Employment Discrimination and Political Views

by

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Abstract

Increasingly employees have be terminated by employers based upon political views which differ from the employer. The right to express opinions and beliefs is firmly granted in the First Amendment to the Constitution. However, expressions of political beliefs are not currently protected from employment discrimination under Title VII of the 1964 Civil Rights Act. Instead, Title VII prohibits discrimination against an employee only "because of such individual's race, color, religion, sex, or national origin." In fact, several courts have suggested that political beliefs are excluded from Title VII employment discrimination protections.

The question raised by this manuscript is whether it is a fair and proper limitation on employment discrimination protections for secular beliefs, including political beliefs, to be excluded. In Part I, this paper explores the criteria that is currently used for Title VII protections and proposes a new model. Part II discusses the dichotomy between the treatment of an employee's religious beliefs and practices, and how this could be extended to secular beliefs. Part III discusses the new model and shows how it would provide employees with greater protections from discrimination for political beliefs unrelated to their jobs.

I. Introduction

On May 25, 2020, Minneapolis police officers arrested George Floyd, a 46-year-old Black man, after a convenience store clerk claimed he used a counterfeit $20 bill to buy cigarettes. Mr. Floyd died after Derek Chauvin, one of the police officers, handcuffed him and pinned him to the ground with a knee, an episode that was captured on video. Mr. Floyd's death set off a series of nationwide protests against police brutality, including those of Black Lives Matter (BLM).[1]

In the wake of BLM protests, a police detective in Springfield, Massachusetts, Florrisa Fuentes, said she was fired after sharing a photo of her niece at a BLM protest on Instagram. Fuentes, reposted her niece's photo, which featured two people holding signs. One sign read, "Who do we call when the murderer wears the badge." The other sign implied that people should shoot back at the police.[2]

Ms. Fuentes, 30, joined the Springfield Police Department in July 2019 and was promoted to detective in the spring of 2020. She shared the Instagram post to support her niece and the movement as a whole, not as an endorsement of violence against the police, she said on Saturday.

But after she shared the post as an Instagram story late one evening, Ms. Fuentes woke up to messages from colleagues warning her about possible consequences. She deleted the post and

[1] Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[2] Stephanie Barry, *Former Springfield Police Detective Florissa Fuentes, Fired Over Black Lives Matter Social Media Post, Files Lawsuit Against City*, MASS LIVE (Sep 28, 2020), https://www.masslive.com/police-fire/2020/09/former-springfield-police-detective-florissa-fuentes-fired-over-black-lives-matter-social-media-post-files-lawsuit-against-city.html.

issued an apology to her co-workers in a private Facebook group. "I did not share the photo with any malicious intent and I should have thought about how others might perceive it," she wrote. Ms. Fuentes said she met with supervisors at the department, including the police commissioner. She said they expressed disappointment at the Instagram post but understood that she regretted sharing it.

Though Ms. Fuentes said the workplace was "hostile," with colleagues shunning her after sharing their criticisms in the Facebook group, she thought the episode was behind her. She soon heard that the mayor, Domenic Sarno, was upset about the post.

Joseph Gentile, a national vice president of the National Association of Government Employees, which represents police officers and other public employees, posted to the Facebook group that he hoped "people will judge her by what she does going forward," and asked the department to "please focus on staying united so we can stay safe!"

Ms. Fuentes said she received a call on June 19, 2020, from Mr. Gentile, who told her she could resign or be fired and that she needed to make a decision that day. Hours later, she turned in her badge and gun after being fired.[3]

Ms. Fuentes was fired for her support of a family member involved in a Black Lives Matter protest. Yet, her Instagram posts were unquestionably an expression of political belief. The right to express opinions and beliefs is firmly granted in the First Amendment to the Constitution.[4] However, expressions of political beliefs are not currently protected from employment discrimination under the Civil Rights Act.[5] Instead, Title VII prohibits discrimination against an employee only "because of such individual's race, color, religion, sex, or national origin."[6] Moreover, several courts have suggested that political beliefs are excluded from Title VII employment discrimination protections.[7]

The question raised by this issue is whether it is fair and a proper limitation on employment discrimination protections for secular beliefs – those which are wholly without a religious component – including political beliefs, to be excluded. In Part I, this paper explores the criteria that is currently used for Title VII protections, arguing for the development of a new model. Part II discusses the dichotomy between the treatment of an employee's religious beliefs and practices, and how this could be extended to secular beliefs. Part III examines how a new model would apply specifically to political beliefs, providing employees with greater protections from discrimination for qualities unrelated to their jobs.

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[3] Bryan Pietsch, *Massachusetts Detective Is Fired Over Black Lives Matter* Post, N.Y. TIMES (July 5, 2020); https://www.nytimes.com/2020/07/05/us/Black-lives-matter-detective-fired-Springfield.html.

[4] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .")

[5] *See* 28 U.S.C. § 2000e *et seq.* (2018).

[6] *Id.* § 200e-2(a)(1).

[7] *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1117 (10th Cir. 2013) (confirming "social, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII"); Telfair v. Fed. Exp. Corp., 934 F. Supp. 2d 1368, 1383 (noting "beliefs and practices grounded in tenets or precepts of groups or entities that are more social and political than religious do not qualify as religious within Title VII"); Fallon v. Mercy Catholic Med. Ctr. Of Se. Pa, 200 F. Supp. 3d 553, 563 (E.D. Pa. 2016) (finding beliefs that are "personal, political, sociological and economic—the very definition of secular philosophy as opposed to religious orientation" are not protected).

II. A Rethinking of the Criteria for Title VII Protections

Unlike federal legislation that prohibits employment discrimination on the basis of age or disability,[8] the United States Code does not explain the purpose behind Title VII's employment protections. When Title VII was enacted during the civil rights movement, congressional discussion focused primarily on race. Because they are often correlated, the additional protected classes of color and national origin can be seen to support and strengthen racial protections. "Creed" encompassed "religion" and often accompanied "race" and "color" in anti-discriminatory efforts prior to the Civil Rights Act of 1965.[9] "Sex" as a protected class was a late addition to Title VII, included without much debate and according to some scholars, with intention to stymie the law's enactment.[10]

In this history, the lack of established congressional findings or a defined purpose for Title VII complicates an evaluation of how well the current statute achieves its goals. Similarly, the text and structure of Title VII are of limited use in arguments for expanding or reinterpreting the discrimination protections for employees. However, the Supreme Court explicitly found a congressional intent "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [one class of] employees over other employees."[11] The sections that follow reexamine the currently protected classes against this stated intention, in light of modern circumstances and particularly in the area of "belief."

A. Current Protections Already Include Mutable Characteristics

The protected classes of race, color, sex, and national origin are considered immutable characteristics. Immutable means not capable of or susceptible to change[12] Each one is established and identified at the moment a baby is born, and barring extraordinary effort, an individual retains those characteristics until death. Religion stands alone as a class characteristic that can be changed,

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[8] *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602, 602; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29.

[9] *See, e.g.*, Steele v. Louisville & N. R. Co., 323 U.S. 192, 209 (1944) (Murphy J., concurring) (expressing disapproval "whenever economic discrimination is applied under authority of law against any race, creed or color"); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) (establishing that a state may "protect workers from exclusion solely on the basis of race, color or creed by an organization"); Estep v. United States, 327 U.S. 114, 121 (1946) (forbidding discriminatory classification because of "race, creed, or color").

[10] *See* Louis Menand, *How Women Got in on the Civil Rights Act*, THE NEW YORKER (July 14, 2014) (stating that legislators viewed the addition "as either a prank intended to expose the limits of liberal egalitarianism or a poison pill that would make the bill more difficult to pass"), https://www.newyorker.com/magazine/2014/07/21/sex-amendment. *But see* Joe Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY: J. OF THEORY & PRACTICE 163-64 (1991) (relating the factors suggesting an attempt to influence the legislation and concluding that the addition was not an "accidental breakthrough").

[11] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[12] Immutable, MERRIAM-WEBSTER, (https://www.merriam-webster.com/dictionary/immutable?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Jul. 16, 2021).

and, therefore, is *mutable*. In her[13] lifetime, an individual can adopt, change, or abandon his religion, and many Americans do so.[14] Based on the inclusion of religion as a protected class, immutability is not a prerequisite for trait or class to be protected from unlawful employment discrimination.

In fact, even protections because of sex now include a mutable characteristic: pregnancy.[15] The expansion of immutable classes to include mutable traits establishes the flexibility within the concept of which traits ought to be protected. It dispels the idea that religion is a mutable characteristic uniquely meritorious of protection. Consequently, it opens the door to consideration of other mutable traits to determine whether they also deserve protection. However, the question remains of how to make such a determination for a particular mutable trait.

One factor suggested by the examples of both religion and pregnancy is their connection to other immutable traits. Although pregnancy may be a chosen and temporary condition, Congress has recognized that it is inexorably linked to sex, a protected immutable class. Likewise, religion is often connected to a person's race and national origin. For example, while the majority of Americans are Christian, the majority of Indians are Hindu, and the majority of Saudi Arabians are Muslim.[16] Consequently, the Equal Employment Opportunity Commission (EEOC) has addressed this linkage between employment discrimination based on national origin and religion.[17] Such actions by legislators and administrative agencies indicate that protection of the immutable characteristic by itself is not sufficient when a corresponding mutable trait can be the basis of employment discrimination.

B. Justifications for Excluding Certain Characteristics Are Unsupported

Specific to religion, the definition of unlawful discrimination has been extended to include "all aspects of religious observance and practice, as well as belief, unless" the employer cannot reasonably accommodate the observance or practice.[18] The inclusion of the word "belief" in a separate phrase separated by commas suggests that it is not necessarily "religious belief." Further, the exception that allows non-accommodation by the employer is only for "observance or practice," not for the employee's beliefs.[19] These important distinctions inform the discussion excluded beliefs.

