualified than the plaintiff." *Id.* at 258.
under the *McDonnell Douglas* framework, the first element of the first prong, proving the prima facie case, would be eliminated (the plaintiff would not need to establish that they are a member of a certain race or class), and the remainder of the elements in the first prong would remain the same. 261 After the plaintiff sets forth evidence regarding their prima facie case and proves that they were qualified for the position, the employer may present rebuttal evidence and must “articulate some legitimate, nondiscriminatory reason for the [employment decision].” 262 This might include comparative evidence that the plaintiff was not the “most qualified” individual among all of the applicants for the employment. The third prong of the *McDonnell Douglas* framework would no longer be necessary, as both parties would have presented evidence on the subject of the plaintiff’s qualifications by this point—the plaintiff presenting evidence as to his or her own qualifications, and the employer presenting evidence as to the qualifications of other applicants or employees. If the plaintiff successfully persuades the trier(s) of fact (judge or jury) that the plaintiff had the requisite qualifications, and the employer fails to rebut the plaintiff’s evidence that he or she was qualified by putting forth evidence that the employee was qualified, but not the “most qualified,” applicant for the position, the plaintiff will succeed.

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261. See *Green*, 411 U.S. at 802 (explaining that under the EQA, the plaintiff would need to establish the remaining three elements to meet the first prong of the McDonnell Douglas test, leaving him to prove: (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant’s qualifications”).

262. See *Green*, 411 U.S. at 802. Essentially, the employer is acting in much the same way as they would under the second prong of the McDonnell Douglas framework, in which the burden shifts to the employer to establish a “legitimate, nondiscriminatory reason for the [employment decision].” See id. Under the EQA, this responsibility falls on the employer because the employer presumably has the best access to relevant evidence regarding all of the applicants’ qualifications.
with their Title VII disparate treatment intentional discrimination claim.

Another by-product of the EQA and these proposed changes to Title VII would be the elimination of the BFOQ defense to disparate treatment discrimination. The EQA requires that employers not take employment action based on anything other than an employee's "qualifications," and does not provide for an exception on any basis such as a BFOQ. Under such a framework, a BFOQ would not be necessary. The operation of other Title VII provisions would protect religious freedoms, so the "religion" part of the BFOQ would be covered. As for the sex and national origin provisions of the BFOQ provision in Title VII, since the "most qualified" applicant would, in theory, always be awarded the employment in question, an employer would not need to raise a "BFOQ-like" defense to their intentional discrimination. The employer would not need to establish that the plaintiff was not hired because he or she was not qualified in a manner "reasonably necessary to the normal operation of that particular business or enterprise," because the employer would only hire or promote employees with the requisite qualifications.

This and other aspects of the EQA might require more detailed review of employers' stated qualifications for a position by administrative entities like the EEOC or the courts to determine which qualifications are necessary for a position and which may be pretext for discrimination. It seems reasonable to believe that an administrative entity or the

263. A "BFOQ" or bona fide occupational qualification is an attribute or characteristic that employers are allowed to consider when making decisions on hiring, promoting, or firing employees, which, if considered in other contexts, would constitute unlawful discrimination (e.g. a mandatory retirement age for certain occupations which would otherwise be prohibited by the Age Discrimination in Employment Act of 1967).

264. See 42 U.S.C. § 2000e-1(a) (providing that Title VII does not apply to religious entities or the "employment of individuals of a particular religion to perform work connected with the carrying on" of such religion).


266. Not all subjective motivations constitute pretext for discrimination. For example, in some fields where evaluation of the candidates is necessarily subjective, such as modeling, candidates might be similarly qualified, but an employer might select one candidate over another because they represent the given company better than another candidate. Discrimination may not factor into the decision at all. Arguably then, such situations are still adequately addressed by the EQA, which would find the model with the "better fit for the company" the "most qualified." Under the EQA an analysis of pretext would still take place in mixed motives cases, but it should be simpler because the EQA distills permissible employment decisions down to objective, qualifications-based criteria. If an employer selects a candidate that is not objectively the "most qualified" for the position, it will be evident that an impermissible factor influenced the employment decision and unlawful discrimination occurred.
courts will be relatively easily able to identify and evaluate such objective criteria—or at least that these types of objective determinations will be equally as challenging or easier to make than determining the often difficult-to-prove subjective motivations behind an employer’s employment decision or the requirements of a BFOQ. These entities, especially the EEOC, have been charged with neutral and objective fact-finding, evaluating employment discrimination claims, and discerning employers’ true motivations for decades now. The EQA would vest the EEOC with the power to investigate claims, fact-find, and make determinations, subject to judicial review when necessary (similar to the Title VII review scheme now). However, the EQA would provide easier-to-use, more objective and discrete criteria than are presently available under Title VII’s classification scheme, with less “maneuvering” room for any entity seeking to reach a discriminatory decision.

For example, if one of the qualifications that permissibly may be considered in determining whether to hire an applicant is educational attainment, and the employer states that “an appropriate education for the job” or “college education” is required for a position, the employer might seek to discriminate against a more educated applicant who happens to be of one race, and instead hire a less educated applicant of another race solely because they are of the preferred race. How would the EEOC or courts determine that the “educational” job qualification, or the employer’s decision on that basis, was pretext for discrimination? The EEOC or courts would do so by reference to the EQA’s provisions, and taking an objective measurement of the applicants’ educational backgrounds. If the former applicant had a graduate degree in a relevant field, but the applicant of the other race who was chosen for the position did not, it would be apparent that the “education” qualification was being used by the employer as pretext for discrimination. This methodology could be used for nearly any imaginable qualification, and it would not be subject to the same type of maneuvering as employers and courts have done in narrowly construing and defining a broad category (e.g. “race”) or provision (e.g. the “because of sex” provision). The EQA operates on the assumption that almost any qualification can be reduced to, measured by, and evaluated in objective and widely-agreed-upon terms. For example, every reasonable person should agree that candidate “A” who possesses a relevant graduate degree in the field in which he or she is applying is more qualified on the basis of education than candidate “B” who possesses only an undergraduate degree. Although educational attainment is merely one qualification to consider in determining which applicant is the “most qualified,” decisions as to other qualifications would be similarly straightforward, and in the end, there
should be a clear winner who is the “most qualified,” and the employer
should select that person for the position. In this way, the EQA would
more concretely hold employers accountable to their own posted job
requirements, but vest the evaluation of employers’ actions in other neu-
tral and objective fact-finders and decision makers. In the end, the result
will be far less, and easier to discern, disparate treatment discrimination.

D. EQA Changes to Burdens of Proof and
Standards—Mixed Motives

Finally, in mixed motives situations, the EQA simplifies the
inquiry significantly, distilling it down to the essence of Title VII: “the
very purpose of Title VII is to promote hiring on the basis of job qual-
ifications, rather than on the basis of race [or another class characteristic].”267 Currently, if a plaintiff is unable to disprove an
employer’s stated non-discriminatory reason for an employment deci-
sion in a disparate treatment case, the plaintiff may attempt to show
that a combination of legitimate and illegitimate reasons motivated the
decision—this is known as the mixed motives theory. The Price Water-
house v. Hopkins268 case initially considered the mixed motives theory.
After the decision, Congress amended Title VII to make mixed motives
cases more favorable to plaintiffs. Before the 1991 Amendment, an em-
ployer could escape liability by showing that it considered an illegitimate
factor in making an employment decision, but it would have made the
same decision regardless of the factor. Since 1991, even if there are legit-
imate factors motivating an employer’s decision, if the plaintiff
establishes that an illegitimate consideration was also part of the mixed
motives behind the decision, liability may attach.269 However, remedies
will be limited if the employer then demonstrates that it would have
made the same decision anyway.270

Under the EQA, a mixed motives case by definition would involve
an employer considering factors other than an individual’s qualifications
for employment. The first part of the mixed motives analysis would re-
main the same, requiring the plaintiff to show that an illegitimate
consideration (i.e. anything other than an individual’s employment qual-
ifications) motivated the employer’s employment decision. If the plaintiff
successfully made such a showing, then liability for the discrimination

268. 490 U.S. 228 (1989).
would attach to the employer. However, the last part of the current analysis necessitates modification under the EQA. An employee's remedies would not be limited under the EQA if the employer demonstrates that it would have made the same decision anyway. This would be so because if the employer made the “same decision anyway,” the employer considered factors other than an employee’s qualifications—engaging in intentional discrimination. When an employer engages in intentional discrimination against an otherwise qualified individual, a full array of remedies for the employee is justified.

