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1-1-2020

## Coming Out & Catching Up: An International Review of Workplace Protections for the Lesbian, Gay, and Bisexual Communities

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### Recommended Citation

Clinton Ford, *Coming Out & Catching Up: An International Review of Workplace Protections for the Lesbian, Gay, and Bisexual Communities*, 34 Emory Int'l L. Rev. Recent Dev. 2011 (2020).

Available at: <https://scholarlycommons.law.emory.edu/eilr-recent-developments/3>

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# COMING OUT & CATCHING UP: AN INTERNATIONAL REVIEW OF WORKPLACE PROTECTIONS FOR THE LESBIAN, GAY, AND BISEXUAL COMMUNITIES

## INTRODUCTION

The United States (U.S.) has codified protections against discrimination within the Fifth and Fourteenth Amendments.<sup>1</sup> But, as history has proven, this is not enough. In the U.S., employment-related discrimination is one of the most commonly reported forms of discrimination across all ethnic groups.<sup>2</sup> As a result, in recent years, minority groups have faced real consequences in recent years. This trend in the workplace extends across many countries. This Comment provides a comparative analysis of federal workplace discrimination protections for LGBT individuals across nations similar to the U.S. The focus will be on the U.S., the United Kingdom (U.K.), and Canada—all English-speaking, common law countries with historical ties to Great Britain.<sup>3</sup> Learning from this comparison, this Comment argues that the U.S. should adopt protections by judicial interpretations of existing statutes (“litigation prong”) and further by legislative ratification (“legislative prong”).

By eliciting this comparison, the U.K. and Canada provide models through which workplace protections for the LGBT community can be justified in the U.S. When taken together, the research reveals that if there is an international trend, it is toward protection against employment discrimination for the LGBTQ+ community. The approach taken by each country will be explained by introducing the country and its legal structure, analyzing key legislation and landmark cases, and identifying legal principles and historical trends that support the country’s approach. This Comment will examine federal cases and legislation in the U.S., U.K., and

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<sup>1</sup> See U.S. CONST. amend. XIV; U.S. CONST. amend. V.

<sup>2</sup> *Discrimination: What It Is, and How to Cope*, AM. PSYCHOL. ASS’N <https://www.apa.org/helpcenter/discrimination.aspx>.

<sup>3</sup> *Canada - Statistics, Rankings, News | US News Best Countries*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-countries/canada> [hereinafter *Canada*]; *United Kingdom - Statistics, Rankings, News | US News Best Countries*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-countries/united-kingdom> [hereinafter *United Kingdom*]; *United States - Statistics, Rankings, News | US News Best Countries*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-countries/united-states> [hereinafter *United States*].

Canada to analyze employment discrimination on the basis of sexual orientation.<sup>4</sup> The argument is particularly relevant because the Supreme Court of the United States has granted a certiorari petition to decide whether sexual orientation discrimination constitutes prohibited employment discrimination “because of ... sex” within the meaning of Title VII.<sup>5</sup>

## I. SEXUAL ORIENTATION AND DISCRIMINATION

### A. *Sexual Orientation*

To preface the analysis below, a brief discussion of the concept of sexual orientation is necessary. The American Psychological Association has explained that sexual orientation “refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women or both sexes [...] and ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex.”<sup>6</sup> LGBTQ+ is an acronym used to refer to communities who “identify as something other than heterosexual and/or cisgender.”<sup>7</sup> Most forms of sexual orientation require that the sex of the employee’s partner be accounted for as well.<sup>8</sup>

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<sup>4</sup> State or provincial legislation will only be analyzed in reference to its interaction with the federal system (e.g. courts). Although other forms of discrimination are found in the workplace, this Comment is restricted to sexual orientation discrimination within the employer-employee relationship. Specifically, discrimination on the basis of transsexualism is beyond the scope of this Comment. Additionally, an employee may have a claim on multiple grounds (i.e. race, color, national origin, or disability), in addition to the sexual orientation discrimination claim. This Comment limits the analysis solely to sexual orientation discrimination claims.