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[13] The authors acknowledge and respect pronoun choices for all persons and eschew any practice that would alienate or exclude transgendered persons. However, for ease of writing, we adopt the convention of referring to non-identified individuals as "her" or "she."

[14] *See America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[15] 42 U.S.C. § 2000e(k) (2018). *See also* Julie Manning Magid, *Cloaking: Public Policy and Pregnancy*, 53 AM. BUS. L.J. 439, 444 (2016) (exploring pregnancy as a protected class).

[16] (Wikipedia, but could find better source)

[17] What You Should Know: Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern, EEOC-NVTA-0000-24 EEOC (Feb. 11, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-religious-and-national-origin-discrimination-against-those-who.

[18] 42 U.S.C. § 2000e(j).

[19] *Id.*

1. "Borrowed" definitions

In *United States v. Seeger*,[20] the Supreme Court interpreted the meaning of "religious training and belief" in the context of the Universal Military Training and Service Act.[21] The Court declared that the test of religious belief is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" for a traditionally religious person.[22] However, the Court noted that the statute in question excluded "essentially political, sociological, or philosophical views."[23]

In *Welsh v. United States*,[24] another case concerning the Military Training and Service Act, the Court affirmed the exclusion of "essentially political" beliefs, but only if it did "not rest at all upon moral, ethical, or religious principle."[25] It noted that "Welsh's conscientious objection to war was undeniably based in part on his perception of world politics," but qualified because it was not solely based "upon considerations of policy, pragmatism, or expediency."[26]

Shortly thereafter, in *Wisconsin v. Yoder*,[27] the Court determined that "philosophical and personal rather than religious" beliefs did "not rise to the demands of the Religion Clauses."[28] Where *Seeger* and *Welsh* dealt with exclusions from military service, *Yoder* considered exclusion from compulsory school attendance based on free exercise of religious beliefs. None of these three cases related to employment discrimination.[29] Moreover, the relevant code for the military cases limited the exclusions specifically to usage in that subsection.[30] Yet each has been cited in subsequent employment cases as establishing precedent for the exclusion of political or philosophical beliefs from Title VII protected beliefs.[31]

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[20] United States v. Seeger, 380 U.S. 163 (1965).

[21] *See* Universal Military Training and Service Act, 50 U.S.C. § 3806 (2018).

[22] Seeger, 380 U.S. at 166.

[23] *Id.* at 165; 50 U.S.C. § 3806(j) ("As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.").

[24] Welsh v. United States, 398 U.S. 333 (1970).

[25] *Id.* at 342–343.

[26] *Id.*

[27] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[28] *Id.* at 216.

[29] The rationale for the exclusionary language in Seeger and Welsh was the fundamental conflict between the interest of the individual in answering a higher duty and the interest of the state in requiring military service during a time of war. Seeger, 380 U.S. at 173–76; Welsh, 398 U.S. at 335–44. Yoder posed a similar conflict between the state's right to impose generally applicable laws in furtherance of its interests and the free exercise right of parents to practice their religion. Yoder, 406 U.S. at 215–219. In all three cases and although each was decided against the government, the conflicting interests gave the Court reason to draw the definition of belief as narrowly as possible.

[30] 50 U.S.C. § 3806(j) ("*As used in this subsection*, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.") (emphasis added).

[31] *See e.g.*, Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 50-55 (2002) (quoting all three cases).

Ultimately, administrative agencies incorporated the standard developed by these cases, implicitly excluding political beliefs from the umbrella of religious beliefs. For example, the Code of Federal Regulations references *Seeger* and *Welsh* when defining the "religious" nature of a practice or belief.[32] Similarly, the EEOC guidelines specifically exclude "social, political, or economic philosophies" from "'religious' beliefs protected by Title VII."[33] In its footnote, the EEOC cites cases related to the Ku Klux Klan (KKK), determining that the philosophy of the KKK "has a narrow, temporal, and political character" and is "political and social in nature."[34]

Returning to the distinction made in the introduction of this section, political and philosophical beliefs are not *required* to be excluded from protection simply because they are not "religious" in nature.[35] The government's interest, as confirmed by the Supreme Court, is focused on eliminating employment discrimination against an identifiable class,[36] and therefore, it *aligns* with the interests of an employee who seeks to avoid discrimination based on his political beliefs. Thus, the Courts could define protected "belief" more broadly to encompass non-religious or secular beliefs. Furthermore, it is very unlikely that the observances or practices stemming from KKK beliefs could be reasonably accommodated without infringing on the rights of other employees. In other words, even if the KKK were included as a belief under religion, an employer would be allowed to lawfully discriminate against the employee for objectionable behavior that creates a hardship or disruption.

In short, case law does not establish a rationale for excluding secular beliefs specifically from employment discrimination protection. Admittedly, political and philosophical beliefs do not naturally fall into the category of "all aspects of religious observance and practice, as well as belief" under the definition of "religion."[37] Both the statute and congressional intent would be more clear if the term "belief" were added as a separate class from religion and applied similarly in the employment field.[38] However, by borrowing definitions from non-employment applications, the government has narrowed the protected beliefs without advancing state interests and while leaving employees vulnerable to discrimination.

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[32] 29 C.F.R § 1605.1 (2020). ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in . . . Seeger . . . and Welsh . . . .").

[33] U.S. Equal Emp't Opportunity Comm'n, EEOC Compliance Manual: Section 12: Religious Discrimination, § 12-I(A)(1) (2008), (Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.) www.eeoc.gov/policy/docs/religion.html.

[34] *Id.* at n. 28 (citing Commission Decision No. 79-06, CCH EEOC Decisions ¶ 6737 (1983); Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1026 (E.D. Va. 1973), aff'd, 508 F.2d 504 (4th Cir. 1974); Slater v. King Soopers, 809 F. Supp. 809, 810 (D. Colo. 1992)).

[35] The Supreme Court found that a lack of religious beliefs must also be protected. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (affirming that the government cannot constitutionally "impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"). Courts have interpreted this to mean that Title VII protects those who hold and "refuse to hold . . . specific religious beliefs." Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir. 1993).

[36] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[37] 50 U.S.C. § 3806(j) (2018).

[38] See Part III for a more thorough discussion of this idea.

2. Questionable Applicability of Case Law

The problem with applying definitions from military or educational applications to the field of employment law is that the objectives and concerns are often different. There may be valid reasons for courts to define belief and religion more narrowly in the context of prisons or schools, [39] for example, where discrimination or lack of religious accommodation would not impact a person's livelihood. Unfortunately, the case law often draws across these fields, straying from instances of employment and muddying the precedent. For the purpose of this paper, we examine statute and case law whose rationale applies specifically to employment.

Even where the topic is employment, employees who work for the government may be treated differently from employees who work for private industry. For example, the Civil Rights Act of 1991 specifically allows the Senate to discriminate on the basis of political affiliations in its hiring decisions.[40] The unspoken assumption is that political affiliation may be a bona fide job qualification for work in a political office. Similarly, government may regulate its own behavior to prevent discriminatory action that violates the Equal Protection clause, while preserving greater freedoms for commercial enterprises.[41]

Because of the potential for additional regulations or constraints that apply outside of the field of employment, each analysis must carefully separate the rationale for the resulting holdings to ensure that only those factors relevant to employment discrimination are given weight.

C. Public Policy Considerations Support Expanding Protections

From its inception, the Civil Rights Act was intended to eliminate discrimination against identifiable groups whose employment opportunities were limited because of a trait unrelated to job performance.[42] Within a decade, the Supreme Court stated that "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[43] The shared interest in efficient and trustworthy production supports a goal of prohibiting and preventing employment discrimination on the basis of any protected class, including age and disability.[44]

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[39] Cases concerning schools, for example, often involve determining whether religious activities are impermissibly supported by public funding and thereby violate the establishment clause. In such cases, courts seek to clearly distinguish religious from non-religious behavior or intent, but the reasoning might not apply to employment law where establishment clause issues do not exist. *See, e.g.*, Louisiana Creationism Act case.

[40] Civil Rights Act of 1991, Pub. L. No. 102-166, §316, 105 Stat. 1071, 1095–96 (1991) ("It shall not be a violation with respect to an employee [on the staff of a Senate member or committee] . . . to consider the (1) party affiliation . . . or (3) political compatibility with the employing office, of such an employee with respect to employment decisions.").

[41] *See* [need example, maybe cakemaking case?]

[42] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (finding congressional intent was to "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group" of employees).

[43] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[44] *See e.g.* Age Discrimination Act of 1967, 29 U.S.C. §§ 621–634 ("It is therefore the purpose of this Act . . . to prohibit arbitrary age discrimination in employment . . . ."); Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12101–12213 ("It is the purpose of this Act [] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; . . . .").

1. Rationale for Protecting the Individual

Congress included a description of the negative impact on the employees, commerce, and the public in its statutory acts addressing sex discrimination in pay, age discrimination, and discrimination against Americans with disabilities.[45] For employees, the impacts included depressed wages, lower living standards, disadvantages in retaining and regaining employment, and limited chance "to pursue those opportunities for which our free society is justifiably famous."[46] To avoid these negative consequences, Congress explicitly declared that adverse employment decisions discriminating on the basis of certain protected traits were unlawful employment practices.[47]

While all states have some form of "at will" employment, meaning that an employee can generally be dismissed at any moment and for any reason, [48] Congress specifically prohibited terminations when based on discrimination. The arguments against employment discrimination were sufficiently strong to prompt Congress to add to the list of protected traits over time and to broaden the definition of some.[49] As justification for enacting the Americans with Disabilities Act, for example, Congress found that Americans who have disabilities had "no legal recourse to redress" the discrimination they faced.[50] Courts followed suit, broadening the scope of employment protections after 1964 and reducing the opportunities for employers to lawfully discriminate.[51]

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[45] *See* Equal Pay Act of 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56, 56; Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602, 602; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29.

