## COMMENT

# READING SEXUAL ORIENTATION PROTECTIONS INTO TITLE VII: A MORAL REVITALIZATION THEORY OF STATUTORY INTERPRETATION

CHARLES J. UREÑA*

Title VII of the Civil Rights Act prohibits employment discrimination based on race, color, religion, sex, or national origin, but does not explicitly mention sexual orientation. Despite a growing acceptance of LGBT individuals in American society, the vast majority of courts have read Title VII to permit employers to fire, fail to promote, demote, refuse to hire, or otherwise discriminate against LGBT employees because of their sexual orientation. This Comment develops and advocates the Moral Revitalization Theory, a theory of statutory interpretation that allows judges to take societal progress and changing moral attitudes into account when interpreting Title VII. Under the Moral Revitalization Theory, judges may use broadly held morals to revitalize statutes if certain preconditions are met. This Comment finds that Title VII is ripe for precisely this kind of revitalization.

This Comment builds upon Judge Posner's concurring opinion in the Seventh Circuit decision *Hively v. Ivy Tech Community College*, which read Title VII's prohibition against discrimination on the basis of "sex" to encompass sexual orientation. Under Judge Posner's approach, judges have a moral obligation to infuse old statutes with a fresh meaning that traces social change, even if that means directly contradicting legislative intent and original meaning. Although Judge Posner's approach invites criticism from those who prefer textualism, oppose judicial activism, and value the separation of powers, this Comment responds to those criticisms by introducing several limiting principles on the application and use of the theory. Applying the refined Moral Revitalization Theory would ultimately allow the courts to halt invidious discrimination against LGBT individuals in the workplace.



---

* J.D. Candidate, University of Wisconsin Law School, May 2019. Many thanks to Professor Gwendolyn Leachman, Professor Robert Yablon, Andrew Fabianczyk, and Melissa Hodge for their invaluable comments and revisions throughout the process.

## INTRODUCTION

Should judges allow their personal beliefs and moral compass to guide their decisions? The short answer, of course, is no.[1] But how can we expect judges to set aside their backgrounds to ensure that *no* part of their beliefs guide their judgment? Should a court come to a result that is contrary to their own and the public's moral standards, simply because the words of a statute *could* be read to constrain their choices? Philosophers and legal commentators have argued that morality and law are inexorably linked,[2] so how can we suggest that the judges, who form the core of the legal system, do not get to use their morals to guide decisions? This Comment addresses these questions within the scope of Title VII of the Civil Rights Act of 1964,[3] which makes it unlawful for employers to discriminate on the basis of a person's "race, color, religion, sex, or national origin."[4] In interpreting this statute, courts have extended the protections of Title VII beyond the semantic limits of those five categories,[5] but it is the basis of sex which has seen the most movement in recent decades.

---

1. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.

ADMIN. OFFICE OF THE U.S. COURTS, 2A GUIDE TO JUDICIARY POLICY, Ch. 2 (2014).

2. *See* Joseph Raz, *About Morality and the Nature of Law*, *in* LAW AND MORALITY (Kenneth Einar Himma & Brian Bix eds., 2005) (discussing law as an institution with a moral task to perform).

3. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

4. § 2000e-2(a).

5. *See, e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (interpreting "sex" to encompass sexual harassment); *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976) (holding that "race" extends to white employees as well as minority employees); *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on*

One such occasion comes from a recent decision of the Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College of Indiana*.[6] There, the court held that Title VII's prohibition against discrimination based on "sex" should be read to include sexual orientation,[7] making it the first court of appeals to hold as such[8] and placing it at odds with nearly every other circuit to address the issue.[9] This Comment focuses on the concurring opinion of Judge Posner, who wrote separately to "explore an alternative approach that may be more straightforward"[10] than the majority's reasoning. In his opinion, Posner identifies an "easy" way to ensure Title VII reaches lesbian, gay, bisexual, and transgender (LGBT) individuals: give a "fresh meaning" to Title VII's half-century-old antidiscrimination language that "infuses the statement with vitality and significance today."[11] Given social changes and an increasing acceptance of LGBT individuals, says

*other grounds*, 523 U.S. 1001 (1998) (interpreting "sex" to prohibit sexually-charged, gender-based remarks from male co-workers to other males); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (interpreting "sex" to encompass transgender plaintiffs); *Connecticut v. Teal*, 457 U.S. 440 (1982) (barring practices with racial disparate impact in context of Title VII). For a discussion of Title VII's prohibition against discrimination on the basis of "national origin," see Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

6. 853 F.3d 339 (7th Cir. 2017).

7. *Id.*

8. The Second Circuit recently joined the Seventh Circuit in holding that Title VII's prohibition on "sex" discrimination encompasses sexual orientation. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018). In that case, the employer skydiving company, Altitude Express, fired a gay male skydiving instructor, Zarda, after a customer alleged he inappropriately touched her and excused the behavior by disclosing his sexual orientation. *Id.* at 108. Zarda denied inappropriately touching the customer, and sued Altitude Express for sex discrimination under *Price Waterhouse v. Hopkins*, which prohibits discrimination on the basis of sex stereotypes. *Id.* at 109. The court accepted Zarda's argument, holding that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination[]" for three reasons. *Id.* at 112. First, the court reasoned that it is impossible to define homosexuality, heterosexuality, or bisexuality without express reference to sex, making sexual orientation "a function of sex." *Id.* at 113. Moreover, Zarda would not have been fired if he were a woman under a "comparative test," meaning that his treatment would have been different "but for [his] sex." *Id.* at 116 (quoting *City of L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). Second, the court found Zarda's stereotyping theory convincing, reasoning that "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women." *Id.* at 120. Finally, the court found that sexual orientation discrimination was barred under an "associational theory," which bars adverse employment action based on an employee's associations (for example, firing a white male for being married to a black woman is illegal under an associational theory). *Id.*

9. *See, e.g.*, *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

10. *Hively*, 853 F.3d at 352 (Posner, J., concurring).

11. *Id.* (Posner, J., concurring).

Posner, we should not allow employers to discriminate based on sexual orientation:

> [W]e, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch.[12]

Although Posner's critics would accuse him of judicial activism, ignoring the text of Title VII, and disregarding the separation of powers, Posner's approach may have some grounding in existing legal theory. This Comment argues that Posner's approach is the right approach—at least in some situations. While traditional canons of statutory interpretation should typically guide a court's interpretation, certain statutes are candidates for Posner's method. Statutes that lend themselves to this approach are those that (1) are ripe for revitalization,[13] (2) deeply affect public normative and institutional culture,[14] and (3) are prone to multiple interpretations because of ambiguities in text or general vagueness. In these instances, judges can, will, and should be guided by an objective moral compass that reflects the changing values of society.

This Comment sets out to square Posner's approach with existing approaches to statutory interpretation. It begins first by reviewing the approach and situating it within the existing dominant views of statutory interpretation, including the Standard Picture method, Ronald Dworkin's Integrity Theory, and Mark Greenberg's Moral Impact Theory. In Part II, this Comment further explains Posner's approach, then reins in and sets boundaries for the approach to create the Moral Revitalization Theory. Part II also addresses the evolution of Title VII and discusses its ripeness for reinterpretation. Part III addresses three important objections to the theory: judicial activism, indeterminacy, and separation of powers. Finally, Part IV concludes that Title VII is fit for the interpretive method Posner identified in *Hively*.

---

12. *Id.* at 357 (Posner, J., concurring).
13. *See infra* notes 90–138.
14. *See infra* notes 139–46.

## I. POSITIONING THE THEORY

This Part aims to situate Posner's approach within existing theories of statutory interpretation. It begins by providing a background of *Hively* itself. This Part continues by discussing three theories of statutory interpretation: the Standard Picture method, Ronald Dworkin's Integrity Theory, and Mark Greenberg's Moral Impact Theory. This Part does not discuss specific canons of interpretation,[15] but rather the theories that guide their use. To illustrate these points, this Part will conclude by applying them to the facts of the Seventh Circuit case, *United States v. Marshall*.[16]

### *A. Judge Posner's* Hively *Approach*

In *Hively v. Ivy Tech Community College*, the plaintiff was an openly-lesbian adjunct professor at Ivy Tech Community College in Indiana.[17] She applied for at least six full-time positions between 2009 and 2014.[18] After denying every application for full-time employment, Ivy Tech refused to renew her contract in July 2014.[19]

Hively filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013.[20] After receiving a right-to-sue letter, she filed an action in district court.[21] Ivy Tech responded with a motion to dismiss on the grounds that Title VII does not cover sexual orientation, which the district court granted,[22] and the Seventh Circuit upheld the district court's determinations.[23] Hively petitioned to have the case heard before the Seventh Circuit en banc.