Thus, the Employment Qualifications Approach proposes to analyze employment decisions by focusing on an individual’s qualifications for employment, within a category-less framework. The EQA would amend the language of several provisions of Title VII, as well as the burdens of proof to establish a Title VII violation in all types of cases. The EQA seeks to ensure that workplace reality aligns with the broad remedial policy goals of Title VII while accounting for changes in employment discrimination over time.

V. THE EFFECTS OF THE EMPLOYMENT QUALIFICATIONS APPROACH

Until Title VII protects all persons from arbitrary workplace discrimination, including transgender persons, and it does so consistently and successfully, Title VII will be more symbolic than substantive. Until all workers can go to work each day and be judged solely on the basis of their qualifications and not their personal characteristics, it cannot be said that Title VII has accomplished what Congress sought to achieve in 1964: equal employment opportunities in the workplace and opportunities for workers to “compete for jobs on a nondiscriminatory basis.” The Employment Qualifications Approach is one means proposed to realize that end. Surely, no approach is perfect because no approach will ever be able to completely eradicate discrimination from the workplace. However, this Part discusses the potential benefits and drawbacks that would accompany the EQA and asserts that, overall, the EQA is the best means by which to achieve the goals of Title VII. The

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271. See Griggs, 401 U.S. at 429 (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities.”).

potential benefits and drawbacks of implementing the EQA are discussed below.

A. Potential Benefits of the Employment Qualifications Approach

This section asserts that implementing the EQA would engender numerous benefits including: accomplishing the goals of Title VII and more; decreased or eliminated resentment toward protected classes of persons; more efficient administration and forward-thinking by Congress; and economic and other benefits for employers. Each asserted benefit is discussed in turn below.

1. Accomplishing the Goals of Title VII and More

All individuals need and deserve equal opportunities to earn a living and to provide for themselves and their dependents. As previously explained, without employment an individual cannot afford basic necessities such as shelter and nutritious food, cannot hope to obtain a good education, cannot afford health care, and cannot even contemplate discretionary purchases that enrich and invigorate life. An ability to obtain employment on equal terms as other similarly-qualified candidates, or to maintain employment free from discrimination and harassment, is of paramount importance to having a good quality of life. Under its current categorical formulation, Title VII does not provide equal employment opportunities and non-discriminatory conditions of employment to all workers, but the EQA potentially could. No regulatory scheme will likely ever eradicate all discrimination in the workplace, but the EQA would result in less discrimination against fewer individuals than Title VII as currently constructed. The EQA would do so by simplifying the inquiry, focusing Title VII on an individual’s qualifications to do a job, rather than arbitrarily covering only some individuals or assigning individuals into classes that time and again are defined and interpreted narrowly to avoid granting protections to qualified workers. Under the EQA, individuals would be evaluated only on the basis of their qualifications, with the “most qualified” individual selected for a position, promotion or the like. All individuals would finally have equal employment opportunities and protections from workplace discrimination, no matter their personal characteristics.273 Because the EQA does

273. In theory, the EQA would provide equal employment opportunities as well as employment non-discrimination protections to everyone. However, it is noted that
not confine employment non-discrimination protections to discrete classes of persons, which are thereafter narrowly interpreted and defined by courts and employers to deny protections to otherwise qualified employees, the EQA would be best-positioned to achieve the remedial goals that inspired and continue to animate Title VII. In these ways, the EQA provides the best means possible to accomplish the goals of Title VII and more, and do so for more individuals than the categorically constrained Title VII does now.

2. Decreased or Eliminated Resentment Toward Protected Classes

From sociologists to Supreme Court Justices, scholars have recognized that category-based categorical systems like Title VII intrinsically divide people and cause resentment toward protected classes of persons. History repeatedly has demonstrated that so long as distinctions between individuals exist, people will find a way to justify, perpetuate, and make judgments based upon them. The EQA would eliminate from Title VII such arbitrary and divisive classifications, and prohibit employment considerations or decisions based upon any factor other than an individual's qualifications for a position. Bitter individuals claiming that they missed out on an employment opportunity because a person in a protected class was selected on the basis of their membership in the protected class would no longer be able to make such assertions. Under the EQA, no employee would be able to assert that "he only got persons from previously disadvantaged backgrounds (pre-EQA) have lacked and might continue to suffer from a lack of access to future-oriented mechanisms to attain certain qualifications or merit-based benchmarks. For example, an individual from a financially or otherwise—disadvantaged background pre-EQA might not be able to enter or graduate from college and, as a result, might not be able to obtain certain jobs, or be deemed the "most qualified" compared to individuals from more advantaged backgrounds. Post-EQA, these individuals might continue to struggle within the EQA's qualifications and merit-based employment system. Such individuals, if not deemed the "most qualified," might claim that an applicant only benefited from an employment decision because of his or her privileged background. The EQA would likely prohibit workplace affirmative action or similar policies to remedy this situation, but it is possible that affirmative action policies in education or other contexts might be available. However, such considerations and discussion of affirmative action programs is beyond the scope of this Article, since that discussion itself would likely require a separate article just for that purpose. The effect of the EQA on sexual harassment claims, which are traditionally brought under the "because of sex" or like provisions, also is beyond consideration within the scope of this Article. For the present, it is assumed that voluntary affirmative action programs would be prohibited in employment but permitted elsewhere, and that legal precedents heretofore decided would provide a means by which sexual harassment victims could bring claims and obtain relief.
the promotion because he is X” (where X denotes membership in a protected class). Individuals would know that they and their fellow applicants would be judged solely on the basis of merit and qualifications, and group bias and resentment on this basis would lessen or disappear as a result. Thus, the EQA would avoid all of these pitfalls of divisive category-based systems and reap the benefits of diminished group bias, increased understanding across groups of people, and decreased discrimination in the workplace.

3. More Efficient Administration and Forward-Thinking by Congress

Adopting the EQA would lead to more efficient administration by Congress by redrafting Title VII to protect more individuals with broader, clearer language, and it would not require constant amendments. The EQA would also address current forms of discrimination while taking a proactive approach to preventing discrimination in the future. As currently formulated, Title VII’s categorical approach requires a great expenditure of congressional time, resources and political capital to amend Title VII any time Congress desires to protect a new class of persons. Amending Title VII has proven nearly impossible, and when amendments have been made, it has sometimes taken decades and numerous failed attempts. This method of legislating is inefficient and does not employ a forward-thinking approach (i.e. an approach that would anticipate and meet the needs of currently unprotected groups of individuals suffering discrimination before the discrimination against such individuals is widespread and more difficult to remedy). Furthermore, when attempts to redefine extant categories of protected individuals under Title VII have failed, efforts have been made to pass stand-alone legislation to protect those individuals and those efforts have also usually failed or taken decades to accomplish. In the meantime, those groups and anyone unprotected under Title VII’s categorical framework remain without equal employment opportunities and non-discrimination protections. Title VII’s categorical approach is intolerably inefficient and is not forward-thinking, to the continuing detriment of thousands of qualified employees, transgender and otherwise. The EQA would afford superior congressional administration and forward-thinking insight to the benefits of all employees and individuals. Using clear, broad language, the EQA would ensure that all individuals enjoy equal employment opportunities or non-discrimination protections without the need to amend Title VII for every new or different class of person.
The EQA would also make it more difficult for would-be discriminators to maneuver around the statutory language or pass through loopholes to discriminate against otherwise-qualified individuals. Thus, adopting the EQA would lead to more efficient administration and forward-thinking by Congress than Title VII does currently.