<sup>5</sup> See generally *Bostock v. Clayton Cty.*, 723 Fed. Appx. 964 (11th Cir. 2018), *petition for cert. filed*, 139 S.Ct. 1599 (Apr. 22, 2019) (No. 17-1618).

<sup>6</sup> *Sexual Orientation and Homosexuality*, AM. PSYCHOLOGY ASS’N, <https://www.apa.org/topics/lgbt/orientation.aspx> (last visited Oct. 13, 2018). Lesbian/gay is defined as a man or woman who has “romantic or sexual attractions to members of one’s own sex.” *Id.* An individual who identifies as bisexual has “emotional, romantic or sexual attractions to both men and women.” *Id.* Queer “serves as an umbrella term for all non-heterosexual, non cis-gender identities.” *Id.* Asexuality refers to individuals who are not attracted to any sex or gender. *Id.* Pansexuality refers to the “attraction to others regardless of sex or gender.” *Id.* Although there are categories of sexuality explained above, research further suggests that one’s sexuality may change over time. *See id.*

<sup>7</sup> David Huante, *The Amherst College Queer Resource Center’s Terms, Definitions, and Labels*, AMHERST C., <https://www.amherst.edu/system/files/Queer%2520Definitions%2520QRC%25208.14.pdf> (last visited Jan. 14, 2019).

<sup>8</sup> *Sexual Orientation and Homosexuality*, AM. PSYCHOLOGY ASS’N, <https://www.apa.org/topics/lgbt/orientation.aspx> (last visited Oct. 13, 2018) (“Sexual orientation is commonly discussed as if it were solely a characteristic of an individual, like biological sex, gender identity or age. This perspective is incomplete because sexual orientation is defined in terms of relationships with others. People express their sexual orientation through behaviors with others, including such simple actions as holding hands or kissing. Thus, sexual orientation is closely tied to the intimate personal relationships that meet deeply felt needs for love, attachment and

### B. *Forms of Discrimination*

In light of the spectrum, discrimination on this basis may manifest in four principle ways: direct discrimination, indirect discrimination, harassment, and victimization. First, direct discrimination can occur “when someone treats you worse than another person in a similar situation because of [a protected characteristic].”<sup>9</sup> For example, refusing to hire someone simply based on sexual orientation would amount to direct discrimination. Second, in contrast, indirect discrimination occurs “when an [employer] has a particular policy or way of working that applies to everyone but which puts people of your [protected characteristic] at a disadvantage.”<sup>10</sup> An employer policy that prohibits homosexual conduct is a primary example of indirect discrimination.<sup>11</sup> Third, harassment occurs “when someone makes [an individual] feel humiliated, offended or degraded.”<sup>12</sup> An example of harassment could occur when gay employees are subjected to slurs from other employees.<sup>13</sup> Fourth, victimization, which can be legally termed as retaliation, occurs “when [a person is] treated badly because [they] have made a complaint of sexual orientation-related discrimination.”<sup>14</sup> All four principled forms of discrimination may occur in tandem as part of a single employee’s work experience.

## II. NOTEWORTHY PARALLELS AND DIFFERENCES ACROSS ALL THREE COUNTRIES

This Part explains parallels between Canada, the U.S., and the U.K. The U.S., Canada, and the U.K. are comparable in a number of ways: history, legal culture, and legal system. All three countries have origins connected to Great Britain.<sup>15</sup> English is the official language spoken by the majority of all inhabitants.<sup>16</sup> The U.S. is a constitutional representative democracy, while

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intimacy.”).

<sup>9</sup> *Sexual Orientation Discrimination | Equality and Human Rights Comm’n*, EQUALITY AND HUM. RTS. COMM’N, <https://www.equalityhumanrights.com/en/advice-and-guidance/sexual-orientation-discrimination#act>.

<sup>10</sup> *Id.*

<sup>11</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.).

<sup>12</sup> EQUALITY AND HUM. RTS. COMM’N, *supra* note 9.

<sup>13</sup> *See, e.g., Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).