[46] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2.

[47] 42 U.S.C. § 2000e(j)

[48] *See* H.G. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877) ("With us [in America] the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will . . . . [U]nless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party . . . ."). *See also* At Will Employment States 2020, WORLD POPULATION REVIEW, https://worldpopulationreview.com/state-rankings/at-will-employment-states (last visited June 13, 2020). Currently, 42 states have a public policy exemption to at-will employment, 36 states have an implied contract exemption, and 11 states have an "implied-in-law" or covenant of good faith exemption. The only states where no exemptions apply to at-will employment are Florida, Georgia, Louisiana, and Rhode Island. In contrast, Alaska, Arizona, California, Idaho, Utah, and Wyoming allow all three exemptions, even if some may be difficult to prove under their statutes.

[49] The Equal Pay Act of 1963 prohibited discriminatory wage differentials based on sex and predated the Civil Rights Act. *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56. In 1967, Congress created additional protections against age discrimination. *See* Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967). In 1978, Congress expanded the term "sex" in Title VII to include "pregnancy, childbirth, or related medical conditions." 42 U.S.C. §2000e(k); *see also* Pub. L. No. 95-555, 92 Stat. 2076 (1978). In 1990, Congress passed the Americans with Disabilities Act to prohibit discrimination based on disability. *See* Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327. (1990).

[50] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(4), 104 Stat. 327, 329 (1990).

[51] For example, Supreme Court decisions expanded the definition of "sex" to include sexual harassment, sexual harassment when both parties are the same sex, gender stereotypes, and most recently, homosexual and transgender individuals. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–67 (1986); Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 76–80 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 233–44 (1989) (superseded by statute); Bostock v. Clayton Cty., 140 S. Ct. 1731, 1744–54 (2020).

Each of these moves demonstrates that, as a matter of public policy, both Congress and the courts have seen merit in protecting an increasingly broad group of employees from workplace discrimination. Americans are now protected based on traits they are born with and traits they acquire during the course of their lives. Yet, Americans can be discriminated against on the basis of their political beliefs, even when they suffer the same recognized negative impacts as a result of discrimination, because political beliefs have been excluded from protection. Just as Americans with disabilities once had no legal resource, Americans with political beliefs can currently be fired at will, without protection or recourse.

2. Rationale for Eliminating Discrimination

The acts state a finding that discrimination "burdens commerce and the free flow of goods in commerce."[52] Regarding societal or public findings, the acts noted that discriminatory practices are unfair, prevent "the maximum utilization of the available labor resources,"[53] and cause unnecessary expense to the country when its citizens are dependent or nonproductive. General recognition of the public benefits of full employment supports governmental efforts to remove artificial barriers that prevent qualified people from working.

Rutan v. Republican Party[54] provides a useful example of the rationale for protecting employees from discrimination based on political belief. Although political affiliation is sometimes a valid basis for employment decisions related to political positions, public employees are, nevertheless, generally protected from political discrimination. In Rutan, the Supreme Court affirmed that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."[55]

The *Rutan* Court noted that the "government has a significant interest in ensuring that it has effective and efficient employees." [56] However, the Court doubted "that 'mere difference of political persuasion motivates poor performance.'"[57] Emphasizing its conclusion in *Elrod v. Burns*,[58] the Court stated that the government could protect its interest "through the less drastic means of discharging staff members whose work is inadequate."[59] The Supreme Court also highlighted the effect of political discrimination on government employees:

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[52] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 § 2, 81 Stat. 602 (1967). Similar wording appears in other anti-discrimination acts and was likely intended to establish congressional authority to prohibit discrimination utilizing the enumerated congressional power to regulate commerce granted under Article I, Section 8 of the Constitution.

[53] Equal Pay Act of 1963, Pub. L. No. 88-38 § 2, 77 Stat. 56 (1963).

[54] Rutan v. Republican Party, 497 U.S. 62 (1990).

[55] *Id.* at 78. The government may have a vital interest in confirming political alignment when the employee is in a policy-making position. The Court found that the government's "interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Id.* at 74.

[56] *Id.* at 69 (referencing its plurality opinion in Elrod v. Burns, 427 U.S. 347, 365–66 (1976)).

[57] *Id*. at 70 (quoting its plurality opinion in Elrod, 427 U.S. at 365–66).

[58] Elrod v. Burns, 427 U.S. 347 (1976).

[59] *Id*.

> Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.
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> . . . Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment.[60]

Consequently, the Court held that "promotion, transfer, recall, and hiring decisions involving low-level public employees" was not constitutional "based on party affiliation and support."[61] In short, political patronage did not provide sufficient employer advantages to overcome the resulting constitutional issues for employees who did not hold policy-making positions. Instead, public policy supported protecting those employees from discrimination based on political beliefs.

Like the government, any private employer has an interest in "effective and efficient employees." If differences of political persuasion do not motivate poor performance for public employees, it is equally doubtful that such political differences would cause poor performance in the private sector. Arguably, because private employers typically focus on commercial endeavors and profit-making, in contrast to the political agenda of a government, differences in political beliefs are less relevant to the private sector. While an employee may hold political or philosophical beliefs that are abhorrent to his employer, and vice versa, there is no evidence that the beliefs themselves cause poor performance in the professional sphere.

Additionally, each of the real effects suffered by a government employee would also apply to a private sector employee who experiences employment discrimination based on his political beliefs. Employee discrimination that affects opportunities, such as promotions and transfers, harms employees whether those employees work for the government or for a private company. The coercive effect of the discrimination, causing employees to compromise their beliefs, support the company position, and refrain from acting on their political views would be identical. The rationale developed in *Rutan* for protecting public employees from political discrimination applies equally to private sector employees.

3. Societal and Judicial Considerations

Anti-discrimination policies provide benefits beyond the interests of the employer and the employee. In its congressional report for the Glass Ceiling Act, the Committee on Education and Labor endorsed the goal of "eradicating discrimination," stating that "[s]trong protections against

[60] Rutan v. Republican Party, 497 U.S. 62, 73 (1990).

[61] *Id.* at 65.

employment discrimination are the keys to unlock the human resources of creativity, productivity and loyalty prized by employers."[62] Diversity in the workplace, increasingly valued by American companies,[63] encourages innovation, which has traditionally been an important driver of the American economy. Such innovation and creativity are prized American values that Congress could foster by protecting diversity of belief within the workplace.

D. A New Model Supported by Societal Trends

The preceding exploration demonstrates three points: 1) public policy supports eliminating employment discrimination against any identifiable class of individuals, 2) the identifiable class may be based on mutable traits as well as those beyond the control of the employee, and 3) the mutable trait of belief is unnecessarily constrained resulting in employment discrimination. This conflict between the public policy goals and the protections the law currently delivers raises the question of whether a new model might better serve American employees.

1. A New Standard

A better model for providing comprehensive protection from employment discrimination would protect fundamental rights of employees without imposing burdens on employers.[64] Religious belief is a fundamental right, and as a protected mutable trait, it has evolved in definition and interpretation.[65] Even though the law now supports protection of both religious belief and non-belief,[66] the courts have consistently struggled to find the limits of belief systems that qualify for

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[62] Civil Rights and Women's Equity in Employment Act of 1991, H.R. Rep. No. 102-40 (Apr. 24, 1991). ("America is a better country because we as a people have moved forward toward the goal of eradicating discrimination. Nowhere is that more important than in the workplace. Of almost any sector of American life, the progress toward equality has been greatest in the workplace precisely because of strong federal equal employment opportunity laws. . . . Together we can make a significant contribution to the advancement of equal employment opportunity in our nation. Strong protections against employment discrimination are the keys to unlock the human resources of creativity, productivity and loyalty prized by employers.").

[63] Glass Ceiling Act of 1991, Pub. L. No. 102-166, § 202, 105 Stat. 1071, 1081 (1991) ("United States corporations . . . are increasingly aware of the advantages derived from a diverse work force . . . .").

[64] The burden on employers is currently only relevant for the accommodation of an employee's "religious observance and practice." When the employer demonstrates that it is "unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business," then accommodation is not required. 42 U.S.C. § 2000e(j) (2018). However, for the protected classes of race, color, national origin, and sex, the employer's burden is not considered, and employees are absolutely protected from intentional or disparate impact discrimination, unless the trait is a bona fide job qualification or the employer qualifies for a special exemption. *See* 42 U.S.C. §§ 2000e–2000e-3.

[65] See Malnak v. Yogi, 592 F.2d 197, 200–15 (3d Cir. 1979) (Adams, J., concurring) for an extensive history of the precedent for religion in the context of traditional definitions, school prayer cases, conscientious objector cases, and newer constitutional definitions beginning with Torcaso v. Watkins, 367 U.S. 488 (1961).

