

(UN?)LAWFUL RELIGIOUS DISCRIMINATION

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ABSTRACT

This Article explores religious institutions' exemption from Title VII liability for religious discrimination. Religious institutions are allowed to fire and hire employees based on religious preference. For example, a Catholic high school may refuse to hire any non-Catholics. Or, that same high school may fire an unwed pregnant mother. But what happens when the discrimination constitutes both religious and sex discrimination?

The First Amendment prohibits courts from delving too carefully into religious institutions' policies to determine whether the discrimination constitutes sex or religious discrimination. But there has to be some inquiry, or else it risks violating the Establishment Clause by granting preferential treatment to religious institutions. This Article explores those questions and offers some solutions for courts to evaluate these types of mixed claims.

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TABLE OF CONTENTS

INTRODUCTION.....	102
I. HISTORY AND BACKGROUND.....	107
A. <i>Title VII of the Civil Rights Act of 1964</i>	107
1. <i>Sex discrimination and "sex stereotyping" theory</i>	108
2. <i>Sex discrimination and the Pregnancy Discrimination Act ("PDA")</i>	111
B. <i>Religious Exemptions from Title VII</i>	112
1. <i>The ministerial exception</i>	113
2. <i>Non-ministerial religious organization exemption</i>	114
II. PROBLEMATIC IMPLICATIONS OF THE RELIGIOUS EXCEPTION AND EXEMPTION.....	118
III. IDENTIFYING PERMISSIBLE RELIGIOUS DISCRIMINATION.....	121
A. <i>Disparate Impact as Applied to Religious Exemption Cases</i>	121
B. <i>Equal Application of Religious Discrimination</i>	122
CONCLUSION.....	127

INTRODUCTION

An individual's right to be free from workplace discrimination can often be at odds with religious institutions' right to function in accordance with their mission. These competing interests create a unique jurisprudence under Title VII of the Civil Rights Act of 1964 ("Title VII"), which seemingly favors religious institutions over individuals.¹ Normally an employer cannot lawfully fire an employee solely because of his particular religion.² In fact, Title VII not only

1. Civil Rights Act of 1964 § 703(a), 42 U.S.C.A. § 2000e (West 2012); *see, e.g.*, Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring) ("Any exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees."); Sidney A. Rosenzweig, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2513 (1996) ("Clashes between employers and employees over religious observance in the workplace are an increasingly familiar feature in the legal system.").

2. *See* 42 U.S.C.A. § 2000e-2(a) (West 2012):

(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

prohibits discrimination on the basis of religion, but also requires an employer to reasonably accommodate an individual's religion in the workplace.³ Yet the prohibition against religious discrimination does not apply to certain religious institutions.⁴ Under § 702 of Title VII, religious institutions are exempt from the statute's core prohibition of workplace discrimination based on religion—allowing them to discriminate on the basis of religion.⁵ For example, a Catholic high school could discriminate against other religions and hire only Catholic teachers. That same high school could also fire an employee who violates Catholic doctrine. The religious institution exemption is necessary to protect the First Amendment's Free Exercise Clause, which allows religious institutions the autonomy to govern their own affairs without interference of the government.⁶ As one would expect, courts have grappled with the definition of "religious institution" for granting the Title VII exemption.⁷ But forty years af-

(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.

3. *Id.* § 2000e(j) (stating that religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."); *see also* *Wilson v. U.S. West Commc'ns.*, 58 F.3d 1337, 1340 (8th Cir. 1995) ("An employer is required to 'reasonably accommodate' the religious beliefs or practices of their employees unless doing so would cause the employer undue hardship.") (citing 42 U.S.C. § 2000e(j)). *But see* *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 606-07 (9th Cir. 2004) (stating that it would be an undue hardship to either permit posting of anti-gay scripture or to exclude sexual orientation from employer's diversity program in order to accommodate plaintiff).

4. *Id.* § 2000e-1(a):

This subchapter shall not apply to an employer with respect . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

5. *Id.*

6. *See* *Little v. Wuerl*, 929 F.2d 944, 947 (3d Cir. 1991) ("Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Title VII), prohibits employers from discriminating on the basis of religion. Application of this prohibition to the Parish's decision would be constitutionally suspect because it would arguably violate both the Free Exercise clause and the [E]stablishment [C]ause of the [F]irst [A]mendment.") (internal quotations omitted).

7. *See, e.g.,* *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007). Applying a nine-factor test:

Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board

ter Congress passed the exemption, an even larger question remains: how does the core purpose of preventing other categories of workplace discrimination under Title VII influence the extent to which we allow religious institutions to discriminate based on religion? In other words, what happens when the discrimination is *lawfully* exempted religious discrimination that also constitutes another form of *unlawful* discrimination?

Suppose a woman works as a caretaker at a Christian daycare center for small children. The woman is unmarried and becomes pregnant during the course of her employment. The daycare has a policy that forbids employment of any individual who conceives a child out of wedlock and subsequently fires the woman for violating the policy. At first blush, the policy appears valid under Title VII's religious institution exemption. It is a religious institution engaging in religious discrimination on the basis of its religious tenets.⁸ Yet a potential problem arises because that kind of discrimination may not be just religious in nature but also (partly) based on sex. Title VII prohibits sex discrimination based on pregnancy and is codified in the Pregnancy Discrimination Act of 1978.⁹ But unlike religious discrimination, Title VII does not exempt religious institutions from sex discrimination. If the religious employer fired the woman because she was pregnant, that would be actionable sex discrimination. On the other hand, if the employer fired her because she violated its religion, that would be exempt religious discrimination. This poses the challenge of parsing the employee's termination to determine if it constituted sex or religious discrimination — or both.

of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

Id. But see *Spencer v. World Vision, Inc.*, 633 F.3d 723, 748 (9th Cir. 2010) (Kleinfeld, J., concurring) (rejecting the nine-factor test, stating “whether an entity is a ‘religious corporation, association, or society,’ determine whether it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts”).

8. Although this is a fictional hypothetical, there are common examples of pregnant, unwed women being fired from religious institutions. See, e.g., Molly Redden & Dana Liebelson, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, MOTHER JONES (Feb. 10, 2014, 9:32 AM), <http://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant> (describing ten examples of women being terminated in connection with their pregnancy).

9. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C.A. § 2000e (West 1982)) [hereinafter Pregnancy Discrimination Act]. See *infra* Part II.A.2 for a detailed explanation of the Pregnancy Discrimination Act.

Presumably, the religious institution will plead its exemption and claim that the adverse employment action was because of a permissible policy based on its religious tenets. How, if at all, can courts test the employer's stated reason for terminating the employee without engaging in impermissible mingling of the church's doctrine? What results when a religious institution engages in other forms of prohibited discrimination, under Title VII, under the guise of or in addition to permissible religious discrimination? How can courts evaluate a religious institution's policy to determine equal application to all employees?