<sup>14</sup> EQUALITY AND HUM. RTS. COMM’N, *supra* note 12.

<sup>15</sup> *See generally supra* note 3 (describing the origins of the United States, United Kingdom, and Canada).

<sup>16</sup> *Top 5 Languages Spoken in Canada*, OFF. OF THE COMM’R OF OFFICIAL LANGUAGES, <https://www.clo-ocol.gc.ca/en/newsletter/2018/top-5-languages-spoken-canada>; *Languages Across Europe*, BBC News, [http://www.bbc.co.uk/languages/european\\_languages/countries/uk.shtml](http://www.bbc.co.uk/languages/european_languages/countries/uk.shtml); *The Most Spoken Languages in*

Canada and the U.K. are constitutional monarchies.<sup>17</sup> Notably, the U.K. is a sovereign country that consists of England, Wales, Scotland, and Northern Ireland.<sup>18</sup>

#### A. *Lawmaking Processes*

Turning to the legislative process, all three countries have lawmaking bodies at the federal level that follows a similar bicameral process.<sup>19</sup> Constitutions at the federal and state level determine how laws are promulgated in the U.S. The U.S. Constitution governs Congress, the bicameral legislative body that is responsible for creating federal laws.<sup>20</sup> Congress is comprised of the Senate and House of Representatives, which must each approve a new law by some form of a majority vote.<sup>21</sup> Thereafter, the bill must receive confirmation by the President, the highest executive official within the country.<sup>22</sup> The Parliament of Canada, which consists of the Monarch, Senate, and House of Commons, has constitutional authority to pass federal acts, which regulate national matters, while individual provinces may pass laws at the state level.<sup>23</sup> Within the U.K. system, Parliament encompasses the House of Lords and House of Commons.<sup>24</sup> Together they may promulgate two broad types of legislation: primary

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America, WORLD ATLAS, <https://www.worldatlas.com/articles/the-most-spoken-languages-in-america.html>.

<sup>17</sup> *Parliamentary Primer*, PARLIAMENT OF CAN., [https://lop.parl.ca/sites/Learn/default/en\\_CA/ParliamentaryPrimer](https://lop.parl.ca/sites/Learn/default/en_CA/ParliamentaryPrimer) (explaining that Canada is a constitutional monarchy); *UK: Constitution and Politics*, COMMONWEALTH, <http://thecommonwealth.org/our-member-countries/united-kingdom/constitution-politics> (stating that the U.K. is a constitutional monarchy); Eugene Volokh, *Is the United States of America a Republic or a Democracy?*, WASH. POST (May 13, 2015, 2:43 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/is-the-united-states-of-america-a-republic-or-a-democracy/> (discussing the debate on the U.S. as a democracy or republic).

<sup>18</sup> *UK Profile – Overview*, BBC NEWS, <https://www.bbc.com/news/world-europe-18023389> (last visited Jan. 10, 2019). In contrast to the U.S. and Canada, the U.K. does not have a written constitution. COMMONWEALTH, *supra* note 17. Its constitution is “made up of common law, statute law and conventions, and may be changed by a simple [Act of Parliament] without any special procedure or majority. *Id.*”

<sup>19</sup> *Legislative Process: Taking a Bill Through Parliament*, GOV’T OF THE U.K., <https://www.gov.uk/guidance/legislative-process-taking-a-bill-through-parliament> (last accessed Feb. 11, 2019); *The Canadian Legal System*, CAN. GUIDE, <http://www.thecanadaguide.com/basics/legal-system/> (last visited Oct. 25, 2018); *The U.S. Legal System: A Short Description*, FED. JUD. CTR., [https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U\\_S\\_Legal\\_System\\_English07.pdf](https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U_S_Legal_System_English07.pdf) (last visited Oct. 25, 2018).

<sup>20</sup> *How Laws Are Made and How to Research Them*, U.S. GOV’T, <https://www.usa.gov/how-laws-are-made> (last visited Oct. 26, 2018).

<sup>21</sup> *How a Bill Becomes Law*, CONGRESSMAN FRANK LUCAS, <https://lucas.house.gov/legislative-work/how-bill-becomes-law>.

