USING RELIGION TO PROTECT TRANSGENDER EMPLOYEES FROM DISCRIMINATION

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Whether Title VII of the Civil Rights Act of 1964 prohibits discrimination against transgender employees is uncertain. Federal appellate courts either disagree or are undecided on this issue, and the last two presidential administrations have taken conflicting positions as well. Disagreement centers on whether Title VII's proscription against discrimination "because of . . . sex" is broad enough to encompass transgender discrimination. Some courts define sex narrowly to mean only one's biological sex assigned at birth, whereas others construe it more expansively to include gender identity. After decades of silence, the Supreme Court agreed to take a first look at this issue during its 2019–2020 term.

This Article assesses whether Title VII's protections can be extended to transgender employees without wading into the debate over the statutory meaning of sex, by instead analogizing transgenderism to religious conversion. A few district courts, the EEOC, and most recently the Sixth Circuit have made this argument, reasoning that because discrimination against an employee who converts from one religion to another constitutes discrimination "because of . . . religion," discrimination against an employee who transitions from one sex to the other must likewise constitute discrimination "because of . . . sex." This Article scrutinizes this analogy, questioning whether sex and religion are comparable protected traits, whether transgenderism and religious conversion are comparable processes, and whether Title VII actually prohibits discrimination against religious converts. The conversion analogy not only holds up to this scrutiny but emerges stronger as a result. It thus offers a path forward to protect transgender employees from discrimination that sidesteps the thorny issues about the meaning of sex that have plagued transgender discrimination jurisprudence in the past.

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I. INTRODUCTION

The struggle for transgender rights in the United States is not new.[1] But the movement is presently receiving unprecedented attention, as a series of recent, high-profile events have served as flashpoints for heated debate.[2] Scrutiny of

1. The transgender rights movement dates back to at least the 1950s, when Christine Jorgensen became the first American to receive widespread press for undergoing sex reassignment surgery. *See Administrative Law–Identity Records–Social Security Administration Eliminates Surgical Requirement for Changing Trans Individuals' Gender Markers–Soc. Sec. Admin., Program Operations Manual System*, 127 HARV. L. REV. 1863, 1867 (2014) (explaining that Jorgensen was the "first person to receive mainstream American press attention for her trans status"); *see also* JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 1 (2002) (noting that the press dubbed Jorgensen as an "Ex-GI" turned "Blonde Beauty").

2. For example, in 2015, Olympic hero and reality television star Bruce Jenner captivated the nation after coming out as a transgender woman in a *20/20* interview with Diane Sawyer. *See* Sean Dooley et al., *Bruce Jenner: 'I'm a Woman'*, ABC NEWS (Apr. 24, 2015, 11:17 PM), https://abcnews.go.com/Entertainment/bruce-jenner-im-woman/story?id=30570350. In 2016, the Obama Administration directed schools to allow students to use the restrooms and locker rooms that match their gender identities. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION & U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. It also lifted the longtime ban on transgender people serving openly in the armed forces. TERRI MOON CRONK, *TRANSGENDER SERVICE MEMBERS CAN NOW SERVE OPENLY, CARTER ANNOUNCES*, U.S. DEP'T OF DEF. (June 30, 2016), https://www.defense.gov/News/Article/Article/822235/transgender-service-members-can-now-serve-openly-carter-announces/. That same year, Army Private Bradley Manning, who was convicted in the leak of national security secrets that propelled WikiLeaks to prominence, underwent a highly publicized hunger strike until the federal government agreed to provide him with sex reassignment surgery while serving his prison sentence. *See* Krishnadev Calamur, *The End of Chelsea Manning's Hunger Strike*, ATLANTIC (Sept. 14, 2016), https://www.theatlantic.com/news/archive/2016/09/chelsea-manning-hunger-strike-ends/499925/. In 2017, transgender access to public restrooms reached the national stage when the U.S. Supreme Court initially granted certiorari on transgender teenager Gavin Grimm's challenge to his high school's refusal to allow him to use the boys' restroom, consistent with his gender identity, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 369 (2016), but ultimately declined to hear the case after the Trump Administration rescinded protections for transgender students in public schools. Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017); *see also* Pete Williams, *Supreme Court Rejects Gavin Grimm's Transgender Bathroom Rights Case*, NBC NEWS (Mar. 6, 2017, 10:00 AM), https://www.nbcnews.com/news/us-news/u-s-supreme-court-rejects-transgender-rights-case-n729556. In 2018, President Trump reinstated limitations on transgender military personnel, banning transgender troops who require surgery or significant medical treatment from serving in the military except in select cases. Press Release, The

transgender rights has permeated the workplace, where questions persist about whether Title VII of the Civil Rights Act of 1964 prohibits discrimination against transgender employees. Uncertainty stems from ambiguity within the statutory text itself. Title VII makes it unlawful for an employer to discriminate against an applicant or employee "because of such individual's race, color, religion, sex, or national origin."[3] But unlike other federal and state statutes that expressly prohibit gender-identity-based discrimination,[4] Title VII contains no such reference. In 2014, the Obama Administration issued a memorandum wherein then-Attorney General Eric Holder declared "that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," and that the Department of Justice would "no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination)."[5] But three years later, the Trump Administration reversed course, issuing its own memorandum in which then-Attorney General Jeff Sessions proclaimed that "Title VII expressly prohibits discrimination 'because of . . . sex' and several other protected traits, but it does not refer to gender identity."[6] Consequently, the Department of Justice presently is of the view that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status."[7]

The courts began grappling with this issue long before the Obama and Trump Administrations weighed in, yet they too have failed to reach a consensus on whether Title VII applies to transgender discrimination.[8] Although the trend

White House: Office of the Press Secretary, Military Service by Transgender Individuals (Mar. 23, 2018), https://www.politico.com/f/?id=00000162-5590-df2f-a7e2-d7d2ebe00001.

3. 42 U.S.C. § 2000e-2(a)(2) (2018).

4. *See, e.g.*, 18 U.S.C. § 249 (2012) (criminalizing certain offenses motivated by a victim's "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability"); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 42 U.S.C.) ("No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [certain federal laws].") (citations omitted); 775 ILL. COMP. STAT. 5/1-103(O-1) (2016) (prohibiting employment discrimination based on sexual orientation, which includes "actual or perceived . . . gender-related identity, whether or not traditionally associated with the person's designated sex at birth"); 28 R.I. GEN. LAWS § 28-5-7(1)(i) (2012) (prohibiting employment discrimination based on "sex, sexual orientation, gender identity or expression").

5. Memorandum from Eric Holder, Attorney Gen., to U.S. Attorneys & Heads of Dep't Components (Dec. 15, 2014), https://www.justice.gov/file/188671/download [*hereinafter* Holder Memo].

6. Memorandum from Jeff Sessions, Attorney Gen., to U.S. Attorneys & Heads of Dep't Components (Oct. 4, 2017), https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf [*hereinafter* Sessions Memo].

7. *Id.* The Trump Administration appears willing to double down on this position, as it is rumored to be considering establishing a legal definition of sex under Title IX of the Civil Rights Act, which bans sex discrimination in certain education programs, as "a person's status as male or female based on immutable biological traits identifiable by or before birth." *See* Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

8. *See infra* Sections II.A–B.

among the federal circuits is to recognize transgender discrimination as a form of sex discrimination,[9] a number of courts, including the Fifth and Tenth Circuits, have reached the opposite conclusion.[10] After decades of silence, the Supreme Court agreed to consider this issue for the first time by granting certiorari in *R.G. & G.R. Harris Funeral Homes v. EEOC*.[11] But whether the Court will actually resolve this issue on its first pass or decide the case on narrower grounds, as it is often inclined to do,[12] is anyone's guess. And regardless of how the Court decides the case, it is unlikely to have any direct impact on state and local sex discrimination laws.

Transgender rights advocates often perceive religion as a major obstacle in their quest for equality[13]—a hardly unreasonable view in light of numerous instances of religious opposition to transgender equality in recent years.[14] Indeed,

9. *See infra* Section II.B.

10. *See infra* Section II.B.

11. 139 S. Ct. 1599 (Mem.) (2019).

12. Justice Sonia Sotomayor has been vocal about how narrow rulings can protect the Supreme Court's legitimacy, commenting at a Princeton University conference for women, "To the extent we can avoid ruling in such expansive ways as to foreclose continued conversation, I think we have a chance of holding onto our legitimacy." Josh Gerstein, *Kagan Fears Supreme Court Losing Swing Justice*, POLITICO (Oct. 5, 2018, 8:25 PM), https://www.politico.com/story/2018/10/05/elena-kagan-supreme-court-kennedy-877288. Justice Elena Kagan similarly remarked to the American Bar Association that "during these polarized times to look and see if there's something smaller we can agree on, some greater consensus we can achieve." *What Justice Kagan Told ABA About Decision-Making, Politics, Pro Bono, More*, AM. B. ASS'N (Nov. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/november-2018/what-justice-kagan-told-the-aba-about-decision-making--politics-/.

13. *See, e.g.*, Dawn Ennis, *New Campaign to Target Christian Anti-Transgender Activists as 'Hate Groups*,*'* LGBTQ NATION (Apr. 18, 2017), https://www.lgbtqnation.com/2017/04/new-campaign-target-christian-anti-transgender-activists-hate-groups/ (reporting the formation of the Eliminate Hate Campaign, a coalition of LGBTQ advocacy groups, whose aim is to apply pressure to the media to label religious right and family values organizations as hate groups); Jay Michaelson, *Stop Kidding Yourself: This is the Christian Right's Presidency*, DAILY BEAST (Oct. 9, 2017, 5:00 AM), https://www.thedailybeast.com/stop-kidding-yourself-this-is-the-christian-rights-presidency (claiming the Sessions Memo was the product of "the same culture war issues that the Christian right has been fighting for years, and that Sessions himself had discussed in secret sessions with Christian right organizations"); Andrew Sullivan, *The Religious Right's Suicidal Gay Obsession*, N.Y. MAG. (Sept. 8, 2017), http://nymag.com/daily/intelligencer/2017/09/the-religious-rights-suicidal-gay-obsession.html ("Christianity doesn't have to grapple at all with the testimony or experiences of gay or transgender people, because, we don't, strictly speaking, exist. At best, we are beset with 'psychological conditions' that lead us into sin and Hell.").

14. Since 2015 alone, leaders from more than 150 evangelical Christian organizations published a statement of faith known today as the *Nashville Statement*, affirming "that adopting a . . . transgender self-conception is [in]consistent with God's holy purposes in creation and redemption" and that "it is sinful to approve of . . . transgenderism." *NASHVILLE STATEMENT*, COAL. FOR BIBLICAL SEXUALITY, https://cbmw.org/nashville-statement/ (last visited Apr. 2, 2020). Pope Francis denounced sex reassignment surgery, remarking that "the biological and physical manipulation of sexual difference, which biomedical technology allows us to perceive as completely available to free choice—which it is not!—thus risks dismantling the source of energy that nurtures the alliance between man and woman and which renders it creative and fruitful." Trudy Ring, *Pope Blasts Gender-Confirmation Surgery*, ADVOCATE (Oct. 5, 2017, 9:25 PM), https://www.advocate.com/religion/2017/10/05/pope-blasts-gender-confirmation-surgery. Islamic leaders banned a transgender congregant from a Tempe, Arizona, mosque unless she dressed as a man or could "prove" she was a woman. *See* Miriam Wasser, *Transgender Woman Barred from Tempe Mosque Unless She Dresses as a Man or Can "Prove" She's a Woman*, PHX. NEW TIMES (Nov. 26, 2015, 4:30 AM), http://www.phoenixnewtimes.com/news/transgender-woman-barred-from-tempe-mosque-unless-she-dresses-as-a-man-or-can-prove-shes-a-woman-7605136. And at an Orthodox Jewish school in Manchester, England, teachers ordered students to shun a classmate whose father transitioned to a

the clash between religion and transgender rights in the workplace is center stage in *Harris Funeral Homes*,[15] as the case involves a claim by a funeral home owner that he was justified in terminating an employee who expressed an intent to undergo sex reassignment surgery because the owner believed he would be violating God's commandments if he continued to employ an individual who denied his "immutable God-given" sex.[16] Of course, not all religions or people of faith are hostile to transgender rights,[17] but certainly the perception remains that any success the transgender rights movement achieves will be despite—not because of—religion.

Notwithstanding this tension, a handful of courts and the U.S. Equal Employment Opportunity Commission ("EEOC") have drawn upon religion in concluding Title VII prohibits discrimination against transgender employees.[18] The argument, first adopted at the federal level in the 2008 case of *Schroer v. Billington*,[19] is that if an employer discriminates against an employee for converting

transgender woman. *See Children at Faith School 'Ordered by Teachers to Ignore Classmate Because Her Parent is Transgender'*, SCHOOLS IMPROVEMENT (Feb. 15, 2017), https://schoolsimprovement.net/children-faith-school-ordered-teachers-ignore-classmate-parent-transgender/.

15. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Mem.) (2019) (No. 18–107).

16. Harris Funeral Homes, Inc., 884 F.3d at 569.

17. For example, the Episcopal Church overwhelmingly voted to allow the priesthood ordination of transgender people. *See* Jaweed Kaleem, *Episcopal Church Approves Transgender People Ordination*, HUFFPOST (July 9, 2012, 6:53 PM), https://www.huffingtonpost.com/2012/07/09/episcopal-church-transgender-ordination_n_1660465.html. The Union for Reform Judaism unanimously passed a resolution calling on synagogues to make restrooms gender neutral, train staffers on LGBT issues, and show support for the transgender community. *See* Emma Green, *Reform Jews: Transgender People are Welcome Here*, ATLANTIC (Nov. 5, 2015), https://www.theatlantic.com/politics/archive/2015/11/reform-jews-transgender-people-are-welcome-here/414415/. And the Church of Jesus Christ of Latter-day Saints played a pivotal role in the adoption of ordinances in Salt Lake City, Utah, aimed at protecting transgender residents from discrimination in employment and housing. *See* Matt Canham et al., *Salt Lake City Adopts Pro-Gay Statutes—with LDS Church Support*, SALT LAKE TRIB. (Nov. 10, 2009, 10:42 PM), http://archive.sltrib.com/story.php?ref=/news/ci_13758070. Moreover, even within religious organizations officially opposed to transgender rights, there can be considerable differences of opinion. For instance, despite the Southern Baptist Convention's unequivocal opposition to transgenderism, *see* S. BAPTIST CONVENTION, ON TRANSGENDER IDENTITY (2014), http://www.sbc.net/resolutions/2250/on-transgender-identity (opposing "efforts to alter one's bodily identity . . . to refashion it to conform with one's perceived gender identity," "all efforts by any governing official or body to validate transgender identity as morally praiseworthy," and "all cultural efforts to validate claims to transgender identity"), the First Baptist Church of Austin, Texas, adopted a diversity statement affirming it "welcomes and wants people of every . . . gender [and] sexual orientation," and "celebrates all people as created in God's very image and likeness." *Diversity Statement*, FIRST AUSTIN (2015), http://fbcaustin.org/what-we-believe; *see also* Bob Allen, *Two Texas Churches Face Ouster for LGBT Policies*, BAPTIST NEWS GLOBAL (Nov. 10, 2016), https://baptistnews.com/article/two-texas-churches-face-ouster-for-lgbt-policies/#.WslvsIj482x (reporting that leaders of the Baptist General Convention of Texas had put the First Baptist Church of Austin on "notice of expulsion because of its welcoming and affirming stance toward LGBTQ people").

18. *See infra* Section II.C.

19. 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008). At the state level, reference to the conversion analogy dates back to at least 2001, when the Massachusetts Commission Against Discrimination explained in an administrative decision, "if an individual who had changed religion, and as a result was subjected to disparate treatment filed a complaint with this commission, it would not be an appropriate defense to claim that the employee was subjected to the treatment because of *the change* in religion, as opposed to the *membership* in the new religion. Yet, in the case of transsexuals, courts have adopted this very analysis." Millett v. Lutco, 2001 WL 1602800, at *5 (Mass. Comm'n Against Discrim. Oct. 10, 2001).

from one religion to another, the employer has unlawfully discriminated "because of . . . religion," even if the employer bears no animosity toward either religion but instead simply disapproves of changing religions.[20] By the same token, if an employer discriminates against a transgender employee for switching sexes, the employer has unlawfully discriminated "because of . . . sex," even if the employer has no animosity toward women or men but instead merely disapproves of changing sexes.[21]

The strength of this so-called conversion analogy is its avoidance of the difficult and highly controversial questions that often plague transgender discrimination jurisprudence, including whether the statutory definition of sex includes gender identity, whether Congress intended to prohibit transgender discrimination when it enacted Title VII, and under what circumstances transgender discrimination constitutes a form of sex stereotyping prohibited by the Supreme Court's landmark decision in *Price Waterhouse v. Hopkins*.[22] Instead, the analogy focuses on how discrimination based on an employee's change within a protected status, be it converting from Christianity to Judaism or transitioning from a female to a male, nonetheless constitutes unlawful discrimination because of that status. In essence, the conversion analogy renders moot the term "sex" and instead emphasizes Title VII's "because of" language, taking the position that even under the narrowest definition of sex, discrimination against a transgender employee is always "because of . . . sex."[23]

Despite its potential to resolve the transgender discrimination question, the conversion analogy went largely ignored by adjudicators during most of the next decade, with only the EEOC considering its utility.[24] But the analogy gained new life beginning in 2016, after two district courts endorsed it[25] and the Sixth Circuit highlighted it as "a useful way of framing the inquiry" in *Harris Funeral Homes*.[26] Curiously, neither the EEOC nor the courts that have approved of the conversion analogy have subjected it to any scrutiny. Instead, they appear to have taken it as given that transgenderism and religious conversion are analytically comparable and that the analogy is logically sound.

Now is a critical time to subject the conversion analogy to the scrutiny that has been lacking. Not only has the analogy gained momentum in the courts but,

20. *Schroer*, 577 F. Supp. 2d at 306–07.

21. *Id.*

22. 490 U.S. 228 (1989).

23. *See* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 73–74 (2019) ("[A]nti-LGBT discrimination is always 'but-for' sex. Thus, a lesbian who is fired for marrying a woman would not have been fired has she engaged in identical conduct as a man. So too a transgender woman who is not hired because she wore a dress to her interview, would have been hired but for her perceived sex (male). Because sexual orientation and gender identity discrimination are inextricably bound up in expectations about how men and women should behave, such discrimination is always—on a straightforward 'but for' approach—'because of sex.'").

24. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

25. *See* Fabian v. Hosp. Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016); Bd. Educ. Highland Local Sch. Dist. v. U.S. Dep't Educ., 208 F. Supp. 3d 850, 868–69 n.8 (S.D. Ohio 2016).

26. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 575 (6th Cir. 2018).

in fact, it is squarely before the Supreme Court in *Harris Funeral Homes*.[27] This Article undertakes the task of scrutinizing the conversion analogy by critically assessing the three major assumptions on which the analogy is built. It first questions whether sex and religion are comparable protected traits.[28] Some claim the traits are incapable of comparison because a person can physically change religions but not sexes. This argument both overestimates the ease of religious conversion and underestimates the possibility of changing sexes, even if one subscribes to the belief that sex is entirely biologically determined. Moreover, in many cases, any difference in the ability to change one's religion compared to one's sex is nullified by the fact that a person can legally change her sex, often without undergoing any physical changes whatsoever. Consequently, sex and religion are comparable traits because they are equally protected under Title VII and because both traits can be changed legally, if not physically.

Second, the Article examines whether religious conversion and transgenderism are comparable processes.[29] At least one critic has argued that comparing these transitions is inappropriate because religious conversion is voluntary, but transgenderism is involuntary.[30] This argument ignores the reality that for the religious convert and transgender individual alike, these transitions encompass both voluntary and involuntary components. A related argument against comparing conversion and transgenderism is that changing one's sex is not nearly as straightforward as changing one's religion. This argument misses the mark because both religious conversion and transgenderism can encompass a broad spectrum of behaviors that make it difficult to pinpoint the precise moment when a person's transition is complete. Furthermore, whether one has completed either transition is immaterial; the Supreme Court has made clear that an employment decision motivated by an employer's misperception about an employee's protected trait constitutes unlawful discrimination.[31]

Lastly, the Article evaluates whether Title VII in fact prohibits discrimination against religious converts.[32] Although there is no case law directly on point, this assumption is almost certainly true. Because Title VII's definition of religion is not confined to an exhaustive list of religions,[33] it would seem illogical for a court to limit religious discrimination to members of particular religions on the list because they are such members. Similarly, being male or female is an example of sex but is not the definition of sex itself. Thus, it would be just as illogical for a court to limit sex discrimination to males or females alone.

27. *See* Brief for Respondent Aimee Stephens at 26, 40, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, (2019) (No. 18-107) (arguing that "[j]ust as firing someone for wanting to change religion is religious discrimination, so too firing a person for wanting to change sex is sex discrimination").

28. *See infra* Section III.A.

29. *See infra* Section III.B.

30. Amy D. Ronner, *Let's Get the "Trans" and "Sex" Out of It and Free Us All*, 16 J. GENDER, RACE & JUST. 859, 899 (2013).

31. *See* E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033–34 (2015) (holding that the employer's refusal to hire an employee who is suspected, but did not know, would need a religious accommodation violated Title VII).

32. *See infra* Section III.C.

33. *See* 42 U.S.C. § 2000e(j) (2018) (defining religion).

In the end, the conversion analogy not only holds up to scrutiny but emerges stronger because of it and thus provides a viable way forward to extend Title VII's protection to transgender employees. Regardless of whether religion itself ever fully embraces transgender rights, the way courts think about religion in the context of employment discrimination may prove helpful to settling a question that has divided courts and presidential administrations alike.

The remainder of this Article proceeds as follows. Part II explores how competing interpretations of Title VII have produced judicial uncertainty over the statute's protection of transgender workers. It focuses particularly on how courts utilize Title VII's text and legislative history, as well as the concept of sex stereotyping, to frame their analyses. Part III considers whether the conversion analogy offers a realistic solution by scrutinizing whether religion and sex are comparable traits, whether conversion and transgenderism are comparable processes, and whether Title VII actually prohibits convert discrimination. Answering each question affirmatively, this Article concludes that the conversion analogy provides a straightforward solution to what has proven a complicated legal issue.

II. ADJUDICATIVE TREATMENT OF TRANSGENDER DISCRIMINATION

This Part traces the evolution of transgender discrimination jurisprudence, as shaped by the federal courts and the EEOC. Section A examines the earliest decisions, which uniformly rejected transgender discrimination claims under Title VII either by construing sex as strictly binary or by drawing upon the statute's legislative history to conclude Congress never intended to prohibit transgender discrimination. Section B explores *Price Waterhouse* and its impact on subsequent transgender discrimination cases. Since the case was decided in 1989, three of the five appellate courts to consider the issue have concluded Title VII prohibits transgender discrimination.[34] Section C discusses the conversion analogy's origin and subsequent treatment by courts and the EEOC. Although the analogy was largely ignored in the decade following its inception, it has experienced something of a renaissance in recent years.

A. The Early Cases

The first appellate courts to consider whether Title VII prohibits transgender discrimination narrowly construed both the definition of sex and the legislative intent behind the statute. In *Holloway v. Arthur Andersen & Co.*, the Ninth Circuit rejected the textual argument that sex and gender are synonymous, and that gender would thus encompass transgender employees, reasoning that nothing in the legislative history of the Civil Rights Act or the amendments to Title VII in the Equal Employment Opportunity Act of 1972 evidenced any intent

34. The holdouts, the Fifth and Tenth Circuits, have acknowledged the possibility that a transgender plaintiff could raise a gender stereotyping claim after *Price Waterhouse*, but maintain that transgender discrimination is not per se gender stereotyping. *See* Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019); Etsitty v. Utah Transp. Auth., 502 F.3d 1215, 1223–24 (10th Cir. 2007).

other than "to place women on an equal footing with men."[35] The court concluded "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning," and that it would "not expand Title VII's application in the absence of Congressional mandate."[36] Although the court did not expound on what it meant by the "traditional meaning" of sex, it evidently conceptualized sex as strictly binary, as it declared later in its analysis that "the manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that *men and women* are treated equally."[37]

In *Sommers v. Budget Marketing, Inc.*, the Eighth Circuit similarly held that sex must be given its "plain meaning" and "traditional definition."[38] The court did not elaborate on the "plain meaning" of sex, nor did it trace the origins of the term's definition.[39] Like the *Holloway* court, it instead focused on legislative intent, noting there were no congressional hearings and little debate over the meaning of sex because the term was added to the bill just one day before the House passed it.[40] From this, the court determined that "the major thrust of the 'sex' amendment was towards providing equal opportunities for women," and that "the legislative history does not show any intention to include transsexualism under Title VII."[41] The court further reasoned that the many failed attempts to amend the Civil Rights Act to prohibit sexual-preference-based discrimination further confirmed that sex should "be given its traditional definition, rather than an expansive interpretation."[42]

Two years later, in *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit reversed a district court's ruling that Title VII's proscription against sex discrimination encompassed "sexual identity" discrimination.[43] Like the *Sommers* and *Holloway* courts, the Seventh Circuit relied on what it considered the plain meaning of the statutory text in holding that Title VII did not prohibit transgender discrimination.[44] But unlike those courts, it made at least some effort to explain its view of the "plain meaning" of sex:

> 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 . . . ; 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.[45]

35. 566 F.2d 659, 662 (9th Cir. 1977).
36. *Id.* at 663.
37. *Id.* (emphasis added).
38. 667 F.2d 748, 750 (8th Cir. 1982).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. 742 F.2d 1081, 1084–87 (7th Cir. 1984).
44. *Id.* at 1085.
45. *Id.*

The court likewise relied on legislative intent to support its decision, characterizing the eleventh-hour inclusion of sex in Title VII as "the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act."[46] It surmised that "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."[47] The court acknowledged remedial statutes should be liberally construed but cautioned that there are "reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress."[48] In the court's view, interpreting Title VII to prohibit transgender discrimination would "far exceed[] mere statutory interpretation," and "take us out of the realm of interpreting and reviewing and into the realm of legislating."[49]

B. Price Waterhouse *and Its Aftermath*

The trajectory of transgender discrimination cases markedly shifted following the Supreme Court's landmark decision in *Price Waterhouse v. Hopkins*.[50] Ann Hopkins, a senior manager at an accounting firm, sued her employer for sex discrimination after it refused to consider her for partnership, at least in part because she failed to conform to traditional notions of femininity.[51] One partner described her as "macho," another claimed she "overcompensated for being a woman," and a third suggested she take "a course at charm school."[52] Hopkins was advised that if she wanted to become a partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[53] Thus, Hopkins was not claiming her employer discriminated against her because she was a woman but rather because she failed to conform to stereotypical assumptions about how a woman should look and act.[54]

In holding that sex stereotyping constitutes a form of sex discrimination under Title VII, a plurality of the Supreme Court rejected the notion that the statutory phrase "because of . . . sex" imposes a but-for causation standard.[55] It instead construed the phrase to mean "gender must be irrelevant to employment decisions."[56] The Court's use of the term "gender" rather than "sex" was significant because it suggested the Court viewed the two terms as interchangeable for purposes of Title VII analysis. In the context of sex stereotyping, the plurality reasoned that "an employer who acts on the basis of a belief that a woman cannot

46. *Id.*
47. *Id.*
48. *Id.* at 1086.
49. *Id.*
50. 490 U.S. 228 (1989).
51. *Id.* at 231–32.
52. *Id.* at 235.
53. *Id.*
54. *Id.* at 250–52.
55. *Id.* at 240.
56. *Id.*

be aggressive, or that she must not be, has acted on the basis of gender."[57] The plurality acknowledged the "somewhat bizarre path by which 'sex' came to be included as a forbidden criterion for employment,"[58] but it considered the legislative history pertaining to the rest of the Civil Rights Act, which focused almost entirely on race, as indicative of Congress's intent as it related to sex.[59] This allowed the plurality to espouse a much broader view of the legislative intent than other courts had attempted:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[60]

In the decades since *Price Waterhouse* was decided, all but one federal appellate court to consider the issue have held that transgender discrimination constitutes a form of unlawful sex discrimination. In *Schwenk v. Hartford*, the Ninth Circuit determined that the Gender-Motivated Violence Act, which parallels the sex discrimination standard of Title VII, was applicable to a rape perpetrated against a transgender prison inmate.[61] The court noted that previous decisions like *Holloway*, which distinguished between sex and gender had "been overruled by the logic and language of *Price Waterhouse*."[62] In the court's estimation, after *Price Waterhouse*, "'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender," such that "discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."[63] The court concluded the plaintiff's claim "easily" survived summary judgment because the perpetrator's demands for sex began only after discovering the plaintiff considered herself to be female, indicating the perpetrator's actions were at least partially motivated by the plaintiff's assumption of a feminine appearance and demeanor.[64]

In *Smith v. City of Salem*, the Sixth Circuit recognized that a transgender firefighter could bring a sex discrimination claim under Title VII.[65] It found that the district court erred in relying on *Holloway*, *Sommers*, and *Ulane* to strike down the plaintiff's transgender discrimination claim, explaining that the approach those courts adopted—distinguishing between sex and gender—was "eviscerated by *Price Waterhouse*."[66] Like the *Schwenk* court, the Sixth Circuit

57. *Id.* at 250.
58. *Id.* at 243 n.9.
59. *Id.* at 239–40.
60. *Id.* at 251 (citation and quotations omitted).
61. 204 F.3d 1187 (9th Cir. 2000).
62. *Id.* at 1201.
63. *Id.* at 1202. Although the court did not adopt a precise definition of what it meant by gender, it noted that other courts had construed the term as referring to one's "sexual identity, or socially-constructed characteristics." *Id.* at 1201 (internal citations and quotations omitted).
64. *Id.* at 1202.
65. 378 F.3d 566 (6th Cir. 2004).
66. *Id.* at 572–73.

interpreted *Price Waterhouse* as prohibiting both sex and gender-based discrimination, including discrimination based on a failure to conform to stereotypical gender norms.[67] The court reasoned:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[68]

The court then turned to the argument that a trans woman who acts in ways typically associated with women is not engaging in the same activity as a woman who acts in ways typically associated with women but is instead engaging in the different activity of being a transgender person.[69] Thus, the discrimination would not be "because of . . . sex" but rather would stem from the employee's unprotected status as a transgender person.[70] The court characterized this as "superimpos[ing] classifications such as 'transsexual' on a plaintiff, and then legitimiz[ing] discrimination based on the plaintiff's gender nonconformity by formalizing the nonconformity into an ostensibly unprotected classification."[71] This was unacceptable to the court because *Price Waterhouse* "does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual."[72]

In *Glenn v. Brumby*, the Eleventh Circuit similarly held that Georgia state officials unlawfully discriminated against an employee who was terminated after expressing an intent to undergo sex reassignment surgery.[73] Relying on *Price Waterhouse*, the court reasoned that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."[74] It made no difference to the court whether discrimination based on gender nonconformity is described as being on the basis of sex or gender; after *Price Waterhouse*, such discrimination is unlawful regardless of how it is labeled.[75]

In *Whitaker v. Kenosha Unified School District*, the Seventh Circuit relied on *Smith* and *Brumby* in holding that a transgender student could bring a sex

67. *Id.* at 572–76.
68. *Id.* at 574.
69. *Id.*
70. *Id.* at 575.
71. *Id.* at 574.
72. *Id.* at 574–75.
73. 663 F.3d 1312 (11th Cir. 2011).
74. *Id.* at 1316.
75. *Id.* at 1317.

discrimination claim under Title IX of the Civil Rights Act.[76] The court explained that nothing in its decision in *Ulane* precluded the plaintiff from asserting a sex discrimination claim based on a sex-stereotyping theory of discrimination.[77] Indeed, the court remarked that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[78]

Since *Price Waterhouse* was decided in 1989, only two federal appellate courts have rejected the view that transgender discrimination is per se unlawful under Title VII. In *Etsitty v. Utah Transit Authority*, the Tenth Circuit affirmed the dismissal of Title VII and Section 1983 sex discrimination claims brought by Krystal Etsitty, a transgender bus operator, who was fired because her employer feared it could be liable if she were to use women's public restrooms along her routes while still having male genitalia.[79] The court avoided delving into the legislative intent issue because, in its estimation, there was no evidence in the record indicating that sex means anything other than male and female.[80] In a throwback to *Ulane* and the other early cases, the court reasoned, "In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female."[81] The court seemed open to the possibility that the plain meaning of sex may someday change due to scientific advances but nonetheless felt constrained to conclude "at this point in time and with the record and arguments before this court . . . [that] discrimination against a transsexual because she is transsexual is not 'discrimination because of sex.'"[82]

Having rejected the argument that transgender employees constitute a protected class, the court turned its focus to the viability of Etsitty's sex-stereotyping claim.[83] The court acknowledged that numerous courts have relied on *Price Waterhouse* to recognize a Title VII claim based on an employee's nonconformity with stereotypical gender norms.[84] Yet it found it unnecessary to decide whether nonconformity with sex stereotypes always constitutes sex discrimination because Etsitty had failed to put on evidence that her employer's legitimate nondiscriminatory reason for firing her was pretextual.[85] Of course, Etsitty argued the reason for her termination—her employer's unwillingness to allow her to use women's public restrooms out of fear of liability—was facially discriminatory because the use of women's restrooms is an inherent part of her identity as a trans

76. 858 F.3d 1034, 1047–49 (7th Cir. 2017).
77. *Id.* at 1047.
78. *Id.* at 1048.
79. 502 F.3d 1215, 1218, 1224 (10th Cir. 2007).
80. *Id.* at 1221–22.
81. *Id.* at 1222.
82. *Id.*
83. *See id.*
84. *Id.* at 1223–24.
85. *Id.* at 1224.

woman and thus, an inherent part of her nonconforming gender behavior.[86] The court acknowledged that using a women's restroom may very well be a part of a transgender person's gender identity but countered that prohibiting such use constitutes discrimination based on one's status as a transgender person, which is not a protected class.[87] It explained that under *Price Waterhouse*, Etsitty would have to prove she was discriminated against as a man who fails to conform to sex stereotypes.[88] "However far *Price Waterhouse* reaches," it continued, "this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."[89] In the court's view, a Title VII sex discrimination claim depends on whether members of one sex are exposed to disadvantageous working conditions to which members of the other sex are not.[90] Because the Transit Authority's requirement that employees use restrooms matching their biological sex did not disadvantage males relative to females or discriminate against employees who fail to conform to gender stereotypes, its reason for terminating Etsitty was not discriminatory on the basis of sex.[91]

In *Wittmer v. Phillips 66 Co.*, the Fifth Circuit chastised a Texas district court that had stated in an earlier published opinion that the Circuit had not addressed whether Title VII prohibits transgender discrimination, and that in light of recent decisions by other circuits, it "assume[d] that Title VII prohibits transgender discrimination."[92] The Fifth Circuit explained that it addressed this issue in 1979, when it held that Title VII does not prohibit discrimination on the basis of sexual orientation—precedent that "remains binding . . . to this day."[93] Judge Ho, who authored the unanimous majority opinion, explained in a separate concurrence that Title VII's definition of sex does not encompass gender identity, but simply "prohibits employers from favoring men over women, or vice versa."[94] In his view, *Price Waterhouse* did nothing to change this because that case "doesn't make sex stereotyping *per se* unlawful. To the contrary, under *Price Waterhouse*, sex stereotyping is actionable only to the extent it provides evidence of favoritism of one sex over the other."[95]

Although the Fifth and Tenth Circuits are the only federal appellate courts after *Price Waterhouse* to reject the argument that Title VII's prohibition against sex discrimination encompasses gender identity per se, this does not mean transgender employees are protected from discrimination everywhere else. As of April 2020, transgender discrimination is prohibited in the Sixth, Seventh, Ninth,

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 1225.
91. *Id.*
92. 915 F.3d 328, 330 (5th Cir. 2019).
93. *Id.*
94. *Id.* at 334 (Ho, J., concurring).
95. *Id.* at 339.

and Eleventh Circuits, but lawful in the Fifth and Tenth Circuits.[96] The continued vitality of *Sommers* in the Eighth Circuit is unclear because the Circuit has not revisited this question post-*Price Waterhouse*.[97] The remaining circuits have yet to consider transgender discrimination under Title VII at all.[98] Moreover, even in those circuits that have recognized transgender discrimination claims under *Price Waterhouse*'s sex-stereotyping theory of discrimination, it may not be that all transgender discrimination plaintiffs would be protected under the statute. Elizabeth Glazer and Zachary Kramer persuasively argue that *Price Waterhouse* is not the panacea to transgender discrimination that it may seem, primarily because of its "reductionist approach" to gender identity.[99] They explain that the sex-stereotyping theory requires a court to first determine a plaintiff's "anchor gender," meaning the gender commonly associated with the person's sex; to then determine the plaintiff's "expressive gender," meaning the particular gender the plaintiff expresses; and finally to determine whether the employer acted because the plaintiff's anchor and expressive genders are incongruent.[100] Glazer and Kramer argue that this approach is problematic because "transgenderism is not a label for gender-nonconforming behavior. It is an identity that [a transgender plaintiff] is affirmatively claiming. It is her sense of self."[101] While the sex-stereotyping theory has been instrumental in changing the trajectory of transgender discrimination jurisprudence, it effectively strips the plaintiff of her transgender identity because a court's causation analysis turns solely on how the employer perceived the plaintiff, not what the transgender plaintiff perceived about herself.[102] Because the sex-stereotyping theory is dependent on the employer's perception of gender nonconformity rather than the plaintiff's perception of self, the theory is only useful in cases where the employer perceives a disconnect between the employee's actual and expressed genders. Thus, only transgender employees who fail to conform to gender stereotypes would be protected; those who identify as transgender, yet dress and act consistently with stereotypes about their "assigned" sex, would have no legal recourse. Accordingly, the conversion analogy not only has the potential to shape transgender discrimination jurisprudence in the circuits where the issue remains undecided but also to reshape, or at least supplement, judicial analysis in circuits where the matter has been resolved.