The answers to these questions are as complex as they are numerous, considering the competing fundamental interests and the balancing legal implications. First, the constitutionally mandated "Ministerial Exception" provides immunity to churches for all forms of discrimination committed against its ministers.¹⁰ But outside of core church personnel, the application of the religious discrimination exemption to non-ministerial personnel creates a gray area in which prohibited forms of discrimination are entangled with permissible religious discrimination. The Free Exercise Clause prohibits the government from interfering with religious exercise, necessitating the § 702 exemption.¹¹ The Establishment Clause prevents a governmental establishment of religion, preventing religious preference by not holding religious institutions accountable for actions that other employers would be accountable for.¹²

10. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705-06 (2012) ("Since the passage of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. We agree that there is such a ministerial exception.").

11. See U.S. CONST. amend. I.

12. See *id.* Although the Establishment Clause is constantly interpreted and the subject of many disputes, the Court summed up the clause in *Everson v. Board of Education of Ewing Township*:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

The Equal Employment Opportunity Commission (“EEOC”)¹³ and United States Circuit Courts of Appeal¹⁴ have held consistently the religious institution exemption under Title VII is narrowly applicable to religious discrimination and does not exempt other forms of discrimination under Title VII.¹⁵ Despite this, some forms of discrimination by religious institutions are inherently based on both sex and religious discrimination (e.g. pregnancy discrimination of an unwed mother). Perhaps plaintiffs need to do a better job pleading their cases to avoid conflating religious and sex discrimination, which would overcome a defendant’s religious employer exemption. To that end, one novel (yet seemingly viable) pleading of Title VII in a sex discrimination suit against a religious employer is the use of disparate impact theory. Alternatively, maybe courts need to do a better job separating impermissible sex discrimination claims from the permissible religious discrimination claims.

This Article argues that courts must engage in a more vigorous analysis of Title VII claims against religious institutions in order to comport with the purpose and plain meaning of Title VII and to prevent violations of the establishment clause. Part II describes the

330 U.S. 1, 15–16 (1947).

13. See *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/qanda_religion.html (last updated Jan. 31, 2011) (“The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.”).

14. *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (“The legislative history of this exemption shows that although Congress permitted religious organization to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute.”), *abrogated by* *Alcazar v. Corp. of Catholic Archbishop*, 598 F.3d 668 (9th Cir. 2010) *vacated in part, adopted in part* *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010); *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (“Section 2000e-1(a) does not exempt religious organizations from Title VII’s provisions barring discrimination on the basis of race, gender, or national origin.”); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 2000) (“This [religious institution exemption] provision does not, however, exempt religious educational institutions with respect to all discrimination. It merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with sex discrimination.”).

15. This principle also applies to the Americans with Disabilities Act (ADA) and Age Discrimination Employment Act (ADEA). See *Geary v. Visitation of Blessed Virgin Mary Par. Sch.*, 7 F.3d 324 (3d Cir. 1993) (applying the ADEA to lay teachers at a religious school); see also *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1179–80 (N.D. Ind. 2014) (applying the ADA to non-minister church personnel and stating “[b]ecause the first religious exemption under the ADA parallels that of Title VII, it also wasn’t . . . intended to be a blanket exemption for religious employers from application of the ADA.”).

history and background of Title VII, focusing on the ministerial exception, religious institutions exemption, and Pregnancy Discrimination Act. Next, it explains the First Amendment implications of these provisions and the perennial task of balancing the Free Exercise Clause with the Establishment Clause. Part III focuses on the gray area of discrimination claims that fall in between the ministerial exception and the religious institution exemption for non-ministers. Part IV proposes a solution for courts to identify impermissible Title VII discrimination without delving into the church's teachings and violating the Free Exercise Clause, by suggesting equal application of religious discrimination as the touchstone question for courts to analyze. Further, it discusses how one might prove unequal application, and thus sex discrimination, absent direct evidence by using a disparate impact theory. Finally, Part V concludes by arguing that the Establishment Clause is violated when courts refuse to provide redress to sex discrimination victims at religious institutions.

I. HISTORY AND BACKGROUND

A. *Title VII of the Civil Rights Act of 1964*

Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.¹⁶ There are several methods for one to prove she was a victim of unlawful discrimination in the workplace, and depending upon which one she chooses, the pleading standards can be very different. First, a plaintiff can claim that she suffered individual disparate treatment, meaning that the employer intended to discriminate against her because of her membership of a protected class and that she suffered an adverse employment action.¹⁷ Second, she can claim systemic disparate treatment, alleging a pattern or practice (formal or informal) of discrimination that led to an adverse employment action.¹⁸ Finally, using disparate impact theory, a plaintiff can allege that an employer's policies adversely affected a particular group and regardless of its intent or neutrality, the employer engaged in unlawful discrimination.¹⁹ Individual disparate treatment, systemic

16. 42 U.S.C.A. § 2000e-2(a)(1) (West).

17. See *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976).

18. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

19. 42 U.S.C.A. § 2000e-2(k). For a more detailed discussion of disparate impact and the codification of the theory under the 1991 Civil Rights Act Amendments see *infra* Part IV.

disparate treatment, and disparate impact are all ways in which a plaintiff can plead and seek relief under Title VII.

The Act also prohibits an employer from retaliating against employees who engage in protected conduct under Title VII.²⁰ There are two ways one can engage in protected conduct: (1) opposing any illegal practice by the employer, and (2) participating in any Title VII proceeding, investigation, or hearing by filing a charge, testifying, assisting, or participating in any other way.²¹ In order to be protected, the employee engaging in the conduct must have a reasonable belief that the original conduct, to which she opposed, constituted unlawful discrimination.²² This is particularly important in the context of religious discrimination exemption because if a plaintiff sues a religious corporation for retaliation, defining the initial discrimination in which she opposed or participated in is crucial to whether she may seek relief. If the initial conduct is alleged to be religious discrimination, then the plaintiff can go no further because the religious institution is exempt from liability under Title VII.

1. *Sex discrimination and “sex stereotyping” theory*

This section attempts to define sex discrimination under Title VII and discusses the various theories that plaintiffs use to prove they were discriminated against because of their sex. Under Title VII, it is illegal for an employer to discriminate because of sex.²³ Courts have grappled with what exactly “because of sex” means, but have recognized that there may be mixed motivations and an employee’s sex does not have to be the sole motivating factor.²⁴ For instance, the courts recognize sexual harassment as a form of sex discrimination.²⁵ Moreover, sex stereotyping—discrimination because of an in-

20. 42 U.S.C.A. § 2000e-3(a).

21. *Id.*

22. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

23. 42 U.S.C.A. § 2000e-2(a).

24. *See Oncale v. Sundowner OffShore Servs., Inc.*, 523 U.S. 75, 80 (1998) (analyzing what it means to discriminate “because of sex” for purposes of determining Title VII liability); *see also* *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012) (holding that sexual advances constitute discrimination “because of sex”).