Rehearing en banc, the Seventh Circuit reversed and remanded.[24] The majority's reasoning appears simple, but involves some linguistic flexibility: if Hively were a man, and all other factors remained the same—that is, a man dating a woman—she would not have been fired.[25] Thus, Ivy Tech fired Hively "because of . . . [her] *sex*," and no other

15. For a discussion of the specific tools courts use to interpret statutes, see Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).
16. 908 F.2d 1312 (7th Cir. 1990).
17. *Hively*, 853 F.3d at 341.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 352.
25. *Id.* at 345–48.

reason.[26] Although Ivy Tech Community College correctly noted that Title VII's literal terms do not protect sexual orientation, the court found that the term "sex" encompassed sexual orientation for the purpose of discrimination.[27] This reasoning, the court notes, reflects an associational theory of discrimination that has been used elsewhere in civil rights and employment litigation.[28] The court pointed to a line of circuit court cases that found Title VII had been violated when whites who were married to or even associated with a person of color faced discrimination.[29] Those cases in turn rely on the landmark Supreme Court decision in *Loving v. Virginia*,[30] which invalidated laws prohibiting interracial marriage.[31] Under the associational theory laid out in those precedential cases, an employer discriminates on the basis of race when it makes an adverse decision against an employee because of who they associate with. All other factors held the same, the employer would not have discriminated against a person of color in that situation (read: a person of color married to another person of color).[32] Applying this reasoning to the sexual orientation context, the court reasoned that Ivy Tech refused to renew Hively's contract because of who she associated with.

Posner wrote separately to "explore an alternative approach that may be more straightforward."[33] After briefly discussing original meaning[34] and unexpressed intent,[35] Judge Posner stated that the court should give a fresh meaning to the statute that "infuses [it] with vitality

---

26. *Id.* at 353 (Posner, J., concurring) (quoting 42 U.S.C. § 2000e-1(a)(1) (2012)).

27. *Id.* at 351–52.

28. *Id.* at 349.

29. *See, e.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."); *Holocomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) ("[Respondent] concedes that an employee can bring an associational race discrimination claim under Title VII and § 1981, so long as the employee can establish the requisite level of association.").

30. 388 U.S. 1 (1967).

31. *Id.* at 2.

32. *Hively*, 853 F.3d at 348.

33. *Id.* at 352 (Posner, J., concurring).

34. Original meaning is "the meaning intended by the legislators," and corresponds to interpretation in ordinary life. *Id.* (Posner, J., concurring).

35. Unexpressed intent is "where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them." 1 WILLIAM BLACKSTONE, COMMENTARIES *60.

and significance today."[36] And while this method admittedly could not "be imputed to the framers of the statute," Posner urged that the court was "entitled to adopt" it in light of "*what this country has become*,"[37] given the widespread understanding that LGBT individuals are entitled to the same rights and protections as other citizens.

According to Posner, this result would accord with common statutory interpretation jurisprudence. He points out a variety of times the Supreme Court has revitalized old legislation.[38] Although the drafters of Title VII likely did not contemplate it would reach sexual orientation, times have changed. Posner argues that "[t]he compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose 'interpretation' of the word 'sex' in Title VII to embrace homosexuality."[39] Moreover, he notes that the Supreme Court has paved the way by loosening the meaning of "sex" to keep up with social change: while the word was previously limited to binary workplace gender roles, it has now been read to cover sexual harassment and sex stereotyping claims.[40]

### *B. Theories of Interpretation*

Posner's approach appears to draw from three prevailing theories of statutory interpretation. While not the only methods of statutory interpretation, this Comment focuses on the Standard Picture method, Ronald Dworkin's Integrity Theory, and Mark Greenberg's Moral Impact Theory. Each theory is set forth below.

The Standard Picture method focuses on the meaning and linguistic content of a statute's text.[41] This involves, first, the "semantic content"—what the words actually say—and second, the "communicative content"—what the legislature wanted to communicate through the passage of the text.[42] Under this theory of interpretation,

---

36. *Hively*, 853 F.3d at 352, 356 (Posner, J., concurring).

37. *Id.* at 355 (Posner, J., concurring).

38. The Sherman Antitrust Act, enacted in 1890, is now read to prohibit monopolies, which weren't understood to exist in 1890. *See id.* at 352 (Posner, J., concurring). The Second Amendment, initially enacted to arm the National Guard, is now read to give private citizens a right to bear arms. *See id.* at 354 (Posner, J., concurring). Lastly, the First Amendment, originally applying only to literal speech, is now read to give people the right to burn American flags. *See id.* at 353–54 (Posner, J., concurring).

39. *Id.* at 355 (Posner, J., concurring).

40. *Id.* (Posner, J., concurring). For a discussion of stereotypical gender roles and Title VII, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

41. Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 47–48 (Leslie Green & Brian Leiter eds., 2011).

42. *Id.* at 47–48, 77–79.

the meaning of a text is deciphered by looking at both the text itself and also the legislature's goal of obtaining specific legal effects through enactment.[43] The Standard Picture method is deeply rooted in everyday notions of the law. Any given person has an idea of what the statutes and law say.

At the other end of the spectrum lies Ronald Dworkin's Integrity Theory, which views law as an "underlying, idealized source from which all legal practices flow."[44] "[S]pecifically, the content of the law is the set of principles that best *morally justifies* past legal and political practices."[45] He "famously explicated the relevant kind of moral justification with his notions of fit and justification," and explicitly rejects pragmatism as having a place in the law.[46]

More recently, the Moral Impact Theory, set forth by University of California-Los Angeles Professor of Law and Philosophy Mark Greenberg, holds that when a legal institution, such as a legislative body, creates a moral obligation, those moral obligations should be binding upon judges and practitioners.[47] Legal institutions, including the legislature, courts, and administrative agencies, "take actions that change our moral obligations" by "changing the morally relevant facts and circumstances."[48] Legal institutions change expectations, give new options, and "bestow[] the blessing of the people's representatives on particular schemes."[49] Greenberg's theory holds that the resulting moral obligations *are* legal obligations. Greenberg refers to this as the "moral impact theory," because it "holds that the law is the moral impact of the relevant actions of legal institutions."[50] Thus, under this view, courts are creating moral obligations for individuals, even if the courts do not do so explicitly.

### *C. An Illustration:* United States v. Marshall

To illustrate these points, consider the following example drawn from a well-known Seventh Circuit case, *United States v. Marshall*.[51] *Marshall* concerned the interpretation of 21 U.S.C. § 841(b), which set a five-year mandatory minimum sentence for selling more than one

43. *Id.* at 42, 79.

44. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1299 (2014) (discussing RONALD DWORKIN, LAW'S EMPIRE (1988)).

45. *Id.*

46. *Id.* at 1300.

47. *See generally id.*

48. *Id.* at 1290.