4. Economic and Other Benefits for Employers

Put into action, the Employment Qualifications Approach would give rise to several substantial economic and other benefits for employers. By eliminating the categories in Title VII, requiring that the employer only consider an individual's qualifications for a job and that the employer select the "most qualified" person, the EQA would reduce category-related costs to employers—such as the costs of running affirmative action programs and litigation defense—and confer an immeasurable benefit of ensuring that employers have the most-qualified workforce possible. Employers would be shrewd to support the actualization of the EQA because employers would incur fewer and less costly fines for Title VII violations, and employers would be able to hire the "most qualified" workforce available, without being "made to hire or promote" a less-qualified or unqualified applicant solely because of a personal characteristic or membership in a protected class. This will also benefit transgender employees and others currently unprotected by Title VII, who often suffer employment discrimination. If a transgender employee is the "most qualified" for the job, they should receive the job, the promotion, or the benefit of the employment decision under the EQA. If a transgender employee is the "most qualified" and he or she still suffers discrimination, the EQA broadens the available remedies. The category-less framework of the EQA would truly ensure equal employment opportunities for all employees, as well as economic and other benefits for employers who would have the autonomy and freedom to make employment decisions without apprehension about Title VII's categorical affirmative action "catch-22" or other category-based

274. The case of Ricci v. DeStefano presents one instance of the Title VII categorical affirmative action "catch-22," as the Author terms it: an employer cannot violate Title VII by intentionally discriminating against a member of a protected class, but an employer can also not impermissibly confer benefits upon some members of a protected class and not others. This leaves many employers who seek to remedy past discrimination in a "catch-22" situation because any such action the employer takes will, by definition, intentionally discriminate against some group of individuals in violation of Title VII. In Ricci, the City of New Haven sought to remedy an unrepresentative firefighter workforce by discarding test results that failed to increase the minority
concerns and constraints. Thus, employers (and employees alike) should support the EQA because the approach would give rise to several substantial economic and other benefits.

5. The Benefits of Anti-Classification and Anti-Subordination Schemes and More

Until now, employment anti-discrimination jurisprudence has largely consisted of two related schools of thought: (1) anti-classification theory; and (2) anti-subordination theory. Anti-classification theory advances a view that "inaugurates the modern equal protection tradition . . . [and] also express[es] the normative conviction that anticlassification embodies . . . the value of individualism." As Justice Thomas put it in *Missouri v. Jenkins*, under the anti-classification theory of anti-discrimination law, "the government cannot discriminate among citizens on the basis of race [or classification]. . . . At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic or religious groups." On the other hand, anti-subordination theory holds "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups." The anti-subordination view prohibits actions that "perpetuate . . . the subordinate status of a specially disadvantaged group."

Some scholars, such as Professor Reva B. Siegel, have chronicled the way in which anti-subordination theory predominated in early anti-discrimination law, largely from the Reconstruction Era until the mid-1960s, after which point the anti-classification theory arrived on the scene to supplement anti-discrimination jurisprudence. As Siegel notes, anti-subordination theory "played a central role in justifying *Brown [v. Board of Education]* throughout the 1950s [and 1960s and

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277. 515 U.S. at 120–21 (Thomas, J., concurring).
278. Siegel, supra note 275.
280. See, e.g., Siegel, supra note 275.
Anti-subordination theory values, premised on the idea that one group should not be advantaged at the expense of another, continue to play a "central role" in anti-discrimination law today, as evidenced, for example, by the *Grutter v. Bollinger* decision of 2003. *Brown* and *Grutter* both held that disparate treatment, subordinating the rights and privileges of one group of students to another in the education setting (in the contexts of segregation and affirmative action, respectively), constituted an impermissible violation of the Equal Protection Clause. Both decisions demanded that all students be treated equally, but spoke in terms of the class memberships of the individuals. By contrast, Title VII exemplifies anti-classification theory. Title VII, promulgated in 1964, identifies protected traits that form the basis of classifications (e.g. race), on which basis employers are prohibited from discriminating.

At first glance, anti-classification and anti-subordination theories may in some ways appear to contradict each other, and yet, there is significant overlap. At bottom, both strike at the same harms and have similar aims. Both schemes disapprove of and seek to prohibit disparate treatment among classes of people. Both theories do so on the basis of an individual's characteristics and membership in certain groups. However, anti-classification theory advocates achieving equal protection and equal opportunities through "colorblindness," while anti-subordination theory prohibits discrimination on the basis of group membership but sometimes permits "color vision" to remedy past harms against certain groups (e.g. through the use of affirmative action programs).

Because both anti-classification and anti-subordination theories classify and differentiate among individuals by their membership in certain delineated classes, both approaches fall victim to all of the same
flaws discussed herein that plague categorical classification schemes. Such flaws include: resentment toward protected class groups by those who are not afforded the same protections or denied opportunities due to a lack of protected class status; the ability of those who seek to discriminate to maneuver around class definitions; under-inclusiveness—the failure of categories to encompass and protect all who would reasonably be expected to be members of a category (e.g. LGBT individuals exclusion from Title VII's "sex" category); dehumanizing valuation and relegating some individuals to second-class status; the ability of courts to interpret categorical statutes as "swords" or "shields" to grant or deny protections as desired; and high costs to employers to ensure compliance with such statutory regimes.

The Employment Qualifications Approach proposes a different, third conception of anti-discrimination law, asserting that the best course is to focus on the "what" of employment discrimination law instead of focusing on the "who." Stated another way, both the anti-classification theory and anti-subordination theory of anti-discrimination law concentrate on group dynamics and assign individuals different group memberships depending on their personal characteristics. On the other hand, the EQA shifts the focus from group membership to objective criteria possessed by individuals, ignoring the groups to which individuals might otherwise belong.

Some might claim that the EQA is a variation on the anti-classification theme. However, the EQA is more than a means to stop discrimination on certain bases by taking action to "stop discriminating" on those bases, as Chief Justice Roberts might put it. The EQA is an affirmative shift in focus to the individual and objective characteristics, rather than group membership and group-level dynamics. The EQA does not classify and grant protections to some individuals but not others. The EQA would not subordinate, advantage, or disadvantage any group at the expense of another. The EQA emphasizes an individual's abilities, experience, and other objective qualifications and attempts to provide discrete criteria by which employers can make employment decisions. By doing so, the EQA focuses on an individual's fit for the job and the organization (the "what"), rather than on the individual's membership in certain groups (the "who"). To merely "stop discriminating" would not change the group-level focus inherent to the anti-classification and anti-subordination theories. The EQA displaces groups as a by-product of shifting to an individual focus, and it provides

287. See Parents Involved, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").
discrete and objective criteria by which to measure individuals’ fitness for employment, rather than just eliminating all groups and leaving a void resulting in a lack of measures or direction with which employers can make decisions. Getting rid of group classifications alone will not prevent discrimination. However, removing constraints on anti-discrimination protections (i.e. group classifications) and supplementing the field with directives that will allow employers to make fairer, better employment decisions based solely on what is relevant (a candidate’s qualifications), will do so.

The EQA possesses all of the benefits of the anti-classification and anti-subordination schemes, and is consistent with the aims of both theories, but is not constrained and flawed by classifications. Where an anti-classification statute like Title VII would prohibit discrimination on the basis of membership in only a few discrete classes, the EQA can prohibit discrimination on any basis not related to qualifications, affording a much broader basis of protection. To take another example, an anti-subordination scheme would prohibit advantaging individuals of one class in employment decisions over individuals of another class, furthering class resentment and hostility on the sole basis of membership in certain groups, among other problems. In contrast, the EQA would afford employment opportunities to the most qualified individual, whether Black, white, or of any other race—irrespective of group membership. Thus, the Employment Qualifications Approach is a more appropriate, and likely a more effective, means to find truly qualified employees and tackle employment discrimination.