<sup>22</sup> *Id.*

<sup>23</sup> CAN. GUIDE, *supra* note 19.

<sup>24</sup> *UK Legislation*, GEO. L. LIBR., <http://guides.ll.georgetown.edu/c.php?g=365741&p=2471215>.

2020]

COMING OUT &amp; CATCHING UP

2015

legislation and secondary legislation.<sup>25</sup> Primary legislation involves Acts of Parliament, which are the “supreme law of the [UK].”<sup>26</sup> To enact primary legislation, Parliament must agree on the text of the bill.<sup>27</sup> Thereafter, the bill must be given Royal Assent<sup>28</sup> to become an Act.<sup>29</sup> There are three types of Acts: Public General Acts, which are of “universal application;”<sup>30</sup> Private Acts, which affect “specified localities, entities or individuals;” and Hybrid Acts, which take on elements of the two previous types.<sup>31</sup>

Conflicts between state and federal law are resolved in favor of the federal cases or directives.<sup>32</sup> Under the Supremacy Clause of the U.S. Constitution, if there is conflict between a federal law and a state law, the federal law controls.<sup>33</sup> The Canada Constitution Act of 1982 establishes that provisions of the Constitution are supreme: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>34</sup> Primary legislation within the U.K. involves Acts of Parliament, which has “supreme legal authority in the UK.”<sup>35</sup> Although the U.K. does not have a formal constitution, the country has passed the most LGBTQ+ targeted federal laws in comparison to the other two countries.<sup>36</sup>

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<sup>25</sup> *Id.* Secondary Legislation, also known as Delegate Legislation, refers to “specialized rules and regulations issued by ministers or governmental entities acting under authority delegated to them by an Act of Parliament [above].” *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> GOV'T OF THE U.K., *supra* note 19.

<sup>28</sup> *Royal Assent*, PARLIAMENT (UK), <https://www.parliament.uk/site-information/glossary/royal-assent/> (describing the U.K.'s bill ratification process).

<sup>29</sup> GOV'T OF THE U.K., *supra* note 19.

<sup>30</sup> *Id.*

<sup>31</sup> GEO. L. LIBR., *supra* note 24.

<sup>32</sup> U.S. Const. art. VI, cl. 2 (1789) (“This Constitution, and the Laws of the U.S. which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the U.S., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); Constitution Act, 1867, 30 & 31 Vict., c. 3 (describing relationship between Canada’s federal preemption and state law); *Parliament’s Authority*, PARLIAMENT (U.K.), <https://www.parliament.uk/about/how/role/sovereignty/>.

<sup>33</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the U.S. which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the U.S., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (“In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”).

<sup>34</sup> Constitution Act, 1867, 30 & 31 Vict., c. 3.

<sup>35</sup> PARLIAMENT (U.K.), *supra* note 32.

<sup>36</sup> *See infra* Part V.B.

### B. Court Systems

Each country, in whole or majority, also follows a common law legal system.<sup>37</sup> Laws are interpreted and applied by courts at the federal and state level in the U.S. based on the authority within the Constitution.<sup>38</sup> Similar to the U.S., Canada inherited its common law legal system from Great Britain.<sup>39</sup> The highest court of each country has binding authority over lower courts. The Supreme Court of the U.S. is the “highest tribunal in the Nation for all cases and controversies” and “final arbiter of the law.”<sup>40</sup> The Supreme Court of Canada sits at the “apex” of the Canadian judicial structure as the final appeals court with jurisdiction over “disputes in all areas of law.”<sup>41</sup>

While the majority of the U.K. follows a common law model, the system, as a whole, is complex. England and Wales share a unified court system, while Scotland and Northern Ireland each have their own judicial systems.<sup>42</sup> The Supreme Court of the U.K. is the highest court of appeals for all U.K. civil and criminal cases that originate in England, Wales, and Northern Ireland.<sup>43</sup> In Scotland, the highest court for civil cases is The Court of Session.<sup>44</sup> This court divides into two branches: the Inner House (the primary

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<sup>37</sup> COMMONWEALTH, *supra* note 17.