49. *Id.*

50. *Id.*

51. 908 F.2d 1312 (7th Cir. 1990), *aff'd sub nom. Chapman v. United States*, 500 U.S. 453 (1991).

gram of "a mixture . . . containing a detectable amount" of LSD.[52] Congress included the word "mixture" in this subsection, as well as in most other subsections, when it established minimum sentences for drug crimes.[53] Congress wanted to impose heavy sentences on both wholesalers and their retailers and was aware of the practice of "cutting" drugs by street dealers of cocaine and heroin.[54] The problem in this case was that LSD alone weighs next to nothing.[55] Consumers buy the drug when it is combined with some "carrier," typically blotting paper or sugar cubes.[56] LSD is sold by the dose, not by weight, as is the case for most of the other drugs the subsection affects.[57]

In *Marshall*, the government argued that a combination of LSD and blotting paper constitutes a "mixture" under the meaning of the Section 841(b).[58] Under the government's theory, the seller's sentence will necessarily depend on the weight of the medium she chooses, because an average dose of LSD weighs 0.05 milligrams: "[A] major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube, would be subject to the mandatory minimum sentence."[59] The Seventh Circuit accepted the government's argument and held that "blotter paper customarily used to distribute LSD[] is a 'mixture or substance containing a detectible amount' of LSD."[60]

According to the Standard Picture method of statutory interpretation, we should consider the semantic and communicative content of the subsection. An analysis of the semantic content, or the meaning derived from the words themselves, indicates that selling a "mixture containing . . . a detectable amount" of LSD would encompass any carrier, whether it be blotting paper or a sugar cube. To a layperson, the combination seems to fall under the common usage of the word "mixture," so the weight should include the medium.[61] Even so, such an interpretation may be at odds with the legislature's intended

52. 21 U.S.C. § 841(b) (2012).
53. *See Chapman*, 500 U.S. at 461–62.
54. *See id.*
55. *See id.* at 457.
56. *See id.* at 453, 458.
57. *See id.* at 458.
58. Brief of the United States at 9, *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (No. 90-5744).
59. *Chapman*, 500 U.S. at 458.
60. *Id.* at 461.
61. "Combination: such as a portion of matter consisting of two or more components in varying proportions that retain their own properties." *Mixture*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/mixture [https://perma.cc/67QB-NGB4].

communicative content. In enacting this statute, Congress hoped to curb the "cutting" of drugs with other dangerous substances. As blotting paper and sugar cubes are not generally dangerous on their own and thus are not the type of "mixtures" Congress had envisioned, the Standard Picture method provides a conflicting result.

Dworkin's Integrity Theory asks us to "seek the principle that best fits and justifies the statute."[62] In *Marshall*, there seem to be two competing principles at issue. First, combining illicit drugs with *any* other materials warrants a five-year sentence at minimum. This principle implies that any combination, including combinations of sugar cubes or blotting paper, should carry the minimum sentence. Second, cutting illicit drugs with potentially harmful materials warrants additional punishment. This view implies that over-punishment should be disfavored, and any measurement used to determine a punishment should include only the illicit substance, and not whether the illicit substance is on a heavier carrier. Dworkin advises us to pick the principle that is morally better: "which principle would, ex ante, be a better one to have."[63] Under this theory, the court was correct in choosing the former.[64] The best moral result is ostensibly no LSD usage; therefore, a harsher punishment is warranted.[65]

Greenberg's Moral Impact Theory informs that a fact's relevance depends on its bearing on the statute's "moral profile."[66] Resolution depends on what the "relevant moral values, on balance, support."[67] Under this theory, the following inquiries could be relevant to a desirable interpretation: "how Congress intended the language to be construed, whether Congress would have wished its language to cover the situation, how the statutory phrase is most reasonably read, what Congress intended to communicate, and the purpose of the statute."[68] Given all of the circumstances, the morally "correct" result would be to have *no* drugs on the street. According to Greenberg's theory, the court should choose the interpretation that meets that end. Again, the

62. Greenberg, *supra* note 44, at 1292.

63. *Id.*

64. *United States v. Marshall*, 908 F.2d 1312, 1329 (7th Cir. 1990).

65. Whether harsher punishments are necessarily linked to reduced crime or fewer drugs is disputed and beyond the scope of this Comment. *Compare* David R. Francis, *Sentence Enhancements Reduce Crime*, THE NAT'L BUREAU OF ECON. RESEARCH, http://www.nber.org/digest/oct98/w6484.html [https://perma.cc/9SVB-MM8U], *with* German Lopez, *More Evidence That Harsh Mandatory Minimums for Drug Offenses Don't Work*, VOX (Aug. 5, 2015, 8:30 AM), https://www.vox.com/2015/8/5/9097307/mandatory-minimums-fair-sentencing-act [https://perma.cc/B6VQ-6VUJ].

66. Greenberg, *supra* note 44, at 1308.

67. *Id.* at 1331.

68. *Id.* at 1329.

interpretation that may lead to less drugs on the street is harsher punishments.

With that backdrop in place, we return to Judge Posner's judicial interpretive updating approach from *Hively*. His approach seems to draw elements from all three of the above theories. Starting with the text, Posner determined that both the semantic and communicative meanings of Title VII do not encompass sexual orientation.[69] Sexual orientation would thus be excluded under the Standard Picture method. Dworkin's Integrity Theory tells us to choose the principle that would be the better one to have, which most would consider to be halting discrimination of underrepresented minorities. The Moral Impact Theory instructs us to look at all democratic considerations. Given the statutory purpose of curbing employment discrimination, coupled with a reasonable reading of the statute, we can reach the result of the majority. And yet, Posner's approach does not fall squarely within any of the foregoing approaches. Rather, he argues that "[t]he compelling social interest in protecting homosexuals . . . from discrimination justifies an admittedly loose 'interpretation' of the word 'sex' in Title VII to embrace homosexuality."[70] In essence, he decides that the cause is sufficiently worthy to merit a more generous interpretation of the statute. Moreover, the Supreme Court had paved the way for Posner's approach by loosening the meaning of "sex" to keep up with social change: "sex" had previously been read to encompass sexual harassment and failing to fulfill typical gender roles.[71] Thus, while drawing on the above approaches, Posner also expands them.

## II. THE MORAL REVITALIZATION THEORY

Posner's approach is highly pragmatic. He believes that interpretation must make room for changing circumstances and changing conceptions of justice.[72] Posner's pragmatism aligns with

---

> 69. The argument that firing a woman on account of her being a lesbian does *not* violate Title VII is that the term "sex" in the statute, when enacted in 1964, undoubtedly meant "man or woman," and so at the time people would have thought that a woman who was fired for being a lesbian was not being fired for being a woman unless her employer would not have fired on grounds of homosexuality a man he knew to be homosexual . . . .

*Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring).

70. *Id.* at 355 (Posner, J., concurring).

71. For a discussion of stereotypical gender roles and Title VII, see *infra* Section II.B.1.a.

72. Joel Cohen, Richard A. Posner & Jed S. Rakoff, *Should Judges Consult Their Personal Moral Conviction?*, SLATE (Mar. 28, 2017, 10:55 AM) http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/how_should_ju

those of William Eskridge's view of statutory interpretation, which similarly holds that statutes should be interpreted dynamically.[73] Both approaches are expanded upon below. The Moral Revitalization Theory then refines Posner and Eskridge's approaches by limiting their applications only to statutes that are ripe for revitalization, are "super-statutes," and that contain ambiguities that need to be interpreted. This Part explains that Title VII is both ripe for revitalization after the emergence and victories of the LGBT rights movement over the course of the past half-century and is a super-statute—one that deeply affected American culture. To illustrate the theory, this Part once again uses *Marshall* as a reference point.

### *A. Dynamic Statutory Interpretation*

Judge Posner has long been regarded as a pragmatist. He is the leading judicial advocate of legal pragmatism. He has said that it is "naïve to think that judges believe only in the legal technicalities of their argument," meaning that judges—whether we want them to or not—consult with their own moral convictions to produce the best results for society.[74] While he doesn't believe it proper to invoke or rely on "idiosyncratic moral convictions," he does think it is proper for a "judge to rely on the general, broadly held moral convictions of his society, provided those convictions are both pertinent to the case at hand and not overridden by other considerations that judges have to take account of."[75] Posner has written that he wants to "strip away the conventional verbiage in which the issues come wrapped" in exchange for "the actual interests at stake, the purposes of the participants, the policies behind the precedents, and the consequences of alternative decisions."[76]

Pragmatism makes room for changing circumstances and changing conceptions of justice to allow judges to mold the meaning of statutes.[77] It makes statutory interpretation dynamic, rather than static.[78] It allows common sense to influence a judge's vote in a case—a "medley of practical considerations (such as cost and other economic consequences)

---

dges_weigh_the_law_and_their_personal_moral_convictions.html [https://perma.cc/PFN4-VPNL].

73. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 PA. L. REV. 1479, 1479 (1986).

74. Cohen, Posner & Rakoff, *supra* note 72.

75. *Id.*

76. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 208–09 (1999).