[66] *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961) ("No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."); *see also* Equal Opportunity Emp't Comm'n v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377, 391–92 (E.D.N.Y. 2016) ("Title VII has been interpreted to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs. . . . Aside from protecting employees from discrimination on the basis of *their*

protection against employment discrimination.[67] This struggle exists because belief is only protected within the definition of religion under Title VII.[68] However, religious freedom is not the only fundamental right guaranteed by the First Amendment.[69]

If employment protections were similarly extended to include all belief-based rights in the first amendment, a much simpler and consistent standard emerges. Following the case law that protects religion, employment discrimination on the basis of belief, whether religious, political, or scientific, would be an unlawful practice. Employees would be protected from intentional or disparate impact discrimination, unless the particular belief were a bona fide job qualification or the employer qualified for a special exemption.[70] Any belief that could be expressed via freedom of speech, freedom to assemble, or freedom to petition the government would thus qualify for protection from employment discrimination.

2. Pertinent to Modern Society

Protection for a broader category of belief, separated from religion and grounded in the First Amendment, is in keeping with modern American society. Religion is a waning influence in the United States, reflected in a decreasing percentage of Americans who identify with a particular religion.[71] Currently, more than 25% of the population describes its religious identity as "atheist, agnostic, or 'nothing in particular,'" and there is no majority religion in the United States.[72] Although Americans believe that religion generally has a positive impact on society, most Americans believe that it is a private concern to be "kept out of political matters."[73] In other words, although Americans support protection from religious discrimination, religion now has a smaller role in the life of the average Americans than in previous decades.[74]

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religion, Title VII also protects employees from discrimination because they do not share their employer's religious beliefs.").

[67] *See* Peterson v. Wilmur Communs., Inc., 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002) ("Deciding how to distinguish a religion from other types of beliefs or belief systems has been a source of great controversy for courts and commentators. . . . In addition, the Supreme Court has noted the care that courts must exercise in this area to avoid making theological pronouncements that exceed the judicial ken."). *See also* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) ("The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task.")

[68] 42 U.S.C. § 2000e(j) (2018).

[69] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

[70] *See* 42 U.S.C. §§ 2000e–2000e-3.

[71] *See America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[72] *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RESEARCH CENTER (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/.

[73] *Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics*, PEW RESEARCH CENTER (Nov. 15, 2019), https://www.pewforum.org/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/.

[74] *Supra*, note 72.

Science, on the other hand, is a growing influence. Almost three quarters of Americans believe that science has had a mostly positive effect on society, and 60% of U.S. adults believe that scientists should take an active role in policy debates about scientific issues.[75] Americans generally see the value of scientific contribution and do not want scientific voices silenced. Yet scientists are not currently protected from adverse employment decisions based on their scientific beliefs, resulting in some scientists experiencing employment discrimination practices that hinder their ability to add to public discourse.[76] Specific court decisions holding that scientific beliefs do not qualify for protection because they are not part of a larger religious-like belief system seem contrary to the wishes of Americans.[77] If Congress or the courts had offered an explanation for including religion alone as a mutable protected class, it might provide criteria to evaluate why scientific belief should be excluded. However, since no justification was provided, it is difficult to understand the justification for excluding a trait that is arguably as important to Americans as religion.

Similarly, many Americans now hold strong political beliefs at both ends of the political spectrum. In 2017, a study showed that "[t]he self-defining characteristics that Americans hold dear include their racial and cultural heritage, the language they speak and their choice of worship," but "the strongest attachment . . . is Americans' connection to their political party."[78] These trends appear to be stronger today, as the country has become increasingly polarized.[79] The researcher's concerning explanation was that "unlike race, religion and gender, where social norms dictate behavior – there are few, if any, constraints on the expression of hostility toward people who adhere to opposing political ideologies."[80] Enforced protections that require tolerance of political beliefs in the workplace may help bridge the divide, ending a type of political apartheid that is currently permitted in the workplace.

Again, given that some beliefs are important to Americans and define their identity to a greater degree than religion, it is surprising that the protection of religious beliefs is unquestioned while

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[75] Cary Funk, *Key Findings About Americans' Confidence in Science and Their Views on Scientists' Role in Society*, PEW RESEARCH CENTER (Feb. 12, 2020), https://www.pewresearch.org/fact-tank/2020/02/12/key-findings-about-americans-confidence-in-science-and-their-views-on-scientists-role-in-society/.

[76] *See, e.g.*, Dr. Maria Caffrey, Opinion, *I was a Climate Scientist in a Climate-denying Administration and It Cost Me My Job,* THE GUARDIAN (July 25, 2019 02:00 EDT), https://www.theguardian.com/commentisfree/2019/jul/25/trump-administration-climate-crisis-denying-scientist (referencing her own situation, as well as two other federal employees, climate staffer Joel Clement and intelligence aide Rod Schoonover, who resigned in protest after experiencing censorship and reassignment due to climate change beliefs).

[77] *See, e.g.*, Seshadri v. Kasraian, 130 F.3d 798, 800 (7th Cir. 1997) (finding that a "creed that requires scrupulous honesty ... in the scholarly pursuit of scientific knowledge" does not constitute religion absent a more complete belief system).

[78] Milenko Martinovich, *Americans' Partisan Identities Are Stronger Than Race and Ethnicity, Stanford Scholar Finds,* STANFORD NEWS (Aug. 31, 2017) https://news.stanford.edu/2017/08/31/political-party-identities-stronger-race-religion/.

[79] Amina Dunn, *White Evangelicals See Trump as Fighting for Their Beliefs, Though Many Have Mixed Feelings About His Personal Conduct*, PEW RESEARCH CENTER (Aug 24, 2020) (showing average presidential approval by the other political party shifting from 49% in 1953 to a low of 6% over the Trump presidency), https://www.pewresearch.org/fact-tank/2020/08/24/trumps-approval-ratings-so-far-are-unusually-stable-and-deeply-partisan/.

[80] Martinovich, *supra*, note 78.

social, political and scientific beliefs are excluded. The legacy of American notions of religious freedom as not just a fundamental right but also a *raison d'être* for the nation creates a dichotomy in treatment of belief that does not match the values of most Americans today. This is not to suggest that religious beliefs should not be protected, but rather that the concept of belief should be expanded to protect both the sacred and the secular, in alignment with modern American society.

3. Recognizing New Workplace Realities

Professionalism requires employees to act according to the interests of their employers, which may require employees to suppress personal behaviors contrary to those interests.[81] For example, an employee might regularly yell at other drivers who frustrate him during his morning commute but refrain from yelling at customers or colleagues who similarly annoy him once he is at work. Likewise, an employer might require employees to wear a company uniform at work, which the employee would never choose to wear at home. Where the separation of work and private lives is clear, these behavior modifications in the workforce are accepted by employees as an explicit or implicit contractual obligation in return for their employment.[82] However, two modern trends, social media and "work at home" initiatives, have increasingly blurred this separation.

As the example of the fired coach in the introduction to this paper shows, an employee may be fired for posts on social media, even when those posts are made during personal time. Social media, including Facebook, Instagram, or Twitter, afford the employer a glimpse into the employee's private life and an opportunity to discriminate based on the views the employee expresses. This is true even when, as with Ms. Flores, the employee's professionalism and effectiveness at work are unquestioned. Moreover, with the advent of COVID-19, many employees are suddenly working from home, joining online meetings and conferences with a video feed that offers a literal glimpse into their home lives.[83] Elements of their personal lives and situations that the employees wished to keep private are now revealed to their employers. The law does not prohibit employers from using such information obtained outside the workplace setting as a basis for adverse employment decisions that harm the employee.

In her article, *Data Analytics and the Erosion of the Work/Nonwork Divide*, Leora Eisenstadt assesses the ramifications of having the strict separation between Americans' work and personal lives relax over time.[84] Telecommuting employees, in particular, are unable to maintain a work/nonwork divide because their work is performed in a nonwork environment, increasing the odds of spillover between the formerly separate realms. The inability to keep private matters out

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[81] Some training program specifically speak to the interests of the employer. *See, e.g.*, Importance of Professionalism, TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER ("A professional works in her employer's or client's interests. She may not always agree with decisions or enjoy what she's doing but in order to do right by the person engaging her services, she does her job ably.") https://www.ttuhsc.edu/pharmacy/documents/administration/professional-affairs/Importance_of_Professionalism.pdf (last visited Sept. 3, 2020).

[82] *See* Leora Eisenstadt, *Data Analytics and the Erosion of the Work/Nonwork Divide*, 56 Am. Bus. L.J. 445, 449–58 (2019) (discussing the origins and consequences of the work and nonwork divide).

[83] *See, e.g.*, Sara Morrison, *Just Because You're Working from Home Doesn't Mean Your Boss Isn't Watching You*, VOX (Apr. 2, 2020) (explaining ways that employers are able to monitor and track employees' activities through software tools), https://www.vox.com/recode/2020/4/2/21195584/coronavirus-remote-work-from-home-employee-monitoring.

[84] Eisenstadt, *supra*, note 82, 4. See also *id.*at 458–65 for a discussion of the benefits both employers and employees receive from the work/nonwork divide.

of the eyesight of employers, whether because of digital media or online meetings, leaves American employees more vulnerable to discrimination if their beliefs and lifestyles are different from their employers.[85] Thus, a new standard that protects all beliefs helps prevent discrimination based on personal factors that are unrelated to employee performance or job qualifications, just as Congress intended.

4. Acknowledging historical linkages

Congress enacted the Civil Rights Act in response to an international human rights movement followed by a national civil rights movement.[86] The political beliefs and pressure of a group of Americans incensed by incidents of racial discrimination provided the impetus for the employment protections of the Civil Rights Act. The civil rights movement illustrates the linkage between race, color, and political belief because the individuals holding strong political beliefs and protesting discrimination were often people of color who had experienced discrimination themselves.[87] In light of this historical linkage and the crucial role of political beliefs in bringing about the Civil Rights Act, the exclusion of secular beliefs from anti-discrimination employment protections is puzzling.