<sup>38</sup> *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (“Article III of the Constitution establishes an independent Judiciary ... with the ‘province and duty ... to say what the law is’ in particular cases and controversies.”); *see also* FED. JUD. CTR., *supra* note 19.

<sup>39</sup> CAN. GUIDE, *supra* note 19. *But see id.* (explaining that Quebec, which was historically colonized by France, follows the civil law system).

<sup>40</sup> *The Court and Constitutional Interpretation*, U.S. SUP. CT. <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Oct. 26, 2018).

<sup>41</sup> *See Supreme Court of Canada – The Canadian Judicial System*, SUPREME COURT OF CAN., <https://www.scc-csc.ca/court-cour/sys-eng.aspx> (“In contrast to its counterpart in the United States, therefore, the Supreme Court of Canada functions as a national, and not merely federal, court of last resort.”).

<sup>42</sup> *Judicial Authority*, GEO. L. LIBR., <http://guides.ll.georgetown.edu/c.php?g=365741&p=4199181>.

<sup>43</sup> *The Supreme Court*, UK SUP. CT., <https://www.supremecourt.uk/>. The jurisprudence interpreted by U.K. courts is also linked to the European Court of Human Rights (ECHR). *See How the Human Rights Act Works*, LIBERTY HUM. RTS., <https://www.libertyhumanrights.org.uk/human-rights/what-are-human-rights/human-rights-act/how-human-rights-act-works> (explaining that the Human Rights Act (1998) requires courts to “take into account” any decision made by the ECHR, so long as they are relevant). Although judgments of the ECHR are not binding on U.K. courts, they must consider them in a way that is compatible with the rights given by the convention “so far as possible to do so.” *Id.* The ECHR ruled on one of the first U.K. cases to address issues of homosexuality. Comment, McKenzie A. Livingston, *Out of The “Troubles” and Into Rights: Protection for Gays, Lesbians, And Bisexuals in Northern Ireland Through Equality Legislation in The Belfast Agreement*, 27 *FORDHAM INT’L L. J.* 1207, 1216.

<sup>44</sup> *Id.*

2020]

COMING OUT &amp; CATCHING UP

2017

appeals court) and Outer House (for cases of “first instance”).<sup>45</sup> From the Inner House, civil cases may be heard by the Supreme Court of the U.K.<sup>46</sup>

### III. UNITED STATES

#### A. *Statutory History of Protections Against Employment Discrimination Based on Sexual Orientation*

The U.S. legislature has never passed a federal law to explicitly protect individuals on the basis of sexual orientation in private employment.<sup>47</sup> The U.S. Congress has a history of attempting to promulgate explicit LGBTQ+ workplace protections. After the 1969 Stonewall Riots, the Equality Act of 1974, which sought to ban discrimination on the basis of sexual orientation, was introduced to Congress.<sup>48</sup> Despite the social activism and recent passage of other civil rights legislation, the Act never made it out of the House Committee.<sup>49</sup> The Employment Non-Discrimination Act (ENDA) would have prohibited discrimination “on the basis of an individual’s actual or perceived sexual orientation or gender identity.”<sup>50</sup> Although the bill underwent legislative activity from 1994 to 2013, it failed to pass after multiple attempts.<sup>51</sup> Some observers have explained that the bill failed for various reasons: exclusion of gender identity as a protected characteristic, crowded legislative calendars, and the conservative make-up of the legislative body.<sup>52</sup> Following closely, the Equality Act was proposed in 2015 with promise to add sexual orientation and gender identity to the Civil Rights Act of 1964.<sup>53</sup> Although the current White House under Trump may be an obstacle, 200 members of Congress plan to bring the bill to fruition.<sup>54</sup>

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<sup>45</sup> *Court Structure*, JUDICIARY OF SCOT., <http://www.scotland-judiciary.org.uk/16/0/Court-Structure>.

