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Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections

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MARRIED ON SUNDAY, FIRED ON MONDAY: APPROACHES TO FEDERAL LGBT CIVIL RIGHTS PROTECTIONS

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INTRODUCTION

The Civil Rights Act of 1964 was passed over fifty years ago.[1] Since that time, legislative updates, judicial rulings, evolving cultural

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2, 28, and 42 U.S.C.).

and societal attitudes, and executive actions, as well as coordinated efforts by advocates, have operated to shape and refine the contours of the Act. The law continues to develop, for example, the scope of its prohibition on sex discrimination in employment.[2] The reach of this protection has seen notable expansion including the legislative addition of pregnancy discrimination as a form of sex discrimination in 1978,[3] the 1989 judicial determination that sex-stereotyping is a form of sex discrimination,[4] and the decisions from the Equal Employment Opportunity Commission (EEOC) first, in 2012, that sex discrimination under Title VII of the Civil Rights Act includes discrimination on the basis of gender identity,[5] and, three years later, that it covers sexual orientation discrimination as well.[6]

While the EEOC decisions were significant, they were not unique. In fact, they mirrored other recent expansions in, and concomitant increased recognition of, the need for protections for the lesbian, gay, bisexual, and transgender (LGBT) community.[7]

Yet even while the movement for LGBT rights has seen notable successes and increased protections,[8] there remain concurrent efforts—some with renewed vigor in the wake of the recent marriage equality decision[9]—to restrict rights and allow discrimination against LGBT individuals. In a majority of states, for example, it remains legal to discriminate on the basis of sexual orientation or gender identity in employment, housing, and public accommodations.[10]

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2. Civil Rights Act of 1964, tit. 7.

3. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)); *see infra* Part II.C.

4. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see infra* Part I.B.

5. Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012).

6. Baldwin v. Foxx, Appeal No. 0120133080 (EEOC July 15, 2015); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ADDRESSING SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN FEDERAL CIVILIAN EMPLOYMENT: A GUIDE TO EMPLOYMENT RIGHTS, PROTECTIONS, AND RESPONSIBILITIES (June 2015), https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf [http://perma.cc/6FCD-GBHP].

7. The LGBT community is a diverse and non-monolithic community; however, for the purposes of this Article, protections to the communities will be considered as a whole, except where there are explicit distinctions or differences. The overarching term for this community is sometimes referenced as LGBTQ, where 'Q' represents queer or questioning. For example, where policies or advocacy did not include efforts on behalf of the transgender community, we will reference the LGB (lesbian, gay, and bisexual) community.

8. *See infra* Part I.B.; *see also Know Your Rights: The Laws That Protect You*, LAMBDA LEGAL, http://www.lambdalegal.org/know-your-rights/workplace/laws-that-protect-you#Q2 [http://perma.cc/WCR4-PYZM].

9. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

10. *See Non-Discrimination Laws: State by State Information—Map*, ACLU, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map (last visited Nov. 4, 2015).

From the Stonewall riots of 1969,[11] and ACT UP's founding in 1987,[12] to the ultimate victory in the fight for marriage equality in 2015,[13] the LGBT community has become increasingly visible and organized in its efforts to exercise its political voice.[14] "In a relatively short period of time, the lesbian, gay, bisexual, and transgender (LGBT) movement has moved from the margins to the center."[15]

Beginning in 1974, the fight for federal civil rights protections became one focus of these efforts. With the introduction of the Equality Act,[16] LGBT rights advocates sought to ensure the same civil right protections afforded other disadvantaged groups by amending the Civil Rights Act of 1964 to include sexual orientation as a protected class.[17] In 1994, after two decades of efforts to achieve these protections, with growing momentum but still no legislative success, LGBT advocates, for both practical and strategic reasons, changed their approach to gaining federal protections by introducing a separate, standalone bill protecting against sexual orientation discrimination in the employment context—the Employment Non-Discrimination Act (ENDA).[18]

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11. Ken Harlin, *The Stonewall Riot and Its Aftermath*, STONEWALL AND BEYOND: LESBIAN AND GAY CULTURE, http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html [http://perma.cc/Y8B3-RDET] (last updated Aug. 24, 2011); *see also Stonewall Riots: The Beginning of the LGBT Movement*, THE LEADERSHIP CONFERENCE (June 22, 2009), http://www.civilrights.org/archives/2009/06/449-stonewall.html [http://perma.cc/THG9-GZNJ].

12. *ACTUP Capsule History 1987*, ACT UP, http://www.actupny.org/documents/cron-87.html [http://perma.cc/KF95-QUJZ].

13. *See* Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1678–80 (2014) (discussing the history of the LGBT movement and marriage equality's emergence a a priority issue beginning in the 1980s and a central issue through the 1990s and 2000s).

14. *See* Luisita Lopez Torregrosa, *The Face of the Gay Rights Movement*, N.Y. TIMES (Apr. 30, 2013), http://www.nytimes.com/2013/05/01/us/01iht-letter01.html?_r=0 [http://perma.cc/UNE6-HJ8L] (identifying political victories and broadening recognition and support for the LGBT community, but noting concerns about the role of women in the movement). For a list of key historical milestones in the gay rights movement, *see, e.g.*, *Key Moments in LGBT Rights History*, MSN NEWS (June 26, 2015), http://www.msn.com/en-us/news/us/key-moments-in-lgbt-rights-history/ss-BBjXpV6#image=1 [http://perma.cc/D7TW-J8VX].

15. Douglas NeJaime et al., *On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship*, 19 LAW & SEXUALITY 181 (2010).

16. H.R. 14,752, 93d Cong. (1974).

17. *See, e.g.*, Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 281–82 (2014); s*ee also* H.R. 15,692, 93d Cong. (1974) (proposing the addition of marital status and sexual orientation as protected classes under the Civil Rights Act, as well as the inclusion of sex discrimination in Titles II, III, and VI, which prohibit discrimination in public accommodations, public facilities, and federally assisted programs, respectively, in addition to Title VII).

18. *See infra* Part I.B.; *see also* William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual*

However, after twenty years of fighting for passage of ENDA, in the face of changes in the bill's coverage, the political climate, and the *Burwell v. Hobby Lobby* Supreme Court decision,[19] LGBT advocates again changed course in 2014, withdrawing support for ENDA and instead demanding comprehensive civil rights protections in contexts beyond just employment.[20]

In a bit of deja vu, on July 23, 2015, forty-one years after the first Equality Act was introduced, the Equality Act of 2015—a bill amending the Civil Rights Act of 1964—was introduced in the Senate by Senator Jeff Merkley (D-OR), and concurrently in the House by Representative David Cicilline (D-RI).[21] Similar to the 1974 bill, the Equality Act amends the 1964 Act to include sexual orientation as a protected class.[22] Going beyond the 1974 bill, the 2015 Act also includes protections based on gender identity and incorporates sexual orientation and gender identity into the definition of sex.[23]

In light of the introduction of the Equality Act, particularly in the context of an abandoned ENDA legislative campaign, a successful marriage equality judicial strategy, and an increase in protections extended by federal agencies, this Article will consider the opportunities and challenges facing the LGBT community in its fight for federal civil rights legislation.

Part I will briefly discuss the storied history of the Civil Rights Act of 1964 and the existing and proposed federal civil rights protections for the LGBT community. Part II will examine potential approaches for achieving LGBT anti-discrimination protections by considering historical examples of civil rights protections.

The Article will conclude with an evaluation of the strengths and weaknesses of each of these approaches in achieving federal civil rights protections for the LGBT community.

I. THE FIGHT FOR FEDERAL CIVIL RIGHTS PROTECTIONS

A. The Civil Rights Act of 1964: The Archetype for Civil Rights Protections

In August of 1963, Reverend Martin Luther King, Jr., stood atop the steps of the Lincoln Memorial at the historic March on

Orientation, and Gender Identity, 84 S. CAL. L. REV. 487, 495–514 (2011) (providing a comprehensive overview of the legislative and political history of ENDA).

19. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (expanding the concept of "religious freedom" to extend to for-profit corporations).

20. *See infra* Part I.C.

21. S. 1858, 114th Cong. (2015); H.R. 3185, 114th Cong. (2015).

22. S. 1858; H.R. 3185.

23. *See* S. 1858, § 2(1).

Washington for Jobs and Freedom in Washington, D.C., and delivered his "I Have a Dream" speech to more than 200,000 Americans,[24] declaring, "[n]ow is the time to make real the promises of democracy. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice."[25] Less than three months later, and just days after the assassination of President John F. Kennedy, President Lyndon B. Johnson addressed a joint session of Congress: "We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter—and to write it in the books of law."[26]

On July 2, 1964, after a long and hard fought public and legislative battle, as a direct result of the civil rights movement,[27] and as a tribute to the memory of President Kennedy,[28] Reverend King joined President Johnson in the oval office as he signed the most sweeping civil rights bill in the nation's history, the Civil Rights Act of 1964.[29]

The Civil Rights Act comprises eleven titles, or areas of protection, and outlawed discrimination in public accommodations (Title II), public facilities (Title III), public education (Title IV), programs that receive federal funding (Title VI), and employment (Title VII).[30] In all of these, it provides protection against discrimination based on race, color, or national origin, with some titles also protecting against discrimination based on sex or religion.[31] The Civil Rights Act also established the Equal Employment Opportunity Commission (EEOC) to review employment discrimination complaints.[32]

Since its passage in 1964, the Civil Rights Act has been amended only a few times. The major amendments relate to sex discrimination

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24. *Civil Rights Movement: The March on Washington and the Civil Rights Act of 1964*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, http://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx?p=3 [http://perma.cc/7AN6-4QBV].

25. Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), http://www.archives.gov/press/exhibits/dream-speech.pdf [http://perma.cc/3RUG-FH88].

26. President Lyndon B. Johnson, Address Before a Joint Session of Congress (Nov. 27, 1963), http://www.senate.gov/artandhistory/history/resources/pdf/JointSession1963.pdf [http://perma.cc/8EC8-MNUG].

27. JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, *supra* note 24.

28. *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE HISTORICAL OFFICE, http://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm [http://perma.cc/BCS6-TQN4].

29. *Id*. This landmark civil rights bill also paved the way for two other vaunted civil rights laws: the Voting Rights Act of 1965 and the Fair Housing Act of 1968. *See* Mae Bowen, *This Day in History: President Lyndon B. Johnson Signed the Civil Rights Act of 1964*, THE WHITE HOUSE (July 2, 2015, 3:29 PM), https://www.whitehouse.gov/blog/2015/07/02/day-history-president-lyndon-b-johnson-signed-civil-rights-act-1964 [http://perma.cc/W589-8QU8].

30. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2, 28, and 42 U.S.C.).

31. *See id*. at 254.

32. *Id*. at 241; 42 U.S.C. § 2000e-4(a)(1) (2012).

in Title VII,[33] and, perhaps because of the late timing and questionable motivation around its addition, there is a lack of legislative history "to guide [courts] in interpreting the Act's prohibition against discrimination based on 'sex.'"[34] It is well-known lore that one day before the House of Representatives was set to vote on the Civil Rights Act of 1964, Representative Howard Smith (D-VA) introduced a floor amendment adding "sex" to the prohibited bases for employee discrimination in Title VII, in an effort to kill the landmark civil rights bill prohibiting racial discrimination, or at the very least in an effort to "protect" white women .[35] Ultimately, the putative attempt to kill the bill failed, Title VII passed with the sex provision included, and women won protection against sex-based employment discrimination, with little discussion or consideration.[36] Thus, while Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex,"[37] this protection was barely considered during the legislative process, which has led to the need for judicial interpretation, and often to subsequent countervailing legislative enactments.[38]

The most important procedural amendments to the Civil Rights Act of 1964, made under the Equal Employment Opportunity Act of 1972, granted the EEOC the authority to bring Title VII lawsuits, rather than simply rely on cease-and-desist powers or a system of private enforcement.[39] The next major amendments to the Civil Rights Act, and Title VII in particular, all overturned controversial Supreme Court cases. In order to overturn the Court's decisions in *Geduldig v. Aiello* and *Gilbert v. General Electric Co.*, which together held that pregnancy discrimination did not constitute sex discrimination,[40] The Pregnancy Discrimination Act of 1978 (PDA) amended the definition

33. *See infra* notes 41–44 and accompanying text.

34. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); *see* Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 429–30 (2012).

35. Lee, *supra* note 34, at 429–30. There is, however, disagreement with this view. *See, e.g.*, Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, JOFREEMAN.COM, http://www.jofreeman.com/lawandpolicy/titlevii.htm [http://perma.cc/VW83-Y6ZP]; Louis Menand, *The Sex Amendment: How Women got in on the Civil Rights Act*, THE NEW YORKER (July 21, 2014), http://www.newyorker.com/magazine/2014/07/21/sex-amendment [http://perma.cc/ZM36-DF5P].

36. Lee, *supra* note 34, at 430.

37. 42 U.S.C. § 2000e-2(a)(1) (2012).

38. *See* Lee, *supra* note 34, at 425–27.

39. Elinor P. Schroeder, *Title VII at 40: A Look Back*, J. KAN. B. ASS'N 18, 22 (Nov./Dec. 2004).

40. Schroeder, *supra* note 39, at 22; *see also* Jennifer S. Hendricks, *Instead of ENDA, a Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 211 (2008).

of sex discrimination in Title VII to include "pregnancy, childbirth, or related medical conditions."[41] Congress also amended the Civil Rights Act in 1991 in response to several Supreme Court decisions that interpreted Title VII narrowly,[42] most notably rejecting the Court's decisions in *Wards Cove Packing Co. v. Atonio*, which made it considerably more difficult to prove disparate impact claims under Title VII,[43] and *Price Waterhouse v. Hopkins*, which limited mixed-motive claims.[44] The most recent amendments to Title VII occurred in 2009, when Congress passed the Lilly Ledbetter Fair Pay Act in response to a Supreme Court decision limiting the ability of women to bring pay discrimination cases.[45]

These cases, and the legislative amendments passed to overturn them, indicate the complications inherent in the interplay between legislative drafting, legislative intent, and legal interpretation.

B. Baby Steps: Burgeoning Federal Civil Rights Protections for LGBT Individuals

While the protections under Title VII's prohibition on sex discrimination were expanding, laws and policies attempting to restrict the rights of LGBT individuals flourished. From state laws and policies including sodomy bans, such as those at issue in *Bowers v. Hardwick* and *Lawrence v. Texas*,[46] attempts to enforce unconstitutional sodomy bans,[47] marriage bans,[48] and the current proliferation of "religious

41. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

42. Howard Eglit, *The Age Discrimination in Employment Act, Title VII, And the Civil Rights Act of 1991: Three Acts and A Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1102 (1993).

43. *Id.* at 1133.

44. *Id.* at 1151–53.

45. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); *Supreme Court Preview*, NAT'L WOMEN'S LAW CTR. (Apr. 1, 2011), http://www.nwlc.org/resource/supreme-court-preview [http://perma.cc/2SGU-SX3M]; *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 644 (2007) (dismissing a pay discrimination case for failure to comply with Title VII's requirement that a plaintiff file a discrimination charge against an employer within "[180] days after the alleged unlawful employment practice occurred" and holding that a new statute of limitations is not triggered with each individual paycheck received after the initial limitations period has lapsed (quoting 42 U.S.C. § 2000e-5(e)(1))).

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

47. *See, e.g.*, Carlos Maza, *State Sodomy Laws Continue To Target LGBT Americans*, EQUALITY MATTERS (Aug. 8, 2011, 3:26 PM), http://equalitymatters.org/blog/20110808 0012 [http://perma.cc/W9U8-P9PG].

48. *See* William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 292–99, 301–02 (2013) (providing a history of the backlash in response to state supreme courts

freedom" bills,[49] to federal restrictions like Don't Ask, Don't Tell (DADT) and the Defense of Marriage Act (DOMA), and even efforts to pass a constitutional amendment to ban gay marriage,[50] the LGBT community has faced direct and specific discriminatory policies.

Yet in the face of these extensive anti-LGBT initiatives, some states began to recognize protections, spurred by well-organized and coordinated LGBT advocacy efforts,[51] both in terms of marriage equality,[52] and anti-discrimination protections.[53] At the same time, incipient federal efforts aimed at ensuring equal treatment for LGBT individuals were developing. This Article will focus on these federal initiatives.

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recognizing same-sex marriage in Hawaii in 1993 and Massachusetts between 2003 and 2004).

49. *See, e.g.,* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 94–100 (2015) (describing sexual orientation discrimination as "highly likely to present the next cutting edge of RFRA claims by both religious nonprofits and for-profit companies"); *see also* MARCI A. HAMILTON, *The Never-Ending Spiral of Extreme Religious Liberty*, *in* GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY, 340, 340–42 (2d ed. 2014) (detailing the gradual lowering of standards for claiming "religious freedom" as a defense); Rick Ungar*, Understanding Why Indiana's RFRA Clears The Way To Discriminating Against LGBT Americans*, FORBES (Mar. 30, 2015, 12:51 PM), http://www.forbes.com/sites/rickungar/2015/03/30/understanding-why-indianas-rfra-clears-the-way-to-discriminating-against-lgbt-americans [http://perma.cc/NFU7-PLY2] (describing the expansion of religious freedom bills from the original federal Religious Freedom Restoration Act to state bills that afford private entities the defense of religious freedom in private suits).

50. *See* Jonathan Capehart, *Gays and Lesbians Owe Thanks to President George W. Bush and Justice Scalia*, WASH. POST (Oct. 20, 2014), http://www.washingtonpost.com/blogs/post-partisan/wp/2014/10/20/gays-and-lesbians-owe-thanks-to-president-george-w-bush-and-justice-scalia [http://perma.cc/E54A-75QX] (stating that "[i]n February 2004, [George W.] Bush called for a constitutional amendment against gay marriage that would have etched discrimination into our nation's most sacred document. Then, thanks to a Bush-backed effort . . . [in November 2004] voters in 11 states approved ballot initiatives that banned committed same-sex couples from marrying.").

51. *See, e.g.*, *MacArthur Fellows Program: Mary L. Bonauto*, MACARTHUR FOUNDATION (Sept. 17, 2014), https://www.macfound.org/fellows/909 [http://perma.cc/LZ7K-M7V3] (describing how "Bonauto led a team from GLAD and private law firms in the first strategic challenge to . . . the federal Defense Against Marriage Act (DOMA) . . . .").

52. *See* Danielle Kurtzleben, *Map: Here's How Same-Sex Marriage Laws Will Now Change Nationwide*, NPR (June 26, 2015, 10:39 AM), http://www.npr.org/sections/itsallpolitics/2015/06/26/417715124/map-heres-how-same-sex-marriage-laws-will-now-change-nationwide [http://perma.cc/S6ZZ-7KDH] (demonstrating the status of same-sex marriage laws in states before and after Obergefell v. Hodges, and distinguishing between protections granted by state action, previous lower federal court decisions, and the Supreme Court's ruling in *Obergefell*).

53. *See* Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed*, CTR. FOR AM. PROGRESS ACTION FUND (June 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf ("Where Congress has failed to act, states have stepped in to provide employment protections to the gay and transgender workforce.").

1. Executive Protections

The Clinton administration created some important policies, programs and protections for the LGB community, many related to sexual orientation and people living with HIV or AIDS.[54] In 1995, President Clinton signed an Executive Order that prohibited discrimination on the basis of sexual orientation in granting security clearances.[55] In 1998, President Clinton signed another Executive Order, prohibiting discrimination based on sexual orientation in the federal civilian workforce.[56]

Following President George W. Bush's White House, which opposed LGBT protections,[57] the Obama administration has taken a number of actions to expand protections for LGBT individuals.[58] At the beginning of his presidency, Obama directed all federal agencies to extend benefits to same-sex partners of federal employees,[59] and ordered the Health and Human Services Administration to issue regulations prohibiting LGBT discrimination in hospitals that receive Medicaid or Medicare funds.[60] The Administration had a role in the repeal of DADT in 2010, which lifted the ban on lesbian, gay, and bisexual service members,[61] and in July of 2015, the Department of

54. *See Clinton-Gore Administration: A Record of Progress for Gay and Lesbian Americans*, NAT'L ARCHIVES & RECORDS ADMIN., http://clinton2.nara.gov/WH/Accomplishments/ac399.html [http://perma.cc/LS6H-6WQR] (providing a comprehensive list of actions taken by the Clinton administration to improve the lives of LGBT Americans). *But cf.* Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES (Mar. 25, 2013) http://www.nytimes.com/2013/03/26/us/politics/bill-clintons-decision-and-regret-on-defense-of-marriage-act.html?_r=0 [http://perma.cc/35NH-ZMYA] (detailing President Clinton's signing of the Defense of Marriage Act, and his subsequent regret and disavowal of that position).

55. Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995).

56. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

57. *See* Capehart, *supra* note 50.

58. *See Strengthening Protection Against Discrimination*, THE WHITE HOUSE, https://www.whitehouse.gov/issues/civil-rights/discrimination [http://perma.cc/5SKQ-67G5]; *Obama Administration Record for the LGBT Community*, THE WHITE HOUSE, https://www.whitehouse.gov/sites/default/files/docs/lgbt_record.pdf [http://perma.cc/L9GU-J6VG]; *Obama Administration Policy Advancements on behalf of LGBT Americans*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/obama-administration-policy-legislative-and-other-advancements-on-behalf-of [http://perma.cc/3Q4C-F6Z7] (providing a comprehensive list of executive branch actions and policies that advance LGBT rights).

59. Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32,247 (June 2, 2010).

60. Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 Fed. Reg. 20,511 (Apr. 15, 2010) (to be codified at 42 C.F.R. 482.13, 489.102(a)).

61. *See Progress Where You Might Least Expect It: The Military's Repeal of "Don't Ask, Don't Tell,"* 127 HARV. L. REV. 1791, 1801–02 (2014) (describing the passage of the DADT Repeal Act as spurred by successful litigation and an extensive study conducted by the Obama administration). *See infra* notes 108–12 for a discussion of DADT.

Defense signaled that transgender individuals will soon be able to serve openly in the military as well.[62]

Importantly, President Obama issued Executive Order 13,672, which amended the existing Civil Rights Executive Order 11,246,[63] and explicitly protected federal employees and employees of federal contractors from sexual orientation and gender identity discrimination.[64] The Obama administration has also advanced pro-LGBT policies, especially related to gender identity, in veterans' health,[65] policing and law enforcement,[66] and housing, noting that under the Fair Housing Act prohibition on sex discrimination, the Department of Housing and Urban Development has the authority "to pursue complaints from LGBT persons alleging housing discrimination because of non-conformity with gender stereotypes."[67]

Most notably, the administration's chief enforcer of employment protections, the EEOC, has taken affirmative steps to provide employment protections and remedies to the LGBT community, even making it a top priority in its 2012 Strategic Enforcement Plan.[68] In addition to providing guidance on LGBT employment

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62. *See* Press Release, U.S. Dep't of Def., Statement by Secretary of Defense Ash Carter on DOD Transgender Policy (July 13, 2015), http://www.defense.gov/Releases/Release.aspx?ReleaseID=17378 [http://perma.cc/77LP-PAFC] (announcing the future lift of the ban, pending a six month study on the effects of lifting the ban, but presuming there will be no adverse effects identified); *see also* Tom Vanden Brook, *Military Transgender Ban Set To End Next May*, USA TODAY (Aug. 25, 2015, 6:21 AM), http://www.usatoday.com/story/news/nation/2015/08/25/military-transgender-ban-set-end-next-may/32345385) [http://perma.cc/VM3U-M4UA].

63. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sep. 24, 1965).

64. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

65. *See* U.S. DEP'T OF VETERANS AFFAIRS, VHA DIRECTIVE 2013-003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS (Feb. 8, 2013), http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863 [http://perma.cc/TG68-2HGY].