77. *Id.*

78. *Id.*

and moral or ethical ones."[79] Judges are able to fill in the gaps left by the legislature, whose members are often in disagreement and have no coherent set of preferences.[80] The Moral Revitalization Theory supplements this form of statutory interpretation. Judges should be able to fill the gaps left by the legislature, and judges should apply broadly held moral convictions.

Similarly, William Eskridge has made the argument that statutes should be "interpreted 'dynamically,' that is, in light of their present societal, political, and legal context."[81] Eskridge was skeptical of the Supreme Court's overwhelming use of originalism, which he and other legal theorists considered "undesirable in theory and unworkable in practice."[82] Originalism, he claimed, is equally as indeterminate as its dynamic counterpart, failing to represent an intelligible view of legislatures and producing "normatively questionable results."[83] Statutory text, says Eskridge, is inevitably vague due to multiple contributing authors over time, intentional ambiguities designed to sidestep controversial issues, and contextual indicators of meaning.[84] Most importantly, the interpreter's own background will necessarily guide her perspective. Because most textual originalists take a "holistic textualism" approach that relies on context to produce "text-based interpretive closure even when the statutory provision being interpreted is itself ambiguous,"[85] Eskridge claims that a more dynamic approach is not only required, but inevitable.[86] Under that background, Eskridge developed a theory of statutory interpretation that evolves with time: Dynamic Statutory Interpretation.[87] Dynamic Statutory Interpretation posits that judges interpreting statutes should "track current political trends in order to achieve an interpretation of a statute that best fits the values and goals animating current legislators, administrative agencies, and other interested actors."[88]

The Moral Revitalization Theory draws from both approaches. Statutory interpreters can—and should—consider what interpretation the current legislature would prefer. They should be guided by an objective moral compass that reflects the broadly held values of American society. These broadly held values are determined by looking at various

79. Cohen, Posner & Rakoff, *supra* note 72.
80. POSNER, *supra* note 76, at 258–59.
81. Eskridge, *supra* note 73, at 1479.
82. John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PENN. L. REV. 2209, 2211 (1995).
83. *Id.* at 2215–16.
84. Eskridge, *supra* note 73, at 1484–88, 1525 n.179.
85. Nagle, *supra* note 82, at 2216.
86. *Id.* at 2217.
87. Eskridge, *supra* note 73, at 1481–82.
88. Nagle, *supra* note 82, at 2212.

sources: the legislature, the governing political party in the White House, and so forth. But judges must be limited in their application of this form of statutory interpretation in order to alleviate the sharp criticism that Posner's and Eskridge's theories have been met with. Accordingly, the following Section introduces three important limiting principles.

### *B. Limiting Principles*

In order to necessarily limit the approach, three preconditions must be met. First, the statute must be ripe for revitalization. Second, the statute must be one that is passed to make a new norm and has a broad effect on the law. Third, the statute must be ambiguous or generally vague, which allows an interpreter to fill in gaps. Together, these three conditions help to ensure that judges apply this approach to statutory interpretation only when it is warranted. This Section addresses how decision makers should approach these inquiries.

#### 1. RIPE FOR REVITALIZING

Title VII's prohibition against "sex" discrimination, as written, only applies to "sex" in the traditional sense of the word.[89] Under the Moral Revitalization Theory, however, the word should be interpreted beyond its semantic or communicative content. Title VII is ripe for reinterpretation for two reasons: first, Title VII's evolution has reflected the changing nature of the workplace—one that is now far more accepting of individuals outside of the stereotypical bounds of the "white-collar male"; second, the progression of LGBT rights indicates that society and its government are no longer willing to accept discrimination against those individuals as the norm.

##### *a. Title VII's Evolution*

The first step in determining whether a statute is ripe for revitalization begins by examining the statute itself. Judges should focus on the circumstances surrounding the passage of an act. Next, judges should determine how a statute has been interpreted throughout its history. Examining both of these stages in the context of Title VII shows that the statute has evolved. Title VII began as a means of prohibiting the categorization of individuals based on traditional notions of sex, but it now encompasses much more. Without a single linguistic change in the statute, courts have broadened its definition to include a

89. *See infra* notes 93–95 and accompanying text.

variety of sex-based discrimination, including sexual harassment[90] in the workplace.[91]

The period immediately following the passage of Title VII represented a refusal on the part of the government to take the issue of sex discrimination seriously.[92] Title VII was interpreted to only prohibit sorting binary genders into separate, sex-differentiated groups.[93] This interpretation thus assumed the purpose of Title VII to be the preservation of traditional gendered organization of the workplace and the isolation of certain practices from scrutiny.[94] In the period following Title VII's enactment, courts interpreted "sex" narrowly to include only its "traditional meaning."[95] Accordingly, courts refused to hold that sex discrimination included pregnancy discrimination in *General Electric Co. v. Gilbert*,[96] or to recognize discrimination arising from sexual harassment.[97] Even more tellingly, the Vice Chairman of the EEOC requested that Congress remove the word "sex" from Title VII.[98] The resistance to Title VII's sex discrimination focused, perhaps unsurprisingly, on maintaining the status quo of the nuclear "family structure."[99]

---

90. For a discussion of the way social movements framed the debate surrounding the social problem of sexual harassment in the workplace and for a more in-depth look on how "sex" discrimination came to encompass discrimination based on sexual harassment, see ANNA-MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE (2005).

91. Discussion of the entire evolution of Title VII is beyond the scope of this Comment. Provided here is a brief summary of the relevant events.

92. HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960-1972, at 106 (1992) ("[I]n 1965 the American public mind at large, as mirrored in press coverage and political discourse, did not take the new issue of sex discrimination seriously."); IRENE PADAVIC & BARBARA RESKIN, WOMEN AND MEN AT WORK 63 (2d ed. 2002) ("The regulatory agencies did not take seriously the prohibition of sex segregation until the 1970s . . . so the level of sex segregation remained essentially the same in 1970 as in 1960.").

93. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1310 (2012).

94. *Id.*

95. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977). By "traditional meaning" of sex, the court most likely meant genitals and gender assigned at birth.

96. 429 U.S. 125 (1976).

97. *See, e.g.*, *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (quoting Defendant's Brief in Support of the Motion to Dismiss at 5–6, *Williams*, 413 F. Supp. 654 (No. 74-186)) ("[T]he primary variable in the claimed class is willingness *vel non* to furnish sexual consideration, rather than gender, the sex discrimination proscriptions of the Act are not invoked.").

98. SONIA PRESSMAN FUENTES, EAT FIRST—YOU DON'T KNOW WHAT THEY'LL GIVE YOU 132 (1999).

99. Franklin, *supra* note 93, at 1336 (noting that "demanding jobs were reserved for men in order to preserve marital harmony and ensure that women were

Due in large part to the women's movement, the EEOC and federal courts began to recognize a broader interpretation of Title VII's proscription of sex discrimination beginning in the late 1960s.[100] The National Organization for Women, founded in 1966,[101] sought to create an organization of feminist lawyers to convince the government and the American public that sex discrimination was a serious problem.[102] With the movement came the expansion of the word "sex" to encompass sexual harassment, male-to-male sexual remarks, and recognition of transgender plaintiffs. In 1972, Congress clarified that sex discrimination should "be accorded the same degree of social concern" as other forms of discrimination,[103] and rejected *Gilbert* by enacting the Pregnancy Discrimination Act.[104] The Supreme Court took note of these developments.

In *Meritor Savings Bank v. Vinson*,[105] the Supreme Court interpreted "sex" to encompass sexual harassment. There, Mechelle Vinson brought suit against the vice president of the bank she worked for, alleging that he had coerced her to have sexual relations with him and made demands for sexual favors at work; they had intercourse forty to fifty times.[106] Due to the nature of their supervisor-supervisee relationship that resulted in her fear of losing her job, she never reported the harassment.[107] The Supreme Court found that the vice president and the bank had violated Title VII's prohibition of sex discrimination, which extended to behavior that creates a hostile or abusive work environment: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at

---

available to provide care to their husbands and children," and continuing, "[j]obs in management, for instance, often required employees to relocate across the country . . . . If women were permitted to enter such jobs, employers argued, it would have a devastating effect on the stability and well-being of the American family.").