<sup>46</sup> *Id.*

<sup>47</sup> Compare Steve Jones, *Sexual Orientation Discrimination In The Workplace*, 17 No. 3 Ark. Emp. L. Letter 3 (“There are currently no federal statutes prohibiting private-sector sexual orientation discrimination in the workplace.”), with 42 U.S.C.S. § 2000e-2.

<sup>48</sup> *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> (last visited Feb. 12, 2019).

<sup>49</sup> *Id.*

<sup>50</sup> S. REP. NO. 113-105 (2013).

<sup>51</sup> Ed O’Keefe, *ENDA, Explained*, WASH. POST, <https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act->

<sup>52</sup> CTR. FOR AM. PROGRESS, *supra* note 48.

<sup>53</sup> *Over 200 Members of Congress File Federal LGBTQ+-Rights Bill*, NBC NEWS (May 2, 2017, 5:28 PM), <https://www.nbcnews.com/feature/nbc-out/over-200-members-congress-file-federal-LGBTQ+-rights-bill-n754006>.

<sup>54</sup> *Id.*

Without more, federal LGBTQ+ workplace protections are left to judges to interpret under the Civil Rights Act of 1964.

After the longest continuous debate in the U.S. Senate's history, the Civil Rights Act of 1964 was passed.<sup>55</sup> Title VII of the Civil Rights Act of 1964 ("Title VII") is a "broad remedial measure, designed to assure equality of employment opportunities."<sup>56</sup> The Act also created the Equal Employment Opportunity Commission (EEOC), an agency that is responsible for the enforcement of federal employment anti-discrimination laws.<sup>57</sup> In creating the EEOC, Congress sought to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of ... impermissible classification."<sup>58</sup> As an enforcing agency, the administrative interpretation of Title VII constitutes "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>59</sup> The EEOC has its own administrative tribunal that may adjudicate claims that arise from other federal agencies.<sup>60</sup>

The U.S. legal system affords protections to employees from sex-based discrimination through Title VII.<sup>61</sup> Title VII served as the primary vehicle for LGBTQ+ plaintiffs to bring sexual orientation discrimination claims under federal law.<sup>62</sup> In relevant part, the law forbids discrimination based on sex: "It shall be an unlawful employment practice 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]."<sup>63</sup> This provision, "because of ... sex," forms the centerpiece of the legal argument for recognizing claims of sexual orientation discrimination.<sup>64</sup>

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<sup>55</sup> *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE <https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm> (last visited Oct. 13, 2018).

<sup>56</sup> Pullman-Standard, Div. of Pullman v. Swint, 456 U.S. 273, 276, (1982) (internal quotations omitted).

<sup>57</sup> *Milestones*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html> (last visited Oct. 26, 2018); *About EEOC: Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/> (last visited Oct. 26, 2018).

<sup>58</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (internal quotations omitted).

<sup>59</sup> Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

<sup>60</sup> *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm) (describing the appeals process for federal employment claims by employees within federal agencies).

<sup>61</sup> 42 U.S.C. § 2000e-2.

<sup>62</sup> See generally *supra* Part III.B.

<sup>63</sup> 42 U.S.C. § 2000e, *et seq.*

<sup>64</sup> See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

### B. *LGBT Progress Through Litigation*

Notwithstanding the lack of express LGBTQ+ protections by statute, litigants have resorted to advocacy through civil rights litigation. By tracing noteworthy U.S. judicial decisions related to LGBT individuals, a trend toward protection is revealed. Even more, by looking at recent decisions that involve employment law protections, it shows that the Supreme Court has expanded the definition of discrimination because of sex. With this in mind, courts have split on whether sexual orientation discrimination may be recognized as a form of sex discrimination. These decisions are grouped into subsections based on whether they deny or afford protections and are analyzed in chronological order.