A more consistent policy would recognize the correlation between the protected classes under Title VII and sincerely held beliefs; it would prohibit employment practices that allow discrimination on the basis of either trait. The law recognizes disparate impacts on a protected class, and the Supreme Court finds discrimination even when the protected trait was not the motive or cause of the employer's action.[88] However, an employer who can show that lawful discriminatory practices were applied equally against all employees, regardless of their status in a protected class, is likely to prevail.[89] In other words, an employer can discriminate against a black employee because of his political belief, as long as the employer would also discriminate against a white employee with that political belief.

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[85] *Id.* at 469–70 ("Millennials are cognizant of their reputational vulnerability on digital media but are not willing to sacrifice Internet participation to segregate their multiple life performances. Lacking the technological or legal ability to shield performances, Millennials rely on others, including employers, to refrain from judging them across contexts.).

[86] *See, e.g.*, Universal Declaration of Human Rights, Article 2, U.N. DOC (1948) (stating that each person is "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services, 13 Fed. Reg. 4313, 4313 (July 26, 1948) (declaring it the President's policy that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin"); *JFK and Civil Rights,* PBS, (recounting President John F. Kennedy's efforts to address civil rights and particularly racial inequities) https://www.pbs.org/wgbh/americanexperience/features/jfk-domestic-politics/ (last visited July 17, 2020). *See also* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 241 (centering much of its discussion on racial discrimination).

[87] Good footnote needed here – best would be an article exploring the demographics of civil rights protestors

[88] *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1744 (2020) (providing two lessons from employment discrimination cases: 1) "'t's irrelevant what an employer might call its discriminatory practice" and 2) the protected class "need not be the sole or primary cause of the employer's adverse action.").

[89] *Id.* at 1743 ("For an employer to discriminate against employees for [an unprotected trait], the employer must intentionally discriminate against individual [employees] in part because of [a protected trait]. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'").

Yet linkages between Title VII protected characteristics and political beliefs continue today. Currently, black voters are much more likely to be Democrats (81%) than Republican (10%), and non-white voters comprise a much larger percentage of those who vote Democratic (40%) compared to those who vote Republican (17%).[90] Most women identify with or lean toward the Democratic Party (56%), while a minority of men do (42%), and this gap of 14% is among the largest gender divides in party affiliation in history.[91] Similarly, correlations emerge in religion, where Jews and religiously-unaffiliated voters lean toward the Democratic Party (68% and 67 % respectively), while Mormons lean Republican (74%).[92] These correlations become more pronounced when protected classes are combined, particularly race and religion. For example, 84% of black Protestants lean toward the Democratic Party, while 78% of white evangelical Protestants lean toward the Republican Party, and a significant discrepancy also exists between Hispanic Catholics and white Catholics.[93]

Beyond simple party affiliation reflective of political beliefs, political action by Americans also tends to be identified with protected classes. Images of Black Lives Matter (BLM) protesters depict a diverse American population, including people of color, women, and individuals of all ages.[94] In fact, 67% of all Americans indicate at least some support for the BLM movement, and a full 86% of black Americans are supportive of it.[95] In contrast, the anti-BLM and pro-police activists are primarily white, middle-aged men.[96] Incensed by discriminatory practices in law enforcement, it is possible that BLM protesters are creating a modern-day version of the civil rights

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[90] *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines,* PEW RESEARCH CENTER 2 (Jun. 2, 2020) https://www.pewresearch.org/politics/2020/06/02/in-changing-u-s-electorate-race-and-education-remain-stark-dividing-lines/.

[91] *Id.*

[92] *Id.*

[93] *Id.* Party affiliation provides a measure of political beliefs supported by studies of the reasons that evangelicals support the Republican Party. *See White Evangelicals See Trump as Fighting for Their Beliefs, Though Many Have Mixed Feelings About His Personal Conduct*, PEW RESEARCH CENTER (Mar. 12, 2020) (finding that 59% of white evangelical Protestants overwhelmingly feel that the Trump administration has helped rather than hurt the interests of evangelical Christians, and thus, 83% of white evangelicals identify with or lean toward the Republican Party), https://www.pewforum.org/2020/03/12/white-evangelicals-see-trump-as-fighting-for-their-beliefs-though-many-have-mixed-feelings-about-his-personal-conduct/..

[94] Kim Parker, Juliana Menasce Horowitz, & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CENTER (June 12 ,2020), https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/.

[95] *Id.*

[96] *See e.g.*, Tony Marrero & Diana C. Nearhus, *Tense Moments at Back the Blue Rally as Cop Supporters, Protesters Come Together in Tampa*, Tampa Bay Times (June 13, 2020) ("The rally crowd ranged in age from kids to seniors, but skewed older, and was almost entirely white."); Jason Wilson, Breadth of Rightwing Portland Protest Network Reveals Energized Trump base, THE GUARDIAN (Sept. 3, 2020) ("One of those is Alan Swinney, a 50-year-old Midland, Texas, resident and Proud Boy with a long history of attending and organizing politicized street confrontations around the country."). The Proud Boys are identified by Southern Poverty Law Center as a hate group with bigoted racist, anti-Muslim and misogynist political views. Proud Boys, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys (last visited Sept. 3, 2020).

movement, focused on police brutality and systemic racism.[97] If so, all the more reason for the participants in the movement to be protected from discrimination based on their beliefs.

Finally, nearly a hundred years before the Civil Rights Act, the Supreme Court, speaking on civil rights, affirmed that our political institutions rest on the theory that individuals hold inalienable rights, including liberty and the pursuit of happiness.[98] Further, the Court declared that "in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law."[99] The case in question, *Cummings v. Missouri*, dealt with a punitive state action against individuals who participated in the rebellion during the American Civil War.[100] Specifically, the state of Missouri attempted to deprive clergymen of their right to practice their vocation unless they declared by oath that they had previously been politically neutral. Although the case regarded a state action, the principle behind the Court's holding may be applied to political beliefs and activities today: an individual should not be punished by deprivation of his profession for an act not punishable when it was committed.[101] Likewise, an employee today should not be deprived of his livelihood for beliefs and related actions that are neither illegal nor applicable to the workplace.

III. Employee Beliefs vs. Practices in the Workplace.

A. Religious Protections Create a Dichotomy

Under Title VII unlawful discrimination currently pertains to "all aspects of religious observance and practice, as well as belief."[102] An exception applies when "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[103] However, the employee's right to hold religious beliefs is absolute, and discrimination on the basis of belief is an unlawful practice just as it is for race.[104]

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[97] Parker, *supra* note 94. *See also* Emily Guskin, Scott Glement & Dan Baiz, *Americans Support Black Lives Matter But Resist Shifts of Police Funds or Removal of Statues of Confederate Generals or Presidents Who Were Enslavers*, Washington Post (July 21, 2020) (exploring attitudes among different demographic groups toward ongoing racial discrimination and support for measures to address it) https://www.washingtonpost.com/politics/americans-support-black-lives-matter-but-resist-shifts-of-police-funds-or-removal-of-statues-of-confederate-generals-or-presidents-who-were-enslavers/2020/07/21/02d22468-cab0-11ea-91f1-28aca4d833a0_story.html.

[98] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 321 (1867).

[99] *Id.* at 321–22.

[100] *Id.* at 316–19.

[101] *Id.* at 316–32. This principle is outlined as an argument prior to the opinion of the Court and is supported by the final rationale and holding found in the Court's opinion.

[102] 42 U.S.C. § 2000e(j).

[103] 42 U.S.C. § 2000e(j).

[104] *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (noting that the freedom to believe "is absolute" even though actions may be regulated).

The structure of Section 2000e(j), creates a dichotomy in legal treatment between the employee's internal beliefs and his external manifestation of that belief, exhibited in observance or practice. In theory, the internal belief has no bearing upon an individual's performance of his duties as an employee and, therefore, discrimination based upon those beliefs is impermissible. In the event that a religious belief results in an action that is detrimental to the employer, the action would fall under the "religious observance or practice" portion of the definition, where discrimination could be legal, depending on the circumstances. If accommodation of the observance or practice requires an employer to bear more than a "de minimis" burden, it imposes undue hardship.[105] The law requires the employer to demonstrate the undue hardship the accommodation would cause, but case law and guidance from the EEOC provide parameters that establish when an employer has met this burden of proof. The dual structure of belief and practice for religion provide a useful model to follow in considering broader employment protections for secular belief.

A. Establishing Minimum Criteria for Covered Practices

1. Sensible Criteria Consistent with Precedent

Although neither Congress nor the courts have established a specific, narrow definition of which beliefs qualify as religion,[106] both the courts and the EEOC have developed guidelines to answer the question.[107] First, the employee's beliefs must be "sincerely held."[108] The beliefs "need not be acceptable, logical, consistent, or comprehensible to others."[109] The EEOC states that "intensely personal convictions which some may find incomprehensible or incorrect" come within the meaning of religious belief.[110] Moreover, an employee's asserted beliefs are presumed to be sincerely held, unless for example, the employee has "behaved in a manner markedly inconsistent

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[105] Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989).

[106] *See* Cooper v. Gen. Dynamics, Convair Aerospace Div., Fort Worth Operation, 533 F.2d 163, 168–69 (5th Cir. 1976) ("The language chosen [in Title VII] is broad -- broader can hardly be imagined . . . . [T]he definition is what may be termed an operative one: *all* forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a businesslike operation.").

[107] *See, e.g.*, U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, Section 12 Religious Discrimination (2008), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref65.EEOC-CVG-2008-1.