25. *See Meritor Sav. Bank v. Vinson* 477 U.S. 57, 67 (1986) (recognizing sexual harassment as a form of sex discrimination under Title VII); *see also* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 *YALE L. & POL’Y REV.* 333, 333 (1990) (“Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment. During the last fifteen years, the courts have extended this prohibition to include sexual harassment.”).

dividual's failure to adhere to traditional sex norms—constitutes illegal sex discrimination under Title VII.²⁶

Some LGBT plaintiffs have sued under the sex stereotyping theory of sex discrimination, even though sexual orientation is not a protected class under Title VII.²⁷ The theory is that the plaintiffs were not discriminated against or harassed because of their sexual orientation, but rather their perceived deviation from traditional sex norms.²⁸ Recently, the Equal Employment Opportunity Commission (EEOC) validated this theory of sexual discrimination and interpreted Title VII to prohibit discrimination of lesbian, gay, bisexual, and transgender employees under the theory of sex stereotyping.²⁹ Additionally, President Obama signed an executive order in 2014, prohibiting federal contractors from discriminating on the basis of sexual orientation and gender identity.³⁰ Although this executive order applies only to a relatively small group of U.S. workers, it, combined with the EEOC's Title VII interpretation, will certainly affect

26. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (“We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.”).

27. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006).

28. *Id.* at 762–63.

29. *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012) (finding that “complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII”); *Veretto v. U.S. Postal Serv.*, EEOC Appeal No. 0120110873, 2011 WL 2663401, at *3 (July 1, 2011) (“The Agency [before appeal] is correct that the Title VII's prohibition of discrimination does not include sexual preference or orientation as a basis . . . Title VII does, however, prohibit sex stereotyping discrimination.”) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649, 2011 WL 6960810, at *2–3 (Dec. 20, 2011) (“[W]e find that Complainant has alleged a plausible sex stereotyping case which would entitle her to relief under Title VII if she were to prevail. Complainant alleged that she was subjected to a hostile work environment when MDO [coworker] made an offensive and derogatory comment about her having relationships with women. Complainant has essentially argued that MDO was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant's failure to adhere to this stereotype. In other words, Complainant alleged that MDO's comment was motivated by his attitudes about stereotypical gender roles in relationships.”); *see Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/federal/otherprotections.cfm> (last visited Nov. 8, 2016).

30. Exec. Order No. 13, 672, 79 Fed. Reg. 42971 (July 21, 2014); *see also* David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, THE WHITEHOUSE (July 21, 2014, 3:00 PM), <http://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers> (quoting President Barack Obama: “It doesn't make much sense . . . but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are—lesbian, gay, bisexual, transgender. And that's wrong”).

courts' decisions and allow homosexual and transgender plaintiffs a greater opportunity to seek redress. Moreover, these changes in law (however slight), in addition to the LGBT community's increased political power, could help achieve a legislative amendment to Title VII to explicitly include LGBT individuals as a protected class.³¹

Some LGBT plaintiffs have been successful under sex stereotyping theory discrimination claims, perhaps partially because of the EEOC's interpretation and courts greater recognition of the theory as a viable way for LGBT individuals to gain protection under Title VII. In *TerVeer v. Billington*, the District Court for the District of Columbia denied defendant's motion to dismiss and held that the plaintiff, TerVeer, sufficiently pled a cognizable claim for sex discrimination based on a stereotyping theory.³² TerVeer worked for the Library of Congress and alleged that his employer created a hostile work environment, denied him a salary increase, and as a result was constructively discharged.³³ His first-level supervisor, with whom TerVeer was friendly, was described as a "religious man" who talked openly about his faith at work.³⁴ Shortly after TerVeer's supervisor learned he was homosexual, he sent TerVeer an e-mail containing photographs of assault weapons with the subject line "Diversity: Let's Celebrate It."³⁵ TerVeer's supervisor also engaged in other allegedly harassing acts: holding a meeting with the stated purpose of "educating [Plaintiff] on Hell and that it is a sin to be a homosexual" and reciting Bible verses to plaintiff.³⁶ TerVeer subsequently received poor performance reviews and filed a complaint alleging sex discrimination because of his perceived failure to adhere to gender stereotypes associated with men.³⁷ Although Title VII does not explicitly protect homosexuals, it does protect men from sex discrimination.³⁸ TerVeer's pleading represents a typical way in which an LGBT individual could bring a claim, as the district court held this as sufficient to state a cause of action.³⁹

31. See generally Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667 (2014) (discussing the history of the LGBT movement and its influence in reforming and passing laws protecting LGBT individuals).

32. 34 F. Supp. 3d 100, 116-18 (D.D.C. 2014).

33. *Id.* at 105.

34. *Id.*

35. *Id.* at 106.

36. *Id.*

37. *Id.* at 107-08.

38. 42 U.S.C.A. § 2000e-2(a)(1) (West).

39. *TerVeer*, 34 F. Supp. 3d at 107-08.

Additionally, discrimination perpetrated against an employee of the same sex is actionable.⁴⁰ All forms of sex discrimination demonstrate an overarching theme: discrimination “because of sex” can take many different forms and is not always clear. Moreover, unconscious bias, societal norms, and social construction of gender often play roles in sex discrimination regardless of whether they were conscious considerations.⁴¹ The central difficulty of discrimination cases can also be the central cause for it—the human psyche is complex, and decisions are rarely based upon one reason or rationale.

2. *Sex discrimination and the Pregnancy Discrimination Act (“PDA”)*

The PDA codifies the prohibition of pregnancy discrimination as a form of sex discrimination.⁴² An employer cannot fire an employee simply because she is pregnant.⁴³ Although an employer can terminate a pregnant employee who is unable to perform the core functions of the job description, the employer would have to treat a similarly situated employee similarly.⁴⁴ For example, suppose a plaintiff was fired because her morning sickness made her late to work and the employer stated her pregnancy and encompassing tardiness was unacceptable. In order to succeed on her claim, the plaintiff would have to prove that the employer would not have fired a male employee who, for example, had insomnia and was often late to work. This can be difficult to do absent concrete comparative examples.⁴⁵ But if an employer simply states that it does not approve of preg-

40. *Oncale v. Sundowner OffShore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”) (internal citations omitted).

41. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995) (“While Title VII jurisprudence gives lip service to the notion that actionable intergroup bias can be subtle or unconscious, courts have so far failed to develop doctrinal models capable of addressing such phenomena—especially subtle or unconscious race and national origin discrimination. This failure, I propose, stems from the assumption that disparate treatment discrimination, whether conscious or unconscious, is primarily motivational, rather than cognitive, in origin. This one-sided understanding of bias leads courts to approach every disparate treatment case as a search for discriminatory motive or intent We need a deeper, more nuanced understanding of what intergroup discrimination is, how and why it occurs, and what we can do to reduce it.”).

42. Pregnancy Discrimination Act, *supra* note 9.

43. *Id.*; 42 U.S.C.A. § 2000e-2(a)(1).