B. Potential Drawbacks and Counterarguments to the Employment Qualifications Approach

This section addresses potential drawbacks to, and the likely counterarguments against, the Employment Qualifications Approach. It argues that even if all of these assertions were true, the enumerated benefits of implementing the EQA would still outweigh these drawbacks, and the EQA should be implemented. This section addresses a few contentions: that transgender persons do not merit employment non-discrimination protections and that granting protections to transgender individuals will lead to a host of horrible results; that the EQA would lead to increased litigation of individual employment discrimination claims; that employers will be denied autonomy in employment decision-making (i.e. the ability to refuse to hire certain employees for reasons including moral opposition or dislike of the
“type of person” that the employee is, such as disliking a transgender person on the basis of their gender identity); 288 that stand-alone legislation or amendments to Title VII within its categorical framework would be more appropriate; and that the un-categorical framework reduces individuals to a sum of their qualifications in an undesirable way. Each is addressed in turn.

1. Opposition to Employment Non-Discrimination Protections for Transgender Persons: The Slippery Slope to the “Parade of Horribles”

A popular argument against granting any equal rights or protections for LGBT persons is that doing so will lead down a slippery slope to a frightening and varied host of horrible results. This argument is invective and incorrect, especially when taking into account the mechanics and practical application of the Employment Qualifications Approach. Opponents of equal rights for transgender persons and others in the LGBT community often argue something to the effect of: “but if we protect transgender people, next we’ll have to protect polygamists, people who engage in incest, or people who engage in bestiality, or “X” type of other often socially unpopular people, and that will lead to the end of the world.” 289 This is only a slight exaggeration of the traditional anti-LGBT equality argument. 290 It is likely that this argument would again be raised in opposition to employment non-discrimination protections for transgender persons and others. This same argument has been popping up for as long as equal rights movements have been in existence—decades ago, the slippery slope argument was frequently employed in

288. See also supra note 273 (discussing the potential prohibition or loss of voluntary affirmative action programs in employment).

289. See, e.g., Hema Chatlani, In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy, 6 APPALACHIAN J. L. 101, 128 (2006) (discussing this argument as it is deployed in the marriage equality debate context).

opposition to interracial marriages. Fortunately, this argument can be overcome with a review of the historical record and analysis of the EQA. History proves unequivocally that granting equal protection of the laws to vulnerable groups of individuals subject to discrimination, contempt, and abuse does not lead down a slippery slope to horrible things. Once *Loving v. Virginia* ended race-based legal restrictions on marriage, the legalization of polygamous marriages did not follow. Bigamy remains illegal, and bigamy laws continue to be enforced today. Similarly, granting persons with disabilities employment protections did not lead to the legalization of bestiality. Other more realistic arguments about the “horrible” consequences of the EQA would surely be raised as well. Employers might claim that employment non-discrimination protections for transgender persons might require the employer to provide expensive insurance coverage for sex reassignment surgery. However, the EQA makes no such mandate. Additionally, employment non-discrimination protections for transgender persons would not “ruin” public restrooms or risk injury to persons using restrooms also utilized by transgender individuals—there is no evidence to substantiate this concern either. There are legion examples of the flaws with this slippery slope “parade of horribles” argument. History demonstrates that affording more individuals equal rights leads to positive results (especially for the previously unprotected individuals). The case would be no different if employment non-discrimination protections were granted to transgender persons. Granting transgender individuals equal employment rights would neither lead to the legalization of polygamy or any of the other aforementioned “horribles,” nor would affording transgender persons equal employment protections lead to protections for other individuals on the basis of what some might call other “ridiculous” bases. This is especially true in light of the mechanics and practical operation of the EQA, which would not permit employers to consider any factors other than an employee’s qualifications for employment. The very nature of the Employment Qualifications Approach proscribes granting any group “special rights,” and the class-less nature of the EQA would prevent expanding class protections, precipitating a slippery slope to a parade of


294. For instance, some opponents of non-discrimination protections for transgender persons might argue that “if we protect transgender people, next we’ll be protecting people with tattoos, dog owners, and all other sorts of people—anyone that asserts their group should have ‘special rights.’”
2011] THE EMPLOYMENT QUALIFICATIONS APPROACH 95

horribles. Thus, this argument fails per analysis and historical experience.

2. The Risk for Increased Individual Litigation

One of the potential drawbacks to the EQA would be a risk for an increase in the quantity of individual-scale Title VII litigation. As stated earlier, in some class actions courts have interpreted and defined Title VII's protected classes very narrowly in a manner detrimental to individual plaintiffs, and often narrowing the Title VII classes to the point where individuals “find it impossible to bring an individual suit or narrow class action even when he has a meritorious claim.” If successfully implemented, the Employment Qualifications Approach would remove the class constraints on aggrieved individuals seeking relief from employment discrimination. This might result in an increase in Title VII litigation by individuals.

As of now, Title VII litigation centers on a plaintiff’s membership (or exclusion) from an enumerated protected class, and litigation is limited by those class constraints—an individual may allege employment discrimination on any of innumerable bases, but only claims made on bases covered by Title VII will be able to proceed. The EQA would eliminate Title VII’s class distinctions and restrictions on employment discrimination claims, allowing an individual to bring a claim of employment discrimination on any impermissible basis (any basis aside from the individual’s employment qualifications). For instance, while an employee cannot successfully bring a Title VII suit alleging discrimination against him or her as a transgender person now, an employee could bring such a suit under the EQA. An employee could also bring a suit alleging discrimination on the basis of political affiliation, marital status, appearance or any of the various bases not presently protected by Title VII. This broadened legal right would almost certainly result in an increase in the quantity and types of employment litigation suits brought.

295. See generally Certifying Classes and Subclasses in Title VII Suits, supra note 185.
296. Certifying Classes and Subclasses in Title VII Suits, supra note 185, at 626.
297. The effect that the EQA would have on class action litigation remains to be discussed or determined, but is beyond the scope of this Article at this time. As class action litigation focuses on membership in a class, which runs counter to the class-less framework of the EQA, it is possible that class action litigation (at least under Title VII) would not be allowable in conjunction with the EQA.
298. This fact is evident from the increase in complaints filed with the EEOC after other instances in which Title VII was broadened to afford protections to a new group of
The potential risk of increased litigation under the EQA, even if realized, would likely not be overwhelming. This is so for two reasons: (1) administrative measures are in place to rule out unmeritorious claims before such claims drain judicial resources, preventing many potentially frivolous employment discrimination claims that might be brought on presently-unprotected bases after implementation of the EQA; and (2) courts would develop a body of case law to exclude frivolous or unsupported claims and use other judicial powers to direct meritorious claims to successful adjudication.

At present, the EEOC is charged with administrative oversight authority over Title VII claims. \(^2^9^9\) Claimants are required to file charges of unlawful employment discrimination with the EEOC within a certain time period to protect their rights, and must receive approval to proceed with civil litigation. \(^3^0^0\) These and other administrative mechanisms currently present in Title VII, which would remain unchanged after EQA implementation, serve to rule out unmeritorious claims and ensure the efficient consideration, administration, and adjudication of Title VII employment discrimination claims. If the EQA resulted in an increase in EEOC filings, additional resources could be committed to take care of the surge.

Additionally, even if the EQA was put into action and individuals brought numerous employment discrimination claims on a multitude of bases, some of which might not be supported by the evidence, courts would quickly develop a body of case law to preclude similar unmeritorious claims in the future. It would not take long for courts to develop a body of precedent that would exclude frivolous or unmeritorious claims (e.g. claims by numerous individuals such as a claim like “I suffered employment discrimination on the basis of my membership in an Ultimate Frisbee club” when the employer had no knowledge of the employee’s participation), and once developed, the body of law would, to some extent, self-govern Title VII claims and render the caseload manageable.