66. *See* U.S. DEP'T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014), http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf [http://perma.cc/LM7Z-VNXR]; *see also* Dep. Attorney Gen. James M. Cole, Remarks at the Community Relations Service Transgender Law Enforcement Training Launch (Mar. 27, 2014) (transcript available at http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-delivers-remarks-community-relations-service) [http://perma.cc/LZA7-9WSU] (announcing the launch of a training program for law enforcement interaction with transgender individuals).

67. Kenneth J. Carroll, *HUD Addresses LGBT Housing Discrimination*, THE WHITE HOUSE (Oct. 13, 2011, 11:01 AM), https://www.whitehouse.gov/blog/2011/10/13/hud-addresses-lgbt-housing-discrimination [http://perma.cc/8DHB-FU6M].

68. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FY 2013–2016 (2012), http://www.eeoc/gov/eeoc/plan/sep.cfm [http://perma.cc/LH32-5WVJ] (recognizing the need to calibrate the nature of coverage extended to "lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions, as they may apply" in its section on "Addressing Emerging and Developing Issues").

protections,[69] the EEOC has recognized that both the sex-stereotyping and per se discrimination approaches apply to discrimination claims based on sexual orientation or gender identity under Title VII's sex discrimination provision.[70] The Department of Justice has also explicitly endorsed the application of Title VII's sex discrimination provision to gender identity discrimination, but has not yet addressed its application to sexual orientation discrimination.[71]

These decisions mark an important step in the movement towards LGBT civil rights protections, as they are binding on all federal agencies and departments,[72] and may be given deference by federal courts.[73] Yet these decisions are limited to the employment context. Even after these determinations, it is still legal to discriminate on the basis of sexual orientation and gender identity in many areas of federal law.[74] Similarly, it is still legal to discriminate on the basis of sexual orientation or gender identity under state law in employment, housing, and public accommodations in a majority of states.[75]

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69. *See* OFFICE OF PERSONNEL MGMT., *Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities* (June 2015), https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf [http://perma.cc/5MQD-NNMB].

70. EEOC v. Lakeland Eye Clinic, P.A. (M.D. Fla. Civ. No. 8:14-cv-02421-T35 AEP filed Sept. 25, 2014); EEOC v. R.G. & G.R. Harris Funeral Homes Inc. (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG filed Sept. 25, 2014) (gender identity under both sex-stereotyping and per se approaches); Veretto v. Dohahoe, Appeal No. 0120110873 (EEOC July 1, 2015) (sexual orientation sex-stereotyping); Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012) (gender identity per se); Baldwin v. Foxx, Appeal No, 0120133080 (EEOC July 15, 2015) (sexual orientation per se).

71. Memorandum from Attorney Gen. Eric Holder to U.S. Attorneys and Heads of Dep't Components, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), http://www.justice.gov/file/188671/download [http://perma.cc/C4GF-32RT].

72. *See* Laura Anne Taylor, Note, *A Win for Transgender Employees:* Chevron *Deference for the EEOC's Decision in* Macy v. Holder, 2013 UTAH L. REV. 1165, 1190 (2013).

73. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). *But see* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1534 (1999) (arguing that "under the Civil Rights Act, Congress did not grant the EEOC the authority to promulgate rules with the force of law. . . . [T]he standard of deference for EEOC guidelines is undefined.") (internal footnote omitted), *and* Jeremy Greenberg, *Not a "Second Class" Agency: Applying* Chevron *Step Zero to EEOC Interpretations of the ADA and ADAAA*, 24 GEO. MASON U. C.R. L.J. 297, 298 (2014).

74. *Why the Equality Act?*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/why-the-equality-act [http://perma.cc/Z2SY-GY2L].

75. *See supra* note 10.

2. Judicial Protections

Judicial advances have been among the most significant and public victories for the LGBT community. In one of its early cases expanding rights for the LGBT community, *Romer v. Evans*, the Supreme Court recognized protections for LGBT individuals under the Equal Protection Clause.[76] In 2003, the Court, recognizing that the petitioners were "entitled to respect for their private lives," decriminalized sodomy and, by extension, homosexuality in *Lawrence v. Texas*, overturning nearly two decades of Supreme Court precedent.[77]

In the context of a growing number of state and lower federal court decisions on marriage equality, most of them granting the right to marry to same-sex couples,[78] the Court struck down the provision defining marriage in the Defense of Marriage Act, which limited marriage to opposite-sex couples,[79] and ended the exclusion of LGBT couples from federal benefits in *United States v. Windsor*.[80] Two years later, in its landmark 2015 decision *Obergefell v. Hodges*, the Court struck down state laws banning same-sex marriage, thereby granting the fundamental right to marry to all Americans regardless of their sexual orientation or gender identity.[81] As stated in Justice Kennedy's soaring opinion:

> No union is more profound than marriage . . . . It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves . . . . They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[82]

In the context of shifting cultural attitudes toward LGBT people, each of these cases has built upon the language, themes, and holdings of

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76. Romer v. Evans, 517 U.S. 620, 635–36 (1996) (striking down a state Amendment that prohibited all legislative, executive, or judicial action designed to protect LGBT individuals from discrimination as a violation of the Equal Protection Clause).

77. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overturning Bowers v. Hardwick, 478 U.S. 186 (1986)).

78. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608–10 (2015) (listing, in Appendix A, the state and federal court decisions addressing marriage equality).

79. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

80. United States v. Windsor, 133 S. Ct. 2675, 2694–96 (2013).

81. *Obergefell*, 135 S. Ct. at 2608.

82. *Id.*

the preceding cases to drastically alter the nation's constitutional and societal landscape for the LGBT community.[83]

Similar advances and shifting legal landscapes can be seen in the employment discrimination context. Although LGBT plaintiffs began challenging employment discrimination in the 1970s, using Title VII's prohibition on sex discrimination, these early cases were unsuccessful, usually due to the court's narrow interpretation of the term "sex."[84] However, the 1989 landmark case *Price Waterhouse v. Hopkins* significantly altered the ability of LGBT plaintiffs to bring successful claims, and the LGBT community has seen greater success more recently.[85] In *Price Waterhouse*, the Court established that the prohibition on sex discrimination includes discrimination based on sex stereotypes and gender conformity.[86] Because discrimination on the basis of sexual orientation and gender identity is often directly related to sex stereotypes and gender norms,[87] LGBT plaintiffs, particularly transgender plaintiffs, have had increasing success bringing discrimination claims under Title VII.[88] And the prospects for success among LGBT plaintiffs under Title VII improved further after the Supreme Court's ruling in *Oncale v. Sundowner Offshore Services, Inc.*, which held that sexual harassment by a person of the same sex is actionable under Title VII.[89] As the EEOC explained in *Baldwin v. Foxx*:

> Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Services, Inc.*, "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions

83. *See* Linda C. McClain, *From* Romer v. Evans *to* United States v. Windsor: *Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 355–57 (2013).

84. Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 GEO. J. GENDER & L. 103, 107, 129 (2015); *see, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) (holding that applying the plain meaning of "sex" demonstrates Congressional intent to protect only "traditional notions" of gender, and excludes "sexual preference such as homosexuality").

85. Rotondo, *supra* note 84, at 107–09; *see also* Lee, *supra* note 34, at 426–27.

86. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.").

87. *See* Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004) ("Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.").

88. *See* Rotondo, *supra* note 84, at 110–11.

89. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

> of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79, 78–80 (1998) . . . . Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included. Nothing in the text of Title VII "suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone." *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).[90]

The jurisprudence around employment protections for the LGBT community, under Title VII's sex discrimination provision, has developed under two distinct, yet often linked, approaches. Courts have not only protected gender identity under the *Price Waterhouse* sex-stereotyping theory,[91] but have also held, consistent with the position of the EEOC[92] and the Department of Justice,[93] that gender identity discrimination constitutes *per se* sex discrimination.[94] This approach holds that discrimination based on an employee's change in sex is literally discrimination "because of . . . sex," similar to the way discrimination based on an employee's change of religion would universally be held to be religious discrimination.[95] It is notable that the only circuit to rule against a transgender plaintiff following *Price Waterhouse* solely rejected the *per se* sex discrimination approach and refrained from answering whether transgender plaintiffs may bring

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90. Baldwin v. Foxx, Appeal No. 0120133080 at 13 (EEOC July 15, 2015) (internal footnote omitted) (subsequently filed in District Court in the Southern District of Florida on Oct. 13, 2015).

91. *See* Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004) (noting that the *Price Waterhouse* doctrine "does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual."); *see also* Glenn v. Brumby, 663 F.3d 1313, 1320 (11th Cir. 2011) (finding an Equal Protection violation when a government agent fired a transgender employee because of gender nonconformity and indicating the lower threshold for Title VII claims); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 216 (1st Cir. 2000) (recognizing a possible Title VII claim for gender identity under *Price Waterhouse* in an Equal Credit Opportunity Act case). *But see* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (concluding that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.") (emphasis added).

92. *See, e.g.*, Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012).

93. *See, e.g.*, Holder, *supra* note 71.

94. *See, e.g.*, Finkle v. Howard County, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("Plaintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination under Title VII."); *see also* Schroer v. Billington, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008).

95. *Schroer*, 577 F. Supp. 2d at 308.

Title VII claims under the sex-stereotyping approach.[96] Title VII's protection from gender identity discrimination has been explicitly recognized or implicitly acknowledged by the First, Sixth, Ninth, Tenth, and Eleventh Circuits.[97]

While there is now an emerging consensus that discrimination based on gender identity is prohibited under Title VII, protections for lesbian, gay, and bisexual (LGB) plaintiffs are unclear and continue to be inconsistently applied.[98] Although circuit courts have universally held that Congress did not intend to include sexual orientation in Title VII,[99] some courts, consistent with the EEOC's interpretation,[100] have been willing to protect LGB plaintiffs under the sex-stereotyping approach.[101] However, other courts refuse to engage the sex-stereotyping approach at all, and instead reject LGBT claims as "bootstrapping" sexual orientation discrimination to sex discrimination.[102]

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96. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) ("This court need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex' and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex. Instead, because we conclude Etsitty has not presented a genuine issue of material fact as to whether UTA's stated motivation for her termination is pretextual, we assume, without deciding, that such a claim is available and that Etsitty has satisfied her prima facie burden.").

97. *See infra* note 99 and accompanying text.

98. *See, e.g.*, Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 766–67 (2014) (analyzing the difference in protection from courts for LGB plaintiffs that "look gay," and LGB plaintiffs who are known or suspected to be gay).

99. DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning . . . . [W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."); *see also* Medina v. Income Support Div., N.M., 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258–59 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996);Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978).

100. *See* Veretto v. Donahoe, Appeal No. 0120110873 (EEOC July 1, 2011) (supporting the sex-stereotyping approach for a gay man who was harassed by a coworker that had seen his wedding announcement in the paper).

101. *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009); Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.").

102. *Simonton*, 232 F.3d at 38 (holding that "[the sex-stereotyping] theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine,"

C. Legislative Efforts: From Failed Campaigns to Nascent Recognition

Although most LGBT protections achieved thus far have been gained through the courts or executive action, LGBT advocates have put tremendous energy into federal legislative initiatives and have succeeded in obtaining some important initial legislative victories, most notably in the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), the repeal of "Don't Ask, Don't Tell" (DADT), and the 2013 reauthorization of the Violence Against Women Act (VAWA).

Over a decade after the homophobic and racially motivated murders of Matthew Shepard and James Byrd, Jr.,[103] Congress passed the HCPA, which, in addition to extending protections on the basis of gender and disability, for the first time ever in federal law, extended protections to include sexual orientation and gender identity, penalizing anyone who "willfully causes bodily injury" because of a victim's "actual or perceived . . . gender, sexual orientation, gender identity, or disability . . . ."[104]

In 2013, in reauthorizing the VAWA, Congress for the first time included sexual orientation and gender identity in VAWA's coverage.[105] In doing so, Congress not only provided LGBT non-discrimination protections for domestic violence services, such as shelters, but also included sexual orientation and gender identity with other groups that face barriers in accessing services, known as "underserved populations,"[106] and increased the ability of the LGBT community to be protected by states.[107]

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and ultimately rejecting the claim because there was "no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation."); *see also* Dawson v. Bumble & Bumble, 398 F.3d 211, 218–20 (2d Cir. 2005).