44. See *Maldonado v. U.S. Bank and Mfrs. Bank*, 186 F.3d 759, 762–63 (7th Cir. 1999).

45. See *Geier v. Medtronic, Inc.*, 99 F.3d 238, 243 (7th Cir. 1996).

nant workers, and being pregnant is not related to the job function, that blatant discrimination is illegal.⁴⁶

B. Religious Exemptions from Title VII

Despite the heightened protections from religious discrimination and added obligation of religious accommodation under Title VII,⁴⁷ there are exceptions. Influencing all statutory schemes is the First Amendment.⁴⁸ The Free Exercise Clause requires the government to allow religious institutions to govern their own affairs, choose their personnel, and further their religious missions.⁴⁹ With that restricting Title VII, religious entities are exempt from the religious discrimination prohibition and, on the contrary, are permitted to discriminate on account of religion.⁵⁰ Without such an exemption, Title VII would effectively force religious institutions to employ people of all religious faiths and contravene the basic freedom to exercise religion.⁵¹ Thus, in addition to the constitutional “Ministerial Excep-

46. Pregnancy Discrimination Act, *supra* note 9; *Maldonado*, 186 F.3d at 763 (quoting *Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chi.*, 104 F.3d 1004, 1010 (7th Cir. 1997)) (“[A]n unlawful employment practice occurs whenever pregnancy is a motivating factor for an adverse employment decision.”).

47. Religious discrimination under Title VII is unique and has arguably more robust protections for employees. Under the statute, employers are not only prohibited from discriminating on account of religion but also required to reasonably accommodate religious practices and observances. 42 U.S.C.A. § 2000e(j). But there are several exceptions to this requirement. First, an employer does not have to provide a reasonable accommodation if doing so would create an undue burden on its business. *See supra* note 3 and accompanying text. Second, an employer is free to discriminate if religion is a bona fide occupational qualification (“BFOQ”). *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 354 (7th Cir. 1986) (holding that Jesuit status was a BFOQ to qualify for Jesuit reserved tenure positions in the philosophy department). The mere fact that Congress legislated an affirmative accommodation provision for religion signifies the importance of allowing individuals to practice their religion. In fact, after the Religious Freedom Restoration Act (“RFRA”), in addition to the Free Exercise Clause, it is arguable that such an accommodation would be required because not having it may burden an individual’s right to freely practice his religion. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C.A. §2000bb to 2000bb-4 (West 1993) [hereinafter *RFRA*]).

48. The First Amendment to the United States Constitution states that Congress shall “make no law respecting an establishment of religion or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

49. *Little v. Wuerl*, 929 F.2d 944, 947, 951 (3d Cir. 1991); *see Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012) (“By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”).

50. 42 U.S.C.A. § 2000e-1(a) (West 2012).

51. *See Little*, 929 F.2d at 951 (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices . . .”).

tion” that applies to ministers, Title VII’s religious discrimination exemption also applies to non-ministers.⁵²

1. *The ministerial exception*

For over forty years, courts have interpreted the First Amendment to bar judicial interference in the employment context when the issue arises out of a relationship between a religious institution and one of its ministers—“the ministerial exception.”⁵³ The Supreme Court recently affirmed and upheld this exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.⁵⁴ The Court noted that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.”⁵⁵ The Court continued and held that such action would constitute a violation of the Free Exercise Clause, “which protects a religious group’s right to shape its own faith and mission through its appointments.”⁵⁶ Furthermore, not allowing autonomy and essentially relegating the church’s hiring to conform to government wishes would also violate the Establishment Clause.⁵⁷ The implication is that nondiscrimination laws do not apply in this context; claims of discrimination on grounds of race, sex, national origin, age, or disability are completely barred.⁵⁸ Regardless of intent, severity, or specifics, “ministers” may not bring employment discrimination claims against a religious institution.⁵⁹

In addition to the Court recognizing the ministerial exception in *Hosanna-Tabor*, it also adopted a broad definition of its meaning.⁶⁰ Despite the fact the plaintiff in the case performed secular activities

52. *Id.* at 947–48.

53. *Hosanna-Tabor*, 132 S. Ct. at 705.

54. *Id.* at 706.

55. *Id.*

56. *Id.*

57. *Id.* at 710 (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”); see U.S. CONST. amend. I.

58. 132 S. Ct. at 705.

59. *Id.* at 698.

60. *Id.* at 697, 709 (“[T]he ministerial exception is not limited to the head of a religious congregation The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical.”) (internal quotation and citation omitted).

and was originally hired as a lay teacher, the Court concluded she was a minister.⁶¹ The Court noted that Hosanna-Tabor held plaintiff out as a minister and that she had a distinct role at the school.⁶² Further, accepted a formal call to religious service.⁶³ But the plaintiff was not a formal minister, and although she incorporated religious teachings into her classroom curriculum, she was hired as a lay teacher.⁶⁴ The majority adopted a broad and expansive definition of minister by applying the exception to the plaintiff.

2. *Non-ministerial religious organization exemption*

The original 1964 Title VII exemption allowed for discrimination based on religion but it applied only to religious activities and not secular activities.⁶⁵ In 1972 Title VII was amended to apply the religious discrimination provision to any “religious corporation, association, educational institution, or society” concerning the employment of “individuals of a particular religion to perform work connected with the carrying on by such [employer] of its activities.”⁶⁶

In *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court addressed the 1972 amendment for the first time and addressed whether Congress had gone too far and actually violated the Establishment Clause by favoring religious institutions.⁶⁷ The Court held that the broader religious exemption, which applied to all activities of employees, even those arguably secular in nature, did not violate the Establishment Clause.⁶⁸ In *Amos*, the plaintiff was an employee at a non-profit gymnasium facility ran by The Church of Jesus Christ of Latter-day Saints (“Latter-day Saints”).⁶⁹ He worked as an assistant engineer at the facility for sixteen years and never once had any adverse employment history.⁷⁰

61. *Id.* at 700, 707. (“It is enough for us to conclude . . . that the exception covers Perich [respondent], given all the circumstances of her employment.”).

62. *Id.* at 697.

63. *Id.* at 698.

64. *Id.* at 700.

65. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (emphasis added) (“This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [employer] of its religious activities . . .”) (codified as amended at 42 U.S.C.A. § 2000e-1 (2012)).

66. 42 U.S.C. § 2000e-1(a).

67. 483 U.S. 327, 329 (1987).

68. *Id.* at 330.