To some extent, an increase in individual litigation is a desired objective of the EQA since it seeks to permit individuals to bring claims of employment discrimination on numerous bases under which they are not presently able to proceed (e.g. transgender status). Thus, administra-

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\(^{3^0^0}\) See generally 42 U.S.C. § 2000e-5.
tive measures already present in Title VII, as well as traditionally available judicial methods of claims adjudication and litigation administration would ensure that the risk of increased individual litigation would not outweigh the benefits of the EQA.

3. Potential Autonomy Concerns for Employers

Another popular argument against granting equal rights for politically less favored or controversial groups (e.g., in this instance, employment non-discrimination protections for transgender persons) is that doing so would impinge on employer “autonomy.” Employers opposed to affording equal employment opportunities and protections have often invoked this argument as one objection to broadening employee civil rights. During the Civil Rights Movement era, Title VII opponents argued that if legislation such as Title VII was enacted, the “President [and federal government] would be granted the power to seriously impair . . . [t]he right of employers ‘to hire or discharge any individual’ and to determine ‘his compensation, terms, condition, or privileges of employment.”

Further, opponents of equal employment opportunities argued that legislation such as Title VII “would be far reaching, encroaching on employer prerogatives and employment at will.” While some employers sincerely harbored these concerns, for other employers, these assertions were a proxy for an argument on behalf of the employers’ ability to intentionally discriminate against classes of persons they disliked. Both the sincere and insincere sides of the

303. Derum & Engle, supra note 302, at 1213 (citing Randall Kennedy, The Struggle for Racial Equality in Public Accommodations, in Legacies of the 1964 Civil Rights Act 156, 161 (Bernard Grofman ed., 2000). “Kennedy observes that combating . . . discrimination in places of public accommodation . . . was less troublesome, since such discrimination was a ‘simple matter of naked racism or acquiescence to naked [discrimination].’ Kennedy notes further that ‘[e]mployers, by contrast, who equate
employer autonomy faction would likely oppose the EQA, which, among other things, would grant equal employment opportunities and non-discrimination protections to transgender persons (or as these employers would characterize it, deny employers the autonomy to intentionally discriminate or make employment decisions regarding transgender persons). However, both sides’ arguments can be defeated.

As for the insincere employers motivated by discriminatory animus, as one scholar has argued, at the very least, intentional discrimination in employment is wrongful because it demeans those who are discriminated against. For this reason alone, it is impermissible to justify opposition to legislation because of a desire to intentionally discriminate on the basis of a person’s characteristics (unrelated to their qualifications). As for the employers holding a sincere concern regarding a loss of

race with preferred or undesirable traits, experiences, or skills rationalize their decisions as a matter of ‘good business’ rather than racism [make discriminatory motives more difficult to detect and remedy]”.

306. Some equal rights opponents have explicitly stated their opposition to Title VII, ENDA and similar legislation precisely because such legislation would deny employers the freedom to discriminate against whom they wish. See Shannon H. Tan, Note, When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees From Discrimination, 37 STETSON L. REV. 579, 608–09 (2008), discussing the way in which

groups such as Concerned Women for America contend that ENDA would force religious business owners to hire gay and transgender people in spite of their belief that homosexuality and transgenderism are ‘sinful’ . . .

This argument parallels that of Title VII critics, who once contended that employers should have the freedom to discriminate against African-Americans.

Id. at 608–09 (citing Concerned Women for America, CWA: ENDA Would Dismantle First Amendment Liberties, CHRISTIAN NEWSWIRED (May 11, 2007); John J. Donohue III, Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 STAN. L. REV. 1583, 1583 (1992)). Some critics of the EQA might suggest that the EQA would serve as a prior restraint on symbolic speech by those who oppose hiring a transgender or other individual on moral or religious grounds. Others might object to the EQA because of a desire to intentionally discriminate for “good reasons,” such as not hiring an individual with a prior child sexual assault conviction for a job requiring frequent interaction with children. Courts would have the latitude to consider such situations and prohibit discrimination based on insincerely-held beliefs and concerns about a loss of autonomy, or to find that, for example, an individual with an established history and propensity to harm children is not the “most qualified” individual to work with them. In this way, the EQA serves to prevent ill-motivated discrimination under the guise of legitimate motives, but allows courts leeway to take into account exceptional situations while still focusing on the individual’s objectively identifiable qualifications for employment.

307. See Deborah Hellman, When Is Discrimination Wrong? 7 (Harv. Univ. Press 2008) (“It is morally wrong to distinguish among people on the basis of a given attribute when doing so demeans any of the people affected.”).
autonomy in employment decision-making, this concern is too un-
founded and insufficient to defeat the EQA. The EQA only requires
that employers consider individuals' qualifications for employment,
not that employers make any particular employment decisions (i.e. an
employer can choose not to hire anyone, but if they hire someone,
must hire the "most qualified" individual). Further, in this way, the
House of Representatives intended for Title VII to be like the EQA—a
"House report discussing the requirements of Title VII observed that
the proper role of the EEOC under the statute would be to 'make cer-
tain that the channels of employment are open[ed by employers] to
persons regardless of [their membership in enumerated classes] and
that jobs in companies or membership in unions are strictly filled on the
basis of qualification."\footnote{308}

The EQA is neither a quota edict nor an affirmative action plan—
the EQA merely requires that employers evaluate individuals on the ba-
sis of their qualifications to do a job, and not other irrelevant,
prejudicial, or discriminatory considerations. Employers would retain
the same ability to make employment decisions "at-will" under the EQA
as they do under the current Title VII regime, with the only limitation
being that an employer could not discriminate against an otherwise-
qualified applicant on any basis aside from their qualifications.\footnote{309}
This might mean that an employer cannot refuse to hire a qualified applicant
who is a reformed domestic abuser, solely because of his history of do-
mestic abuse. However, an employer can refuse to hire the individual if
they are not the "most qualified" applicant, or terminate them for inade-
quate job performance, or make other qualifications-based
employment decisions, and criminal or other law will have to handle the
behavioral aspects of the individual's actions.

Thus, the EQA would only limit employer decision-making to the
extent that an employer would consider illegitimate and irrelevant factors
and make discriminatory employment decisions, and it is the position of

\footnote{308} Derum & Engle, \textit{supra} note 302, at 1214 (citing H.R. Rep. No. 88-914, pt. 2
(1963), reprinted in United States Equal Employment Opportunities Commission,
\textit{Legislative History of Titles VII and XI of Civil Rights Act of 1964}).

\footnote{309} If "at-will" employment is defined to mean that an employer can make any
employment decision on any arbitrary basis, then both Title VII and the EQA
impinge on "at-will" employment to some extent, as do a variety of other
employment laws, including the ADA. In that Title VII prohibits employment
decision-making on the basis of several categorical characteristics, Title VII limits
employment "at-will" decision-making. However, it is the position of this Article that
the EQA's one constraint on true employment "at-will" decision-making (that of
qualifications) is reasonable and does not impinge on employer autonomy, or at least
does so far less than the current Title VII regime and other employment laws.
this Article and Congress that employers should not have the autonomy to discriminate based on such factors anyway. As for employers' autonomy regarding legitimate bases for employment decision-making, the EQA would preserve that autonomy and the ability to make any employment decision that only takes into account job qualifications. Therefore, neither sincere nor insincere autonomy concerns of employers are sufficient to overcome the benefits of the EQA.