C. The Conversion Analogy in the Courts and the EEOC

Schroer marked the first judicial opinion at the federal level to consider whether Title VII could apply to transgender employees by likening transgenderism to religious conversion.[103] The case involved a sex discrimination claim

96. *See* discussion *supra* Sections II.A–B.

97. *See* Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 524 (D. Conn. 2016).

98. *See id.*

99. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 665–67 (2009).

100. *Id.* at 665.

101. *Id.* at 667.

102. *Id.*

103. Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

by Diane Schroer, whose job offer with the Library of Congress was rescinded after she confided in her prospective employer that she would soon begin transitioning from male to female.[104] Following a bench trial, the court determined Schroer had been discriminated against because of her sex.[105] In reaching this conclusion, the court first determined the Library of Congress impermissibly discriminated against Schroer based on her failure to conform to gender stereotypes.[106] Although it could have stopped there, it additionally held that the Library of Congress was liable because its decision to rescind Schroer's job offer after learning of her intent to undergo sex reassignment surgery "was *literally* discrimination 'because of . . . sex.'"[107] The court supported this finding by likening transgenderism to religious conversion:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.
>
> . . . .
>
> The decisions holding that Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of "judge-supposed legislative intent over clear statutory text." In their holdings that discrimination based on changing one's sex is not discrimination because of sex, *Ulane*, *Holloway*, and *Etsitty* essentially reason that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This is no longer a tenable approach to statutory construction.[108]

104. *Id.* at 295–96.

105. *Id.* at 308.

106. *Id.* at 302–06.

107. *Id.* at 308.

108. *Id.* at 306–07 (citations omitted). Although the *Schroer* court was the first to articulate this analogy in a judicial decision, scholars and advocates began advancing this argument years earlier. *See* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 41 (2000) (comparing transgenderism to religious conversion and concluding that "the only difference . . . is that while changing one's religion . . . is generally considered to be a legitimate personal choice, the very idea that one sex can change into another is likely to engender ridicule and horror" (internal quotations and citation omitted)); Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 652 (2000) (arguing that because a change in religion is "logically subsumed under the term 'because of religion,' . . . if discrimination occurs because someone has announced a *change* of his or her sex from the one assigned at birth . . . , that should constitute discrimination because of sex").

By analogizing transgenderism to religious conversion, the court extended to Schroer broader protection than what may have been available to her under *Price Waterhouse*. This is because the conversion analogy enabled Schroer to prevail "even if the job offer had been revoked under circumstances that didn't evoke discrimination on the basis of gender nonconformity—for example, if Schroer had not been able to prove that her prospective employer thought of her as a 'man in a dress' and was uncomfortable with that."[109] Moreover, focusing on the change component of transgenderism allowed the court to avoid thorny questions about the meaning of sex under Title VII, which in turn means the conversion analogy is potentially available even in circuits that have defined sex in strictly binary terms that exclude gender identity.[110] The conversion analogy thus renders moot the age-old question of whether the term "sex" is confined to anatomical differences between males and females or encompasses gender identity. Likewise, it no longer matters whether Congress intended to protect transgender employees from discrimination because discrimination based on a change in one's sex constitutes discrimination "because of . . . sex" no matter how sex is defined. And questions about whether a transgender employee was discriminated against because of her transgender status or because of her nonconformity with sex stereotypes are no longer relevant. Instead, all that matters is whether an employee changes or attempts to change statuses within a protected classification. If the employee suffers discrimination as a result of the change, the action is unlawful because the protected classification motivated the employment decision.

Despite its potential to reshape transgender discrimination jurisprudence, the conversion analogy failed to gain any traction until four years after it was introduced, when in 2012 the EEOC adopted it in *Macy v. Holder*.[111] Although the EEOC's position on transgender discrimination is not binding on the courts, it is instructive to the extent courts defer to the EEOC on matters of Title VII interpretation.[112] Mia Macy, a transgender woman, filed a discrimination complaint with the EEOC after the Bureau of Alcohol, Tobacco, Firearms and Explosives initially agreed to allow her to transfer to a crime laboratory in California but subsequently rescinded the offer after learning Macy was in the process of transitioning from male to female.[113] Macy filed a complaint with the EEOC, alleging discrimination based on sex, gender identity, and sex stereotyping.[114]

109. Erin Buzuvis, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L., GENDER & SOC'Y 219, 232 (2013).

110. *See id.*

111. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

112. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112 n.6 (2002) (citation omitted) (explaining that the EEOC's interpretive guidelines do not warrant *Chevron* deference but are entitled to respect "to the extent that those interpretations have the power to persuade"); Griggs v. Duke Power Co. 401 U.S. 424, 433–34 (1971) (declaring that the EEOC's interpretation of Title VII is entitled to "great deference"); EEOC v. Champion Chevrolet, No. 3:07-CV-444-ECR-VPC, 2009 WL 2835101, at *6 (D. Nev. Aug. 26, 2009) ("Federal courts generally accord deference to an agency's administrative decisions, rule-making, and operating procedures, as well as to their interpretations of their governing statute.").

113. *Macy*, 2012 WL 1435995, at *1–3.

114. *Id.* at *2.

The EEOC took the position that only her sex discrimination claim could be taken up through the EEOC process, and that her "gender identity stereotyping" claims would have to be processed in accordance with the applicable Department of Justice policy, which afforded less relief and fewer avenues for appealing an adverse decision.[115] Macy argued on appeal that the EEOC's decision to separate her claims amounted to a "'de facto dismissal' of her Title VII claim of discrimination based on gender identity and transgender status."[116] The EEOC reversed its prior determination, concluding that all of Macy's claims were essentially "different ways of stating the same claim of discrimination 'based on . . . sex'" and should therefore be processed through the EEOC.[117] "When an employer discriminates against someone because the person is transgender," the EEOC observed, "the employer has engaged in disparate treatment related to the sex of the victim."[118]

The EEOC supported this conclusion with an analogy nearly identical to the *Schroer* court's:

> Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.[119]

The EEOC then turned its focus to *Schroer*, noting the decision provided "reasoning along similar lines."[120] The EEOC quoted *Schroer*'s conversion analogy in its entirety and then made explicit a crucial point that Judge Robertson had left implicit: that protecting religious converts does not create a new class of people covered under Title VII but "would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account."[121]

Four years after the EEOC backed the conversion analogy in *Macy*, a pair of federal district courts followed suit. In *Fabian v. Hospital of Central Connecticut*, the district court characterized the *Schroer* decision as "thoughtful" and its

115. *Id.* The Department of Justice has one system for adjudicating sex discrimination claims under Title VII and a separate system for adjudicating sexual orientation and gender identity discrimination complaints by its employees. *Id.*

116. *Id.* at *3.

117. *Id.* at *5.

118. *Id.* at *7.

119. *Id.* at *11.

120. *Id.*

121. *Id.*

conversion analogy as "useful."[122] Similarly, in *Board of Education of the Highland Local School District v. U.S. Department of Education*, the district court praised the *Schroer* court's analogy as "show[ing] just why discrimination against a transgender employee constitutes discrimination 'because of sex' under Title VII."[123] Apart from these two decisions, however, no other district court has addressed the conversion analogy. Thus, even though the analogy has received uniformly positive treatment from those courts that have considered it, its contribution to transgender discrimination jurisprudence has been modest at best.

In 2018, the Sixth Circuit breathed new life into the conversion analogy. In *Harris Funeral Homes*, the court followed its prior holding in *Smith* in affirming the district court's determination that the funeral home violated Title VII by terminating Aimee Stephens, its transgender funeral director, for failing to conform to sex stereotypes.[124] Like in *Schroer*, the court could have ended its analysis there, but it went on to consider whether Stephens could alternatively pursue a claim that she was discriminated against because of her transgender and transitioning status.[125] The district court had dismissed this claim, holding that Title VII does not currently recognize transgender status as a protected class.[126] In reversing the lower court, the Sixth Circuit concluded, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[127] The court offered two arguments in support of this conclusion. First, it applied the Seventh Circuit's method of "isolating the significance of the plaintiff's sex to the employer's decision to determine whether Title VII has been triggered" by asking whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code.[128] The court found the answer to this question was "quite obviously [] no," which "in and of itself confirms that Stephens's sex impermissibly affected [the employer's] decision to fire Stephens."[129]

The court then turned to the conversion analogy as a second way of conceptualizing why transgender discrimination is always "because of . . . sex":

> The court's analysis in *Schroer v. Billington* provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee because of religion, regardless of whether the employer feels any animus against either Christianity or Judaism, because discrimination because of religion easily encompasses discrimination because of a *change* of religion. By the same token, discrimination because of sex inherently includes discrimination against employees

122. 172 F. Supp. 3d, 509, 527 (D. Conn. 2016).
123. 208 F. Supp. 3d 850, 868–69 n.8 (S.D. Ohio 2016).
124. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571–74 (6th Cir. 2018).
125. *Id.* at 574–81.
126. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015).
127. *Harris Funeral Homes*, 884 F.3d. at 575.
128. *Id.* (citation omitted).
129. *Id.*

> because of a change in their sex. Here, there is evidence that [the employer] at least partially based his employment decision on Stephens's desire to change her sex . . . .[130]

The funeral home claimed this analogy was "structurally flawed" because, unlike religion, a person's sex is a biologically immutable trait that cannot be changed.[131] But rather than wade into the debate over the mutability of sex compared to religion, the court dismissed the funeral home's contention as "immaterial" because *Price Waterhouse* requires gender to be irrelevant to employment decisions.[132] The court concluded, "Gender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse employment decision."[133]

The court advanced several other intriguing arguments for why transgender employees constitute a protected class under Title VII,[134] but its treatment of the legislative history is especially noteworthy because of how heavily other appellate courts have relied upon it to reach the opposite conclusion. The court dismissed the funeral home's argument that Congress understood sex to mean a person's "physiology and reproductive role," rather than the person's "self-assigned gender identity," as being "of little interpretative value."[135] The court was unmoved, not because the funeral home was necessarily wrong but because, as the Supreme Court noted in *Oncale v. Sundowner Offshore Services, Inc.*, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[136] Thus, it was unimportant to the court that Congress may not have had transgender discrimination at the forefront of its mind when it passed the Civil Rights Act in 1964. By reaffirming textualism as the primary concern above and beyond congressional intent, the Court effectively held that when Congress enacts broad language, such as the term "sex" in Title VII, an application that falls within that language is protected, regardless of whether Congress had it in mind.[137]

In sum, uncertainty persists as to whether Title VII prohibits transgender discrimination. Disagreement over this issue is not confined to the courts alone but has also spanned the past two presidential administrations.[138] At present, a transgender employee's rights in the workplace depend not on the antisubordination or anticlassification values that traditionally have informed employment

130. *Id.* at 575–76 (citation omitted).

131. *Id.* at 576.

132. *Id.*

133. *Id.*

134. *See id.* at 576–81.

135. *Id.* at 577.

136. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)) (recognizing same-sex harassment as a form of sex discrimination prohibited by Title VII). Attorney General Holder advanced this same argument in conveying the Obama Administration's position that Title VII prohibits transgender discrimination. *See* Holder Memo, *supra* note 5, at 2.

137. *See* Eyer, *supra* note 23, at 91–92.

138. *Compare* Holder Memo, *supra* note 5, *with* Sessions Memo, *supra* note 6.

discrimination jurisprudence[139] but on the fortuity of the circuit in which the employee resides and the occupant of the Oval Office. But even as disagreement over the statutory meaning of sex persists, a handful of courts and the EEOC have found in the conversion analogy an alternative basis for extending Title VII's protections to transgender employees. Although the analogy had little impact in the years immediately following its introduction, it is now gaining momentum. At this critical juncture, the analogy should be carefully scrutinized to ascertain its soundness and long-term viability. Part III undertakes this task.

III. DOES THE CONVERSION ANALOGY REALLY WORK?

Neither the EEOC nor the handful of courts that have endorsed the conversion analogy seemed to subject it to much scrutiny. Indeed, the *Schroer* court built the analogy on three assumptions for which it failed to articulate any factual or legal support: (1) that sex and religion are comparable traits, (2) that transgenderism and religious conversion are comparable processes, and (3) that discrimination against a convert "would be a clear case of discrimination because of religion."[140] This Part assesses the validity of each assumption.