100. *Id.* at 1345.

101. For a discussion of the founding of the National Organization for Women, see Betty Friedan, *Introduction—Part II: The Actions*, *in* "IT CHANGED MY LIFE": WRITINGS ON THE WOMEN'S MOVEMENT 123, 87–91 (Harvard Univ. Press 1998) (1976).

102. For an extended discussion of the Feminist Movement's effect on the EEOC and sex discrimination in the workplace, see Franklin, *supra* note 93 at 1333–54.

103. H.R. REP. NO. 92-238, at 5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 (report of the House Education and Labor Committee on the Equal Employment Opportunity Act of 1972).

104. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

105. 477 U.S. 57 (1986).

106. *Id.* at 59–61.

107. *Id.* at 60.

the entire spectrum of disparate treatment of men and women' in employment."[108]

In *Price Waterhouse v. Hopkins*,[109] the Supreme Court held that Price Waterhouse's refusal to promote a female because she didn't fit the partners' idea of what a female employee should look and act like could violate Title VII's prohibition against sex discrimination.[110] The Supreme Court rejected Price Waterhouse's argument that an employee has to prove that the employer gave "decisive consideration to an employee's gender, race, national origin, or religion"—a "but-for causation" standard.[111] Rather, the Court determined that "because of" as used in the statute does not mean "*solely* because of."[112] *Price Waterhouse* was expanded in *Oncale v. Sundowner Offshore Services*,[113] in which the Court interpreted "sex" to prohibit sexually-charged, gender-based remarks from male co-workers to other males.[114] There, Oncale's male coworkers sexually mocked him and called him a name suggesting homosexuality.[115] The Court held that sex discrimination encompassed "discriminatory intimidation, ridicule, and insult" and protected men as well as women.[116]

Title VII has evolved. While it started as a means to prohibit categorizing individuals based on traditional notions of sex, it now encompasses a broader range of protection from discrimination. Without a single textual change in the statute, courts have broadened its definition to include a variety of sex-based discrimination, including sexual harassment[117] in the workplace.[118] This treatment makes Title VII an ideal candidate for the Moral Revitalization Theory. The statute itself has already been broadly interpreted to deal with emerging situations that were not seen as important enough to be embodied in the words of the statute itself at the time: discrimination against males,

---

108. *Id.* at 64 (citing *City of L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

109. 490 U.S. 228 (1989).

110. *Id.*

111. *Id.* at 237–38.

112. *Id.* at 241.

113. 523 U.S. 75 (1998).

114. *Id.* at 82.

115. *Id.* at 77.

116. *Id.* at 78 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)).

117. For a discussion of the way social movements framed the debate surrounding the social problem of sexual harassment in the workplace and for a more in-depth look on how "sex" discrimination came to encompass discrimination based on sexual harassment, see ANNA-MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE (2005).

118. Discussion of the entire evolution of Title VII is beyond the scope of this Comment. Provided here is a brief summary of the relevant events.

pregnancy, sexual harassment, interracial marriage, and other forms of disparate treatment. Title VII is ripe to include LGBT individuals specifically in part because of the enormous strides the group has made over the past half-century culminating in *Obergefell v. Hodges*,[119] which constitutionalized same-sex marriage.[120] The following Section traces LGBT rights from their nascent period to *Obergefell*.

### *b. The Emergence of LGBT Rights*

The second step in the ripeness for revitalization inquiry is examining the affected party. When faced with the question in *Hively*—whether discrimination "because of . . . sex" includes discrimination because of sexual orientation—the affected group is those with historically marginalized sexual orientations. The second inquiry in determining a statute's ripeness for revitalization should look at how society views the group and changing moral attitudes towards that group.

An examination of the affected group shows that LGBT[121] individuals have made significant cultural and political strides to improve their roles in society and the law. Well into the twentieth century, same-sex intimacy was perceived as immoral on both the state[122] and national[123] levels; often, it was treated as a mental illness.[124] Bans on same-sex intimacy were upheld in *Bowers v. Hardwick*.[125] LGBT individuals were barred from serving openly in the United States

119. 135 S. Ct. 2584 (2015).

120. *Id.* at 2604–05.

121. I use the term LGBT—the contemporary designation—to demonstrate the broader goals of the efforts I discuss, but I recognize that the developments I cover in this Section were largely focused on sexual orientation and not gender identity (that is, the "LG," sometimes the "B," but generally not the "T").

122. Anti-sodomy laws that applied only to gay people existed in Kansas, Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas. Am. Civil Liberties Union, *Why Sodomy Laws Matter* ACLU (2018), https://www.aclu.org/other/why-sodomy-laws-matter [https://perma.cc/Y68L-HNBG]. In eleven other states, anti-sodomy laws applied to straight and gay couples on their face, but were only enforced against gay couples. *Id.* These laws allowed states to limit the ability of gay couples to raise children, justify denying gay parents custody of their children, and refuse to allow gay couples to adopt or become foster parents. *Id.*

123. *See, e.g.*, Defense of Marriage Act, 28 U.S.C. § 1738C (1996) (defining marriage for federal purposes as the union of one man and one woman, allowing states to refuse to recognize same-sex marriages granted under the laws of other states), *invalidated by United States v. Windsor*, 570 U.S. 744 (2013).

124. Sarah Baughey-Gill, *When Gay Was Not Okay with the APA: A Historical Overview of Homosexuality and Its Status Mental Disorder*, 1 OCCAM'S RAZOR 5 (2011).

125. 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

military.[126] The gay rights movement made headway from the 1970s until present.[127]

LGBT identity-based organizations proliferated in the 1970s.[128] "Gay rights" and "gay pride" thrived during this time as a means of political organization.[129] In the 1980s, when the HIV/AIDS crisis induced antigay backlash, gay and lesbian groups began to "focus on an essentialized gay experience and common, collective goals."[130] This in turn resulted in a major mobilization of "formerly apathetic gay men and lesbians,"[131] leading to an inundation of funding to private LGBT groups.[132] That funding allowed for the professionalization of the LGBT rights movement and the rise of highly successful LGBT impact litigation groups.[133]

The movement's impact litigation became highly visible in the courts during the early 2000s. In 2003, *Lawrence v. Texas*[134] overruled *Bowers*, concluding that laws that make same-sex intimacy a crime "demean[] the lives of homosexual persons."[135] In 2012, the Federal Defense of Marriage Act, which allowed the federal government to disregard same-sex marriages in the states, was struck down.[136] Rounding off the success of the LGBT rights movement was the Supreme Court's ruling in *Obergefell v. Hodges* in 2015, which constitutionalized same-sex marriage.[137] Especially relevant to this

126. 10 U.S.C. § 654 (repealed 2010).

127. This Section only begins to touch the surface of this historical development. For an extended (and excellent) discussion on social movements of LGBT groups, see Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655, 664–77.

128. ELIZABETH A. ARMSTRONG, FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950-1994, at 97–112 (2002).

129. *See id.*

130. Leachman, *supra* note 127, at 673.

131. *Id.* (quoting Mary Bernstein, *Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement*, 26 SOC. SCI. HIST. 531, 559 (2002)).

132. *Id.*

133. *Id.* For an expanded description of the founding and successes of LGBT impact groups, see Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1705–13 (2014).

134. 539 U.S. 558 (2003).

135. *Id.* at 575.

136. *United States v. Windsor*, 570 U.S. 744 (2013); s*ee also* Dylan Matthews, *The Supreme Court Struck Down Part of DOMA. Here's What You Need to Know*, WASH. POST (June 26, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/06/26/the-supreme-court-struck-down-doma-heres-what-you-need-to-know/?utm_term=.0668f710fa30 [https://perma.cc/LVT3-GRS6].

137. 135 S. Ct. 2584 (2015).

Comment is the following passage from Justice Kennedy's majority opinion in that case:

> The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clause of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry . . . . While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right.[138]

The rise of the LGBT movement, coupled with the broad nature of Title VII indicates that Title VII is ready to be revitalized. Through the Supreme Court's decisions and the movement's successes, it has become clear that American society is no longer willing to accept LGBT discrimination in the workplace. Moral attitudes towards the affected group have changed in a way that allows the group to gain protections under Title VII.