103. *See* Matthew Trout, *Federalizing Hate: Constitutional and Practical Limitations to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009*, 52 AM. CRIM. L. REV. 131, 137 (2015) (discussing the politics surrounding the passage of the bill).

104. Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, Div. E., 123 Stat. 2835, 2839 (codified as amended at 18 U.S.C. § 249 (2009)).

105. 42 U.S.C. § 13925(b)(13) ("No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, . . . sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act . . . .").

106. 42 U.S.C. § 13925(a)(39).

107. 42 U.S.C. § 3796gg(b)(19) (allowing grants for "developing, enlarging, or strengthening programs and projects to provide services and responses targeting male and female victims of domestic violence, dating violence, sexual assault, or stalking, whose ability to access traditional services and responses is affected by their sexual orientation or gender identity").

In the context of military service, under pressure from both the Obama administration,[108] and the courts,[109] Congress repealed DADT, the military policy that, although initially intended as a compromise to allow LGB individuals to serve in the military, had the practical effect of banning these individuals from serving.[110] While the repeal of DADT allowed individuals to serve openly and was a significant win for LGB service members, transgender individuals were still effectively banned from service,[111] though it is expected that that will soon change as well.[112]

While these successes are noteworthy and groundbreaking, the paramount LGBT legislative priority—federal civil rights protections against employment and other forms of discrimination—is a fight that has been taking place for decades,[113] and has yet to be realized.

1. LGBT-Focused Legislation

Beginning in 1974, LGBT advocates initially sought to amend the Civil Rights Act of 1964 to include sexual orientation, and thus comprehensively protect LGB individuals from discrimination in employment, public accommodations and facilities, housing, and federally assisted programs.[114] Introduced as the Equality Act,[115] by Congresswoman Bella S. Abzug, the 1974 bill failed to attract a single cosponsor and died in committee without a vote.[116] For the next

108. *See The Military's Repeal of "Don't Ask, Don't Tell"*, *supra* note 61, at 1801 (describing the passage of the DADT Repeal Act as spurred by successful litigation and efforts by the Obama administration).

109. *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011) (per curiam) (holding DADT violates the First Amendment).

110. *See The Military's Repeal of "Don't Ask, Don't Tell", supra* note 61, at 1795–97 (explaining that due to the vast unreviewable discretion of Commanders to investigate, as well as aggressive investigatory practices, unequal enforcement, similar outcomes, and a culture of fear, the policy of DADT was, in effect, the same as an outright ban).

111. DADT's policies remain in effect for transgender troops. *See, e.g.*, Emma Margolin, *'Don't Ask, Don't Tell' Lives On for Transgender Troops,* MSNBC (Oct. 22, 2014, 7:54 AM), http://www.msnbc.com/msnbc/dont-ask-dont-tell-lives-transgender-troops [http://perma.cc/2DZG-ENXS]; Colin Daileda, *For Transgendered Soldiers, Don't Ask Don't Tell Carries On*, THE ATLANTIC (Oct. 29, 2012), http://www.theatlantic.com/sexes/archive/2012/10/for-transgendered-soldiers-don't-ask-don't-tell-carries-on/264225 [http://perma.cc/6VTG-MHL3].

112. *See* Carter, *supra* note 62.

113. *See infra* notes 114, 119–49 and accompanying text.

114. *See, e.g.*, Reed, *supra* note 17, at 281–82 (2014).

115. Equality Act of 1974, H.R. 14,752, 93d Cong. (1974) (proposing the addition of marital status and sexual orientation as protected classes under the Civil Rights Act, as well as the prohibition of sex discrimination—not just in employment under Title VII—but in public accommodations, public facilities, and federally assisted programs under Titles II, III, and VI, respectively).

116. *See, e.g.*, Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 838 (2013).

twenty years, numerous bills were introduced to amend the Civil Rights Act to protect the gay and lesbian community,[117] and although none of these bills made it past committee, they slowly built support and gained cosponsors.[118]

However, in 1994, LGBT advocates shifted strategies, abandoning broad LGB protections in favor of a more politically expedient, standalone bill drafted around a single issue: employment discrimination.[119] This decision was a result of both the political realities facing LGBT individuals at the time,[120] and the recent passage of the Americans with Disabilities Act of 1990, a model of a freestanding civil rights bill that passed with bipartisan support.[121] Seen as the best option at the time, the Employment Non-Discrimination Act (ENDA) was introduced in 1994, and by 1996, the Senate version of ENDA was poised to pass, with advocates counting on Vice President Al Gore's deciding vote.[122] Although ENDA proponents compromised to avoid a filibuster and negative amendments from opponents by allowing a vote, without amendments, on the Defense of Marriage Act (DOMA)[123]—which passed—ultimately ENDA was defeated by a vote of fifty to forty-nine, when a supporter was unexpectedly called away.[124]

Reintroductions of ENDA in 1997,[125] 1999,[126] 2001,[127] and 2003,[128] proved fruitless due to significant changes in the political climate.[129] While ENDA was already a low priority issue for the Republican

117. *See A History of Federal Non-Discrimination Legislation*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/a-history-of-federal-non-discrimination-legislation [http://perma.cc/29FL-CZHB] (last visited Nov. 4, 2015).

118. *See, e.g.*, Sung, *supra* note 18, at 495–514 (2011) (noting the number of cosponsors for bills amending the CRA grew from zero in 1974 to 110 by 1991 in the House of Representatives, and grew from three in 1979 to sixteen in 1991 in the Senate).

119. *See, e.g.*, Reed, *supra* note 17, at 282.

120. *Compare* Sung, *supra* note 18, at 497 (attributing the shift in strategy to the loss in the fight against "Don't Ask, Don't Tell," the exhaustion of resources on the AIDS epidemic, and the passage of the ADA), *with* Barney Frank, *Civil Rights, Legislative Wrongs*, THE ADVOCATE, Feb. 15, 2000, at 9 (attributing the shift in strategy to the increasing demonization of affirmative action policies in the 1980s).

121. Sung, *supra* note 18, at 497.

122. *See* Reed, *supra* note 17, at 283.

123. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

124. Sung, *supra* note 18, at 502.

125. S. 869, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997).

126. S. 1276, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999).

127. S. 1284, 107th Cong. (2001); H.R. 2692, 107th Cong. (2001).

128. S. 1705, 108th Cong. (2003); H.R. 3285, 108th Cong. (2003).

129. *See, e.g.*, Reed, *supra* note 17, at 284.

Congress that took office beginning in January of 1995, any hope of ENDA's passage was defeated with George W. Bush's election and the withdrawal of support from prominent advocacy groups over the lack of transgender protections.[130]

When the Democrats won both houses of Congress in the 2006 midterm elections, ENDA became a legislative priority, and unlike its previous versions, included protections for discrimination based on gender identity.[131] But as opposition grew, even among Democrats, the House ultimately passed a bill that excluded protections for gender identity, and the Senate never took up the bill.[132] The decision to exclude gender identity from the 2007 version of ENDA greatly divided the LGBT community, and caused nearly 300 LGBT organizations to oppose the bill.[133]

As a solution to this tension, the LGBT community coalesced around a gender-identity inclusive ENDA and each subsequent version of ENDA has included protections for gender identity.[134] Both the 2009 and 2011 versions of ENDA included gender identity, and both died in committee.[135] And while the Senate passed a gender identity inclusive ENDA in 2013,[136] the bill died in the House.[137]

But advocates had other reasons to be concerned about the scope of ENDA, including the failure to include voluntary affirmative action plans or disparate impact claims, and the ever expanding religious exemptions.[138] Even the earliest versions of ENDA explicitly precluded voluntary affirmative action plans—temporary plans adopted by employers to remedy imbalances in traditionally segregated jobs[139]—and disparate impact claims—challenges to facially neutral policies that have a discriminatory effect, regardless of

130. *Id.*; *see also* Shannon H. Tan, Note, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 605 (2008) (noting various LGBT organizations that stopped supporting ENDA because it was not transgender-inclusive).

131. Reed, *supra* note 17, at 284–85; *see* H.R. 2015, 110th Cong. § 4(a)(1) (2007).

132. Reed, *supra* note 17, at 285.

133. *See* United Opposition to Sexual Orientation Only Non-Discrimination Legislation, UNITED ENDA, Oct. 2007, http://www.thetaskforce.org/static_html/enda07/tools/united_enda_materials_1.pdf [http://perma.cc/U6K9-HS9V].

134. *Reed*, *supra* note 17, at 285.

135. *Id.*

136. S. 815, 113th Cong. (2013).

137. Reed, *supra* note 17, at 314.

138. *See, e.g.*, Reed, *supra* note 17, at 294; Sung, *supra* note 18, at 508–11.

139. Reed, *supra* note 17, at 301; *see* S. 815, 113th Cong. § 4(f) (2013); S. 811, 112th Cong. § 4(f) (2011); S. 1584, 111th Cong. § 4(f) (2009); H.R. 3685, 110th Cong. § 4(f) (2007); S. 1705, 108th Cong. § 8 (2003); S. 1284, 107th Cong. § 8 (2001); S. 1276, 106th Cong. § 8 (1999); S. 869, 105th Cong. § 8 (1997); S. 932, 104th Cong. § 7 (1995); S. 2238, 103d Cong. § 6 (1994).

intent.[140] Perhaps the greatest fear, however, was the increasingly broad religious exemptions.[141]

While the first version of ENDA, in 1994, did include an exemption, it also prohibited sexual orientation discrimination by religious organizations related to their for-profit activities, without exception.[142] But by 2007, ENDA included "three broad exemptions for religious groups," which became even broader during its passage.[143] In comparison to Title VII, which allows religious organizations to discriminate only on the basis of religion,[144] ENDA, without restriction, exempted from coverage any "corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of [T]itle VII."[145]

This broad exemption worried many, and the death knell for ENDA came in the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*[146] In that case, the Court extended the Religious Freedom Restoration Act of 1993 (RFRA)[147] to cover "closely held" for-profit corporations, effectively allowing such companies to use religion as a basis to discriminate.[148] Fearing that this extension could be used to justify discrimination against LGBT individuals based on religious objections to homosexuality, numerous LGBT advocates and allies pulled their support for ENDA and indicated that any protections sought for LGBT individuals would have to address the implications of *Hobby Lobby* moving forward.[149]

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140. Reed, *supra* note 17, at 295; *see* S. 815, 113th Cong. § 4(g) (2013); S. 811, 112th Cong. § 4(g) (2011); S. 1584, 111th Cong. § 4(g) (2009); H.R. 3685, 110th Cong. § 4(g) (2007); S. 1705, 108th Cong. § 4(f) (2003); S. 1284, 107th Cong. § 4(f) (2001); S. 1276, 106th Cong. § 4(f) (1999); S. 869, 105th Cong. § 7(a) (1997); S. 932, 104th Cong. § 6 (1995); S. 2238, 103d Cong. § 5 (1994).

141. Sung, *supra* note 18, at 509.

142. *Id.*

143. *Id. Compare* H.R. 2015, 110th Cong. § 6 (2007), *with* H.R. 3685, 110th Cong. § 6 (2007) (enacted).

144. 42 U.S.C. § 2000e-2(e)(2) (2006).

145. H.R. 3017, 111th Cong. § 6 (2009); S. 1584, 111th Cong. § 6 (2009); H.R. 3685, 110th Cong. § 6 (2007); *accord* S. 815, 113th Cong. § 6 (2013); S. 811, 112th Cong. § 6 (2011).

146. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

147. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified in part at 42 U.S.C. §§ 2000bb-1(a–b)) ("Government shall not substantially burden a person's exercise of religion . . . [unless] it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

148. *Hobby Lobby*, 134 S. Ct. at 2759.