A. Are Sex and Religion Comparable Traits?

For the conversion analogy to work, sex and religion must be sufficiently alike to allow for direct comparison. The *Schroer* court obviously believed this was the case yet made no attempt to identify the commonalities these traits share that enable their comparison. In reality, sex and religion are well-suited for comparison because of their centrality to many people's personal identity.[141] Sex has long been regarded as "inherent and essential to an individual's identity and core self-hood."[142] A person's basic sense of being male or female, commonly referred to as gender identity, is a "deeply felt, core component of a person's identity."[143] David Cruz explains that "[s]ex/gender group membership is also critical to many individuals' personal identity, because gender, like religion, connects group affiliation and personal identity."[144] Ordinarily, a person's inner

139. *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 957–58 (2012) (explaining how anti-discrimination law has been shaped by anti-subordination principles, which generally prohibit practices that enforce inferior social status against historically oppressed groups, and anti-classification principles, which prohibit practices that classify people on the basis of a forbidden category).

140. Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

141. *See* Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 208–09 (2007) (arguing that sex and religion are "central components of individual identity").

142. Jasmine Hanasab Barkodar, *Gay Marriage is Legalized, Now What?: Discriminatory Adoption Regulations*, 26 S. CAL. REV. L. & SOC. JUST. 131, 147 (2017).

143. Brief for Me. Chapter of the Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Appellants at 5–6, Doe v. Clenchy, 86 A.3d 600 (No. PEN-12-582) (Me. Jan. 30, 2014), 2013 WL 8349676, at *5–6; *see also* Adam R. Chang & Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 59 (2017) ("Gender identity represents a part of one's innermost sense of self in respect to being male, female, both, neither, or any other gender-related identity.").

144. David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1019 (2002).

sense of self that gender identity embodies is aligned with the person's biological sex.[145] Gender identity comprises a significant part of an individual's self-definition, which, "in turn, affects nearly every aspect of one's life, from the way that he or she interacts with others, to the way he or she feels about him or herself."[146] Because gender identity is so foundational to personal identity, some who feel a disconnect between their gender identity and their biological sex experience gender dysphoria,[147] a condition that can have dire consequences ranging from psychological distress to suicidality and death in extreme cases.[148] Treatment options vary, but generally include psychotherapy, changes in gender role and expression, hormones, or surgery.[149]

Like sex, religion can form a core component of personal identity.[150] In fact, some scholars argue that religion is the most essential factor to a person's sense of being.[151] This is because religion not only forges community bonds but also provides moral direction by addressing the central concerns of human existence.[152] Alan Brownstein argues that for the devoutly religious individual, "The personal decision to accept or choose religious beliefs as binding on an individual's understanding of the world and his or her conduct is a self-defining and transforming choice."[153] According to Brownstein, a religious person's relationship with God is "profound and defining," serving "both as the source of duties and as the foundation of experience."[154]

When cast in terms of salience to personal identity, it becomes clear why sex and religion are, in fact, especially apt for comparison. Katie Reineck persuasively argues that sex resembles religion more than it does any of Title VII's

145. *See* Moira Cooper, *Gender Identity Behind Bars: An Analysis of* Kosilek v. Spencer, 23 BUFF. J. GENDER, L. & SOC. POL'Y 101, 103 (2015) (explaining that "the traditional model of gender identity is a binary system that associates particular genders with the biological sexes," and that the "inner sense of self that gender identity embodies is aligned with sex").

146. Heather L. Mckay, Note, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIPIAC L. REV. 493, 520 (2011).

147. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, THE STANDARDS OF CARE: FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 2 (7th ed. 2012) [hereinafter STANDARDS OF CARE].

148. *See* Mass. Med. Soc'y et al., *Removing Financial Barriers to Care for Transgender Patients*, Am. Med. Ass'n House of Delegates Res. 122 (A-08) (citing the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed. text revised), http://www.imatyfa.org/assets/ama122.pdf (last visited Apr. 2, 2020).

149. STANDARDS OF CARE, *supra* note 147, at 8–10.

150. *See Government Burdens on Religious Sites*, 102 HARV. L. REV. 232, 237 (1988) ("Religious affiliations, like ethnic and racial ones, are essential to the formation of individual identity; religious groups supply their members with outlooks and values critical to individual self-realization.").

151. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 147 (1990) (noting "the unique nature of religious affiliation with regard to its impact on a person's sense of identity" and arguing that "[r]eligion is a core part of one's sense of self. Other mutable attributes, such as political affiliation, are generally viewed as more tangential and ephemeral"); Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 74 (1990) (stating that religious identity is "often primary in adherents' conceptions of themselves and others").

152. William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 843 (1993).

153. Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 207 (2013).

154. *Id.* at 207–08.

other protected characteristics because "both gender and religion have a 'deeply personal, internal genesis, [and] lack a fixed external referent.'"[155] As with religion, she explains, there are an indeterminate number of genders "and two people belonging to the same gender can experience and express it in completely different and seemingly contradictory ways."[156] Sue Landsittel adds that "one's religious identity may not adhere to tenets of an organized religion or orthodox doctrine, just as one's gender identity might not conform to dogmatic 'male' and 'female' norms."[157] The similarities between sex and religion vis-à-vis their centrality to personal identity make these two traits apt for comparison. Both are deeply personal and can feature prominently in a person's sense of self. Both derive from internal genesis rather than a fixed external referent. And both can be, and often are, experienced and expressed in a variety of ways. Accordingly, what may appear to critics as a vulnerability of the conversion analogy is, in actuality, a strength.

The employer in *Harris Funeral Homes* attempted to divert the court's attention from these similarities by claiming sex cannot be compared to religion because the former is unchangeable and immutable, whereas the latter is changeable and mutable:

> [The conversion] analogy is structurally flawed: a person's religion can be changed, but a person's sex cannot. That is because sex, as the term was understood at the time of Title VII's enactment, is immutable: a person has either "XX" or "XY" chromosomes, and that biological foundation determines whether the person will fall within the male or female classifications as defined according to reproductive function. Thus, regardless of whether a person surgically alters their appearance, a "gender transition" does not alter one's sex or make one the functional equivalent of the opposite sex. It merely alters some range of secondary characteristics associated with one's actual sex.[158]

This argument misses the mark for several reasons. First and foremost, any distinction between sex and religion based on physical changeability is largely mooted by the fact that, increasingly, a person can *legally* change sexes—often without undergoing any physical change whatsoever.[159] If it is legally possible

155. *See* Katie Reineck, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People*, 24 MICH. J. GENDER & L. 265, 290 (2017) (quoting Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1150 (2010)); *see also* Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 1022 n.299 (2012) (arguing that sexuality is more comparable to religion than it is to race); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014) ("At least as far as immutability is concerned, religion and sex are more alike than different.").

156. Reineck, *supra* note 155, at 290.

157. Landsittel, *supra* note 155, at 1172.

158. Responsive Brief of Appellee at 30–31, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (No. 16-2424), 2017 WL 2222848, at *30–31.

159. As of February 2019, a person could legally change the sex on her birth certificate and/or driver's license in forty-nine states, with Tennessee being the sole exception. *See State-by-State Overview: Rules for Changing Gender Markers on Birth Certificates,* TRANSGENDER L. CTR. (Apr. 2017), http://transgenderlawcenter.org/wp-content/uploads/2016/12/Birth-Cert-overview-state-by-state.pdf (summarizing each state's law regarding the ability to change one's legal sex). Approximately one-half of the states do not require that a person

for a person to change her sex, it makes no difference whether it is physically possible to do so: a female who legally becomes a male is just as much a member of the protected class of males as is a person who is "born" male.[160] Antidiscrimination laws, including Title VII, do not only protect statuses inherited at birth; a person can become a member of a protected class later in life, such as by adopting religious beliefs,[161] developing a disability,[162] aging,[163] joining the military,[164] or becoming pregnant.[165] Likewise, there is no requirement that entry into a protected class must be based on a physical change in one's person; class membership based on a change in one's legal status, such as becoming a member of the military, is equally worthy of protection. Consequently, if it is legally possible to change one's sex, whether it is physically possible is irrelevant.

Second, even if it were not legally possible to change sexes, the impossibility of physically changing one's sex is far from certain. The answer depends, at least in part, on how sex is conceptualized. Of course, there is no universally recognized understanding of sex;[166] the term has meant different things to different people across time and space.[167] At one extreme, sex is deemed a strictly biological phenomenon;[168] at the other, it is merely a social construct.[169] In the

undergo surgery in order to change her sex. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (authorizing a person to change the sex reflected on his birth certificate simply by submitting an affidavit attesting that the request for a change "is to conform the person's legal gender to the person's gender identity").

160. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (recognizing that a male-to-female transgender plaintiff could prevail under Title VII if she could demonstrate that her employer discriminated against her because of her reassigned sex (female) but not by proving she was discriminated against for being transgendered); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa. 1993) (holding that a male-to-female transgender plaintiff's discrimination claim was only actionable if her employer considered her to be female and discriminated against her on that basis).

161. 42 U.S.C. § 2000e-2(a) (2018).

162. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2018).

163. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2018).

164. Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 (2018).

165. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018).

166. *See* John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER, RACE & JUST. 237, 244 (2004) ("There is, of course, no universal definition for sex or gender, at least none that a majority of academics agree upon.").

167. *See* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 597–616 (2009) (detailing how the meaning of sex has evolved over time); *see also* JUDITH BUTLER, GENDER TROUBLE 7 (1990) ("Does sex have a history? Does each sex have a different history, or histories? Is there a history of how the duality of sex was established, a genealogy that might expose the binary options as a variable construction? Are the ostensibly natural facts of sex discursively produced by various scientific discourses in the service of other political and social interests?").

168. *See* Deborah Zalesne, *When Men Harass Men: Is it Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 395 (1998) ("Most courts have interpreted the word 'sex' in its narrowest sense to mean biological sex, which is determined by a person's genitalia.").

169. *See, e.g.*, BUTLER, *supra* note 167, at 7 (arguing that sex is just as culturally constructed as gender); Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 144 (2011) ("Faced with the true complexity of sex identity and sex difference, binary sex classifications can only be viewed as a social construct that disciplines the body in ways that defy logic, compassion, and medical science."); Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 540 (2018) ("Beginning in the early 1990s, feminist scholars began to develop a new relationship with transgender identity, arguing that transsexual-

middle lies the possibility that sex is comprised of both biological and social components.[170] Thus, whether sex is truly unchangeable, as the Funeral Home claimed, may depend on whether one considers sex to be more biologically or socially determined.

The more open one is to the possibility that sex is socially determined, the more likely one is to reject the argument that a person's sex cannot be changed. This is because social constructs, by nature, are not intractable but instead are continually shaped and reshaped by political, economic, and social forces.[171] Thus, a person's sex could change if the construct itself is modified or if a person deliberately alters her conformance with the construct.[172]

Those who believe sex is biologically determined may be less accepting of the possibility that a person's sex can be changed because certain biological traits associated with sex, such as chromosomal composition, cannot be altered. But even within the biological framework, the notion that sex is unchangeable is becoming increasingly complicated, as our understanding of the biological determinants of sex continues to evolve. Indeed, even the *Etsitty* court, which held that transgender discrimination does not constitute sex discrimination, acknowledged that "[s]cientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female."[173] As science has advanced, so too has our understanding that a person's sex is not biologically determined by genitalia alone; other traits, such as gonads, hormones, secondary sex characteristics, chromosomes, and even gender identity may also factor into the classification.[174] Moreover, the fact that

ity showed how both gender *and* sex were socially constructed."); Terry S. Kogan, *Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"*, 48 HASTINGS L.J. 1223, 1248–49 (1997) ("Contemporary critical gender theory has moved beyond the early feminist critique of the construction of gender to a realization that the dimorphic paradigm of sex itself is socially constructed.").

170. *See, e.g.*, Weiss, *supra* note 167, at 616 ("[T]he most plausible and fruitful theoretical stance is to consider both gender and biological attributes distinct components of sex. Thus, sex would be understood as a combination of two parts: biological attributes and gender attributes. The biological attributes include genitalia, chromosomes, and secondary sex characteristics. The gender attributes are composed of two different parts: a psychological gender identification as male or female and a social-behavioral expression of masculinity or femininity. Thus, both biological attributes and gender bear on the issue of a person's sex."); *see also* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 11 (2012) (explaining that many scientists believe a person's gender identity is one of many aspects of their sex).

171. *See* Anthony Bertelli, *Marketing Racism: The Imperialism of Rationality, Critical Race Theory, and Some Interdisciplinary Lessons for Neoclassical Economics and Antidiscrimination Law*, 5 VA. J. SOC. POL'Y & L. 97, 136 (1997) (explaining the postmodern view that social constructs are not intractable but can be changed through social forces).