The history of both Title VII and the LGBT rights movement indicate that "sex" should be interpreted to bar employment discrimination against those with minority sexual orientation or other sexual-minority status. Title VII has evolved from its original meaning. The term "sex" has consistently been broadly interpreted to include a variety of meanings outside of its semantic limits. The relatively recent strides of the LGBT movement indicate that society is no longer willing to tolerate discrimination against these groups. This brief history supports the use of the Moral Revitalization Theory in revitalizing the word "sex" to encompass sexual orientation in the context of employment discrimination.

### 2. APPLICATION TO "SUPER-STATUTES"

The Moral Revitalization Theory should only be applied to super-statutes. A super-statute is one that:

> (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the

138. *Id.* at 2605–06.

> law—including an effect beyond the four corners of the statute.[139]

Typically, they are enacted only after long "debate about a vexing social or economic problem."[140] This Comment argues that such statutes are proper candidates for revitalization.

Title VII is a super-statute. It sought to make a new norm regarding employment discrimination. As discussed above, it stuck with public culture, and has had a broad effect on the law. It was enacted only after a long debate about a "vexing social or economic problem."

The legislative debate over the addition of "sex" to Title VII centered around the treatment of sex discrimination as "a social phenomenon encased in a social context."[141] Its introduction was viewed as a distraction from the primary agenda of the civil rights bill.[142] Furthermore, its presentment appeared to be a threat to employment regulations that relied on the notion that "women were marginal participants in labor markets . . . [a]nd . . . were especially deserving of public protection as actual or potential mothers."[143] Proponents of the addition agreed that adding "sex" implicated policy that was deeply rooted in American history, but that it was not a proud legal tradition.[144] The Civil Rights Act in general was passed only after the longest debate in the history of the Senate. Five hundred amendments were proposed and debate lasted 534 hours.[145] Eventually, of course, the statute passed 73-27.[146]

Because Title VII sought to establish a new normative framework for state policy and "stuck" with public culture in a way that its institutional and normative principles had a broad effect on the law, it is a super-statute that is eligible for the Moral Revitalization Theory. With those preconditions met, the Moral Revitalization Theory can be applied to Title VII of the Civil Rights Act. Judges should apply the changing "moral compass" of society, reflected by the expansion of Title VII and the progression of the LGBT rights movement.

---

139. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

140. *Id.*

141. Franklin, *supra* note 93, at 1320 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)).

142. *Id.* at 1320.

143. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 374 (1992).

144. Franklin, *supra* note 93 at 1327.

145. Clifford M. Lytle, *The History of the Civil Rights Bill of 1964*, 51 J. NEGRO HIST. 275, 295–96 (1966).

146. *Id.* at 296.

### 3. TEXTUAL AMBIGUITIES OR GENERAL VAGUENESS

The Moral Revitalization Theory should only be applied to statutes that contain textual ambiguities or are generally vague. Ambiguous simply means that a statute is unclear or equivocal.[147] In other words, ambiguous statutes can be interpreted in multiple senses, are reasonably open to more than one construction, or are overall unascertainable within the bounds of the statute itself.[148] Similarly, general vagueness implies that a statute is imprecise, uncertain, or indefinite.

Title VII's use of the word "sex" is ambiguous. While traditionally "because of . . . sex" has meant discrimination based on a person's status as either man or woman, the phrase has been extended beyond that definition. "Sex," within the context of Title VII, now can mean sexual harassment and stereotyping based on sex. It is thus unclear and equivocal whether or not "because of . . . sex" encompasses "because of . . ." sexual preference.

## *C.* Marshall *Revisited*

To illustrate the points made above, this Comment returns to *United States v. Marshall*. That case concerns another statute that is a candidate for the Moral Revitalization Theory. As discussed, the Theory requires three preconditions to qualify. First, the statute must be ripe for revitalization—that is, ready to be reinterpreted due to a change in public thinking or some other development in society. Next, the statute must be a "super-statute"—one that penetrated public normative and institutional culture in a deep way. Finally, the statute must contain interpretive ambiguities. After all of those conditions are met, the statute will qualify for the Moral Revitalization Theory.

First, the statute was ripe for revitalization and interpretation. *Marshall* was decided in 1990, just four years after the passage of the Anti-Drug Abuse Act.[149] The short period of time notwithstanding, the Act was ready to be interpreted. Mere passage of time is not the only way a statute reaches ripeness. In this situation, the statute was ripe because of its ambiguities. The court was unable to punt the question, and needed to decide whether to read blotting paper and other mediums into or out of the statute.

---

147. Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 170 (2002).

148. *Id.*

149. The Anti-Drug Abuse Act was enacted in 1986, Pub. L. No. 99-570, 100 Stat. 445 (codified at 21 U.S.C. § 801 (2012)).

Next, the statute at issue in *Marshall*—the Anti-Drug Abuse Act of 1986—was a super-statute. It was enacted as part of Ronald Reagan's War on Drugs as a response to the problem of drug addiction, which had recently gained national attention due to a media-sensationalized "crack cocaine epidemic."[150] Due to record levels of public concern, the Act was drafted, debated, and passed in just over a month.[151] It set out mandatory minimum sentences for a variety of drugs, including crack cocaine, powder cocaine, and "mixture[s]."[152] The Anti-Drug Abuse Act of 1986 and its mandatory minimum sentences sought to establish a new normative or institutional framework for state policy and over time did "stick" in the public culture such that the Act and its institutional or normative principles have had a broad effect on the law—including an effect beyond the four corners of the statute. The Anti-Drug Abuse Act of 1986 was a major legislative victory for the Reagan Administration, and has affected both public culture[153] and the law.

Finally, the statute contains ambiguities left open for a judge to interpret. *Marshall* concerned the interpretation of 21 U.S.C. § 841(b), which set a five-year mandatory minimum sentence for selling more than one gram of "a mixture . . . containing a detectable amount" of LSD.[154] The ambiguity, as discussed above, is whether the word "mixture" includes mediums that are not harmful on their own, such as blotting paper or sugar cubes. The "mixture or substance" language in the statute indicates that the legislature did not only mean pure LSD and contemplated some sort of medium or carrier. But still, that phrase cannot mean *all* mediums. As Judge Easterbrook put it: "One gram of crystalline LSD in a heavy glass bottle is still only one gram of 'statutory LSD.' So is a gram of LSD being 'carried' in a Boeing 747."[155] The main question before the court, as Judge Easterbrook saw it, was "[h]ow much mingling of the drug with something else is essential to form a 'mixture or substance'?"[156]

Similar to Title VII, therefore, the "mixture or substance" phrase was eligible for the Moral Revitalization Theory. This theory requires a judge to consider the moral, ethical, and practical repercussions of the

150. Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2544 (2010).

151. *See id.*

152. *See* 21 U.S.C. § 841(b) (2012).

153. *See, e.g.*, *The Wire* (HBO 2002–08).

154. 21 U.S.C. § 841(b) (2012).

155. *United States v. Marshall*, 908 F.2d 1312, 1317 (7th Cir. 1990), *aff'd sub nom. Chapman v. United States*, 500 U.S. 453 (1991).

156. *Id.*

various possible interpretations. Morally and ethically, the best result would be to have fewer drugs on the street. In order to obtain that result, it may be justified to have harsher punishments and include carriers within the meaning of "mixture." The pragmatic side of the theory helps deal with some of Judge Easterbrook's concerns. Practically speaking, it would not be morally or ethically fair to include a "Boeing 747"[157] in the weight determination, but it *would* be fair to include the blotting paper or sugar cube.

### *D. Counterarguments*

Three important objections to Moral Revitalization Theory are clearly present. The first major critique concerns textualism and judicial activism. Another counterargument disfavors as a whole dynamic statutory interpretation. According to this criticism, dynamic statutory interpretation will result in unconstitutional ex post facto legislation. Finally, concerns about the role of the legislature and the separation of powers frequently disfavor the courts enacting changes that are thought to be in the legislature's realm. The three criticisms are set forth below, with a discussion and rebuttal of each following.