69. *Id.*

70. *Id.*

But the plaintiff was fired after failing to obtain a certificate demonstrating that he was a member of the Latter-day Saints and was eligible to attend its temples.⁷¹ The plaintiff argued that applying the religious exemption to non-religious activities would violate the Establishment Clause and go beyond the intention of the exemption.⁷²

The district court focused its inquiry on the meaning of religious activities and concluded that the gymnasium had no connection to the religious activities of the church and that none of plaintiff's duties were "even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration."⁷³ The district court ruled the amendment unconstitutional and stated that the 1972 amendment singles out religious institutions and grants them a benefit not granted to secular organizations.⁷⁴ The Supreme Court disagreed, reasoning that the government itself would have to be advancing and fostering religion in order for the amendment and subsequent application of the exception to violate the *Lemon* test and thus the Establishment Clause.⁷⁵ The Court held that § 702's exemption satisfied the *Lemon* test, was facially neutral, and did not intend to promote religion.⁷⁶ The Court firmly stated that "the exemption involved here is in no way questionable under the *Lemon* analysis."⁷⁷

The plaintiff disagreed, arguing that the exemption went beyond what was needed to protect the Free Exercise Clause and that the original exemption reflected the appropriate amount of governmental exemption.⁷⁸ The Court acknowledged, assuming arguendo, the pre-1972 amendment was constitutionally adequate because it was the minimum exemption needed to not violate the Free Exercise Clause.⁷⁹ But then the Court stated that it would be a burden for religious institutions to distinguish secular from non-secular activities

71. *Id.*

72. *Id.* at 331.

73. *Id.* at 331-32 (quoting Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 594 F. Supp. 791, 802 (D. Utah 1984)) (internal quotations omitted).

74. *Id.* at 333.

75. *Id.* at 330, 335 (reversing the judgment). The *Lemon* test is a three-part test first developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In order for a law not to violate the Establishment Clause, it must satisfy all three prongs. *Id.* at 612-13. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* (internal citations omitted).

76. *Amos*, 483 U.S. at 339.

77. *Id.* at 335.

78. *Id.* at 335-36.

79. *Id.* at 336.

for the purpose of applying the exemption.⁸⁰ According to the Court, religious institutions might fear that courts would misunderstand the tenets and principles of their religion when trying to delineate between secular and non-secular activities.⁸¹ The Court further noted that the legislative history supported its opinion.⁸² And it concluded that, “[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”⁸³

Supreme Court Justice William Brennan wrote a separate concurrence to emphasize his conclusion that the § 702 exemption should apply categorically to non-profits and that there should not be a determination of secular versus non-secular activities because the inquiry alone involved too much church-government entanglement.⁸⁴ But the Justice also recognized the inherent difficulty of applying this exemption to non-religious activities stating that, “[a]s a result, the authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the Establishment Clause.”⁸⁵ And although he ultimately believed that non-profit entities were sufficiently religious to have a categorical exemption, he added that, “[n]onetheless, if experience proved that nonprofit incorporation was frequently used simply to evade Title VII, I would find it necessary to reconsider the judgment in these cases.”⁸⁶

After *Amos*, it was clear that religious institutions had great latitude to base hiring and firing decisions for non-ministerial positions on the tenets of their religion. The plaintiff in *Amos* did not belong to the institutions’ religion for all intents and purposes. The Church of the Latter-day Saints was justified in firing him because he was not eligible to attend the temple and could not receive a certificate saying he was a member. To the church, not being able to attend the temple and not being in good standing were the same as not being a member at all. It would be wholly permissible for a religious institution to refuse to employ a person of another faith or without faith. But there remains a slightly more interesting scenario in which an

80. *Id.*

81. *Id.*

82. *Id.* at 338.

83. *Id.*

84. *Id.* at 341–42 (Brennan, J., concurring).

85. *Id.* at 343.

86. *Id.* at 344 n.4.

employee is fired not for being of a different religion, but for being a less than ideal member of the same religion.⁸⁷

Should religious institutions be able to legally discriminate, not just against employees of a different faith, but also against employees who are inadequately faithful? One could argue that is exactly what the Church of the Latter-day Saints did to Mr. Amos. But even if that were true, there was a proxy they used to determine his reprobate status. He failed to obtain a certificate and was not allowed to attend church temples – he was essentially non-Mormon because he was unable to practice the faith.⁸⁸ In other instances, the employee's offense that warrants an adverse employment discrimination may not be as clear and may not violate the religious tenets of a particular faith.

In *Little v. Wuerl*, Susan Long Little, a Protestant school teacher, alleged that she was terminated from her Roman Catholic employer because she remarried.⁸⁹ The Court of Appeals for the Third Circuit held that the decision not to renew her contract was based on permissible religious discrimination.⁹⁰ However, the court recognized that this was not a clear preference for Catholics over non-Catholics, and the court was forced to consider “whether Title VII applies to a Catholic school that discriminates against a non-Catholic because her conduct does not conform to Catholic mores.”⁹¹ Ultimately, the court declined to address the question directly but instead interpreted the statute broadly and concluded that the plaintiff was barred from bringing her claim.⁹² The Third Circuit was concerned about constitutional implications and stated, “[b]ecause applying Title VII in these circumstances would raise substantial constitutional questions and because Congress did not affirmatively indicate that Title VII should apply in situations of this kind, we interpret the exemption broadly and conclude that Title VII does not apply.”⁹³ But the facts created an interesting case for Susan Long Little.

Little served as an elementary teacher for nearly ten years but never taught religion, although she incorporated Catholic values into her regular curriculum.⁹⁴ By all accounts she was a good teacher,

87. *Id.* at 343.

88. *Id.*

89. 929 F.2d 944, 946 (3d Cir. 1991).

90. *Id.*

91. *Id.* at 945.

92. *Id.* at 950–51.

93. *Id.* at 945.

94. *Id.*

with no adverse employment history, and was tenured.⁹⁵ Normally, Little would not be fired absent just cause.⁹⁶ But Little was terminated when she remarried.⁹⁷ The Parish asserted that she was fired because she violated the handbook, which allowed the termination of employees that violated public immorality or rejected the official teachings of the Catholic Church.⁹⁸ The key dispute concerned whether Little was fired because she rejected the teachings of the Catholic Church.⁹⁹ According to the court, it was compelled by the Constitution to decline to engage in such an inquiry because such action would violate both the Free Exercise and Establishment Clause.¹⁰⁰ Little argued that she was hired as a Protestant and if they fired her because of that, the Parish would be estopped from the religious exemption.¹⁰¹ The court disagreed; the First Amendment strictly prohibits that sort of detailed inquiry into the meaning of the Church's doctrine.¹⁰² In these situations, the problem is two-fold. First, it poses a larger First Amendment problem by requiring the courts to make possibly impermissible inquiries into the tenets of a religion. Second, it raises the risk that the discrimination is not based on clear religious reasons but other forms of illegal discrimination.

II. PROBLEMATIC IMPLICATIONS OF THE RELIGIOUS EXCEPTION AND EXEMPTION

Discrimination based on religion by religious institutions is undoubtedly legal and necessary. Discrimination or retaliation (outside the ministerial context) based on race, sex, age, disability, or na-

95. *Id.*

96. *Id.*

97. *Id.* at 946.