[108] *Id.* at 12-I(A)(2)*; see also* Welsh v. United States, 398 U.S. 333, 339–40 (1970) (requiring that conscientious objection to war be based on a "sincere and meaningful belief"); Holt v. Hobbs, 574 U.S. 352, 360–61 (2015) (specifying that "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation"); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834, 109 S. Ct. 1514, 1517 (1989) (finding that an employee was entitled to invoke First Amendment protection when her actions were "based on a sincerely held religious belief"). Although the Supreme Court cases establishing this criterion dealt with conscientious objection, religious accommodation for prisoners, and unemployment benefits, the criterion has been confirmed in employment discrimination cases. *See, e.g.,* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 66 (1986) ([The employee] established his case, the court held, by showing that she *had a sincere religious belief* that conflicted with the employer's attendance requirements . . . .") (emphasis added).

[109] Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

[110] *See* EEOC Decision No. 71-779 (1970); EEOC Decision No. 71-2620 (1973).

with the professed belief."[111] In short, as long as an employee's beliefs are sincere, rather than self-serving and disingenuous, those beliefs can qualify for protection from employment discrimination.

Second, the convictions must be important to the employee, alternately described as "meaningful," "strong," or "deeply held."[112] When the beliefs occupy "a place parallel to that filled by" traditional religion then those beliefs qualify under Title VII.[113] Significantly, those beliefs do not need to be traditionally religious or based on a belief in God; they simply must play a religious-like role "in the person's own scheme of things."[114] However, the belief must be "held with the strength of traditional religious convictions," and a belief that is "not deeply held" is excluded, even though it may be religious in nature.[115] In other words, the belief must inform the individual's life in some meaningful way because of the strength or depth of the conviction.

Third, a religious belief must have a moral or ethical component, guiding the individual in what is right and wrong.[116] This requirement excludes matters of personal preference that "do not relate to any 'ultimate concerns' such as . . . right and wrong," and that "are not part of a moral or ethical belief system."[117] As an example, the EEOC cites an employer who implements a dress code that prohibits tattoos and an employee who claims "her tattoos and piercings are religious because they reflect her belief in body art as self-expression and should be accommodated."[118] Because her belief does not have a moral or ethical component, it "is a personal preference that is not religious in nature" and therefore, does not qualify for Title VII protection.[119] Similarly, the Supreme Court held that beliefs that do not rest "upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency" are excluded.[120]

The Code of Federal Regulations encapsulates these three criteria succinctly: religious practices and observances "include *moral or ethical beliefs* as to what is right and wrong which

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[111] U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(2).

[112] Welsh v. United States, 398 U.S. 333, 342 (1970) ("The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by [God]."); *see also* U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(1) (including beliefs that are "held with the strength of traditional religious views").

[113] U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(1).

[114] *Id.*

[115] Welsh, 398 U.S. at 342.

[116] U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(1).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Welsh v. United States, 398 U.S. 333, 342–43 (1970). As this is a conscientious objector case, the exclusion is from qualifying as "religious belief," precluding exemption from military service. For additional discussion of cases that define religious belief, see Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 588–89 (1982) (discussing statutory interpretation to broaden the definition of religion); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 258–62 (1989) (discussing both "the transformation of religion from a theistic conception to a sincere and meaningfully held belief system" and "suggestions of a judicial retreat from a concept of religion broad enough to cover all aspects of individual conscience"); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 158–61 (1990) (discussing the development and later revision of the Seeger rationale).

are *sincerely held with the strength of traditional religious views*."[121] The EEOC applies this standard in its decisions, and an employer is not allowed to discriminate against an employee on the basis of these beliefs.[122] Furthermore, when an employee requests reasonable accommodation of his practices based on his qualifying belief, the employer must accommodate the practices unless doing so creates an undue hardship for the employer.[123] These criteria are sensible, clarifying that only worthwhile beliefs, those that an employee truly holds dear and that guide his conscience, are protected. When an employee does not give serious regard to his beliefs, then neither do the courts or federal agencies, and the employer is sparred efforts to accommodate such frivolous beliefs.

2. Irrelevant or Problematic Criteria

The courts have utilized additional criteria to determine which beliefs and practices are religious in nature. In *Malnak v. Yogi*,[124] Judge Adams developed three indicia: 1) whether the concepts in question "are of the greatest depth and utmost importance," 2) whether the beliefs have "the element of comprehensiveness," addressing a broader scope than a single question or teaching, and 3) whether the beliefs have "any formal, external, or surface signs that may be analogized to accepted religions."[125] These indicia eliminate sincerely and deeply held beliefs that would otherwise qualify, when the beliefs are considered too narrow or too private. For example, veganism has been excluded from protected religious belief because it did not answer larger "ultimate questions" about life, was not comprehensive, and was not exhibited through formal or external signs that a religion was present, such as vegan services.[126]

Similarly, in United States v. Meyers, the Tenth Circuit noted that the "threshold for establishing the religious nature of [an individual's] beliefs is low" but listed a more extensive set of factors for consideration than Justice Adams' indicia.[127] In both instances, the factors rely upon

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[121] 9 C.F.R. § 1605.1 (2020).

[122] U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(1).

[123] 42 U.S.C. § 2000e(j) (2018).

[124] *See* Malnak v. Yogi, 592 F.2d 197, 200–15 (3d Cir. 1979) (Adams, J., concurring). In his opinion, J. Adams offers an extensive history of the precedent for religion in the context of traditional definitions, school prayer cases, conscientious objector cases, and newer constitutional definitions beginning with Torcaso v. Watkins, 367 U.S. 488 (1961). Part II of his opinion details the three indicia he identifies for the modern definition, while Part III reconciles the establishment clause with the free enterprise clause, arguing to read religion broadly in both. Part IV applies the indicia to Science of Creative Intelligence/Transcendental Meditation, concluding that "SCI/TM is not a Theistic religion, but it is nonetheless a constitutionally protected religion." *Id.* at 213. Only then does the opinion apply the conclusion to the case at hand. The Third Circuit summarized J. Adams' three indicia as "Fundamental and ultimate questions," "comprehensiveness," and "structural characteristics" when the court adopted and applied them in Africa v. Com. Of Pa. *See* Africa v. Com. of Pa., 662 F.2d 1025, 1032–36 (3d Cir. 1981).

[125] *Id.* at 208–09.

[126] Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 70 (2002) (finding that a person's sincerely held belief "that it is immoral and unethical for humans to kill and exploit animals even for food, clothing and the testing of product safety for humans" was not sufficient by itself); *see also* Donna D. Page, Note, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 386 (2005) (arguing that veganism should be protected as a religious belief).

[127] *See* United States v. Meyers, 95 F.3d 1475, 1482–84 (10th Cir. 1996). The factors are: 1. Ultimate Ideas, 2. Metaphysical Beliefs, 3. Moral or Ethical System: 4. Comprehensiveness of Beliefs, 5. Accoutrements of Religion,

pre-determined ideas of religion that are no longer relevant to a large percentage of the American population. Millennials, in particular, may not identify with an established religion, but may hold strong and sincere beliefs based on their own observation and introspection.[128] Any religious belief arising from personal contemplation is unlikely to be accompanied by the requisite "accoutrements of religion" or "formal, external, or surface signs." Likewise, an ethical or moral belief may be focused on one subject, such as the treatment of animals, and fail by the court's criteria to be sufficiently comprehensive, even when it satisfies the criteria and rationale of the original conscientious objector cases.[129]

In addition, the insistence on dividing beliefs into religious and secular categories leads to inconsistencies in judgment. The EEOC acknowledges this inconsistency, providing an example where the practice of observing identical dietary restrictions would be protected for a religious employee but not for the secular employee.[130] Two possible justifications for treating the same practice differently are the First Amendment, which provides for the free exercise of religion and does not address secular belief, or Title VII, which prohibits discrimination based on religion. However, the First Amendment right to the free exercise of religion would not be infringed by extending the same privileges to employees with secular reasons for their practice. Also, the current interpretation of belief appears to contradict the Supreme Court's holding that laws cannot favor the religious over the nonreligious and that religion does not require a belief in God.[131]

When each of Adams' indicia is carefully considered, the requirements become superfluous in the context of employment discrimination. Requiring the belief to answer ultimate questions about

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including a. Founder, Prophet, or Teacher, b. Important Writings, c. Gathering Places, d. Keepers of Knowledge, e. Ceremonies and Rituals, f. Structure or Organization, g. Holidays, i. Appearance and Clothing, and j. Propagation.

[128] *See In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RESEARCH CENTER 7–8 (Oct. 17, 2019) (showing more millennials are religiously-unaffiliated than any other generation), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/; *see also Generation Z looks a Lot Like Millennials on Key Social and Political Issues*, PEW RESEARCH CENTER 7–8 (Jan. 17, 2019) https://www.pewsocialtrends.org/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/ (showing how Millennials' beliefs and views differ on social and political issues).

[129] *See* United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333, 340 (1970) (If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions.") The key criteria here is a "deeply and sincerely" held belief that imposes a "duty of conscience" that prohibits serving in a war. The burden on an employee to accommodate an employee's "duty of conscience" that prohibits him from eating meat, for example, would presumably be less than the government exempting a person from military service during a time of war.

[130] U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(1) ("For example, one employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (*e.g.*, health or environmental) reasons. In that instance, the same practice might in one case be subject to reasonable accommodation under Title VII because an employee engages in the practice for religious reasons, and in another case might not be subject to reasonable accommodation because the practice is engaged in for secular reasons.").