149. *See, e.g.*, Ed O'Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, WASH. POST (July 8, 2014, 4:37 PM), http://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision [http://perma.cc/9JJB-MG7X]; Molly Ball, *How* Hobby Lobby *Split the Left and Set Back Gay Rights*, THE ATLANTIC (July 20, 2014), http://www.theatlantic

II. APPROACHES FOR ACHIEVING FEDERAL LGBT PROTECTIONS

While civil rights protections for sexual orientation and gender identity discrimination are increasingly recognized,[150] these protections remain incomplete.[151] The LGBT community has a clear goal and believes the time has come. The question is, how best to achieve such protections.

This section will examine potential approaches for achieving federal LGBT protections, both legislative and non-legislative. Based on the historical examples of civil rights protections, we look at various strategies, including an employment-only standalone statute, a comprehensive standalone statute, and amendments to the Civil Rights Act of 1964—considering the historical examples of the Age Discrimination in Employment Act of 1967 (ADEA),[152] the Americans with Disabilities Act of 1990 (ADA),[153] and the Pregnancy Discrimination Act of 1978 (PDA).[154] Section A looks at the ADEA and relevant jurisprudence; Sections B and C do the same for the ADA and the PDA, respectively. Section D looks at amending The Civil Rights Act with The Equality Act of 2015. Section E evaluates the strengths and weaknesses of these legislative approaches. Section F briefly examines non-legislative alternatives.

A. Stand-Alone Employment Protections: The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (ADEA) was enacted three years after the Civil Rights Act of 1964, "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[155] This stated purpose reflects Congress' decision in 1964 to exclude age discrimination protections from Title VII and instead direct the Secretary of Labor to

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.com/politics/archive/2014/07/how-hobby-lobby-split-the-left-and-set-back-gay-rights/374721/ [http://perma.cc/M6ZG-RKTY].

150. *See* Hendricks, *supra* note 40, at 212–16; *see also* Sung, *supra* note 18, at 524–27 (discussing the history of congressional "willingness to redefine and expand Title VII's existing protections as long as no new classes are added.").

151. *See* Hendricks, *supra* note 40, at 209–10.

152. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 603 (codified at 29 U.S.C. § 623).

153. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 328 (codified at 42 U.S.C. § 12101).

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

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

conduct a study on "arbitrary" age discrimination,[156] in recognition of the fact that there are legitimate as well as invidious reasons for employment decisions based on age.[157] In response to that study,[158] and the resulting proposed legislation,[159] Congress held extensive House and Senate hearings and ultimately passed the ADEA.[160]

The ADEA protects employees and job applicants over the age of forty[161] from age discrimination by employers that have twenty or more employees.[162] Specifically, the ADEA made it unlawful for employers "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ."[163] This provision is identical to the language in Title VII of the Civil Rights Act.[164] However, unlike Title VII, the ADEA allows employers to take "otherwise prohibited" employment actions when "the differentiation is based on reasonable factors other than age," known as the "RFOA" provision, which operates to limit the coverage and effect of the ADEA.[165]

Perhaps unsurprisingly, due to the similarity of statutory language and the origins of the ADEA, the jurisprudence and doctrine of the ADEA and Title VII have developed jointly.[166] However, while the Court may have a presumption that, due to the similar language and timing of the statutes, Congress intended the same meaning in both,[167] there has been considerable confusion over the interaction between the statutes and considerable differences have developed in the case law and doctrine.[168]

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156. SEC'Y OF LABOR, REP. ON THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965), *reprinted in* OFFICE OF THE GENERAL COUNSEL, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16, 17 (1981).

157. *See* 110 Cong. Rec. 2596–99, 9911–13, 13,490–92 (detailing the proposed and rejected amendments to protect older workers in Title VII). *See also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 585–86 (2004).

158. SEC'Y OF LABOR, *supra* note 156, at 19–22.

159. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601 § 606, 80 Stat. 845 (codified at 42 U.S.C. § 2000e-14) (directing the Secretary of Labor to provide Congress legislative recommendations to curb age discrimination).

160. *See Cline,* 540 U.S. at 586–88 (reviewing the legislative history of the ADEA).

161. 29 U.S.C. § 631(a) (2012) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

162. *Id.* § 630(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . .").

163. *Id.* § 623(a)(2).

164. Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

165. 29 U.S.C. § 623(f)(1); *see* Smith, 544 U.S. at 233.

166. Eglit, *supra* note 42, at 1100–01.

167. *Smith*, 544 U.S. at 233.

168. Eglit, *supra* note 42, at 1101–02 n.36.

This is partly due to the standalone nature of the ADEA, and is illustrated most clearly by the evolution of disparate impact claims under the ADEA. In the 1993 case, *Hazen Paper Co. v. Biggins*, the Supreme Court declined to rule on whether disparate impact claims were proper under the ADEA.[169] For the next twelve years, there was a split in federal circuit courts over whether disparate impact claims were available under the ADEA.[170] Until 2005, a majority of federal circuit courts rejected disparate impact theory under the ADEA,[171] based on the express reservation in *Hazen Paper Co.*, the RFOA provision and the lack of similar policy justifications for age discrimination as for other forms of discrimination.[172] Finally, in 2005, the Court weighed in and allowed disparate impact claims under the ADEA in *Smith v. City of Jackson*.[173]

However, further confusion over the interaction between the statutes was created when Congress passed the Civil Rights Act of 1991, amending Title VII in response to Supreme Court decisions that had limited claims under it.[174] Thus, because the ADEA, as a standalone bill, was not amended by the Civil Rights Act of 1991, the Court also held in *Smith* that the standard of proof enunciated in *Wards Cove Packing Co. v. Antonio*[175] is still applied to the ADEA,

169. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609–10 (1993) (contrasting disparate treatment and disparate impact jurisprudence).

170. Kelli A. Webb, Note, *Learning How to Stand on Its Own: Will the Supreme Court's Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?,* 66 OHIO ST. L.J. 1375, 1377 (2005) (explaining that the First, Third, Fifth, Seventh, Tenth, and Eleventh Circuits questioned, or outright denied, the viability of ADEA disparate impact claims, while the Second, Eighth, and Ninth Circuits allowed such claims).

171. *Compare* Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 56 (2d Cir. 2004) (explaining that "under principles of stare decisis, [the] Court was obligated to hold that ADEA allowed disparate impact claims"), Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997) (recognizing "the viability of [disparate impact] claims under the ADEA"), *and* Frank v. United Airlines, Inc.*,* 216 F.3d 845, 856 (9th Cir. 2000) (allowing disparate impact claims), *with* Smith v. City of Jackson, 351 F.3d 183, 187 (5th Cir. 2003), Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001), Mullin v. Raytheon Co., 164 F.3d 696, 706 (1st Cir. 1999), DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732–33 (3d Cir. 1995), Hiatt v. Union Pac. R. Co., 65 F.3d 838, 842–43 (10th Cir. 1995), *and* Equal Emp't Opportunity Comm'n v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994) (rejecting ADEA disparate impact claims).

172. *See Smith*, 351 F.3d at 199 (5th Cir. 2003), *aff'd on other grounds*, 544 U.S. 228 (2005).

173. *Smith*, 544 U.S. at 240.

174. Eglit, *supra* note 42, at 1101–02 (explaining that the passage of the CRA of 1991, overturning four Supreme Court decisions that adversely affected Title VII plaintiffs—including Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)—complicated future interpretations of the ADEA).

175. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657–58 (1989) (holding that to prove Title VII disparate impact claims, the employee is responsible for identifying the specific employment practices that cause the disparity), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

even though it no longer applies to Title VII.[176] Thus, although the Court allowed disparate impact claims under the ADEA, the Court imposed a higher standard of proof for ADEA claims than for Title VII claims, and "narrowly construed the employer's exposure to liability on a disparate-impact theory."[177] The distinction between the ADEA and Title VII has broad implications for future claims.[178]

Another complication arising from the complex interaction between the ADEA, Title VII, and the Civil Rights Act of 1991, came from the Court's holding in *Gross v. FBL Financial Services, Inc.*, that mixed-motive cases are never proper under the ADEA.[179] Following *Gross*, an ADEA plaintiff must prove that, "but for" the consideration of his or her age, the employer would not have made the employment decision.[180] This is in contrast to a Title VII claim, where the burden of proof shifts to the employer upon a showing that the prohibited reason—race, color, religion, sex, or national origin—was a "motivating factor," even if other factors also motivated the decision.[181] As "[p]roving discriminatory intent is not easy for plaintiffs," *Gross* has made it more difficult for ADEA plaintiff's to bring successful claims.[182] In response to this decision, the Protecting Older Workers Against Discrimination Act (POWADA), which attempts to reverse *Gross*, has been introduced in virtually every Congress since the *Gross* decision.[183]

The LGBT employment protections in ENDA reflected an approach similar to the ADEA. The potential dangers of narrow court interpretations, confusing or conflicting interactions with other statutes, and the symbolism inherent in a separate LGBT bill, in addition to the legislative carve-outs already incorporated in ENDA, may lead advocates to consider this approach cautiously.[184]

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176. *Smith*, 544 U.S. at 240.

177. *Id.*

178. Webb, *supra* note 170, at 1401 (including potentially creating hostile work environment claims and claims associated with reductions in force).

179. Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 175 (2009).

180. *Id.* at 177–78.

181. *Id.* at 177 n.3; Price Waterhouse v. Hopkins, 490 U.S. 228, 257–58 (1989) (using the *McDonnell Douglas* framework); *see* 42 U.S.C. § 2000e-2(m) (2015) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). *But see* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013) (finding no mixed motive claims available in retaliation cases under Title VII).

182. Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 447 (2009).

183. *See* Press Release, *Civil and Human Rights Coalition Applauds Introduction of Bill to Protect Older Workers From Discrimination*, THE LEADERSHIP CONFERENCE (Oct. 8, 2015), http://www.civilrights.org/press/2015/POWADA.html [http://perma.cc/PXY8-W6R2].

184. *See supra* Part I.C.1.

B. Comprehensive Stand-Alone Legislation: The Americans with Disabilities Act of 1990

Twenty-five years ago, Congress passed the Americans with Disabilities Act of 1990 (ADA), as the result of a decades-long advocacy campaign.[185] This campaign began with the passage of Section 504 of the 1973 Rehabilitation Act, which banned recipients of federal funds from discriminating on the basis of disability, and marked the first time that people with disabilities were recognized as a protected class.[186] Both prior to and after its transformation into an independent agency in 1984, the National Council on Disability (NCD) has worked with this campaign and greatly influenced the enactment and continued strengthening of the ADA.[187] Starting with its 1986 report, *Toward Independence*,[188] the NDC recommended the ADA's enactment, and two years later, in its second report, *On the Threshold of Independence*,[189] proposed a draft statute that ultimately became the ADA.[190]

The final bill was signed into law on July 26, 1990, after passing overwhelmingly by a 91–6 vote in the Senate, and a 377–28 vote in the House.[191] The legislative history regarding the ADA's passage reflects both a widespread and bipartisan congressional desire to protect people with disabilities from discrimination in all areas of life, as well as a certain level of homophobia, as Congress quickly excluded coverage for all sexual minorities and "transvestites."[192]

The ADA is a comprehensive standalone civil rights statute, intended to be broad in application, yet specific in areas of coverage, including employment,[193] government programs and services,[194]

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185. Donovan W. Frank & Lisa L. Beane, *How the ADA Was Passed*, FED. LAW., June 2015, at 62, 63.

186. *Id*. at 63.

187. Jonathan R. Mook, *Celebrating and Reflecting on 20 Years of the Americans with Disabilities Act*, LEXISNEXIS: EMERGING ISSUES LAW BLOG (July 27, 2010, 10:15 AM), http://www.lexisnexis.com/legalnewsroom/top-emerging-trends/b/emerging-trends-law-blog/archive/2010/07/27/celebrating-and-reflecting-on-20-years-of-the-americans-with-disabilities-act.aspx [http://perma.cc/9EEV-LBKH].

188. *See* NAT'L COUNCIL ON DISABILITY, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS (1986), http://www.ncd.gov/publications/1986/February1986 [http://perma.cc/8Q45-5ZWB].

189. *See* NAT'L COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988), http://www.ncd.gov/publications/1988/Jan1988 [http://perma.cc/2UEH-GHSL].