98. *Id.* The handbook reads in relevant part:

9.5 Just Cause Termination: One example of termination for just cause is a violation of what is understood to be the Cardinal's Clause. The Cardinal's Clause requires the dismissal of the teacher for serious public immorality, public scandal or public rejection of the official teachings, doctrine or laws of the Catholic Church. *Examples of the violation of this clause would be the entry by a teacher into a marriage which is not recognized by the Catholic Church, or the support of activities which espouse beliefs contrary to Church teaching, e.g. advocacy of a practice such as abortion.*

Id.

99. *Id.*

100. *Id.* at 948 (“[I]f this court were to review the Parish’s decision, it would be forced to determine what constitutes ‘the official teachings, doctrine or laws of the Roman Catholic Church,’ and whether plaintiff has ‘rejected’ them.”).

101. *Id.* at 951.

102. *Id.*

tional origin is illegal under Title VII, the Americans with Disabilities Act (“ADA”), and the Age Discrimination in Employment Act (“ADEA”).¹⁰³ But when discrimination could constitute both sex and religious discrimination, the question of liability for religious institutions becomes complex.¹⁰⁴ One of the most problematic areas where these two forms of discrimination converge is in pregnancy of unwed employees at religious institutions. On the horizon, a potentially bigger issue will be sexual orientation. Successful Title VII claims for discrimination based on sexual orientation are actually brought vis-à-vis sex-stereotyping theory of sex discrimination.¹⁰⁵ Discerning the reason for discrimination is difficult because there can often be a mixed-motivation for the alleged discriminatory action and it is also impermissible for courts to delve too far into the religious tenets of the defendant.

In *Boyd v. Harding Academy of Memphis, Inc.*, a preschool teacher was terminated because of her pregnancy as an unwed woman.¹⁰⁶ After the plaintiff informed the Christian school about her pregnancy, the administration terminated her, telling her that being pregnant and unwed would set a bad example for students.¹⁰⁷ The defendant argued that the pregnancy itself was not the basis of the dis-

103. See *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982), *abrogated by* *Alcazar v. Corp. of Catholic Archbishop*, 598 F.3d 668 (9th Cir. 2010) *vacated in part, adopted in part* *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010).

104. This section identifies the gray area of discrimination between legal religious discrimination and illegal sex discrimination, and the next section proposes a solution. Additionally, it discusses LGBT discrimination in the form of sex stereotyping. Several scholars have identified the same problem with regards to sex discrimination (not LGBT discrimination) and have proposed solutions. While this article does not propose solutions using any of their frameworks, it is still helpful to evaluate their arguments. See, e.g., Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U.L. REV. 369, 373 (1996) (arguing that “principles of church autonomy do not constrain judicial resolution of employment disputes under Title VII, because such disputes represent essentially secular rather than ecclesiastical controversies”); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1060 (1996) (arguing that “remedies can be crafted to dismantle discrimination while minimizing the impact on religious liberties by providing a full range of remedies for non-religiously based discrimination, but more limited remedies when the discrimination is religiously based”); Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2007–08 (2007) (arguing that “government regulation of any church employment decision would extend the civil government’s authority into areas of exclusively religious cognizance” and concluding “that the Free Exercise Clause exempts all church employment decisions from the requirements of Title VII”).

105. I briefly note that discrimination based on secular orientation is illegal in some states and cities, but that has no bearing on its absence from Title VII.

106. 88 F.3d 410, 412 (6th Cir. 1996).

107. *Id.*

crimination; it was that she had engaged in sexual relations while unmarried.¹⁰⁸ The defendant's argument was supported by the fact that it had fired at least four other individuals for engaging in extramarital relations, one of whom was male.¹⁰⁹ The district court properly concluded and the circuit court affirmed that there was no differentiating treatment between the male and female employees.¹¹⁰ In this case, the court inquired as to whether the school had applied its policy to both male and female employees, which is necessary under a Title VII analysis. The central question becomes whether the employer applied a gender-neutral policy based on its religious institution or committed sex discrimination because of one's pregnancy. But some courts consider this question more carefully than others.

In *Cline v. Catholic Diocese of Toledo*, the plaintiff sued after being terminated for engaging in premarital sex and becoming pregnant.¹¹¹ The district court granted summary judgment in favor of the defendant and held that the diocese lawfully discriminated on the basis of religion.¹¹² The Court of Appeals for the Sixth Circuit reversed the judgment because the plaintiff had put forth sufficient evidence to create a dispute as to whether the policy applied to both men and women.¹¹³ The court of appeals properly reversed and its analysis turned on the equal applicability of the religious institution's policy.

In *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, the Third Circuit held that firing a Catholic School teacher for signing a pro-choice petition in the local newspaper constituted permissible religious discrimination.¹¹⁴ Although the plaintiff alleged an unfair application of the policy, she offered no proof to support that claim.¹¹⁵ She made only a blanket allegation that male employees who committed similar moral digressions were not punished.¹¹⁶ Moreover, the Free Exercise Clause requires courts to stay focused on the policy in dispute and not engage in comparing acts of other employees to essentially rate their adherence to the religious doc-

108. *Id.* at 413.

109. *Id.* at 412.

110. *Id.* at 414.

111. 206 F.3d 651, 657 (6th Cir. 2000).

112. *Id.* at 659.

113. *Id.* at 667.

114. 450 F.3d 130, 130 (3d Cir. 2006).

115. *Id.* at 139.

116. *Id.*

trine.¹¹⁷ Thus, without concrete proof of discriminatory application of policies, plaintiffs will be unable to prove that they were singled out because of sex.

III. IDENTIFYING PERMISSIBLE RELIGIOUS DISCRIMINATION

A. *Disparate Impact as Applied to Religious Exemption Cases*

One Title VII theory of discrimination that has not been used in the context of dual sex and religious discrimination claims: disparate impact. Although the previous cases turned on whether the religious institutions' policies were applied equally, application may not matter if there is a creation of a disparate impact. Disparate impact theory was first developed by the Court in *Griggs v. Duke Power Co.*¹¹⁸ In a disparate impact case, a plaintiff can prove her case by showing that a facially-neutral policy constituted employment discrimination, regardless of intent, because it disproportionately and negatively affected a protected class.¹¹⁹

Disparate impact theory could benefit plaintiffs in cases where there is a mix of religious and sex discrimination and where there is a lack of proof of unequal application of a policy. For example, if a religious institution had a policy to fire any person who became pregnant outside of the marriage, that would affect only women and thus create a disparate impact. But if that policy was based on a religious policy, then presumably it is permissible under Title VII. More likely, the religious institution would have a policy prohibiting premarital sex. Suppose a plaintiff becomes pregnant and is then fired for engaging in premarital sex. She files a claim and alleges that the institution subjected only female employees to its policy and not male employees. In order to succeed, she would have to put forth a specific example of a time that a male employee engaged in premarital sex, the employer was aware, and the employer chose not to apply the policy. Given the nature of proving premarital sex, this seems unlikely. But if the plaintiff claimed disparate impact, then the focus would not be on the differential treatment but rather the disparate impact.