[131] Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (affirming that the government cannot constitutionally "impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

"life and death" and "man's role in the Universe"[132] does not appear to justify one set of dietary restrictions over another. Additionally, the weighty question of "the proper moral code of right and wrong" is addressed simply by requiring the protected belief to have an ethical or moral component. Secondly, the "comprehensiveness" of the belief system does not address why a more comprehensive belief would be more "worthy" than a narrower belief resulting in the same practice. The third indicium requiring external signs of an organized religion could be intended to show that the religious belief is genuine and not a passing fancy. However, the criteria that the belief be sincerely and strongly held should suffice to address this concern. Together, Adams' indicia seem aimed at identifying which religious beliefs are valid and merit protection, yet the Supreme Court has specifically noted that the "truth" or "validity" of a belief is not open to question."[133] In summary, additional criteria or indicia that the courts have proposed fail to add clarity to a muddled situation and do not appear to offer advantages over the criteria developed in the previous section.

B. Appling the Criteria to Non-Religious Beliefs

By rethinking the Title VII protections, the category of belief could be expanded to include both secular and religious beliefs. This paper examines the ramifications for the employee, the employer, and the courts. For this discussion, the covered beliefs are assumed to meet the criteria in the Code of Federal Regulations:1) moral or ethical beliefs, 2) sincerely held, 3) with the strength of traditional religious views.[134]

1. Implications for Employees

For employees, an expanded category of belief would protect them from adverse employment decisions even when their beliefs were not based on religion. The employee who simply holds his belief, without any corresponding observance or practice in the workplace, is automatically afforded protection against unlawful practices. However, where an employee's beliefs compel him to practice his beliefs during work hours or on work premises, both the employer and the employee have responsibilities in working together to resolve conflicts between the employee's religious practice and the demands of the workplace.[135]

First, the employee is required to request accommodation based on his sincerely-held belief. He must explain to his employer his practices, the belief upon which they are based, and the type of accommodation that enable him to fulfill his conscience. He should be certain to show how his beliefs meet the criteria required for them to qualify for coverage under Title VII. When the employee requests an accommodation, the duty falls to the employer to offer an accommodation; once the employer makes an offer to accommodate, the duty then shifts to the employee to work cooperatively with the employer to satisfy his belief-based needs.[136] This cooperative approach to finding appropriate accommodations is in the best interest of both the employee and the employer.

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[132] Malnak v. Yogi, 592 F.2d 197, 208 (3d Cir. 1979).
[133] United States v. Seeger, 380 U.S. 163, 184–85 (1965).

[134] 9 C.F.R. § 1605.1 (2020).

[135] Lee v. ABF Freight Sys., 22 F.3d 1019, 1022-23 (10th Cir. 1994).

[136] *Id.*

The employee should understand that the employer is not obligated to give him the exact accommodation that he requests. "When [the employer] demonstrates that it has offered a reasonable accommodation to the employee," the employer "has met its obligation" and is neither required to offer the employee's preferred option nor to show that alternatives are unworkable.[137] In addition, the employee should ensure that he maintains professional standards to keep his personal beliefs from interfering with job requirements. Requested accommodations are typically appropriate when an employee's beliefs require him to observe or practice his beliefs during work hours. If an employee were to abuse the privilege of the Title VII protection for belief, it is likely that the courts would return to a strict and narrow definition of belief.

2. Implications for Employers

The employer is prohibited from considering beliefs in making employment decisions, unless belief is a bona fide job qualification. If an employee requests an accommodation of his sincerely held beliefs, the employer must make reasonable efforts to accommodate the request. However, if the accommodation would disrupt business operations, creating an undue hardship, then the employer is relieved from the obligation to accommodate the request.

To help prevent employment issues, the employer should have a clear policy of allowed and prohibited behaviors in the workplace in order to maintain a professional environment. If the policies apply equally to all employees, regardless of their beliefs, then the employer is better protected from claims of discriminatory practices on the basis of belief. Additionally, the employer should help maintain the distinction between an employee's work and nonwork life. For example, the employer should only impose requirements on the employee's nonwork behavior when the behavior directly relates to and impacts business operations. An employer who attempts to curtail belief-based practices outside of the workplace will run the risk of discrimination charges.

To return to the EEOC's example of an employer who implements a dress code that prohibits tattoos, an employer could have such a policy, particularly if the employer could demonstrate that employee tattoos were detrimental to its business. However, the EEOC provided an alternate scenario in which the uncovered tattoos could be religious belief and practice.[138] Under the new Title VII protection of belief, the tattoos could be the practice of both employees' deeply held and sincere beliefs, one religious and one secular. If the employer would suffer "undue hardship on the conduct of its business" because of the practice, then the employer would be relieved from the burden of accommodating the practice. However, if the tattoos could be accommodated, then both employees would be treated equally in the accommodation of their belief-based practice.

A final consideration is the case when one employee's practices have a detrimental effect on or create a discriminatory environment for other employees. An employer is allowed to prohibit an act that is illegal or creates a hostile work environment.[139] Where behavior, such as the use of

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[137] Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 68–69 (1986).

[138] U.S. Equal Emp. Opportunity Comm'n, Compliance Manual, 12-I(A)(1). The employee "practices the Kemetic religion, based on ancient Egyptian faith, . . . states that he believes in various deities, and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents physical and moral balance in the universe. During a religious ceremony he received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. When his employer asks him to cover the tattoos, he explains that it is a sin to cover them intentionally because doing so would signify a rejection of Ra." *Id.*

[139] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (stating that "not only pervasive harassment but also criminal conduct of the most serious nature -- are plainly sufficient to state a claim for "hostile environment"

racial epithets, has been declared illegal and discriminatory, the courts allowed an injunction to prevent the continued behavior, even when the injunction infringes the employee's First Amendment right to free speech.[140] In other words, the employer does not give the employee carte blanche to act according to the employee's beliefs; it is a cooperative process of accommodating practices where those practices do not infringe on the rights of others or create hardship for the employer. Furthermore, an employer may terminate employment of an employee who refuses to cooperate or whose practices are sufficiently burdensome that reasonable accommodation cannot be achieved.

3. Judicial Guidelines

Noting that "only beliefs rooted in religion are protected by the Free Exercise Clause," the Supreme Court stated that "the determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task."[141] Such a struggle is made more difficult when the same practice may be protected when the belief is religious and not protected when the belief is secular. Including secular beliefs and practices under the Title VII employment protections eliminates much of this dilemma and increases the consistency of decisions.

Courts should treat beliefs that are "sincerely held with the strength of traditional religious beliefs" as protected from employment discrimination whether within a public or private workplace, as they do with religious beliefs today. Indeed, it is unlikely that many employers could legally justify discrimination against their employees based on secular beliefs, particularly as the exceptions allowing discrimination by religious employers would not be extended to secular employers.[142] However, in the event that a specific belief, whether religious or secular, is a bona fide job qualification, the courts would uphold employer decisions that are based on the belief, as they do currently.

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sexual harassment" under Title VII). "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (quoting Vinson).

[140] *See* Aguilar v. Avis Rent A Car Sys., Inc., 21 Cal. 4th 121, 146-47, 87 Cal. Rptr. 2d 132, 151, 980 P.2d 846, 862-63 (1999). "The trial court found that [the employee's] use of racial epithets was sufficiently severe or pervasive to constitute employment discrimination. The trial court further found that injunctive relief was necessary to prevent a continuation of the abusive work environment. Accordingly, the trial court enjoined [the employee] from 'using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc.' Because [the employee's] past use of such epithets in the workplace had been judicially determined to violate [state statute], prohibiting him from continuing this discriminatory activity does not constitute an invalid prior restraint of speech." *Id.*

[141] Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713–14 (1981); *see also* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833 (1989) ("Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held.")

[142] While it could be argued that employer protections based on the sincerely held religious beliefs of its owners should also extend to secular beliefs, the rationale does not hold. The owner/employer exception allows limited acts against the interests of the employee, a form of discrimination contrary to public policy and general congressional intention, in order to protect the First Amendment rights of the employer per the Religious Freedom Restoration Act. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692–93 (2014). Because it permits employer religious practices that affect employees who do not share the religious belief, the exception should be drawn narrowly, as noted by the Supreme Court. *Id.* ("As this description of our reasoning shows, our holding is very specific.").

The treatment of belief-based observances or practices also follows the current treatment of religious practices, even when the belief is nonreligious. Courts would consider cases where an employee claims his belief-based practice was not reasonably accommodated by his employer. In general, the expectation of reasonable accommodation should be higher for employee practices outside of the workplace or work hours; the employer's ability to determine employee behavior during nonwork time should be limited to circumstances where the employer can demonstrate a legitimate and compelling business need.[143] When the employee is engaged in work, however, the employee's requested accommodation must be weighed against the burden imposed on the employer, as it is today for religious beliefs. Because practices related to non-religious beliefs are not protected by the First Amendment, the courts could apply greater skepticism to employee claims when they do not appear to be founded on a moral or ethical, sincerely and deeply held belief or when the practices themselves are objectively unreasonable.

In short, although new protections sometimes open the floodgates for new legal actions, including both secular and sacred beliefs is likely to produce judicial efficiency. That is, under this proposal, the same legal standards and processes can be used, while eliminating the "difficulty of distinguishing between religious and secular convictions."

C. Protections Based on Political Belief

As the Supreme Court noted in Cantwell v. Connecticut:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[144]

As the Supreme Court notes, these liberties provide a shield under which "many types of life, character, opinion and belief can develop unmolested and unobstructed" and that "[n]owhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[145] This section of the paper examines the application of broader anti-discrimination employment protections specifically to political beliefs.

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[143] Not only does this policy this protect the privacy and personal life of the employee, but it furthers the goal of eliminating discrimination by encouraging employers to focus their employment policies on true business requirements. While initially the policy could result in more litigation, case law would likely establish the new boundaries of "reasonableness," and employers would modify their own practices to avoid litigation.