#### 1. TEXTUALISM AND THE CONCERN OF JUDICIAL ACTIVISM

Judicial restraint focuses on those relationships between the coordinate branches. It is a policy that asks the courts to be deferential to the legislative and executive branches and cautious toward voiding legislation.[158] The most common argument in favor of judicial self-restraint is the "counter-majoritarian difficulty"[159]: "the anomaly, in a democratic system, of unelected judges nullifying acts of the people's elected representatives."[160] As Chief Justice Roberts famously put it:

> My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. . . . Judges are not politicians who can promise to

157. *Id.*

158. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 450 (1994).

159. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

160. Luban, *supra* note 158, at 456.

> do certain things in exchange for votes. . . . I will remember that it's my job to call balls and strikes and not to pitch or bat.[161]

But even umpires have to use judgment. Perhaps that is why Chief Justice Roberts voted to uphold the Affordable Care Act's Individual Mandate provision under Congress's taxing power on the basis of the word "tax,"[162] which never appears in the statute itself,[163] or why Justice Scalia would interpret the Second Amendment to permit civilians to own guns, despite the Amendment's lack of language indicating so.[164] The Chief Justice's opinion in *Sebelius* undercuts the argument that judicial restraint promotes majoritarianism; while judicial review is thought necessary to "safeguard minority rights from the 'tyranny of the majority,'"[165] the Chief Justice upheld legislation that a majority of people did not support[166] because he believed it to be constitutional according to words that were not in the statute. Thus, he used judicial restraint to do exactly what the doctrine purports to prevent: counter the majority.

Furthermore, state judges across the country are elected, making the fact that federal judges are unelected a bit of a "red herring" when it comes to the counter-majoritarian argument, since states with an elected judiciary very likely experience at least some counter-

---

161. *Roberts: 'My job is to call balls and strikes and not to pitch or bat'*, CNN (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ [https://perma.cc/ULA9-77MQ].

162. In *National Federation of Independent Business v. Sebelius*, the Chief Justice, writing for the majority, rejected the argument that the Individual Mandate clause of the Affordable Care Act could not be a tax because the statute referred to it as a penalty: "In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here." 567 U.S. 519, 569 (2012).

163. 26 U.S.C. § 5000A(b)(1) (2012) ("[T]here is hereby imposed . . . a *penalty* with respect to such failures in the amount determined under (c)." (emphasis added)).

164. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *United States v. Miller*, the Supreme Court held that a sawed-off shotgun had no "reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. 174, 178 (1939). In *District of Columbia v. Heller*, however, Justice Scalia wrote that the Second Amendment established an individual right for U.S. citizens to possess firearms. 554 U.S. 570, 635 (2008).

165. Luban, *supra* note 158, at 456.

166. Jeffrey M. Jones, *Americans' Approval of Healthcare Law Declines*, GALLUP NEWS (Nov. 14, 2013), http://news.gallup.com/poll/165863/americans-approval-healthcare-law-declines.aspx [https://perma.cc/E57H-9A2B].

majoritarian difficulty.[167] Thus, the argument might not have anything to do with the "anomaly" of a nonmajoritarian judiciary, or anything to do with the judiciary at all. Indeed, quite apart from the judiciary, the U.S. Constitution established very few institutions that are majoritarian. The President and Vice President, through the Electoral College, and the Senate (until the Seventeenth Amendment)[168] are nonmajoritarian institutions, and federal judges are appointed for life.[169] In fact, pure majoritarianism would make the Constitution impossible.[170] And of course, the "counter-majoritarian difficulty" is not foreign to Judge Posner. In response to a question detailing the objection to judicial activism, Posner made the following distinction:

> I distinguish between personal moral convictions and moral convictions that a judge shares with the rest of the society, or at least with a substantial share of the rest of the society, or that he *reasonably* believes the rest of the society or a large fraction of the rest can be persuaded to share. Even so, he or she must be careful to make sure that relying on those convictions to decide a case would not run afoul of an authoritative legal principle or rule or decision.[171]

Thus, Posner addresses the counter-majoritarian difficulty with a seemingly simple approach: take the interpretation that accords with the majority. The majority can be evidenced in a variety of ways: the controlling party in the legislature or executive, various polls across the country, or prevailing media or literature. This task is precisely what the Moral Revitalization Theory sets out to do: base a revitalization on the moral convictions the judge shares with the rest of society.

It is not disputed that the central job of the judiciary is to say what the law is.[172] Likewise, no one would argue that the Article III judicial powers are not "subject to the checks and balances of the Article I legislative powers." Since "We the People" elect the legislature, not the judiciary, federal judges are not "legislative surrogates." That said, the constitutional function of the Supreme Court includes reviewing legislative acts to ensure constitutionality.[173] The checks and balances

---

167. Luban, *supra* note 158, at 456.

168. U.S. CONST. amend. XVII.

169. U.S. CONST. art. III, § 1.

170. Luban, *supra* note 158, at 456.

171. Cohen, Posner & Rakoff, *supra* note 72.

172. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

173. *See McColluch v. Maryland*, 17 U.S. 316, 423 (1819) ("Should Congress, in the execution of its powers, adopt measures which are prohibited by the

go both ways between the legislative and judicial branches. Ever since *Marbury v. Madison*,[174] that judicial check/balance on Congress is the process of interpretation.

The Moral Revitalization Theory should not be used haphazardly, or even frequently. Only in situations where the statute is ripe for revitalization, has deeply affected American society, and is subject to multiple interpretations should values guide a judge's determinations. In most circumstances, the traditional canons and methods of statutory interpretation should apply and guide a judge.

### 2. INDETERMINACY

Anthony D'Amato's article, *The Injustice of Dynamic Statutory Interpretation* argues that dynamic statutory interpretation amounts to unconstitutional ex post facto legislation.[175] Under D'Amato's view, judges should not favor one interest group over another.[176] They must evaluate the rights and interests "of the parties to the case and resolve" those rights and interests fairly in light of relevant statutes, precedents, and other sources of law.[177]

> Judges should be concerned about the interests of parties and not about the interests of Congresspersons. In deciding a case where a statute is relevant, the courts should not try to change the statute, transform it, amend it, adapt the statute to fit one side's notion of policy, finish Congress's job, or make the enterprise work.[178]

In fact, a court should do very little with the statute. The root of D'Amato's article is that doing anything more is "blatantly unjust."[179] Consider the following scenario:

---

constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.").

174. 5 U.S. 137 (1803).

175. Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretations*, 64 U. CIN. L. REV. 910, 935 (1996).

176. *Id.* at 927.

177. *Id.*

178. *Id.*

179. *Id.* at 935.

> Suppose you get into a dispute with somebody and you see a lawyer. She tells you that there's a statute that's relevant to your case. You ask what the statute provides. "We can't be sure," she says, "because it depends on what the government's policy will be by the time your case gets you to court. Even if I make a good guess as to what the government's policy is today, it could change by the time a judge looks at this case. I can't guess what a judge is going to say about policy six months or a year or two years from now. It will depend on which judge gets the case, what his view of the policy is, and whether he believes in the policy strongly enough to twist or even disregard the statute in order to fit the policy."[180]

Thus, D'Amato is concerned about the indeterminacy of dynamic statutory interpretation—having both sides rely on the law at the time their case arises, and then changing the law based on the judges' own idea of government and social policies. But this criticism appears to ignore the simple idea that it is always the judge's job to say what the law is. If a statute is ambiguous, the sides are put on notice that it could be interpreted any number of ways. Moreover, our constitutionally-based representative democracy and the separation of powers require that courts step in when laws are unconstitutional. In some circumstances, that requires courts to overturn both their own precedent and the laws and regulations of the two other branches. This should further put both sides on notice that the laws they rely on potentially will not apply with the same force during or after their case.

Alternative theories of interpretation may be just as indeterminate as a dynamic method. Originalism may fail to represent an intelligible view of legislatures.[181] Because Congress rarely reaches unanimous consensus, legislative gaps may be inevitable, and perhaps even intended.[182] There may be no original intent embodied in a statute, and attempting to determine original intent may produce "normatively questionable results."[183]

The limiting principles to the Moral Revitalization Theory further undercut the indeterminacy issue. This Comment has set out guidelines that will reduce indeterminacy in statutory interpretation. When a statute is grossly outdated, litigants and employers should expect that the law will adapt. It seems like common sense, at least in the case of

---

180. *Id.*
181. Eskridge, *supra* note 73, at 1480.
182. *Id.*
183. Nagle, *supra* note 82, at 2211.