172. Feminist scholar Judith Butler argues in her groundbreaking work, *Gender Trouble*, that sex is just as socially constructed as gender, such that "the distinction between sex and gender turns out to be no distinction at all." BUTLER, *supra* note 167, at 7. Butler refutes the notion that gender is simply "the cultural inscription of meaning on a pregiven sex," claiming instead that "gender must also designate the very apparatus of production whereby the sexes themselves are established. As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established . . . ." *Id.* If Butler is correct that sex is socially constructed, there is no reason to suppose sex is unchangeable.

173. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007).

174. *See* Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 288–91 (2015) (summarizing research on the various biological traits that factor into scientists' current understanding of sex); *see also* GREENBERG, *supra* note

a person may possess some biological traits typically associated with males but others typically associated with females raises complex questions about how to classify such a person. Must a person possess all of the biological traits associated with a particular sex to be deemed a member of that sex?[175] If a person must be either male or female despite possessing ambiguous or noncongruent sex traits, are there some traits, like genitalia or chromosomes, that factor more heavily than others into that determination? The funeral home seemed to think so. It argued that even if a person alters his genitalia or secondary sex characteristics, it is his chromosomes—a trait that cannot be changed—that ultimately determine his sex.[176] But even then, the funeral home's claim that a person possesses either XX or XY chromosomes is not always true: scientists in Australia were astounded to recently discover that a woman pregnant with her fifth child possessed both XX and XY chromosomes.[177]

The biological complexities of sex raise challenging questions about whether it is possible to change a person's sex, and if so, how that is accomplished. Must a person alter all of his biological sex traits in order to change his sex? Or is it only necessary to change certain traits? If so, which ones? And who decides? If a person possesses noncongruent sex traits, does it matter whether the noncongruence is a consequence of birth or is self-induced? In other words, are people who intentionally manipulate their sex traits somehow different from people who are born with noncongruent sex traits? Furthermore, if it is more accurate to characterize biological sex as a spectrum than as a dichotomy, as some scientists and scholars urge,[178] can a person change his sex merely by changing his position on the spectrum? If so, how much movement on the spectrum is required to change one's sex? And who decides at what point on the spectrum a person qualifies as male or female? Of course, these questions defy easy answers, and

170, at 11–13, 139 n.2 (arguing that gender identity is a component of biological sex); JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES 4–5 (1994) (arguing the same).

175. If so, where does that leave the father of four children who discovered he has a uterus, *see* Afak Yusuf Sherwani et al., *Hysterectomy in a Male? A Rare Case Report*, 5 INT'L J. SURGERY CASE REPS. 1285–87 (2014), not to mention the estimated 1% of the population that has some form of disorder of sex development by which they possess a combination of "male" and "female" biological traits? *See* Valerie A. Arboleda et al., *DSDs: Genetics, Underlying Pathologies and Psychosexual Differentiation*, 10 NATURE REVS. ENDOCRINOLOGY 603–15 (2014).

176. Responsive Brief of Appellee at 30–31, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (No. 16-2424), 2017 WL 2222848, at *30–31.

177. *See* Paul A. James et al., *High-Level 46XX/46XY Chimerism Without Clinical Effect in a Healthy Multiparous Female*, 155 AM. J. MED. GENETICS 2484–88 (2011).

178. *See, e.g.*, Anne Bolin, *Transforming Transvestism and Transsexualism: Polarity, Politics, and Gender, in* GENDER BLENDING 25–27 (Connie Bullough et al. eds., 1997) (discussing the expanding spectrum of sex and gender identities in American culture); Ainsworth, *supra* note 174, at 290 (quoting Eric Vilain, a clinician and the director of the Center for Gender-Based Biology at UCLA, who explained, "Biologically, [sex is] a spectrum."); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 275 (1999) (arguing that "sex and gender range across a spectrum"); Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 281–82 (1997) ("There *is*, however, unanimity of opinion in the medical community that sex exists along a continuum, that male and female are not the sole and mutually exclusive categories, and that determination of sexual identity requires consideration of several factors.").

any attempt to resolve them would far exceed this Article's scope. But the broader point is this: even if one subscribes to the view that sex is biologically determined, the complexities of biological sex leave open the possibility that a person's sex may be changed. Therefore, regardless of whether sex is socially or biologically determined, the funeral home's claim that "a person's religion can be changed, but a person's sex cannot," is far from certain.

The funeral home sought to establish that religion is changeable but sex is not so it could then argue more broadly that mutable and immutable characteristics are incapable of comparison. In making this argument, the funeral home equated mutability to changeableness, claiming that because sex is unchangeable it is therefore immutable.[179] Setting aside the uncertainty of the underlying premise that a person's sex cannot be changed, there are at least two problems with the funeral home's argument. First, it does not matter whether religion is mutable and sex is immutable because Title VII protects mutable and immutable characteristics alike.[180] The statute prohibits discrimination based on race, color, sex, and national origin—all of which are typically regarded as immutable,[181] as well as religion, which is widely considered mutable.[182] While the mutability/immutability distinction may have relevance in other areas of the law, in the Title VII context courts do not treat religion any less favorably than the other traits protected under Title VII.[183] There is no hierarchy of traits under the statute; each is considered equally important and worthy of protection.[184] Consequently,

179. Responsive Brief of Appellee at 30–31, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (No. 16-2424), 2017 WL 2222848, at *30–31 (arguing that "a person's sex cannot [be changed] . . . because sex . . . is immutable").

180. *See* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 838–39 (1987) (arguing that the distinction between mutable and immutable traits should be "meaningless" under Title VII).

181. *See, e.g.*, Baker v. Cal. Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974) (referring to race, national origin, color, and sex as immutable characteristics); EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014) ("Title VII prohibits discrimination on the basis of immutable characteristics, such as race, sex, color, or national origin."); Pagan v. Dubois, 884 F. Supp. 25, 26 (D. Mass. 1995) (explaining that "[t]he color of a person's skin and the country of his origin are immutable facts").

182. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 329 (4th Cir. 2018) ("Although religion, unlike race and national origin, is not an immutable characteristic, the Constitution treats classifications drawn on religious grounds as equally offensive."); Wilson v. Pepsi Bottling Grp., Inc., 609 F. Supp. 2d 1350, 1352 (N.D. Ga. 2009) ("Although most people are 'born into' a religion as a result of their parents' faith, religion is not an immutable characteristic; people can change, or convert, from one religion to another."); *In re* Marriage Cases, 43 Cal. 4th 757, 842 (2008) (arguing that "one's religion, of course, is not immutable but is a matter over which an individual has control"); Startzell v. City of Phila., No. Civ. A. 05-05287, 2006 WL 1479809, at *6 (E.D. Pa. May 26, 2006) (reasoning that "religion and religious beliefs are not truly immutable characteristics, as are a person's race or national origin").

183. If anything, Title VII may afford *more* protection to religion than the other traits, as it is the only trait that employers have a statutory duty to affirmatively accommodate. *See* 42 U.S.C. § 2000e(j) (2018).

184. *See* Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations that Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer under Title VII?*, 78 FORDHAM L. REV. 1331, 1338–39 (2009) (explaining that "Title VII protects both mutable and immutable characteristics" because discrimination based on either type of characteristic "may be equally unfair"); Dallan F. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 711 (2015) (arguing that "there can be no doubt that [religion's] inclusion in Title VII places religion on equal footing with race, color, sex, and national origin"); James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV.

whether sex is immutable and religion is mutable is irrelevant to whether the two traits are comparable.

But even if courts were to treat mutable and immutable characteristics differently in Title VII cases, it is hardly certain that a court would consider religion mutable but sex immutable, as the funeral home alleged. In making this argument, the funeral home relied on a narrow, antiquated understanding of immutability tied solely to one's inability to change a physical trait. This characterization is hardly novel but instead finds root in the Supreme Court's early ruminations on immutability. For instance, in *Frontiero v. Richardson*, a plurality of the Court described sex, race, and national origin as "immutable characteristic[s] determined solely by the accident of birth,"[185] and in *Regents of the University of California v. Bakke*, Justice Brennan reasoned that "race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside."[186] Other courts have similarly held that a trait is immutable if it is incapable of being changed or overcome.[187]

Over time, the way courts have thought about immutability has evolved to not only encompass physical traits that cannot be changed but also those traits that would be exceedingly difficult to change or that are so central to a person's identity that they should not be required to be abandoned. Foundational to this evolution has been Judge William Norris' concurring opinion in *Watkins v. U.S. Army*, a Ninth Circuit case involving the military's refusal to reenlist a solider because of his sexual orientation.[188] Judge Norris argued that the Supreme Court never intended to limit immutability to traits that cannot be physically changed or masked—sex can be changed through surgery, alienage can be modified through naturalization, national origin can be hidden through assimilation, and racial appearance can be altered with pigment injections.[189] "At a minimum," he reasoned, "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[190] Judge Norris went even further, explaining that under a more "capacious" reading of the case law, "'immutability' may describe those traits that are so central to a person's identity that it would be

1023, 1034 (2004) ("[R]eligion's inclusion enshrined it as something beyond the reach of employers in making relevant workplace decisions and, in so doing, equated it with other indisputably immutable characteristics, such as race or sex, at least for the purpose of legal protection.").

185. 411 U.S. 677, 686 (1973).

186. 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part) (citation omitted).

187. *See, e.g.*, Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (explaining that discrimination based on immutable sex characteristics violates Title VII because "they present obstacles to employment of one sex that cannot be overcome"); D'Amario v. Russo, 718 F. Supp. 118, 123 (D.R.I. 1989) (defining immutability as "not capable of change").

188. 875 F.2d 699, 711 (9th Cir. 1989) (Norris, J., concurring).

189. *Id.* at 726.

190. *Id.*

abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[191] Courts that have followed Judge Norris' lead no longer evaluate immutability solely by whether a trait can be physically altered but alternatively by considering the difficulty (both physically and mentally) of altering the trait or the centrality of the trait to the person's identity.[192] Under this "new immutability,"[193] both religion and sex likely qualify as immutable traits because of their centrality to many people's identity, as previously discussed.[194]

In short, sex and religion are comparable protected traits because they both play an essential role in a person's sense of identity and can be expressed in a variety of different, sometimes inconsistent ways. The funeral home's emphasis on the physical permanence and immutability of sex compared to religion is misguided. The inability to physically change one's sex—a proposition that is far from certain—ultimately has no bearing on the conversion analogy's validity because a person's sex can be legally changed. The immutability of sex compared to religion is similarly unimportant. Title VII protects mutable and immutable traits equally, and even if this were not so, sex and religion are both immutable under contemporary interpretations of such a term that focuses on the centrality of the trait to personal identity rather than whether the trait can be physically changed.

191. *Id.*; *see also* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 28 (2015) (arguing that this revised version of immutability abandons the "fraught distinction between chance and choice," "refocuses the doctrine to consider the costs of change for an individual's sense of self," "expands protection beyond those deemed blameless for possessing disfavored traits to include those who have made protected choices to adopt particular traits," and "counters stigma by allowing those claiming discrimination to do so without disavowing their own agency and pride in determining the content of their characters").

192. *See, e.g.*, Hernandez-Montiel v. Immigration & Naturalization Serv., 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, 409 F.3d 1177 (9th Cir. 2005) (holding that "[s]exual orientation and sexual identity" are "immutable" because they are "so fundamental to one's identity that a person should not be required to abandon them"); Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 326 (D. Conn. 2012) ("Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic should be considered immutable and an individual should not be required to abandon it. To hold otherwise would penalize individuals for being unable or unwilling to change a fundamental aspect of their identity; an aspect which has been recognized as an integral part of human freedom."); Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992) ("While traits such as race, gender, or sexual orientation may be altered or concealed, that change can only occur at a prohibitive cost to the average individual. Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self."); *see also* Clarke, *supra* note 191, at 4 ("Many courts now ask not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon.") (internal quotation and citation omitted).

193. *See generally* Clarke, *supra* note 191 (referring to modern interpretations of immutability as "new immutability").

194. *See supra* notes 136–41 and accompanying text. Indeed, a number of courts and scholars have begun characterizing religion as immutable. *See, e.g.*, Sullivan v. Cty. of Hunt, 106 Fed. Appx. 215, 220 (5th Cir. 2004) (listing religion as an immutable trait); McDowell v. Alvarez, No. 09-C-8033, 2012 WL 3481642, at *12 (N.D. Ill. Aug. 15, 2012) (same); STEPHEN L. CARTER, THE CULTURE OF DISBELIEF, HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION 5–6 (1993) (arguing that religion is an immutable characteristic); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1517 (2011) ("A secularist might deem religion to be alterable, but it is immutable in the worldview of many devout individuals because it is fundamental to their conscience or identity.").