If the plaintiff demonstrates multiple instances of females being fired for violating the policy and not one instance of a male employee being fired, then there would be a threshold showing of disparate

117. *Id.*; see U.S. CONST. amend. I, cl. 2.

118. 401 U.S. 424, 424 (1971).

119. See generally Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 914 (2006).

impact. Of course, the defendant would then have the opportunity to present its defense. The religious institution would have at least two viable defenses: (1) the discrimination, regardless of impact, was based on a legal and permissible religious reason; and (2) the discrimination was a business necessity.

Proving that the policy is invalid because it creates a disparate impact would be difficult if it is based upon legitimate religious discrimination. However, a plaintiff may be able to prove that there was unequal application of the facially valid policy. A policy against premarital sex certainly would be valid. But if a critical mass of female employees were consistently being fired and not one male was fired, that would suggest an uneven application of the policy. Ultimately, one might argue that it is inherently difficult (if not impossible) to prove that male employees violated the policy but on the contrary quite easy to prove when an unwed female employee becomes pregnant. Regardless of whether plaintiffs are successful, pleading disparate impact based on sex discrimination might be a way to survive summary judgment and overcome the religious exemption when the discrimination might constitute both religious and sex discrimination.

B. Equal Application of Religious Discrimination

Coinciding with disparate impact, courts should focus on equal application of the religious institutions' policies in evaluating discrimination claims. Although religious institutions are exempt from religious discrimination claims, if they are applying the policy only to their female employees, then the discrimination is not based on religion (or at least not solely) but rather, on sex. Equal application could be used as the touchstone inquiry in mixed discrimination cases involving religious institutions. For example, consider again *Little v. Wuerl*.¹²⁰ There is a plausible way Little might have won her case without the court delving into the question of what it means to be a good Catholic or what it means to reject the teachings of the Catholic Church. The court accepted that remarrying outside the Catholic Church rejected the teachings of the Catholic Church.¹²¹ However, it failed to ask, or perhaps the plaintiff failed to put forth, whether that policy was applied evenly to all church employees. Maybe there were specific examples of male teachers remarrying outside the Church and still remaining employed. If there were not,

120. 929 F.2d 944 (3d Cir. 1991).

121. *Id.* at 947.

then there might be an abundance of female teachers who were terminated for the same reason and that could be used as the basis of a disparate impact claim. The Church would then have a chance to rebut, but it would get the plaintiff past the pleading stage and give her the opportunity to show unequal application.

Of course there are other constitutional concerns associated with the equal application question that should be considered. First, the unequal application could be a result not of an official disparity, but rather individual choice—such as a change in parish leadership. Certainly a court could not delve into the decision making of individual priests or ministers. It is plausible and even likely that parishes make decisions based on various factors, such as the stance of the priest or the geographical location of the church. That may be one explanation for the parish's decision in *Little v. Wuerl* not to fire her for her divorce, but to subsequently fire her for the remarriage. This is where the disparate impact theory and unequal application intersect. If there is a disparate impact, then the court need not delve into why it exists—unless the church puts forth a reason for the court to evaluate. The religious institution, however, could simply assert that the disparity is because only women in its parish remarried outside the church and no men did. It would then be up to the trier of fact to determine if the discrimination was based on religion or if it was based on sex. The question would not be whether the policy or the particular religious tenet was valid (that would be presumed), instead it would look to the application of the policy as evidence of discrimination.

Perhaps Justice Brennan's concurrence in *Amos* would be helpful in evaluating the prevalence of the issue.¹²² Justice Brennan stated that religious non-profit entities should be given a categorical exemption because of the presumably religious nature of their work unless they are doing it under the guise of avoiding Title VII liability.¹²³ It is doubtful that religious institutions are intentionally incorporating as non-profits in order to actively violate Title VII. It is possible, however, that they have slowly engaged in more sex discrimination because of their categorical exemption and because of the ever-expanding definition of sex discrimination. At the time that Congress amended the § 702 exemption in 1972 to apply to secular activities and not just religious activities, it was six years before Title

122. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring).

123. *Id.* at 343.

VII was amended to include the Pregnancy Discrimination Act.¹²⁴ Before the time it was codified, courts did not recognize pregnancy discrimination as a form of sex discrimination.¹²⁵ In other words, if a religious institution did fire a woman on account of her pregnancy, it would not have even needed the religious exemption. Moreover, there are more mothers and pregnant women in the workforce than ever before, and naturally there will be more discrimination claims (presumably from proportionally increased discrimination).¹²⁶

Another expansion of the definition of sex discrimination is the recognition of workplace sexual harassment. Before the early 1990s, courts did not readily recognize sexual harassment in the form of hostile work environment claims.¹²⁷ And to a large degree, neither did the general public.¹²⁸ But now that sexual harassment is a recog-

124. See *supra* note 3 and accompanying text.

125. In *General Electric Co. v. Gilbert*, the Supreme Court held that the employer did not violate Title VII because its disability plan excluded coverage for pregnancy-related disabilities. 429 U.S. 125, 145–46 (1976). In a perplexing analysis, the Court reasoned that women were not less protected than men under the plan and stated, “the program divides potential recipients into two groups: pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). The Court was remiss in failing to recognize that while it is true that both men and women could be nonpregnant, only women are capable of being pregnant. As a response to the Court’s decision, Congress passed the Pregnancy Discrimination Act and overruled the Court’s holding. See generally Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67, 67 (2013) (explaining that the Pregnancy Discrimination Act of 1978 was passed with the “specific purpose” of remedying the Supreme Court’s failure to identify pregnancy discrimination as a form of sex discrimination under Title VII).

126. See *Women in the Labor Force in 2010*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited Sept. 18, 2016).

127. Prior to this time, *quid pro quo* claims were regularly brought and decided, but whether a hostile work environment was actionable under Title VII was unclear. The Supreme Court first addressed the relevant standard for sexual harassment claims in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Court held in *Meritor* that for sexual harassment to be actionable it must be either “sufficiently severe or pervasive.” *Id.* at 67. It further clarified this standard in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and held that “no tangible psychological injury” is necessary but both objective and subjective injury is required. *Id.* at 21–22; see also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151 (1994) (criticizing the *Harris* standard for reinforcing gender subordination, and arguing for a more individualized subjective standard that considers the disposition of the victim).