4. Stand-Alone Legislation as a Vehicle for Change, Instead of a Reformulated Title VII

The preceding three subsections considered arguments that might be raised in opposition to the implementation of the Employment Qualifications Approach—arguments that would almost certainly be brought by opponents to equal employment opportunities and non-discrimination protections for transgender persons. In contrast, this and the subsequent subsection address justifications that might be raised for opposition to the EQA, but that would likely be brought by individuals who do not take issue with granting opportunities and protections for transgender persons, but the method of actualization itself (i.e., the EQA).

In its current formulation, Title VII has failed the transgender community and others not protected by the statute's discrete categories. Considering transgender individuals specifically, the vast majority of courts have considered transgender plaintiffs' Title VII "because of sex" discrimination claims only to dismiss and discount them, while utilizing the "language of monstrosity" and other degrading forms of discourse to describe transgender persons. Some scholars contend that stand-alone legislation would be a more effective means by which to achieve equal employment opportunities and non-discrimination pro-

310. See supra Part I.B.
311. See, e.g., Abigail W. Lloyd, Defining the Human: Are Transgendered People Strangers to the Law?, 20 BERKELEY J. GENDER L. & JUST. 150, 162–63 (2005) (discussing the language used by the Seventh Circuit in the Ulane case, including: "Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes . . . it may be that society . . . considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.") (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (footnote omitted)); see also Carolyn E. Coffey, Note, Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures, 7 N.Y. CITY. L. REV. 161, 179 (2004) ("attempts to gain transgender equality in the federal court system have been unsuccessful").
tions for uncovered groups such as transgender persons. The arguments in favor of one specific piece of stand-alone legislation, the Employment Non-Discrimination Act ("ENDA"), will be considered herein, because the arguments in favor of ENDA align with the arguments that have been cited of other pieces of stand-alone legislation aimed at affording similar protections to other groups.

As early as 1974, members of the U.S. House of Representatives introduced legislation proposing to add sexual orientation non-discrimination protections to The Civil Rights Act of 1964. The 1974 bill failed to make it out of committee, failing just like all subsequent attempts to amend The Civil Rights Act for this purpose. After years of repeated failures to amend The Civil Rights Act, in 1994 "advocates switched tactics" and proposed stand-alone legislation that would prohibit employment discrimination on the basis of sexual orientation, ENDA. It was not until 2007 that gender identity non-discrimination protections would be included in a proposed version of ENDA, and those protections were subsequently removed. The "trans-inclusive ENDA" bill as it was called, would have prohibited employment discrimination because of "sexual orientation, actual or perceived, and gender identity." Although the House of Representatives successfully passed a trans-exclusive version of ENDA in 2007, the bill failed to make it to a vote by the Senate. Thus, every attempt during the last thirty-seven years to pass sexual orientation or gender identity non-discrimination protections, whether as amendments to The

312. Coffey, supra note 311, at 179.
313. See Weinberg, supra note 204, at 8.
314. See Weinberg, supra note 204, at 9.
315. See Weinberg, supra note 204, at 9 (citing S. 2238, 103d Cong. (1994)). In this version of the bill, discrimination on the basis of gender identity was not prohibited—only discrimination on the basis of sexual orientation. See S. 2238, 103d Cong. (1994).
316. See Weinberg, supra note 204, at 10. However, gender identity protections were eventually sacrificed in an attempt to pass the bill with only sexual orientation protections. See id. at 11. This caused great discord within the LGBT community. See Ethan Jacobs, Local activists take lead role in ENDA debate, EDGE (Oct. 11, 2007), http://www.edgeboston.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=23646.
317. See Jacobs, supra note 316.
319. See Weinberg, supra note 204, at 11–12.
Civil Rights Act, or as stand-alone legislation, has thus far been unsuccessful.

Arguments in favor of ENDA include: that stand-alone legislation is one of the only means by which Congress can make its intent to protect the LGBT community clear (since apparently the broad language in defining "because of sex" did not make Congress's intentions clear enough to courts);\(^3\) that stand-alone legislation, if carefully constructed, may be the best means by which to "account for the diversity and fluidity of [the LGBT] community;\(^3\) and that as an independent piece of legislation, ENDA would provide a decisive response to discriminatory employers' and courts' allegations regarding the LGBT community's attempts at "bootstrapping" sexual orientation and gender identity claims onto what is "really a sex discrimination claim," a defense that has successfully absolved discriminatory employers of liability.\(^3\)

However, several considerations and counterarguments illustrate the superior ability of Title VII, as reformulated under the EQA, to provide for transgender equal employment opportunities and non-discrimination protections. Initially, all of these arguments may be addressed, and could be repudiated, in considering that these arguments are aimed at the categorical approach or current formulation of Title VII. These issues may exist under the current framework of Title VII, but would not pose a problem under the EQA.

First, the language of what would be the revised Title VII under the EQA, as well as past and present legislative history, would make the intent of the de-categorized Title VII clear: to "make certain that the channels of employment are open[ed] by employers to persons regardless of [their membership in enumerated classes] and that jobs . . . are strictly filled on the basis of qualification."\(^3\) With the EQA, courts will no

\(^3\)20. See supra Part I.B.


\(^3\)22. See Jennifer Wilson, Note, Horizontal Versus Vertical Compromise in Securing LGBT Civil Rights, 18 Tex. J. Women & L. 125, 131 (2008) (citing Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Desantis v. Pac. Tele. & Tele. Co., 608 F.2d 327 (9th Cir. 1979) (holding that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender and should not be judicially extended to address "bootstrapped" claims based on plaintiffs' homosexuality)).

longer be able to feign ignorance as to congressional intent, or idle in indecision for fear of engaging in "judicial activism," in interpreting the broad remedial statute that is (or is supposed to be) Title VII. The EQA makes clear that only employment qualifications may be considered, and that the purpose of the reformed Title VII is to provide actual equal employment opportunities to anyone qualified for the employment.

Second, the argument that ENDA, carefully constructed, could protect all component constituencies of the diverse LGBTQIA community ignores past history and practical reality. This argument proposes to protect LGBT individuals by adding and redefining categories within the same categorical framework that has operated to proscribe protections for the same community at every turn. If the broadly defined term "sex" in Title VII was interpreted narrowly and found insufficient to cover individuals on the basis of sexual orientation and gender identity, how can ENDA proponents so unrealistically trust the courts to define these terms in a manner that comports with congressional intent? As one scholar put it, "[l]eaving it up to the courts to interpret what constitutes 'sexual orientation' or 'gender identity' may lead to the same battle that Title VII claims 'because of sex' have demonstrated." This is entirely correct, because ENDA would not alter the flawed framework. However, the EQA will operate outside the constraints of a categorical framework, and for that reason, the EQA is more likely to successfully protect transgender employees.

Third, although ENDA would create new categories within Title VII to protect individuals from discrimination on the basis of "sexual orientation" or "gender identity," thereby avoiding the "bootstrapping" problem, ENDA's categorically confined approach would still fall victim to the host of criticisms and defects of the categorical approach generally. In the process of avoiding the "bootstrapping" problem by crafting new categories, ENDA would create several more (and more disconcerting) problems because of those categories.