B. Are Religious Conversion and Transgenderism Comparable Processes?

Although transgenderism and religion often find themselves at odds,[195] the process of changing one's sex and the process of changing one's religion share a number of key similarities. Both involve alterations that go to the very core of self-identity.[196] As such, the decision to change one's religion or sex is deeply personal and private. And yet, for an individual whose transition results in outward changes in appearance or conduct, the decision is highly public in the sense that the individual has little control over who finds out about the transition and how the individual is treated as a result. Because the ramifications of religious and sexual transitions often reverberate beyond the individual, the decision to transition can be highly polarizing. Some who transition undoubtingly will be met with support, encouragement and love from their families, friends, and broader communities. But for others, such a transition could—and too often does—result in disownment, ostracization, discrimination, or even death.[197]

Notwithstanding these similarities, two objections have surfaced to analogizing sexual and religious transitions. First, Amy Ronner argues that a change to one's sex fundamentally differs from a change to one's religion because sexual transitions are involuntary whereas religious transitions are voluntary.[198] In Ronner's view, transgenderism is not a choice; consequently, a transgender person's "process of being herself is not analogous to waking up one morning and deciding to go to the synagogue in lieu of the church."[199] This argument misses the mark because it underestimates the involuntariness of religious conversion for some people. In many cases, changing religions is nowhere near as simple as Ronner suggests. Few religious converts simply wake up one morning and decide to change religions as flippantly as they might select what outfit to wear that day. The decision to convert, or, as is becoming increasingly common in the United States, to deconvert,[200] can be an excruciating process that the individual may

195. *See supra* notes 13–17 and accompanying text.

196. *See supra* Section III.A.

197. *See* Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 159–60 (2000) ("During the transition, transgendered people lose jobs, are often ostracized by families of origin, are subjected to religious guilt, may experience divorces and loss of child or grandchild visitation, and suffer cruelty from peers and neighbors. In addition, legal hurdles for documentation correction add more layers of stress during this already difficult time."); Elizabeth Booker Houston, *The ADA's Exclusion of Gender Dysphoria: An Analysis of the Rift Between Jurisprudence and Mental Health*, 26 TUL. J.L. & SEXUALITY 83, 96 (2017) ("The transgender community faces high levels of violence, harassment, and discrimination."); *Violence Against the Transgender Community in 2018*, HUMAN RIGHTS CAMPAIGN (2018), https://www.hrc.org/resources/violence-against-the-transgender-community-in-2018 (last visited Apr. 2, 2020) (reporting that in 2017, "advocates tracked at least 28 deaths of transgender people in the United States due to fatal violence, the most ever recorded").

198. Ronner, *supra* note 30, at 899.

199. *Id.*

200. *See* PEW RESEARCH CTR., U.S. PUBLIC BECOMING LESS RELIGIOUS: MODEST DROP IN OVERALL RATES OF BELIEF AND PRACTICE, BUT RELIGIOUSLY AFFILIATED AMERICANS ARE AS OBSERVANT AS BEFORE 3 (2015), http://assets.pewresearch.org/wp-content/uploads/sites/11/2015/11/201.11.03_RLS_II_full_report.pdf (finding that the percentage of religiously-unaffiliated Americans increased from 16% in 2007 to 23% in 2014).

agonize over for months, years, or even a lifetime.[201] Psychologist Lewis Rambo, who identified seven distinct stages of the conversion process, argues that "conversion is a complex, multifaceted process involving personal, cultural, social, and religious dimensions" that ordinarily transpires over a period of time, if not an entire lifetime.[202]

Like changing one's sex, religious conversion can exact a heavy toll on the convert, whether psychologically, socially, financially, physically, politically, or otherwise.[203] That people who face such severe consequences convert anyway speaks to how involuntary conversion can feel in some situations. If religious conversion were always merely a matter of preference, a mother likely would not have converted from Islam to Christianity—a decision that ultimately resulted in her murder.[204] Nor would tens of thousands of Europeans in the 1800s have sold virtually all of their possessions, left their families, traversed the ocean, and pulled handcarts across the Great Plains and over the Rocky Mountains to join the Latter-day Saints in the Salt Lake Valley.[205] Accounts of individuals sacrificing everything—including their lives—for their newfound faiths are not uncommon.[206] For such converts, the decision to join a new religion is not simply a matter of preference or convenience; they often speak of their conversion not as a choice but as something to which they felt called, guided, or compelled from within.[207] Whether the convert's compulsion to join a religion is as strong as a transgender person's impulse to change sexes is unimportant for purposes of the conversion analogy. What matters is that in both situations, an element of involuntariness may be present: just as a transgender person may feel he has no choice but to change his sex, a religious person may feel equally compelled to change his religion. In this way, sexual and religious transitions are highly analogous.

201. David G. Bromley, *The Social Construction of Contested Exit Roles: Defectors, Whistleblowers, and Apostates*, *in* THE POLITICS OF RELIGIOUS APOSTASY 19, 30 (David G. Bromley ed., 1998) ("Priests and nuns who ultimately have left their religious roles often agonize over that decision, sometimes for many years.").

202. LEWIS R. RAMBO, UNDERSTANDING RELIGIOUS CONVERSION 165–70 (1993).

203. *See generally* Raymond F. Paloutzian, *Psychology of Religious Conversion and Spiritual Transformation*, *in* THE OXFORD HANDBOOK OF RELIGIOUS CONVERSION 209 (Lewis R. Rambo & Charles E. Farhadian eds., 2014); Jeffrey A. Roy, Carolene Products*: A Game-Theoretic Approach*, 2002 BYU L. REV. 53, 94 (2002) ("[C]hanging religion may involve very high costs since religion is often central to a person's identity.").

204. *See Germany: Afghan Man Sentenced to Life for Murder of Converted Muslim*, DW (Feb. 9, 2018), http://www.dw.com/en/germany-afghan-man-sentenced-to-life-for-murder-of-converted-muslim/a-42516438.

205. *See* William G. Hartley, *The Place of Mormon Handcart Companies in America's Westward Migration Story*, 65 ANNALS IOWA 101, 103–08 (2006) (detailing the history of how European converts to Mormonism left their homelands to join other Mormons in the Salt Lake Valley); *The Convert Immigrants*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Aug. 1, 2013), https://history.churchofjesuschrist.org/article/pioneer-story-the-convert-immigrants-?lang=eng ("As the Church spread through Europe, tens of thousands of new converts emigrated to America, leaving everything behind them for their faith and desire to be with fellow members.").

206. *See, e.g.*, Azam Ahmed, *A Christian Convert, on the Run in Afghanistan*, N.Y. TIMES (June 21, 2014), https://www.nytimes.com/2014/06/22/world/asia/afghanistan-a-christian-convert-on-the-run.html (recounting the experiences of a Christian convert in Afghanistan who was forced into hiding after his in-laws attempted to kill him because of his religious beliefs).

207. *See generally* CHANA ULLMAN, THE TRANSFORMED SELF: THE PSYCHOLOGY OF RELIGIOUS CONVERSION (1989). For many Christians, the apostle Paul stands out as an especially unlikely candidate for conversion. Paul wrote of his unexpected conversion on the road to Damascus, "For I neither received it of man, neither was I taught it, but by the revelation of Jesus Christ . . . when it pleased God, who separated me from my mother's womb, and called *me* by his grace." *Galatians* 1:12, 15.

Ronner's argument that religious conversion is voluntary but transgenderism is involuntary is also flawed because it fails to acknowledge the voluntary aspects of both types of transition. The religious convert and the transgender individual may feel equally compelled to undergo their respective transitions. Yet even if they feel as though they have no choice in the matter, the actual decision to transition—be it from wearing a crucifix to a yarmulke, or from slacks to a skirt—is not a matter of biological survival but is voluntary in the sense it must be affirmatively reached through weighing costs and benefits.[208] Therefore, religious conversion and transgenderism may be involuntary in some ways but voluntary in others. This dualism further illustrates the similarity between changing one's sex and changing one's religion.

A second criticism of analogizing transgenderism to religious conversion is that the two processes are dissimilar because changing one's sex is not nearly as straightforward as changing one's religion. Ronner argues that "while the word 'change' is the linchpin of Judge Robertson's decision [in *Schroer*], he never defines 'change of sex,' and thus leaves unresolved questions" about what a transgender person's change from one sex to the other must entail, if not require, to be comparable to religious conversion.[209] Ronner wonders:

> [D]oes "change" occur when one body defies gender conventions? Is "change" a body undergoing physical alterations through hormones or surgery? If "change" equals fixing the body, then what anatomical features qualify as "change" within the meaning of *Schroer*'s take on Title VII? Is mere disclosure of a [gender identity disorder] diagnosis sufficient to trigger protection for an individual under the *Schroer* court's construction of a Price Waterhouse claim? But most significantly, the court does not even mention or consider that there might be no "change" at all. Is it possible that Schroer is and has always been simply herself?[210]

To Ronner, the *Schroer* court's failure to define change was "not just dissatisfying but a tad disingenuous."[211] But in reality, the court was wise not to wade into controversial and highly complex questions about how sex is changed because this issue need not be resolved for the conversion analogy to work. Just as the court chose not to define what it means to change one's sex, it likewise declined to expound on what it means to convert from one religion to another. Like changing one's sex, conversion can encompass a broad spectrum of behaviors that can make it difficult to pinpoint the precise moment when a person's

208. This is not to diminish the seriousness of a person's decision to convert to a religion or to change sexes. Religious converts and transgender individuals alike have reported feeling as if their transition were a matter of life or death. *See, e.g.*, Bill Briggs, *For Transgender Prisoners, Hormones Seen as Matter of Life and Death*, NBC NEWS (Aug. 23, 2013, 3:56 AM), https://www.nbcnews.com/healthmain/transgender-prisoners-hormones-seen-matter-life-death-6C10981031 (quoting a transgender prisoner whose estrogen prescription was withheld during her imprisonment, who explained, "[y]ou begin to feel like you might as well just die . . . [i]t's like a roller coaster ride without anything to hang on to"). But while a person may prefer death over remaining in his or her present state of being, the person is biologically capable of surviving without undergoing the desired change.

209. Ronner, *supra* note 30, at 899–900.

210. *Id.* at 900.

211. *Id.*

conversion is complete.[212] Does the atheist who converts to Christianity become a convert the moment he decides to believe in God? The first time he prays? After reading the Bible? When he attends church? By accepting Christ? Through baptism? What if a person accepts some but not all of a religion's tenets, or begins practicing a new religion while still adhering to certain aspects of his prior faith?[213] In reality, Ronner's questions regarding how a person changes her sex apply with equal force to the religious conversion process, further underscoring the similarities between the two transitions.

The conversion analogy does not require exact definitions of change and conversion because it is unimportant for Title VII purposes where in the transition process the transgender person or the religious convert finds herself. In *Schroer*, the plaintiff was diagnosed with gender identity disorder but had not yet begun physically transitioning from male to female.[214] The court found it unnecessary to decide whether Schroer had fully transitioned to a female at the time of the discrimination.[215] What mattered was that Schroer had informed her prospective employer of her intent to transition and was denied employment as a result.[216] Focusing on the employer's awareness of Schroer's intent to transition allowed the court to avoid having to decide whether Schroer was in fact transgendered before she began dressing as a woman or underwent sex reassignment surgery.[217] Similarly, the *Schroer* court's determination that an employer who fires an employee for converting from Christianity to Judaism has discriminated against the employee "because of . . . religion" is not dependent on the employee actually converting.[218] It would have reached the same conclusion had the employer fired the employee simply for manifesting an intent to convert,

212. *See* RAMBO, *supra* note 202, at 5 ("There is no one cause of conversion, no one process, and no one simple consequence of that process."); Glazer & Kramer, *supra* note 99, at 653–54 ("Transitional identity is identity that has aspects of one or more extant identities, but which is inchoate, in that the identity does not express fully any of those extant identities. For instance, a religious convert has a transitional identity, because her identity has aspects of the religion from which she is converting as well as the religion to which she will convert. Similarly, a transgender person has a transitional identity, because the person's identity has aspects of the gender or sex from which the person is transitioning, as well as the gender or sex to which the person will transition.").

213. *See* PEW FORUM ON RELIGION & PUB. LIFE, *Many Americans Mix Multiple Faiths* (Dec. 9, 2009), https://www.pewforum.org/2009/12/09/many-americans-mix-multiple-faiths/ (reporting that "large numbers of Americans engage in multiple religious practices, mixing elements of diverse traditions;" more than one-third of Americans either regularly or occasionally attend worship services at more than one place; and nearly one-quarter sometimes attend services of a faith different from their own).

214. Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

215. *Id.* at 308.