128. Professor Anita Hill’s testimony during Clarence Thomas’s 1991 Supreme Court confirmation hearing is often viewed as a turning point of public awareness about sexual harassment. See Marcia D. Greenberger, *What Anita Hill Did for America*, CNN (Oct. 22, 2010, 9:54 AM), <http://www.cnn.com/2010/OPINION/10/21/greenberger.anita.hill/> (“The issue of sexual harassment was out of the shadows. Before Hill’s testimony, sexual harassment was viewed as a problem for victims, predominantly women, to solve on their own. Most women suffered in silence rather than jeopardize their careers by complaining.”). Following Hill’s testimony, there was public outrage about the issue of workplace sexual har-

nized discrimination theory, the pre-dated religious exemption could cause potential conflict. For example, the conflict could manifest in a discrimination retaliation claim. Suppose a woman was sexually harassed at her religiously affiliated employer. She complained to her superior, but for whatever reason, the superior believed that she was causing too much trouble and she should be terminated. At the time of termination, she was pregnant and the stated reason of her termination was her pregnancy as an unwed woman. If the employer states religious discrimination as the reason for its decision, it may forbid a retaliation claim under sex discrimination. It is also possible that the employee's termination was due to a mix of motivations. But the women would have a difficult time succeeding on the retaliation claim because that would require the courts to delve into the workings of that particular church. Absent written or physical proof of the harassment, the court would have to evaluate the validity of the claim and how the church handled it, and then ask whether that was the true reason for termination, as opposed to the church's stated reason. In addition to Establishment Clause issues, this sort of inquiry puts courts in a less than desirable position—one that is skeptical and distrustful of the church. Perhaps that is not a negative, after all, courts investigate any other defendants in the same manner; but it is a compelling consideration.

In addition to the already complex intersection between unlawful sex discrimination (in the form of pregnancy discrimination, harassment, and retaliation) and lawful religious discrimination, there is potential for a new surge of claims vis-à-vis sex stereotyping. Suppose, for example, that a religious employer heard rumors or suggestions that one of its employees was homosexual and consequently it might be inclined to fire him. If the employee was openly homosexual and that contravened the church's teaching, then such firing would constitute permissible religious discrimination. But what if the employee was merely flamboyant and exhibited characteristics of stereotypical homosexual men? Or put another way, the employee exhibited characteristics that diverged from those of a stereotypical heterosexual man. The employer has no knowledge that the employee is homosexual, but it strongly suspects it. Then, the decision would not be based on lawful religious reasons, it would be based on sex stereotyping, and thus actionable under Title VII. Would it matter though if the employee was or was not indeed homosexual? In a typical discrimination claim, the intent of the dis-

assment and the CRA was amended in 1991 to strengthen the prohibition against sexual harassment. *Id.*

criminator matters even if such animus was based on a false assumption about the plaintiff. But here, the context is much different because the inquiries of whether the plaintiff was homosexual, whether the church knew he was homosexual, what steps it took to discern this fact, and what was the true reason for the termination, might in itself violate the Establishment Clause. Once again, it puts religious institutions and churches in a delicate position.

Yet, there is still one option that gives more robust protection to defendants without having to question churches' motives: repeal the religious exemption's applicability to non-secular activities. Arguably, this could complicate the inquiry by forcing courts to delineate between secular and non-secular activities.¹²⁹ The Court briefly addressed this issue in *Amos* and stated that such an inquiry may burden churches.¹³⁰ It is a fair point to evaluate the line between secular and non-secular activities, especially considering the subsequent passing of RFRA. But one could argue that distinguishing between secular and non-secular activities is easier than determining an individual's motivations for firing an employee when the action could be ostensibly based on sex or religious discrimination—or a combination of both. Justice Brennan also stated that the inquiry might cause religious institutions to *fear* entanglement; he did not state that it would *per se* constitute entanglement.¹³¹ Moreover, Justice Brennan recognized that excessive benefits to religious institutions, in the form of evading liability for Title VII violations through its exemption as applied to non-secular activities, could constitute an Establishment Clause violation.¹³²

Without a categorical exemption, church personnel and religious activities would still have absolute protection from government intrusion. But if a plaintiff brought a sex discrimination suit with respect to non-secular activities, the defendant would not be able to state lawful religious discrimination. Thus, the inquiry would be narrowly focused on the alleged sex discrimination and not on whether the church is acting in bad faith and stating a pretense. While an inquiry into secular and non-secular activities is potentially problematic, there are certainly church activities that are objectively secular or not. For example, Mr. Amos was an engineer who

129. See *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987).

130. *Id.*

131. *Id.* at 343 (Brennan, J., concurring).

132. *Id.*

worked at a non-profit gym owned by the Latter-Day Saints.¹³³ It is reasonable for a court to absolutely describe his position as non-secular, and indeed the Court did.¹³⁴ Such inquiry is surely less offensive than questioning whether a church is lying to the court about why it fired a particular employee. Amending the exemption to exclude secular activities could potentially create brighter lines. Despite the Court upholding the § 702 amendment, Justice Brennan did contemplate its future inapplicability, stating, “[n]onetheless, if experience proved that nonprofit incorporation was frequently used simply to evade Title VII, I would find it necessary to reconsider the judgment in these cases.”¹³⁵ Maybe congressional reconsideration of the religious exemption for non-secular activities is precisely the solution. But it is still possible to keep the exemption as is and instead, better evaluate mixed discrimination claims through a combination of utilizing disparate impact and by making equal applicability of religious policies the touchstone inquiry.

CONCLUSION

Title VII’s § 702 exemption is constitutionally necessary to protect the First Amendment. But its application to secular activities is arguably superfluous; the Court in *Amos* and Brennan’s concurrence acknowledged that the amended exemption might be more than the Constitution demands.¹³⁶ Nevertheless, Congress chose to provide added protections to protect the autonomy of religious institutions, which is permissible so long as it does not violate the Establishment Clause. It is debatable whether the problem of sex discrimination being swept into permissible religious discrimination is large enough as to say it violates the Establishment Clause. Congress is not promoting the religion, and its exemption is grounded in a concern for the First Amendment. Still, the problem should be evaluated.

Besides a congressional amendment, plaintiffs can try using a disparate impact claim to show an unequal application of religious discrimination and thus show sex discrimination. If courts begin recognizing this as a valid way to prove sex discrimination and to differentiate from permissible religious discrimination, then Congress may take notice. Disparate impact in the first instance was a judicially recognized theory of sex discrimination that was eventually codi-

133. *Id.* at 330 (majority opinion).

134. *See id.* at 330–31.

135. *Id.* at n.4 (Brennan, J., concurring).

136. *See id.* at 340.

fied in the 1991 Civil Rights Act Amendments. The Pregnancy Discrimination Act was a response to courts not recognizing pregnancy discrimination as illegal sex discrimination. Moreover, the EEOC and courts are beginning to protect LGBT plaintiffs by recognizing the validity of sex stereotyping as a form of redress. It is possible that Congress will eventually amend Title VII to comport with this trend and explicitly protect LGBT employees under Title VII. Right now, § 702's religious exemption is difficult to overcome. Without a novel pleading scheme or a congressional amendment, it is unlikely that courts will delve into a deeper analysis of sex discrimination claims against religious institutions that such institutions deem religious. But if plaintiffs begin using disparate impact to aid their cases, maybe Congress will evaluate the exemption just as it did other forms of Title VII discrimination.