In terms of the transgender community within the larger LGBT community, and gender identity or expression protections, some versions of the ENDA legislation have purposefully excluded protections for transgender individuals. So, if such a version of ENDA was passed, ENDA would still not afford equal employment opportunities and non-discrimination protections to transgender persons. This incremental

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324. See Palmer, supra note 25, at 892.
325. The incremental approach has caused a deep divide within the LGBT community, between those who wish to obtain some non-discrimination protections (i.e. against discrimination "because of sexual orientation"), and those who are unwilling to sacrifice any part of the community for the sake of advancing protections for the rest.
method of seeking protections for the LGBT community would not only exclude the transgender collective, but it might also doom the gay, lesbian and bisexual collective at the same time. Again, the categorical approach reveals its weakness here—although gay, lesbian and bisexual individuals would be protected from discrimination on the basis of sexual orientation under almost any version of ENDA introduced thus far, they would not be protected from discrimination based on their gender non-conformity. Employers seeking to justify discrimination against the LGBT community would be able to discriminate on the basis of gender identity or gender non-conformity, and category-constrained ENDA and Title VII legislation would be powerless to prevent it.\(^{326}\)

Additionally, some within the LGBT community assert that the incremental approach itself “reinforces systems of oppression” by preferring the rights of non-transgender individuals in the LGBT community, seeking progress at the expense of transgender individuals and their protections.\(^{327}\) Thus, ENDA remains flawed so long as it remains category-driven legislation because LGBT individuals could still face adverse employment action under an incomprehensive version of ENDA legislation.\(^{328}\)

After failed attempts to pass different versions of ENDA over the course of thirty-seven years, it seems reasonable to doubt whether ENDA will ever become law. Even if ENDA could overcome the practical obstacles in place and earn passage into law, as a category-dependent approach to a category-caused problem, ENDA is not up to the task of providing equal employment opportunities and protections for transgender persons. Thus, for these reasons, the EQA is preferable to ENDA.

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\(^{326}\) Different rationales for incrementalism and thoroughness have been advanced. See Ryan E. Mensing, *A New York State of Mind: Reconciling Legislative Incrementalism with Sexual Orientation Jurisprudence*, 69 Brook. L. Rev. 1159, 1160–62 (2004).

\(^{327}\) See Wilson, supra note 322, at 131.

5. Opposition to De-Categorization Generally: A Response to Robert C. Post

In his work *Prejudicial Appearances: The Logic of American Antidiscrimination Law,* 329 Professor Robert C. Post offers a critique of what he terms the "context-free" approach to anti-discrimination law, an approach that initially appears to have some similarities to the Employment Qualifications Approach. Post’s piece analyzes the logic behind anti-discrimination law in the context of discrimination based on appearance. The article begins by characterizing anti-discrimination law as that which “understands itself as negating prejudice [regarding judgments of a person’s ‘worth’ when that person possesses certain characteristics] by eliminating or carefully scrutinizing the use of stigmatizing characteristics as a ground for judgment.” 330

Unfortunately, as discussed, Professor Post’s insights, if implemented, would lead to very little change in the theory or application of employment anti-discrimination law. That is to say, all of the same people “winning” in employment (discriminatory employers and less qualified employees promoted because they possess certain class characteristics) would still come out “winning” on the other side of Professor Post’s “sociological account.” This Part argues that such an approach would be ineffective, and an approach such as the Employment Qualifications Approach would have more success because it would reframe the debate and restructure the system, rather than attempting to achieve reform by conceding human fault and being resigned to a certain level of discrimination “because that is just how things are.”

In his article, after discussing the congressional intent and meaning of Title VII, Post turns his attention to the “context free” approach, analytically arraigning the approach while advocating a different method—one that he terms the “sociological account.” 331 Post makes several criticisms of the “context free” approach, criticisms that might be raised against the EQA and therefore merit further deliberation. Each will be considered and responded to in turn.

Post begins by characterizing the “context free” approach as one requiring that an individual be distilled into separate parts characteristics and qualifications. 332 Post asserts that after “effac[ing] forbidden

330. Id. at 9.
331. Id. at 31.
332. Post compares this process to rendering an individual in the “original position” behind a “veil of ignorance” in the Rawlsian fashion. Id. at 12.
attributes," nothing more is revealed than the inherently equal “intrinsic worth” of individuals. He asserts that filtering out forbidden attributes leaves employers with a metaphorical pile of nothing but characteristics unable to “make distinctions between employees,” and therefore that anti-discrimination law must have a different purpose than to merely “strip away prejudicial contingencies of social circumstances” in order to render those factors beyond consideration in employment decisions. Post recognizes that one function of anti-discrimination law is to “uncover . . . an apprehension of ‘individual merit’ . . . [and an employee’s] ability to perform the job.” However, Post goes on to argue that Title VII is not intended as a “context free” approach, but the purpose of anti-discrimination law is to “transform[] preexisting social practices, such as race or gender, by reconstructing the social identities of persons.” Post explains that “[i]n contrast to the [“context-free” approach], the sociological account accepts the inevitability of social practices” and “focuses on how the law reconstructs social practice, even at the sacrifice of instrumental rationality.”

As Post depicts it, the “context free” approach is embodied by an orchestra audition in which musicians are required to “play behind opaque screens” so that those evaluating their talents may “overcome ingrained sex discrimination” and focus on ability, not characteristics. Or, as Post puts it, “[t]he musician becomes a perfectly disembodied instrument.” Post takes issue with this approach to anti-discrimination law, because he asserts that ability is “intrinsically connected” to some characteristics (e.g., in this example to gender, such as the biological differences between most men and women in regard to physical strength). He acknowledges that the screen can be “serviceable only in discrete, bounded, and exceptional circumstances,” such as in orchestra auditions, but not generally, as in employment. Further, Post criticizes the “context free” approach for purportedly dehumanizing individuals by
abstracting away their identifying characteristics and summing them up in terms of abilities, not personality, race, or sex, and so forth.\textsuperscript{341}

The differences between the "context free" approach and the Employment Qualifications Approach are abundant. There is a significant distinction between "abstracting away" personal characteristics to the point that a person is the sum of nothing more than their abilities, totally devoid of gender, race, or other identifying qualities on the one hand (as Post characterizes the "context free" approach), and prohibiting consideration of such characteristics for the purposes of making employment decisions (under the EQA) on the other hand. Individuals are not sexless because we do not consider their sex (as under the EQA's framework), or at least no more sexless than individuals who are categorized by sex and whose sex cannot be used in consideration of an employment decision (as is the case with Title VII as currently constructed).

Moreover, Post frames the choice of framework as an ultimatum, claiming that we can consider sex and have the best orchestra possible, recognizing that the inquiry would "incorporate sex-related traits, or sacrifice the quality of our orchestra in order to pursue a norm of sex equality."\textsuperscript{342} But this is a false dichotomy. Post points out that in our everyday interactions, we do not consider people sexless, and that it would be impossible to do so in the employment context, and therefore we should accept and work within current social norms for change.\textsuperscript{343} It is true that each of us often bases our interactions and judgments of others to some extent on characteristics such as sex. If nothing else, sex serves as a useful, crude, shorthand descriptor when speaking about someone (e.g. "I met a nice woman at the store today."). However, it is important to note a key distinction that Post either disregards or fails to make—an approach such as the EQA is not advocating total blindness to all characteristics in all contexts (as the "context free" approach might do). Post refers to the "context free" approach and evaluates its desirability and feasibility across all aspects of social interaction, but the EQA only deals with the very specific and discrete context of employment. The EQA merely prohibits employers from considering characteristics in the employment context, when making employment decisions—a very specific context in which such characteristics almost always bear no rational relation to an employee's ability to do a job. Because of this, many of Post's objections and concerns on this point are inapplicable. Admittedly, while it might be quite difficult, if not impossible, to disregard all of a

\textsuperscript{341} See id. at 12.
\textsuperscript{342} See id. at 21.
\textsuperscript{343} See id. at 16.
person's characteristics in everyday social interactions, or at minimum it would require a broad reworking of social interaction generally, it does not seem irrational or impossible to temporarily ignore irrelevant social characteristics when rendering employment decisions. To use the orchestra audition metaphor, the EQA would simply require that employers evaluate musicians on the music they play, not qualities that are unrelated to the music. It is possible to achieve success with an orchestra screen because jobs can be reduced to objective qualifications, even if people cannot be reduced to nothing but qualifications. Furthermore, if it is necessary to avoid an otherwise discriminatory result, then temporarily using a screen in employment evaluations to ensure that the most qualified candidate is selected for the orchestra appears to be a fair, practical, and viable means by which to accomplish that end.