190. Mook, *supra* note 187.

191. Frank & Beane, *supra* note 185.

192. Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER, RACE & JUST. 33, 39–40 (2004); Ruth Colker, *The ADA's Journey Through Congress*, 39 WAKE FOREST L. REV. 1, 2 (2004).

193. 42 U.S.C. §§ 12111–12117 (2015).

194. *Id* at §§ 12131–12134.

transportation,[195] private businesses,[196] and telecommunications.[197] As such, the first stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[198]

But as a standalone civil rights statute, the ADA has complex interactions with other federal statutes, including Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act of 1993,[199] as well as the Age Discrimination in Employment Act.[200] As a result of this confusion, and narrow court interpretations, litigation under the ADA was challenging for plaintiffs.[201] The Supreme Court's narrowing of the definition of "disability," in a series of cases beginning in 1999, ultimately resulted in a Congressional override with the passage of the Americans with Disabilities Act Amendments Act (ADAAA) in 2008.[202]

Under the ADA, "disability" is defined as "[a] physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[203] Starting with *Sutton v. United Air Lines, Inc.*, the Court began to ignore legislative history and the executive agencies tasked with implementing the ADA,[204] and held that mitigating measures, such as corrective lenses or a prosthetic limb, should be considered in the determination of whether an individual has a disability.[205] Then, in *Toyota Motor Mfg., Kentucky,*

195. *Id* at §§ 12141–12165.

196. *Id* at §§ 12181–12189.

197. These provisions can be found in both Title IV, and as amendments to the Communications Act of 1934, and are codified at 47 U.S.C. §§ 225, 611.

198. 42 U.S.C. § 12101(b)(1).

199. *See* Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 992 (2005) (detailing the interaction of the ADA with other federal laws including: the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act of 1970, Title VII of the Civil Rights Act of 1964, the Social Security Act of 1935, and the National Labor Relations Act).

200. *See* Bryan Joggerst, Note, *Reasonable Accommodation of Mixed Motives Claims Under the ADA: Consistent, Congruent, and Necessary,* 35 CARDOZO L. REV. 1587, 1601–05 (2014) (addressing mixed-motive cases under the ADA in light of the ADAAA and the Court's holding in Gross v. FBL Fin. Serv., Inc., 557 U.S. 167 (2009), that mixed-motive claims are improper in ADEA cases).

201. *See* NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA (2004), http://www.ncd.gov/publications/2004/Dec12004 [http://perma.cc/66SU-LEKE].

202. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. 12101).

203. 42 U.S.C. § 12102(1)(A–C) (2012).

204. NAT'L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT (2013), http://www.ncd.gov/publications/2013/07232013 [http://perma.cc/Z537-2J2Y].

205. Sutton v. United Airlines Inc., 527 U.S. 471, 482 (1999).

Inc. v. Williams, the Court held that the terms "major life activity" and "substantially limiting" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[206] These cases, in addition to procedural and pleading issues,[207] led to an extremely low success rate for ADA plaintiffs,[208] and fueled a renewed advocacy campaign for comprehensive protections against disability discrimination.[209]

This continued advocacy, in conjunction with the release of another NCD report, *Righting the ADA,*[210] was the impetus behind the ADAAA.[211] The report analyzed all the Supreme Court decisions interpreting the ADA since its passage and concluded that because courts had construed the definition of disability so narrowly, many people with disabilities intended to be covered under the ADA were no longer protected.[212] It also called for the ADA to be restored, and proposed legislation, which ultimately became the ADAAA, after extensive negotiations with the business community.[213] While a preliminary review of the success of ADA plaintiffs after the ADAAA is promising, more time is required to determine if the trend will continue.[214]

Using the ADA as an example, an LGBT comprehensive standalone bill would provide the opportunity for broad, yet tailored protections. However, potential conflicts with other statutes, and limited, and confusing interpretations by the courts, may lead to inconsistent protections.

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206. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197–98 (2002) (overturned due to legislative action in the ADAAA).

207. *See* Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs,* 6 U. PA. J. LAB. & EMP. L. 735, 744 (2004) (attributing the low success rate for ADA plaintiffs to a number of factors: "(1) the courts' abuse of the summary judgment device; (2) the courts' failure to defer to the EEOC's guidance; (3) the apparent hostility of some courts, particularly in conservative circuits, to ADA claims; (4) the EEOC's infrequent participation in plaintiff's ADA litigation; and (5) the Supreme Court's use of the ADA's flexible and ambiguous language to narrow the grounds of recovery . . . ."); *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 204, at 3 (indicating that inadequate pleadings are still a factor in the low success rate of ADA plaintiffs, even after the passage of the ADAAA).

208. Kaiser, *supra* note 207, at 738–41; *see* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999); Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L.J. 239, 248–51 (2001).

209. NATIONAL COUNCIL ON DISABILITY, *supra* note 201, at 1.

210. *See id.*

211. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553 (2008).

212. NAT'L COUNCIL ON DISABILITY, *supra* note 204, at 2.

213. *Id.* at 17–18.

214. *Id.* at 8 (recognizing "that not enough time has elapsed since the ADAAA took effect for the drawing of firm and definitive conclusions," but in "decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs"); *see also* Kaiser, *supra* note 207, at 764–65.

C. Amending Title VII: The Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act of 1978 (PDA)[215] amended Title VII of the Civil Rights Act of 1964 in two places. First, the PDA expanded the definition of sex discrimination to include "pregnancy, childbirth, or related medical conditions."[216] Second, it required that pregnant women, and women with related conditions "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[217]

Congress introduced the amendments to the Civil Rights Act in response to the Court's decisions in *Geduldig v. Aiello*,[218] and *General Electric Co. v. Gilbert*,[219] which together held that pregnancy discrimination did not constitute sex discrimination.[220] The Court extended its Constitutional reasoning in *Geduldig* to Title VII and the prohibition on sex-based discrimination two years later in *Gilbert,* a case involving the exclusion of pregnancy in an employer's insurance plan.[221]

Similar to the ADA and the ADEA, narrow court interpretations also plagued the PDA. From failing to find that lactation is "related" to pregnancy to refusals to infer pregnancy discrimination for circumstances clearly related to the status of pregnancy, narrow court interpretations have limited the ability of plaintiffs to bring claims.[222]

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215. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2015)).

216. *Id.*

217. *Id.*

218. Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (rejecting an equal protection challenge to California's disability insurance program, which exempted work loss resulting from pregnancy from coverage).

219. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (extending the reasoning of *Geduldig v. Aiello* to Title VII*).*

220. *See, e.g.*, Hendricks, *supra* note 40, at 211 (discussing how the Supreme Court's initial narrow interpretation of sex discrimination prompted Congress to amend the Civil Rights Act to include protection against pregnancy discrimination via the Pregnancy Discrimination Act).

221. *Gilbert*, 429 U.S. at 135–36.

222. Joanna L. Grossman, *The Pregnant Workers' Fairness Act: Accommodating the Needs of Pregnant Working Women*, JUSTIA: VERDICT (May 11, 2012), https://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act, [http://perma.cc/UPX4-QZ9Z] (citing EEOC v. Houston Funding II LLC, No. 4:11-CV-2442 (S.D. Tex. Feb. 2, 2012), *overruled by* EEOC v. Houston Funding II LLC, No. 12-20220 (5th Cir. May 30, 2013), and Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994) (holding that the discharge of a pregnant worker the day before her scheduled maternity leave did not prove intentional discrimination, and that although the employee was frequently late due to morning sickness, in the absence of better treatment for similarly tardy non-pregnant employees, there was no pregnancy discrimination)).

A particularly damaging narrowing of rights has emerged in denial-of-accommodation cases.[223]

In 2015, the Supreme Court addressed this issue in *Young v. UPS*.[224] The Supreme Court held that the PDA does not require employers to provide the same accommodations as those provided for other workers with comparable physical limitations, unless the plaintiff can demonstrate there is a significant burden on the pregnant worker because the employer accommodates a large percentage of employees who are not pregnant.[225] The ADAAA of 2008 also addressed the accommodation requirement reasoning that, with the addition of temporary disabilities to the definition of disability,[226] certain pregnancy related impairments can be considered protected disabilities for which employers must provide a reasonable accommodation.[227]

In response to the confusing and indirect approach to pregnancy accommodation that has developed around the PDA, an explicit legislative proposal, the Pregnant Workers Fairness Act, that is both bipartisan and avoids the complicated interaction with the ADAAA by adding a provision directly to the PDA, has been proposed in both houses of Congress.[228]

Thus, the PDA provides a template for an amendment to Title VII of the Civil Rights Act. Similar to the PDA, Congress could amend the definition of sex to include sexual orientation and gender identity.[229] Likewise, Congress could also amend Title VII to include sexual orientation and gender identity in the list of protected classes.

However, this approach is not without its drawbacks. First, this approach lacks the comprehensive protections that the LGBT community is seeking. Second, as shown above, narrow court interpretations can plague amendments to the Civil Rights Act, just as they can to standalone approaches.

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223. Grossman, *supra* note 222.

224. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354–55 (2015).

225. *Id.*

226. *See* 42 U.S.C. § 12102(4)(D); *see also* 29 C.F.R. § 1630.2(j)(ix) (2012) (impairments lasting fewer than six months can be disabilities).

227. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, No. 915.003, EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015) http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [http://perma.cc/ZA2Z-7YZN] ("Although pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. An impairment's cause is not relevant in determining whether the impairment is a disability. Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.").

228. S. 1512, 114th Cong. (2015); H.R. 2654, 114th Cong. (2015).

229. Hendricks, *supra* note 40, at 210.

To protect LGBT individuals in other areas, such as public accommodations or housing using this approach, Congress would have to incrementally amend the Civil Rights Act or relevant law issue by issue. As discussed below, the dangers of amending the Civil Rights Act would likely push advocates in favor of a comprehensive strategy, to eliminate the danger of repeatedly opening the Act.

D. Amending the Civil Rights Act: The Equality Act of 2015

A final potential legislative approach can be found in the Equality Act, which was introduced in its current form in July 2015.[230] Similar to the 1974 bill of the same name, the Equality Act amends the 1964 Civil Rights Act to include sexual orientation as a protected class.[231] In addition, the 2015 Act includes protection based on gender identity, and incorporates sexual orientation and gender identity into the definition of discrimination on the "basis of sex."[232] The bill also closes longstanding loopholes that exclude sex from the prohibition of discrimination in public accommodations under Title II, and in federally assisted programs in Title VI.[233]

This approach would include the LGBT community in a landmark and well litigated civil rights statute. However, it is difficult to draw lessons from the past, in part due to historic opposition to amending the Civil Rights Act, based on concerns surrounding efforts to limit or remove protections for the currently covered groups. The proposed amendments would provide expansions and amend definitions, which may cause confusion in interpretation by the courts.

E. Evaluating Legislative Approaches

We have now identified four legislative approaches to achieving comprehensive civil rights protections for the LGBT community: (1) an incremental issue-by-issue standalone approach similar to the ADEA or ENDA; (2) a comprehensive standalone approach similar to the ADA; (3) an incremental issue-by-issue amendment to the Civil Rights Act, similar to the PDA;[234] or (4) a comprehensive approach

230. S. 1858, 114th Cong. (2015); H.R. 3185, 114th Cong. (2015).

231. S. 1858 § 2(3); H.R. 3185 § 2(3).

232. S. 1858 § 1101(a)(4).

233. *Id.* §§ 3, 7; *see* Dana Beyer, *The Equality Act, Part One—Introduction*, HUFFINGTON POST (July 29, 2015, 7:59 PM), http://www.huffingtonpost.com/dana-beyer/the-equality-act-part-one_b_7880612.html [http://perma.cc/JT7D-SFDM] (adding sex to 42 U.S.C. §§ 2000a(a), 2000(d)).

234. *See* Hendricks, *supra* note 40, at 212 (suggesting a "gender amendment" incorporating gender identity and sexual orientation into the definition of sex-based discrimination, just as Congress did with pregnancy in the PDA).

to amending the Civil Rights Act, similar to the newly introduced Equality Act, which amends several sections of the Civil Rights Act of 1964 in one bill.