216. *Id.* at 296–97. Similarly, the *Harris Funeral Homes* plaintiff lost her job after revealing to her employer that "she has struggled with a gender identity disorder her entire life" and intended to have sex reassignment surgery "to become the person that her mind already is." EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568 (6th Cir. 2018) (internal quotations and punctuation omitted). In *Glenn*, the plaintiff, who had begun presenting as a woman outside of work, was fired after informing her employer that she was transgendered and intended to change her name and begin coming to work as a woman. Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011). In *Smith*, the plaintiff was terminated after notifying his employer that she had been diagnosed with gender identity disorder and was undergoing treatment that would likely culminate in complete physical transformation from male to female. Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004).

217. *Schroer*, 577 F. Supp. 2d at 305.

218. *Id.* at 306.

since the employer harbored no bias against Christians or Jews but instead was hostile to the act of conversion itself.[219]

The *Schroer* court was correct to focus on the employer's motivation for the discrimination, as opposed to the employee's actual transgender status, for the additional reason that under Title VII, the employer's motive is the touchstone for liability.[220] In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court held that if the clothing retailer rejected a Muslim applicant because it suspected, but did not know, she would ask to wear a hijab to work, this would constitute discrimination because of religion despite the employer's lack of actual knowledge of the applicant's need for an accommodation.[221] It seemed unimportant to the Court whether the applicant actually would have requested an accommodation to wear a hijab; all that mattered was whether Abercrombie was motivated by this possibility.[222] Similarly, whether a person has actually converted to a particular religion or actually transitioned to the opposite sex is inconsequential. If the employer is motivated to discriminate by the possibility that the employee will change religions or sexes, *Abercrombie* makes clear that such motivation alone would trigger liability under Title VII.

Although not explicitly stated, another reason the *Schroer* court may have been unconcerned about where Schroer was in the transition process was because Schroer considered herself a woman at the time of the discrimination, even though she had not yet begun her physical transition.[223] The court simply deferred to Schroer's subjective understanding of herself as a woman in precisely the same way that courts defer to religious-discrimination plaintiffs when the sincerity of their beliefs is questioned. In assessing an employee's religious beliefs, courts do not probe the validity or plausibility of the beliefs but instead limit their inquiry to "whether the beliefs professed . . . are sincerely held and whether they are, in the believer's own scheme of things, religious."[224] The Fifth Circuit cautioned that this inquiry "must be handled with a light touch, or judicial shyness," and that "examining religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread."[225] In practice, courts are highly deferential to religious-discrimination plaintiffs and have accepted claims of religious belief on little more than an employee's own credible assertions.[226] By deferring to Schroer's subjective understanding of her sex, the court applied the same self-identification standard to sex

219. *Id.*

220. *See* Dallan F. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. 87, 131–32 (2016) (arguing that it is unnecessary for a court to scrutinize an employee's actual protected status because the employer's motivation is the touchstone of Title VII liability).

221. 135 S. Ct. 2028, 2034–35 (2015).

222. *Id.* at 2032–33.

223. *Schroer*, 577 F. Supp. 2d at 295.

224. Fallon v. Mercy Catholic Med. Ctr., 877 F.3d 487, 490–91 (3d Cir. 2017) (internal citation, punctuation, and quotation omitted).

225. Davis v. Fort Bend Cty., 765 F.3d 480, 486 (5th Cir. 2014) (internal citation and punctuation omitted).

226. *See* Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013).

as it would to religion. This tactic, which some scholars have urged,[227] renders moot Ronner's concern about what a change of sex entails. It is certainly possible for the religious convert and transgender individual alike to consider their respective transitions complete without taking any steps to change their identity beyond how they see themselves. If a person sincerely believes she has changed her sex—or for that matter, her religion—that alone should ordinarily end the inquiry.

In sum, transgenderism and religious conversion are sufficiently alike to warrant comparison. The criticism that a change in one's sex is involuntary whereas a change in one's religion is voluntary ignores the reality that there are voluntary and involuntary components of both transitions. Likewise, the argument that determining the point at which a person changes sexes is more difficult than pinpointing when a person changes religions is an insufficient basis for invalidating the analogy, as both transitions can encompass a broad spectrum of behaviors. The argument also fails because whether a person actually changes her sex or religion is immaterial so long as the employer perceives she has or intends to do so.

C. Does Title VII Prohibit Convert Discrimination?

A final vulnerability of the conversion analogy is its presumption that discrimination based on the act of religious conversion constitutes discrimination because of religion under Title VII. The *Schroer* court forcefully concluded this would be "a clear case of [religious] discrimination," that "no court would take seriously the notion that 'converts' are not covered by the statute," and that "discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion."[228] Yet conspicuously absent from its analysis is any authority to support these assertions. Indeed, as of the publication of this Article, no reported federal or state judicial decisions address the convert discrimination scenario *Schroer* describes. Consequently, there is no controlling authority to validate or invalidate the presumption that Title VII protects the act of conversion itself. Whether the court is correct on this point is critical. If it is right, the analogy is sound and may prove the solution to the circuit split. But if it is wrong, the analogy collapses entirely.

227. *See, e.g.*, Reineck, *supra* note 155, at 290–91 ("The self-identification framework is ideal for gender because, as its name suggests, it revolves around self-identification. When applied to religion, it not only acknowledges that, while two Christians, two Jews, or two Muslims might believe in and practice the same religion differently, both interpretations are valid. It also recognizes that not everyone falls into a finite number of categories. Some practice well-known religions, others practice lesser-known religions, and some hold religious beliefs unique to themselves and unconnected to any recognized religion. Likewise, many identify outside of the well-known binary genders: man and woman. Some identify with lesser known genders, such as agender, neutrois, or androgyne, and others feel that no existent word adequately describes their experience and may identify under an umbrella term, such as non-binary or genderqueer, or invent their own word altogether. Additionally, two people who do identify as the same gender may not experience it the same way, but their experiences are equally valid.").

228. *Schroer*, 577 F. Supp. 2d at 306 (emphasis in original).

The employer in *Harris Funeral Homes* argued to the Sixth Circuit that the *Schroer* court erred in claiming convert discrimination is a form of religious discrimination.[229] The funeral home took the position that religious discrimination is only unlawful if it burdens a person's religious beliefs,[230] reasoning that "the act of converting is not itself a religion; it is rather a transition from one belief system to another. So while there are religious tenets to which one may adhere in the Catholic faith or Jewish faith, there are no tenets establishing a 'conversion faith.'"[231] In the funeral home's estimation, "if a new convert has occasion to claim religious discrimination for being of, for example, the Jewish faith, he must point to his Jewish faith, not to the transition between one faith (or no faith) and the new one."[232] In essence, the funeral home relied on the same logic the Tenth Circuit employed in *Etsitty* to hold that transgender discrimination is not sex discrimination per se under Title VII: Sex discrimination is only unlawful if it burdens one sex relative to the other; the act of transitioning is not itself a sex but is rather a transition from one sex to another; therefore, a transgender plaintiff must point to her sex, not her transition between sexes, to prevail on a sex discrimination claim.[233] As with the funeral home's contention that sex and religion are not comparable, the Sixth Circuit did not engage with this claim, so while the court obviously found it unconvincing, its reasoning underlying this determination remains unknown.

The Sixth Circuit is not alone in embracing the idea of convert discrimination without explaining its rationale; the EEOC[234] and an Ohio district court[235] did so as well. These endorsements certainly signal that if presented with a convert-discrimination claim, they would agree that such discrimination was "because of . . . religion,"[236] yet it remains unclear what logic they would rely upon to reach this conclusion. Among the handful of adjudicators that have endorsed the conversion analogy, only one—a Connecticut district court—felt it necessary to explain why Title VII prohibits convert discrimination:

> No court would make [the] mistake [of concluding discrimination because of conversion does not constitute religious discrimination] because no court would implicitly define religion as synonymous with a purportedly exhaustive list of religions, and thus could not conclude that discrimination "because of religion" must be limited to discrimination against members of particular religions on the list because they are such members. Because

229. Responsive Brief of Appellee, *supra* note 158, at *30.

230. *Id.* at *31.

231. *Id.*

232. *Id.*

233. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) ("Nevertheless, there 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 protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.").

234. *See* Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

235. *See* Bd. Educ. Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 868–69 n.8 (S.D. Ohio 2016).

236. 42 U.S.C. § 2000e-2(a) (2018).

> Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the "wrong" way, is obviously discrimination "because of religion."[237]

Thus, just as Christianity and Judaism are examples of religion rather than the definition of religion itself, male and female are examples—not the definition—of sex. Moreover, the court's well-reasoned analysis lays to rest the claim that Title VII only prohibits discrimination against religious beliefs, not religious transitions. There is no requirement under Title VII that a plaintiff asserting a religious-discrimination claim actually belong to a formal religion.[238]

In essence, Title VII prohibits discrimination against religious converts because they would not have suffered discrimination but for their religious beliefs. The discrimination is "because of . . . religion" because the convert would not have suffered an adverse employment action if she had changed some other aspect of herself, such as wearing red instead of blue nail polish. Thus, Title VII's protection of religious converts does not require recognition of converts as a protected class, but rather stems from the reality that an employer literally cannot discriminate against a person who changes religions without discriminating "because of . . . religion." In like manner, it is impossible for an employer who discriminates against a transgender employee to do so without discriminating "because of . . . sex."[239]

In short, the *Schroer* court's omission of judicial authority to support its claim that discrimination because of conversion is discrimination "because of . . . religion" does not render the assertion invalid. Although no court to date has

237. Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016).

238. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1117 (10th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 2008 (2015) (quoting EEOC, EEOC COMPLIANCE MANUAL § 12-I(A)(1) (2008), http://www.eeoc.gov/policy/docs/religion.pdf) ("Religion includes not only traditional, organized religions . . . but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others."); Scott v. Montgomery Cty. Sch. Bd., 963 F. Supp. 2d 544, 547, 559 n.11 (W.D. Va. 2013) (stating that the plaintiff who described her religious beliefs as "orthodox Christianity" was not precluded from bringing Title VII claim based on lack of formal religious affiliation because "the statute protects persons who are not members of organized religious groups"); Bushouse v. Local Union 2209, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) (noting that Title VII has a "broad definition" of religious belief).

239. An additional possible basis for concluding convert discrimination is a form of religious discrimination lies in Title VII's definition of religion itself, which "includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j) (2008). Although the funeral home may have been correct in arguing to the Sixth Circuit that the act of conversion does not constitute a religion per se, Responsive Brief of Appellee *supra* note 158, at *31, its conclusion that Title VII does not protect the act of conversion seems clearly wrong in light of the statutory definition of religion. Conversion is quite clearly an "aspect of religious observance[,] . . . practice, [or] belief" and therefore must fall squarely within the statute's definition of religion. If Title VII's expansive definition of religion were the sole basis for concluding convert discrimination constitutes religious discrimination, the conversion analogy may not apply to transgender discrimination. Title VII does not define sex in the same broad way it defines religion. *See* 42 U.S.C. § 2000e(k). The statute makes no mention of sex-related observances, practices, or beliefs. *See id.* In fact, it does not attempt to define sex at all other than to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of unlawful sex discrimination. *Id.* Title VII's omission of a broad definition of sex, however, does not appear fatal to the conversion analogy because of the alternative, more compelling basis for concluding convert discrimination is unlawful religious discrimination articulated by the *Fabian* court.

decided a case of convert discrimination, the fact that the Sixth Circuit, two district courts, and the EEOC have adopted the analogy, and that no court has rejected or even criticized it, suggests that at least some courts would consider the *Schroer* court's assumption correct. Moreover, although this premise lacks judicial validation, it is almost certainly correct because the term religion is not confined to a list of particular religions but encompasses a spectrum of behaviors influenced by religious belief.

IV. CONCLUSION

This Article critically assesses the conversion analogy as a way to potentially resolve uncertainty over whether Title VII prohibits discrimination against transgender employees. The analogy is appealing because it focuses on change within a protected status, rather than the parameters of the protected status itself, thus allowing courts to avoid controversial questions about the statutory meaning of sex or whether Congress intended to prohibit transgender discrimination when it passed the Civil Rights Act. Moreover, because the analogy is untethered to the concept of gender nonconformity, a transgender employee may qualify for protection under the statute regardless of how she chooses to act or dress. The conversion analogy not only withstands this Article's scrutiny but is stronger because of it. Though perhaps odd bedfellows, transgender employees and religious converts share a number of key features that make their comparison not only possible but appropriate. Thus, in an era when uncertainty persists as to the rights of transgender people in the workplace, the conversion analogy offers a viable basis for protecting a subset of workers that has been marginalized, harassed, and discriminated against for far too long.[240]

240. *See* JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 22, 55–63 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (finding that 90% of transgender survey respondents experienced harassment, mistreatment, or discrimination at work or took actions to avoid it; they were twice as likely as the general population to be unemployed; and they were four times more likely than the general population to live in extreme poverty).