Title VII, that employers should not discriminate against their employees. Furthermore, this is what judges are doing regardless. "The very growth of common-law rules is based on the judges' choice between competing principles, choices expressed in the process of overruling or distinguishing earlier judicial pronouncements."[184] Take D'Amato's hypothetical, for example. He is concerned that litigants will be unable to know what the law is, because they will be unable to "guess what a judge is going to say about policy six months or a year or two years from now."[185] Under the Moral Revitalization Theory, however, litigants *will* have an idea of what a judge is going to say about policy. The theory limits judges to an "objective moral compass," meaning that their opinions must comport with a sector of the American public. The theory is further limited only to those statutes that have deeply affected American culture.

### 3. THE SEPARATION OF POWERS

Underlying both the concerns of judicial activism and indeterminacy is an argument that focuses on the separation of powers. The Constitution's system of the separation of powers and checks and balances is designed to prevent any one branch—the legislature, the executive, or the judiciary—from gaining too much power. The separation of powers criticism of dynamic statutory interpretation is premised on a simple fact: "a judge is not a legislator."[186]

The federal separation of powers is inferred from the vesting clauses in Articles I, II, and III of the Constitution.[187] Each article vests the legislative, executive, and judicial powers in "a Congress,"[188] "a President,"[189] and "one supreme Court, and in such inferior Courts,"[190] respectively. The vesting clauses, coupled with the Framers' high regard for the concept of separation of powers,[191] enshrine a constitutional design meant to allow each branch to have a check on the

184. *Milkovich v. Saari*, 203 N.W.2d 408, 415 (Minn. 1973) (quoting Albert A. Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, VA. L. REV. 847, 855 (1967)).

185. D'Amato, *supra* note 175, at 935.

186. *Id.* at 912.

187. Many state constitutions have express separation of powers clauses. *See, e.g.*, IND. CONST. art. III, § 1; KY. CONST. § 27.

188. U.S. CONST. art. I, § 1, cl. 1.

189. U.S. CONST. art. II, § 1, cl. 1.

190. U.S. CONST. art III, § 1, cl. 1.

191. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 446–53 (1969).

others. The argument essentially boils down to the fact that the Constitution contemplates that the people will elect the legislature, who will in turn be responsible for making the law. The judiciary, on the other hand, is completely insulated from the political process with life tenure, and should not make those judgments: "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . ."[192] Those who disfavor judicial activism question why we should allow an appointed (rather than elected) judge, who is not accountable to the electorate, to make value judgments.[193]

The Supreme Court has suggested that the correct lens to view the separation of powers (in the administrative law context) is by examining whether one branch has sought to increase its power at the expense of another: "as we have noted many times, the Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"[194] If this "aggrandizement" lens is indeed the correct one, the Moral Revitalization Theory may not implicate the separation of powers at all. The Theory does not allow judges to expand their power at the expense of another. If a judge determines that all preconditions are met, and revitalizes the statute in a way that the legislature disagrees with, the legislature is free to amend the statute. But if the judge correctly revitalizes the statute in a way that reflects societal progress and changing moral attitudes, the legislature may not have much incentive to do so.[195]

Further, the issue of the separation of powers may not be as severely implicated when it comes to expanding Title VII. Writing for the majority in *Oncale v. Sundowner Offshore Services, Inc.*, Justice Scalia held that Title VII's prohibition of discrimination "because of . .

192. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

193. *See generally* J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

194. *Mistretta v. United States*, 488 U.S. 361, 381–382 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

195. Of course, the legislature does enact change when it feels the courts have made misguided decisions. In *Employment Division, Department of Human Resources v. Smith*, for example, the Supreme Court backed away from religious protections for employees fired for the use of peyote in religious ceremony. 494 U.S. 872 (1990). Almost immediately after the Court's ruling, Congress enacted the Religious Freedom Restoration Act, which "ensures that interests in religious freedom are protected." Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2012)).

. sex" protects same-sex harassment claims, as well as opposite-sex harassment claims previously held cognizable:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind meets the statutory requirements.[196]

Thus, in the context of expanding preexisting statutes and precedents to cover reasonably similar situations, the court can fairly go beyond what Congress has specifically stated in the statute to cover "reasonably comparable evils."[197] Because a judge is not necessarily creating new law, but rather expanding upon preexisting statutes, the judiciary may not be aggrandizing its power at the expense of the legislature.

The Framers may not have contemplated rigid formality in the separation of powers. Because they lacked a detailed vision of the institutional implications of the separation of powers, the Constitution does not provide definitive answers to these questions. The Moral Revitalization Theory's limiting principles give it the potential to not implicate the separation of powers at all, if the doctrine is viewed through an "aggrandizement" lens. Either way, applying the Theory in the context of Title VII does not hold grave separation of powers implications.

## CONCLUSION

Although we typically hold our judiciary to a high level of impartiality, the current trends of statutory interpretation suggest that strict impartiality is likely impossible and may not even be preferable. The Moral Revitalization Theory set forth above suggests that certain statutes may be interpreted in a way that allows judges to make limited value judgments. Where a statute (1) is ripe for revitalization, (2) has deeply affected public normative and institutional culture, and (3) is

196. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).
197. *Id.*

prone to multiple interpretations because of textual ambiguity, syntactic ambiguity, or general vagueness, judges can, will, and should be guided by an objective moral compass that reflects the changing values of society.

The virtues of this approach are exemplified in the Seventh Circuit decisions, *United States v. Marshall* and *Hively v. Ivy Tech Community College of Indiana*. Both cases involved statutes that "penetrate[d] public normative and institutional culture in a deep way."[198] *Marshall* concerned the prohibited acts encompassed in the United States drug code. Its origins were in the Alcohol and Drug Abuse Amendments of 1986, which established mandatory minimum sentences for drugs as part of Ronald Reagan's War on Drugs. These mandatory minimum sentences affected in a deep way the way drug crimes were enforced. *Hively* concerned Title VII of the Civil Rights Act. Title VII made it illegal to fire or treat a person differently because of their race, color, religion, sex, or national origin. This affected the American workplace in a deep way.

Furthermore, in both cases, the words of the statute are prone to multiple interpretations. At first glance, the words "mixture" and "sex" are unambiguous. To a layperson, a "mixture" would include *any* medium LSD is attached to, and "sex" would not include sexual orientation. Upon deeper inspection of legislative intent, however, the words could carry a narrower or broader meaning. In the statute at issue in *Marshall*, the legislature was concerned about cutting drugs with harmful materials—for example, mixing cocaine with baking soda or mixing MDMA with bath salts. Under that backdrop, "mixture" may not include blotting paper or sugar cubes, particularly when the weight of LSD is next to nothing. In *Hively*, the entire statutory scheme is aimed at curbing discrimination. Moreover, courts have used the listed terms in the statutes to cover a variety of non-listed situations—for example, expanding "sex" to include pregnancy, or expanding "race" to include interracial marriage. That historical foundation could permit the interpretation that "sex" really does encompass sexual orientation in the same way.

When the two statutes reached the court, they were ripe for revitalization. In *Marshall*, the rising problem of LSD created new problems for the Drug Code. The court needed to either read blotting paper into or out of the statute, rather than wait for the legislature to address the problem. As discussed above, the court chose to include blotting paper in the word "mixture." In *Hively*, the problem of LGBT discrimination in the workplace had become apparent. In the wake of the LGBT rights movement culminating in the landmark decision of

198. Eskridge & Ferejohn, *supra* note 139, at 1215.

*Obergefell v. Hodges*, the court needed to either read sexual orientation into "sex" or not.

With the preconditions met, judges faced with the difficult decisions presented in *Marshall* and *Hively* should be free to be guided by an objective moral compass. Using prevailing thoughts in American culture, as evidenced by the legislature or the state of American politics, a judge faced with these statutes may analyze them using morals, in order to create the best societal outcome. The problems of judicial activism, indeterminacy, and the separation of powers have been addressed, because the majority will consistently prevail and judges may only step in during extremely limited circumstances.