1. Scope of Coverage: Incremental v. Comprehensive

The first consideration we evaluate is whether a series of separate bills or a one-time comprehensive bill is preferable.

While the ADEA- and ENDA-based approaches were intended to address employment discrimination in particular, the LGBT community has indicated a commitment to comprehensive protections greater than just employment.[235] Although the incremental approach may be more politically feasible, in some ways, simply because it will progress slowly and cumulatively,[236] it could be quite a lengthy process, with a need to coordinate efforts to amend and address each issue (housing, credit, public accommodations, etc.) in subsequent separate standalone bills in order to achieve comprehensive protections. Ultimately, the slow process and individual nature of the approach may lead to inconsistent protections depending upon the issue, as the wins and losses of LGBT advocates and opponents would accumulate through the years.[237] Additionally, legislative pieces introduced over a broad time frame may have differing levels of success related to changing political tides.

Under this incremental approach, employment protections would likely be first on the agenda, given that advocates have worked to pass ENDA for twenty years and that the EEOC has recognized that discrimination on the basis of sexual orientation and gender identity is covered under Title VII.[238] The political battle over religious exemptions in ENDA has already demonstrated that standalone bills may

235. *See* Rea Carey, *Op-ed: Why One of the Biggest LGBT Orgs Has Stopped Supporting ENDA*, THE ADVOCATE (July 8, 2014, 12:02 PM), http://www.advocate.com/commentary/2014/07/08/op-ed-why-one-biggest-lgbt-orgs-has-stopped-supporting-enda [http://perma.cc/TF6D-KZFB]; *see also* Sheryl Gay Stolberg, *Rights Bill Sought for Lesbian, Gay, Bisexual and Transgender Americans*, N.Y. TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/us/advocates-seek-civil-rights-bill-for-lesbian-gay-bisexual-and-transgender-americans.html?_r=0 [http://perma.cc/7CPD-QZBJ] (noting that LGBT advocates have adopted a broad approach).

236. *See* Jennifer Wilson, Note, *Horizontal Versus Vertical Compromise in Securing LGBT Civil Rights*, 18 TEX. J. WOMEN & L. 125, 139–42 (2008) (distinguishing "horizontal compromise," which precludes certain claims from the LGBT agenda, from "vertical compromise," which precludes certain groups, and suggesting that horizontal compromise is more politically feasible).

237. *Id.* at 134 (arguing for the necessity of a comprehensive bill to "fill in the gaps").

238. Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012); Baldwin v. Foxx, Appeal No. 0120133080 (EEOC July 15, 2015).

be vulnerable to compromises and amendments.[239] The religious exemption in the most recent version of ENDA was far broader than the existing religious exemption in Title VII.[240] This, in combination with the lack of disparate impact claims and voluntary affirmative action programs in ENDA,[241] means that each issue could face the same or similar carve-outs.[242]

Similarly, an approach that amends the Civil Rights Act issue by issue—like the PDA, which only amended Title VII—would likely prove a lengthy process.[243] While existing protections and legal precedents may be incorporated—and overall this strategy may attract less attention due to the limited scope of each discrete proposal—this approach may prove less politically expedient, as the problems associated with opening up the Civil Rights Act, discussed below, may increase exponentially.[244]

2. Is It Better To Stand Alone?

As noted above in relation to ENDA, standalone bills may be drafted to have less extensive protections, whether from the beginning, such as the lack of disparate impact protections or voluntary affirmative action programs, or to reflect political compromise, such as the broadening religious exemptions in ENDA.[245] Political climate at the time of drafting, and the variety of supporters and opponents, all factor into how much compromise is necessary.[246] Amending the Civil Rights Act, on the other hand, may not require the same level of sacrifices or carve-outs as a standalone bill, partly because of the significance and history of the Act.[247]

However, one fear of this approach is that limiting amendments introduced by opponents may restrict existing protections for currently covered groups. Further, while amending the Civil Rights Act provides assurances of existing protections, it is a one-size-fits-all approach, whereas a standalone bill can be tailored to the specific

239. *See* Hendricks, *supra*, note 40, at 209.

240. *See* Sung, *supra* note 18, at 509. *Compare* H.R. 2015, 110th Cong. § 6 (2007), *with* H.R. 3685, 110th Cong. § 6 (2007).

241. Reed, *supra* note 17, at 295, 301.

242. *Id.* at 310 (noting the religious exemption carve-out).

243. *See infra* Part II.E.3.

244. *See supra* Part II.D.

245. Reed, *supra* note 17, at 295, 301.

246. *See* Bil Browning, *Sweeping Federal LGBT Rights Bill from Senate, House Democrats Has Huge Support in New Poll*, THE ADVOCATE (Oct. 7, 2015, 4:50 PM), http://www.advocate.com/politics/2015/07/21/sweeping-lgbt-rights-bill-be-introduced-week [http://perma.cc/YNZ5-42A2].

247. *See id.*

needs of the group it is meant to protect.[248] The ADA, for example, was written as a separate bill in part to go beyond existing protections and provide specific and wide-ranging civil rights protections for the disability community.[249] In the context of LGBT civil rights protections, special protections may be needed. For instance, some have raised the point that sexual orientation and gender identity are not always visible and identifiable characteristics,[250] and in the context of disparate impact litigation, for example, the LGBT community might want special provisions regarding data collection that account for specific privacy concerns.[251] Further, as explained above, the approach to sexual orientation and gender identity coverage in the Equality Act is a sort of belt and suspenders approach—expanding the definition of sex to encompass sexual orientation and gender identity and also creating a separate protected category of sexual orientation and gender identity.[252] This unique approach may indicate that a separate bill may better address the needs of the LGBT community.

But perhaps the most significant difference between a comprehensive standalone bill and amending the Civil Rights Act is how the courts will interpret the protections. In the ADA context, the Court consistently interpreted the ADA narrowly, leading to lesser protections in a number of areas.[253] The ADEA similarly caused confusion for the plaintiffs and courts, as demonstrated by the twelve-year uncertainty between *Hazan Paper Co.* and *Smith* over whether disparate impact claims were allowed.[254] Thus, if a comprehensive standalone bill is the approach taken, there is a possibility for more extensive, and more tailored protections, but also a greater chance that a court will interpret the standalone nature to be intentional and apply a different, and often lower, standard.

This scenario has already played out in the context of California's non-discrimination employment protections for sexual orientation, and

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248. *See, e.g.,* Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?postshare=9351437902663138 [http://perma.cc/8KZ6-K7E8].

249. *Id.*

250. *See* Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 144–45 (2007) (discussing the lack of visibility of sexual orientation).

251. *Id.* at 149.

252. *See supra* Part II.D.

253. *See supra* Part II.B.

254. *See* discussion *supra* Part II.A; *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609–10 (1993) (noting that the Court had never decided whether a disparate impact theory of liability was available under the ADEA); Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (holding that the disparate impact theory of liability is available under the ADEA).

ultimately required clarifying amendments to resolve the issues raised.[255] In a case involving a schoolteacher, the trial court dismissed a harassment claim, reasoning that because of the standalone nature of the sexual orientation protection, only decisions related to hiring, firing and promotion were covered in relation to sexual orientation.[256] Ultimately, California added sexual orientation and gender identity to its general non-discrimination protections.[257] An appeals court retroactively held the amended protections to apply to the schoolteacher,[258] and the school settled for $140,000.[259]

Another problem with court interpretation is that a court may or may not incorporate existing Title VII doctrines and protections into a standalone bill.[260] Specifically, the recent EEOC decisions,[261] and the various court decisions that have protected LGBT plaintiffs under Title VII's prohibition on sex-based discrimination,[262] could be enshrined in Title VII through an amendment to the definition of sex-based discrimination to include sexual orientation and gender identity, as proposed in the 2015 Equality Act,[263] but may not easily be imported into a separate, standalone bill. In the face of narrow court interpretations, advocates have pressed for legislation to clarify the intended scope.[264]

Standalone bills have also faced complicated and sometimes confused interaction with other civil rights statutes. For example, the ADA has complex interactions with other federal statutes including Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act of 1993,[265] and the ADEA, which ultimately can

255. J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a "Separate But Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1555, 1555 n.197 (2000).

256. *Id.* at 1546, 1555 n.200 (citing Murray v. Oceanside Unified School Dist., 79 Cal. App. 4th 1338 (2000)).

257. CAL. GOV'T CODE § 12940(a) (West 2015).

258. *Murray*, 79 Cal. App. 4th at 1354.

259. *California Teacher Settles Sexual Orientation Discrimination Suit with School District*, LAMBDA LEGAL (May 23, 2002), http://www.personproject.org/Alerts/States/California/settlement.html [http://perma.cc/W5DP-M7FG].

260. *See* Shawn Clancy, Note, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 HARV. J. ON LEGIS. 119, 134 (2011) (suggesting that an amendment to Title VII incorporating gender and sexual orientation would reflect the law as it currently stands and remove confusion).

261. Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012); Baldwin v. Foxx, Appeal No. 0120133080 (EEOC July 15, 2015).

262. *See* discussion *supra* Part I.B.2.

263. S. 1858, 114th Cong. § 9(2) (2015).

264. *See* Clancy, *supra* note 260, at 134.

265. *See* Lucas, *supra* note 199, at 992 (detailing the interaction of the ADA with other federal laws including: the Family and Medical Leave Act of 1993, the Occupational

cause confusion and harm plaintiffs while being sorted out.[266] The ADEA, similarly, has complex interactions with Title VII and the 1991 amendments to the Civil Rights Act.[267] An approach based on a comprehensive standalone bill may likewise have complex interactions with existing civil rights statutes, including the Civil Rights Act of 1964.[268] Further, as we saw in *Gross*,[269] amendments to one law—in this case, to the 1991 amendments to the Civil Rights Act—cause confusion and complicated interpretation for other laws.[270] Interestingly, the 1991 Act did not specifically mention retaliation in its motivating factor provision, causing confusion among lower courts.

> [C]ourts could not agree on how to treat retaliation claims after the 1991 Act. Some courts applied the motivating-factor standard, allowing plaintiffs to establish liability once they demonstrated retaliation played a motivating factor in the adverse employment action. Most courts, however, applied *Price Waterhouse*, finding Title VII liability *only* when a plaintiff demonstrated the defendant was motivated at least in part by a retaliatory motive, *and* the defendant could *not* demonstrate it would have made the same decision absent the retaliatory motive.[271]

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court considered the question and applied the more narrow interpretation to the retaliation provisions of Title VII of the Civil Rights Act itself,[272] highlighting the complications inherent in and potential unintended consequences of amendment language, and the potential impact of court interpretation.[273]

Another potential pitfall for a comprehensive standalone approach is that the protections may not apply to the states through the Fourteenth Amendment.[274] The Supreme Court has applied civil rights laws to states under the Fourteenth Amendment for suspect

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Safety and Health Act of 1970, Title VII of the Civil Rights Act of 1964, the Social Security Act of 1935, and the National Labor Relations Act).

266. *See* Joggerst, *supra* note 200, at 1588.

267. Eglit, *supra* note 42, at 1101–02.

268. *See id.* at 1161.

269. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173–74 (2009).

270. *See* discussion *supra* Part II.A.

271. Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either* Price Waterhouse*'s or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (But Should)*, 64 ALA. L. REV. 1067, 1079 (2013).

272. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2544 (2013).

273. *Id.* at 2547.