Additionally, it is important to recognize that Post makes several assumptions that underlie, inform, and animate his "sociological account" theory. If these assumptions are improper, then the theory unravels to some extent, if not entirely. Initially, Post assumes that if personal attributes are removed from consideration (i.e., that one thinks of an individual in a way that does not take into account their race, religion, sex, etc.) that all that remains is the individual's "inherent worth" (which does not overlap with an individual's qualifications). However, this assumption grossly oversimplifies and ignores one of the main focuses of employment (anti-discrimination) law: an individual's qualifications to do a job. In broad terms, at the very least, individuals are made up of their personal characteristics, "inherent worth," and, importantly, their qualifications to do a job. With his discussion of the manner in which employment anti-discrimination law effaces individuals, Post focuses only on the sociological and philosophical aspects of personhood, to the exclusion of objective, employment-related qualifications—the only quality that almost everyone agrees is relevant and should be considered in employment decisions. This exclusion improperly provides Post a biased basis on which to build and support his "sociological account" theory of anti-discrimination law, much in the same way that an argument that individuals are only comprised of skills, experience and qualifications to do a job would support the EQA (although that argument is not made herein). Recognizing this flawed foundation upon which Post's "house" is "built," further analysis proceeds.

Post claims that implementing the "sociological account" would have several benefits. One of the alleged benefits is that the "sociological account" would "create greater judicial accountability" in that courts

344. See id. at 13.
could implicitly or explicitly accept and justify the use of social practices in judicial decisions, instead of making decisions on bases taking into account impermissible characteristics and justifying the decisions with different reasoning. Another purported benefit of the “sociological account” is “greater doctrinal coherence,” or the ability of judges to “explain the actual justifications for their decisions.” These asserted benefits are related and employ similar reasoning, and therefore are considered together. For example, in a case in which an employee alleges employment discrimination “because of sex” for failure to conform to a dress code based on gender norms, a court would be able to explicitly justify its decision to uphold the gendered dress code based on “its acceptance of these norms.” A judicial realist would likely agree that it would be a benefit to have judges adjudicating cases with an open and candid declaration of their reasoning for their decision, rather than making decisions and justifying them with insincere and often unjustifiable reasoning. However, aside from shining a light onto such practices that are already taking place, the value of this alleged benefit of the “sociological account” is unclear—in fact, there are disconcerting drawbacks to this course of action that would far outweigh any claimed benefit of judicial accountability.

Post’s “sociological account” would further entrench and perpetuate societal norms and prejudices based on individuals’ membership in certain groups, and allow courts to do so with official sanction. So many prejudices and social norms serve to damage and disenfranchise vulnerable groups (e.g., transgender persons, women, persons of color). Open recognition and sanctioned use of such norms is not a positive. It is arguably just as “damaging to doctrinal structure” when judges make decisions based on entrenched and prejudicial social norms because of societal pressure to do so. Presumably, Post advocates this approach and asserts this benefit because he believes that such norms are correct and appropriate, and because he believes that such norms cannot be changed within the “context free” approach. However, this Author asserts, and the EQA embodies, a belief that wrongful and prejudicial social norms can be changed within a system that does not focus on or perpetuate them (generally or en route to changing them). The EQA disallows

345. See id. at 32.
346. See id. at 33.
347. See id. at 32.
348. See id. at 30 (In fact, Post admits as much: “courts are continuously re-evaluating which stereotype should be permitted, in what contexts, and for what reasons, . . . to the extent that gender remains a culturally inescapable fact, it also will remain inextricably present in the application of Title VII”).
employers from utilizing or perpetuating such prejudicial and harmful social norms, and that certainly seems like one reasonable and realistic method by which to do away with them. It strains credulity to argue that perpetuating a wrongful belief for any amount of time is the best way to change it. If employers and courts honestly evaluate candidates based solely on the basis of their employment qualifications under the EQA, judicial accountability, doctrinal coherence, and other benefits would surely follow.

Post returns to his initial assumption in asserting the next supposed benefit of the “sociological account,” which is that courts would be able to focus on and consider “the right question, the question that ought to govern the application of antidiscrimination law.” In Post’s view, “the point of antidiscrimination is to transform [rather than transcend] existing social practices,” and courts should consider and ask “what purpose the law expects to accomplish by such transformations.” He asserts that the purpose and goal of anti-discrimination law (past, present and future, apparently) varies by category of person, “that the ambitions of the law vary depending upon the social practice at issue. . . . antidiscrimination law seeks to exercise a far more sweeping transformation of race than gender.” Post fails to explain his reasons for this assumption and characterization. The lack of a BFOQ for race offers some evidence that Congress may have intended to strike more forcefully at racial discrimination than other types of employment discrimination. However, this is not a decisive or clear indication that this is the correct of the two characterizations (of Title VII as intended to strike at some types of discrimination more than others, or Title VII as intended to equalize employment opportunities and render certain characteristics “not relevant” to employment decisions). Additionally, Post’s characterization limits Title VII to the congressional intent of the time, and the enumerated classes of the statute. Equal employment opportunity without categorical limitations may also transform social practices in a positive way, and the lack of categorical constraints would allow the Title VII (through EQA) to do so for more people. That Title VII is frozen in time, and that equal employment opportunities and non-discrimination protections will be forever denied to un-enumerated victims of discrimination, including transgender persons, is an actuality that those unenumerated victims cannot afford to accept.

The Supreme Court stated in Hopkins: “[i]n passing Title VII, Congress made the simple but momentous announcement that sex,

349. See id. at 36.
350. See id.
351. See id. at 36–37 (citing a lack of BFOQ for race as proof of this fact).
race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Further, the point of rendering such factors irrelevant is to “target” and eliminate “stubborn but irrational prejudice.” This Article maintains that the “context free” approach and the EQA are not equivalent, and furthermore, that the EQA is a much better means by which to accomplish these ends than is Professor Post’s “sociological account.”

Conclusion

It has been forty-seven years since the Civil Rights Act of 1964 and Title VII became law. While employment non-discrimination efforts and protections have come a long way for certain elect groups, other groups including transgender individuals remain subject to rampant discrimination and its attendant detriments. Title VII’s categorical approach has failed many qualified individuals and employees, and for the reasons explained herein, revision to Title VII’s categorical framework will not change that result. The ADA serves as an example “that where the characteristic or characteristics used to define the protected group are not easily categorized, defining the protected group becomes very difficult,” if not impossible. This is especially true for the differently-abled and LGBT communities. This is precisely why Title VII’s categorical approach will not suffice for transgender persons or others not currently covered by Title VII. Ill-motivated employers seeking to justify discrimination against transgender individuals continually maneuver around Title VII’s categorical constraints and discriminate with the greatest of ease. Courts interpret broad remedial provisions narrowly and perform any required legal maneuvering necessary to exclude transgender persons from equal employment opportunities and non-discrimination protections. Title VII’s categories are ill-fitting and ill-equipped to the task of tackling pervasive and invidious employment discrimination. An individual’s personal characteristics such as their sex bear no rational relation to their ability to perform a job. This work has proposed an alternative to Title VII’s flawed categorical framework, the Employment Qualifications Approach. The EQA would require that employers evaluate individuals on the basis of their qualifications alone, and select the “most qualified”

352. Id. at 10 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (Brennan, J., plurality opinion)).
353. See Lam v. Univ. of Haw., 40 F.3d 1551, 1563 (9th Cir. 1994).
individual for the position—whether transgender, Libertarian, divorced, Asian, or whatever other characteristics they possess. Unconstrained by categorical limits, the EQA seeks to ensure that Title VII is followed and enforced in line with its broad remedial goals, taking into account changes in the forms and targets of employment discrimination over time. It is asserted herein that the EQA would result in numerous attendant benefits which far outweigh any asserted potential drawbacks. It is this Author's hope that via the Employment Qualifications Approach, transgender persons and others will finally secure equal employment opportunities, non-discrimination protections and all of the attendant benefits of employment in the process.