[144] Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S. Ct. 900, 906 (1940).

[145] *Id.* The Supreme Court also provides a warning: "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish." *Id.* As noted in this paper, belief-based practices that create harm to others may be curtailed and punished.

A. Political Beliefs Merit Protection

This paper has argued that, despite case law explicitly excluding beliefs that are political from Title VII protections, the exclusion is unjustified. Here, it takes the argument a step further to contend that inclusion is justified. The importance of political belief and political movements throughout the history of this nation is undeniable, continuing today with the BLM movement. The Supreme Court has observed that "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[146] The liberty to hold political beliefs, discuss and debate them, and show support for favored political ideas is a cherished and fundamental American freedom which contributes to the strength of the nation.

However, in this moment of history, the work life of Americans extends into their homes and into personal hours, limiting the ability of employees to exercise this important right without their employers observing. If their livelihood is threatened by their political beliefs and activities, American employees cannot freely participate in the political realm. Worse, they are vulnerable to pressure by their employer to conform to their employer's political interests at the expense of their own, allowing the minority to potentially impose its views on the majority. Although Americans now identify more strongly with political positions than with religion or other traditional characteristics of identification, their political beliefs are not protected. Moreover, since many protected traits under Title VII are linked, employees in currently protected classes may experience disproportionate discrimination when their political beliefs are used as a basis for discrimination.[147]

An expansion of employment protections to include political beliefs serves each of the policy goals originally outlined for the Title VII protected classes: it eliminates employment discrimination based on a class that is irrelevant to job performance, reduces unemployment and other detrimental effects to employees, and increases diversity, innovation, and loyalty in the workplace to the benefit of the country. Further, the political divisions of the country may be lessened if employers are required to hire and promote regardless of their employee's political beliefs. When nonburdensome political practices are accommodated in the workplace, employees with different political beliefs working together may develop a tolerance or even an appreciation for other viewpoints.

As shown in the introduction of this paper, discrimination based on political beliefs does exist and can be damaging to a community; anti-discriminatory policies may conversely be healing to a community and to the country. Justice Brandeis noted that those who fought for American independence "believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." [148] Thus, American government should support the

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[146] Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000).

[147] It might be possible for an employee to bring a disparate impact case based on an already protected trait, however, the case would be difficult to win unless there is sufficient evidence to establish a pattern. Small employers might not have enough employees to demonstrate a pattern and could argue that it is currently legal and permissible to discriminate on the bases of political belief.

[148] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

exercise of its people's freedom by protecting employees from adverse employment decisions based on political belief.

B. Political Beliefs Meet Qualifying Criteria Under New Model

The determination of which political beliefs qualify under Title VII relies on the criteria developed earlier. First, the belief must be sincerely held, and an employee who claims a political belief simply to be controversial, promote discord, or as a joke would not be protected. Second, there must be a strength to the conviction. The standard under the Code of Federal Regulations is that the belief must be held with "the strength of traditional religious views."[149] While this may not be the best description for employees with secular beliefs who are not religiously affiliated, it is easily understood as a measure of a deep and abiding belief, rather than a whim or light-hearted stance. Finally, the belief must have an ethical or moral component, which is satisfied if the employee's political beliefs reflect his sense of right and wrong. Many people who identify strongly with one set of political views do so because they believe it is right and they reject opposing views or positions as morally wrong.

Under this criteria, frivolous beliefs and passing fancies would be excluded. However, given the passion with which Americans currently hold their political beliefs, most political beliefs are likely to qualify for protection under Title VII. Evaluated against these criteria, Ms. Flores from the introduction of this paper would have protected beliefs; there is nothing to suggest his political beliefs are not sincerely and strongly held, and they appear to reflect his view of right and wrong. However, it should be noted that Ms. Flores was not fired on the basis of her beliefs, but rather due to her belief-based practices.

C. Reasonable and Limited Accommodation of Practices and Observances

Political beliefs shape the actions of Americans who choose to display symbols of their political affiliation, to participate in political protests, or to use social media to show their support. If an employee feels compelled, based on his sincere beliefs, to follow these practices while at work, he should verify that he will not violate the policies of his employer. When his practices are in conflict with employer policies, then he must request an accommodation, following the same process as an employee who requests a religious accommodation.[150] If the employer cannot reasonably accommodate the employee's request, despite working cooperatively to do so, because reasonable accommodation would create an undue hardship for the employer, then the employee cannot practice or observe his political beliefs at work. However, the employer should not unnecessarily restrict the employee from these practices while at home or during nonwork hours.

In the case of Ms. Flores her actions were to express her political beliefs in on social media. Because she did this on her own time and outside the workplace, the practice would normally be

[149] 9 C.F.R. § 1605.1 (2020).

[150] In Ansonia, the court described a process for an employee to establish a prima facie case of discrimination when: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement." Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 65-66, 107 S. Ct. 367, 370 (1986) (quoting the Second Circuit Court of Appeals).

protected. However, her employer is a public police force, and the post "violated district guidelines on expressing political views."[151] A law enforcement agency that allows officers to express one set of political views, but not the opposing political views, is discrimination on the basis of political belief. This type of discrimination would be an unlawful employment practice under Title VII, if both secular and sacred beliefs are protected.

The example of Goodyear's zero-tolerance policy is also illustrative. In response to instances of racial graffiti at its tire-manufacturing facility, Goodyear explained that its zero-tolerance policy allows expression of views supporting social justice or inequity or equity, including BLM and LGBTQ issues.[152] However, because of the upcoming election, the employer asked employees to keep "workplace expressions, verbal or otherwise," including political facemasks and shirts supporting political campaigns or candidates out of the workplace." By the criteria for political beliefs "in support of political campaigning for any candidate or political party."[153] Goodyear has determined that political practices are disruptive to its workplace, and reasonable accommodation of political observance within its plant would create an undue burden. However, it does not discriminate between the employees who support one candidate and those who support another, nor does it impose restrictions on employee behavior outside of work.

Further, as with the case of illegal and discriminatory epithets in the workplace, Goodyear is taking action to prevent a hostile work environment, implementing a zero-tolerance policy. Support of social justice and equity issues are allowed because they work to create a more inclusive environment, furthering anti-discrimination goals. Even though it may first appear that Goodyear is allowing some political expression and not others, the policy is applied consistently to all employees and is based on legitimate business needs. Goodyear is accommodating its employee's belief-based practices to the extent that it reasonably can do so, without impinging on the rights of other employees. Similarly, there is no evidence of discriminatory employment practices, such as terminations or the withholding of promotions, based on the employees' political beliefs. Under the proposed expanded Title VII protections, Goodyear is compliant.

Conclusion

In summary, a new standard for "belief" under Title VII's employment protections creates a workable solution that aligns better with both modern societal trends and with modern employment conditions than case law's present interpretation. The solution does not require a wholesale change of the currently protected classes, so much as a removal of artificial constraints on existing classes. The classes themselves already include both mutable and immutable traits, but they unnecessarily exclude secular, and specifically political, beliefs. The exclusion is based on a rationale that

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[151] Id., at note 2.

[152] Isaac French & Shawn Wheat, *New Audio from the Goodyear Training on Their Zero-tolerance Policy*, WIBW (Aug. 19, 2020 4:45 PM MDT) https://www.wibw.com/2020/08/19/new-audio-from-the-goodyear-training-on-their-zero-tolerance-policy/.

[153] *Id.* In its statement, Goodyear stated its commitment "to fostering an inclusive and respectful workplace where all of our associates can do their best in a spirit of teamwork." In support of this commitment, Goodyear clarified "we do allow our associates to express their support on racial injustice and other equity issues but ask that they refrain from workplace expressions, verbal or otherwise in support of political campaigning for any candidate or political party." *Id.*

applied to a different set of circumstances where state interests conflicted with the interests of the individual.

By removing the artificial constraint, the protected category of "belief" can be interpreted more broadly to include all beliefs, religious and nonreligious, that are worthy of protection. The broader protection serves the interest of both the employee, who may currently experience legal employment discrimination based on his secular beliefs, and society where the government's interest in eliminating discrimination is synergistic. The inclusion of nonreligious belief is harmonious with modern societal trends, where Americans increasingly identify with political affiliation more than religious affiliation and where workplaces are increasingly fluid, extending into employees' homes and personal lives. The historical linkages between protected employment classes provide further support for a broader interpretation of belief, to avoid unintentional discrimination against a protected class where there are correlations with secular belief.

The model for protecting secular belief follows the model developed for religious belief, where the belief itself and the resulting observance or practice are treated distinctly. The criteria that determines a protectable belief is the same as the criteria established in the Code of Federal Regulations for religious belief. However, the additional indicia or factors that attempt to distinguish religion from nonreligion become irrelevant and inapplicable. An examination of the practical implications of the new standard for "belief" reveals little disruption to existing procedures in the workplace compared with clear gains in the protections provided to vulnerable employees with heartfelt nonreligious beliefs. In addition, the new standard eliminates judicial inefficiency and inconsistencies caused by the current requirement to draw a distinct line between the sacred and the secular in an increasingly blurry field of beliefs.

The importance of political beliefs and practices, both in the history of America and in current times, underscores the reason that political beliefs are worthy of protection from employer discrimination. The fundamental right to participate fully in the political process of the country, without fear of recrimination, is instrumental to our functioning democracy. Under the new standard, political beliefs qualify for absolute protection, while accommodation of political practices in the workplace may be limited. An employer is obligated to make reasonable accommodations but only when those accommodations do not create an undue hardship. In this way, the needs of both employer and employee are balanced to encourage workable solutions and to prevent employment discrimination based on political beliefs.