274. *See, e.g.*, Clancy, *supra* note 260, at 135–36; Hendricks, *supra* note 40, at 214–15.

classes such as race and sex, but not for other classifications, including age and disability.[275]

Finally, the issue of optics and messaging must be considered. Inclusion in the iconic Civil Rights Act of 1964 not only garners well established legal protections and well settled expectations, but it also puts the group covered on equal footing with others covered by this historic and paradigmatic law.[276] Advocates have noted that by adding gender identity and sexual orientation to the existing law, the LGBT community would be seen as incorporated into and protected by the preeminent civil rights law, getting the same protections as other marginalized groups: "The time has come for full federal equality—nothing more, nothing less."[277] A standalone bill might separate the LGBT community from other protected classes from the beginning and create the potential for LGBT individuals to be subject to different standards.[278] By amending the Civil Rights Act to include LGBT individuals, it equates discrimination based on sexual orientation and gender identity with discrimination based on categories like race and national origin, removing any stereotypes or preconceptions of LGBT individuals as different or other.[279]

3. Amending The Civil Rights Act of 1964

But while a comprehensive standalone bill may ultimately raise concerns—in terms of extent of coverage courts will afford it, whether or not the protections will apply to the states through the Fourteenth Amendment,[280] or whether this approach separates the LGBT community from other protected groups—a significant problem with amending the Civil Rights Act provides a counter-argument to these concerns.[281] Any attempt to amend the Civil Rights Act will open the

275. *See* Hendricks, *supra* note 40, at 214–15. *Compare* Nevada Dep't. of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (sex); *and* Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (race*), with* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (disability), *and* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 63 (2000) (age).

276. *See* Hendricks, *supra* note 40, at 215 (noting a separate law is less of a "symbolic achievement" than for a group to achieve protection under the Civil Rights Act).

277. HRC Staff, *HRC Endorses Comprehensive New Legislation that Ensures Full Federal Equality for LGBT Americans*, HUMAN RIGHTS CAMPAIGN (July 23, 2015), http://www.hrc.org/blog/entry/hrc-endorses-comprehensive-new-legislation-that-ensures-full-federal-equali [http://perma.cc/G43N-5JS8] (quoting the statement of Human Rights Campaign President Chad Griffin).

278. *See* Clancy, *supra* note 260, at 135.

279. *Id.*

280. *See Garrett*, 531 U.S. at 374 (holding that states are not required under the Fourteenth Amendment to provide accommodations because disabled persons are not a traditionally suspect class); Clancy, *supra* note 260, at 135.

281. *See* Lupu, *supra* note 49, at 92–100.

historic bill to the risk of amendments that could limit or restrict existing protections for all groups covered by the law, not just the LGBT community.[282] Particularly vulnerable issues will likely include the use of disparate impact—as evidenced by the repeated challenges to disparate impact claims under the Fair Housing Act[283]—and religious exemptions.[284]

This fear of limiting amendments was a significant reason that the ADA was a standalone bill, making it "more palatable to Congress than an amendment to existing civil rights legislation."[285] The civil rights community opposed linking disability rights with civil rights based on the belief that disability rights would be costly and opening the Civil Rights Act to amendments could weaken existing protections for women and minorities.[286] This was also reflected in the Civil Rights Act of 1964's history, as certain legislators, women's groups, and civil rights advocates had concerns about attaching women's rights to race-based civil rights protections.[287] Some civil rights groups have already expressed concerns leading up to the introduction of the Equality Act.[288]

However, while amending the Civil Rights Act is not without its drawbacks, this approach, and the Equality Act in particular, may still be the best option, both in practice—by incorporating the existing executive and judicial LGBT protections and avoiding the complications associated with standalone protections—as well as symbolically. For example, in contrast to other standalone bills—such as the ADEA, where age is sometimes considered relevant to one's ability

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282. *See* Clancy, *supra* note 260, at 120 (noting that the Civil Rights Act provided protection "for individuals of all walks of life").

283. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2510 (2015); *see also* Amy Howe, *Will the Third Time be the Charm for the Fair Housing Act and Disparate-Impact Claims? In Plain English*, SCOTUSBLOG (Jan. 6, 2015, 10:19 AM), http://www.scotusblog.com/2015/01/will-the-third-time-be-the-charm-for-the-fair-housing-act-and-disparate-impact-claims-in-plain-english [http://perma.cc/5HUX-EKLG] (describing the Texas case as the third time the Supreme Court has granted review of the issue).

284. *See* Lupu, *supra* note 49, at 92–100.

285. Sung, *supra* note 18, at 497.

286. RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 114 (2002).

287. Menand, *supra* note 35.

288. Chris Johnson, *Some LGBT Advocates Not On Board With Equality Act*, WASH. BLADE (July 21, 2015, 9:07 PM), http://www.washingtonblade.com/2015/07/21/some-lgbt-advocates-not-on-board-with-equality-act [http://perma.cc/CL3J-JTWQ]; Heather Cronk & Angela Peoples, *Op-ed: Oregon Senator's Plan for Full LGBT Equality Is Not the Right Path*, THE ADVOCATE (June 25, 2015, 2:00 PM), http://www.advocate.com/commentary/2015/06/25/op-ed-oregon-senators-plan-full-lgbt-equality-not-right-path [http://perma.cc/9ZTF-JMLL].

in employment,[289] and the ADA, where the need to provide reasonable accommodations is often specific to the disability community—a person's sexual orientation or gender identity is irrelevant to their ability to do the job.[290] Because sexual orientation and gender identity are as irrelevant to employment as race, sex, national origin and religion, an amendment to the Civil Rights Act may be the only way to ensure both symbolically, as well as in practice, that LGBT individuals are afforded the same protections as other similarly situated groups.

While there are pitfalls to a comprehensive standalone approach, they may be preferable to threatening one of the most significant pieces of civil rights legislation in this nation's history. For the moment, however, amending the Civil Rights Act of 1964 is the approach that Congress is considering, in the form of the Equality Act.

F. Non-Legislative Approaches to Federal LGBT Civil Rights Protections

An alternative to a legislative solution, and perhaps a more likely scenario in the short term, considering the improbability of the Equality Act moving in the current Congress,[291] would be a judicial approach to extending equal treatment under the law to LGBT individuals.

Some have argued that courts are a limited tool in the efforts for social change,[292] especially in the debate over marriage equality, but it is clear that achieving marriage equality through the courts was an intentional, calculated and ultimately successful strategy.[293] Mary

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289. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587, 587 n.2 (2004) (describing age discrimination as "one different in kind from discrimination on account of race" and further explaining that "[e]mployment discrimination because of race is identified . . . with . . . feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned. The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*.") (emphasis and omissions in original) (citation omitted).

290. *See* ERICA HOWARD, THE EU RACE DIRECTIVE: DEVELOPING THE PROTECTION AGAINST RACIAL DISCRIMINATION WITHIN THE EU 96–97 (2009).

291. Mark Joseph Stern, *Democrats Announce Sweeping, Doomed Federal LGBT Rights Bill*, SLATE (July 21, 2015, 4:18 PM), http://www.slate.com/blogs/outward/2015/07/21/equality_act_democrats_in_congress_announce_lgbt_rights_bill.html [http://perma.cc/ZRE3-ZJSZ].

292. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (2d ed. 2008).

293. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Mary L. Bonauto, *Supreme Court's Marriage Equality Decision Should Energize Us*, BOSTON GLOBE (June 26, 2015), https://www.bostonglobe.com/opinion/2015/06/26/supreme-court-and-same-sex-marriage-the-equality-revolution-started-massachusetts/4CsQK6JiOi9tb4xRWsEXXI/story.html [http://perma.cc/2ET9-RTAQ]; Leachman, *supra* note 13, at 1669–71 (providing a comprehensive overview of the success and intention of the litigation strategy).

Bonauto, the Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (GLAD), who argued both the first case to declare a state same-sex marriage ban unconstitutional in perpetuity,[294] and the last case to declare all state same-sex marriage bans unconstitutional,[295] was one of the lead strategists of this largely successful judicial approach.[296]

The marriage equality campaign, won primarily through the courts, may make sense as a model. Employment protections for LGBT individuals are beginning to, and likely will continue to, be won in the courts.[297] It is expected that courts will continue to apply and extend the sex-discrimination provision of Title VII to cover sexual orientation and gender identity discrimination, especially in light of the EEOC decisions.[298] If the LGBT advocacy community were to chart out a comprehensive judicial strategy, similar to its campaign around marriage equality, the likelihood of such a prospect would be even greater.[299] However, as different courts of appeals consider the question, the protections gained may be inconsistent. And the strategy of creating judicial protections for sexual orientation and gender identity under protections for "sex" discrimination is necessarily limited to statutes which protect against sex discrimination,[300] and extending these gains to other titles would be unlikely where "sex" is not protected.[301] Thus, this judicial strategy would need to be combined with a legislative campaign to insert "sex" as a protected category into the other titles of the Civil Rights Act. Even if this legislative update were successfully accomplished, and "sex" was added to the remaining sections of the Civil Rights Act, advocates might then need to craft a judicial campaign for each title, establishing that sexual orientation and gender identity are included in the definition of sex.

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294. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (holding that the Massachusetts law prohibiting the issuing of marriage licenses to same-sex couples violated the state Constitution by failing the rational basis test under both the due process and equal protection prongs).

295. Obergefell, 135 S. Ct. at 2608.

296. *See* Bonauto, *supra* note 51.

297. *See supra* Part I.B.2.

298. Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012); Baldwin v. Foxx, Appeal No. 0120133080 (EEOC July 15, 2015); Reed, *supra* note 17, at 314 ("Courts and the EEOC are increasingly likely to perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII . . . . This trend suggests that advocates should abandon their seemingly quixotic quest to enact ENDA in favor of allowing Title VII's 'sex' provision to continue on its LGBT-inclusive evolution.").

299. *See* Bonauto, *supra* note 293.

300. Lee, *supra* note 34, at 461.

301. *See* Browning, *supra* note 246 and accompanying text.

As we learned from the Civil Rights Act of 1991, *Gross*, and *Nassar*, however, amending legislation may lead to confused and unintended results.[302] The fact that the Equality Act provides two ways to protect sexual orientation and gender identity—along with adding sexual orientation and gender identity as protected classes themselves, the Act would explicitly define sex to include sexual orientation and gender identity—could lead to confusion over which claims are being brought and how they are evaluated. Further, additional complications could arise from court interpretations around the addition of sex to the provisions of the Civil Rights Act of 1964 where it was excluded.[303]

Another, and perhaps complementary, judicial strategy would involve an approach to get the Supreme Court to grant or clarify a heightened level of scrutiny for the LGBT community.[304] The appropriate level of scrutiny to be applied to LGBT individuals is currently unresolved, but if the Court were to recognize a higher level of scrutiny for LGBT individuals, legal protections would be easier to obtain.[305]

A final proposed strategy revolves around the executive branch, and the President's power to issue executive orders. President Obama has already leveraged the executive branch to extend to LGBT individuals a variety of protections,[306] and should continue to engage his cabinet to develop creative and meaningful approaches to extending LGBT protections.[307] This strategy is limited only by what the President is empowered to accomplish via executive order.[308]

CONCLUSION

LGBT individuals have slowly and incrementally been gaining federal recognition and protections over the past few decades. While

302. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

303. S. 1858, 114th Cong. § 9(2) (2015); *see also* Beyer, *supra* note 233.

304. Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 494 (2015).

305. *See* Chanakya Sethi, *How the Supreme Court Could Make Everyone Happy With Its Same-Sex Marriage Decision*, SLATE (June 16, 2015, 9:59 AM), http://www.slate.com/blogs/outward/2015/06/16/gay_marriage_at_the_supreme_court_heightened_scrutiny_would_be_a_win_win.html [http://perma.cc/9EY2-63J3].

306. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

307. Alex Reed, *Redressing LGBT Employment Discrimination Via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 136 (2015).

308. VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION (2014).

the courts, societal attitudes and executive actions have all advanced LGBT rights, legislative recognition of federal LGBT civil rights protections have thus far proven elusive, despite decades of legislative advocacy.

In June of 2015, a comprehensive civil rights bill, which amended several titles of the Civil Rights Act of 1964, was introduced.[309] While it provides sweeping protections for LGBT individuals, the bill is only supported by Democrats, is not currently fully endorsed by the entire civil rights community, and is unlikely to be brought up in either chamber of Congress in the foreseeable term.[310]

This approach may motivate the base of LGBT advocates, but it does create some fears about the security of the Civil Rights Act among some in the civil rights community, and it does raise questions about what type of unintended consequences could result from the proposed changes.

While advocates work internally to devise a path toward passage, it may be that the courts turn out to be the place where changes get made.

309. Johnson, *supra* note 288.
310. *Id.*