LGBTQ+ citizens have relied on courts for progressive legal change. In *One, Inc. v. Olesen*, one of the first cases to address an LGBT issue at the federal level, the Court held that pro-LGBTQ+<sup>65</sup> writing is not *per se* obscene—thus promoting free speech rights.<sup>66</sup> Almost fifty years later, the Court held that a state law prohibiting explicit protection of individuals based on sexual orientation violated the Equal Protection Clause.<sup>67</sup> In *Lawrence v. Texas*, the U.S. Supreme Court legalized intimate conduct between consenting same-sex individuals, overruling the Court’s prior decision in *Bowers v. Hardwick*.<sup>68</sup> In *U.S. v. Windsor*, the Supreme Court ruled that a federal provision that limited the terms “marriage” and “spouse” to heterosexual couples violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution.<sup>69</sup> In *Obergefell v. Hodges*, the Court further established that the right to marry is extended to same-sex couples.<sup>70</sup> Most recently in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, the Court had occasion to rule on whether religious beliefs justify the refusal of services to LGBTQ+ individuals, but remanded the case for lack of neutral consideration by the state commission.<sup>71</sup>

Turning to employment, recent cases in federal courts display a broader understanding of Title VII that favors expansion of protections in legal areas similar to sexual orientation.<sup>72</sup> In *Los Angeles Dept. of Water and Power v.*

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<sup>65</sup> LGBTQ+ refers to the general population of lesbian, gay, bisexual and transgender individuals. This term is interchangeably used with the phrase “gays and lesbians” throughout this decision.

<sup>66</sup> *One, Inc. v. Olesen*, 355 U.S. 371 (1958).

<sup>67</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>68</sup> *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>69</sup> *U.S. v. Windsor*, 570 U.S. 744, 775 (2013).

<sup>70</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>71</sup> *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018).

<sup>72</sup> J. Dalton Courson, *Circuit Split on Interpretations of Title VII and Sexual-Orientation-Based Claims*,

*Manhart*, the Supreme Court held that employers may not discriminate based on traits that are a function of sex, such as life-expectancy.<sup>73</sup> In *Price Waterhouse v. Hopkins*, the Court held that Title VII prohibits employment decisions on the basis of gender-based stereotypes, which includes non-conformity with one's sex.<sup>74</sup> In *Phillips v. Martin Marietta Corp.*, the Court held that employers cannot discriminate on the basis of sex plus other factors, namely having different standards for men and women who have school-age children.<sup>75</sup> In *Meritor Savings Bank, FSB v. Vinson*, the Court recognized sexual harassment as a form of sex discrimination—more specifically prohibiting an employer taking an action with an employee's sex in mind.<sup>76</sup> And perhaps most pertinent to sexual orientation, the Court, in *Oncale v. Sundowner Offshore Servs.*, recognized the prohibition of same-sex harassment in the workplace, which “was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”<sup>77</sup> These legal principles have appeared within the jurisprudence of federal circuits and agencies that have expanded Title VII to prohibit sexual orientation discrimination.<sup>78</sup>

However, federal law does not provide explicit legal protections to employees from sexual orientation discrimination.<sup>79</sup> In lieu of this, federal courts have not reached a consensus on the availability of federal protections against sexual orientation discrimination, to say the least.<sup>80</sup> The interpretation of the “because ...of sex” provision under Title VII is the primary point of contention between federal circuits, splitting them into two camps.<sup>81</sup> The majority of federal circuits within the U.S. legal system have interpreted Title VII in a way that does not provide workplace protections

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AM. B. ASS'N (Mar. 19, 2018), <https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2018/circuits-split-on-interpretations-of-title-vii-and-sexual-orientation-based-claims.html>.

<sup>73</sup> L.A. Dept. of Water and Power v. Manhart, 435 U.S. 702, 707–08 (1978).

<sup>74</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”); see also *Manhart*, 435 U.S. at 707 (“It is now well recognized that employment decisions cannot be predicated on mere “stereotyped” impressions about the characteristics of males or females.”).

<sup>75</sup> Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971) (per curiam).

<sup>76</sup> Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

<sup>77</sup> Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79–80 (1998).

<sup>78</sup> *Zarda*, 883 F.3d at 108; *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); Baldwin v. Foxx, EEOC Decision No. 120133080 (July 16, 2015).

<sup>79</sup> *Lesbian, Gay, Bisexual, and Transgender Workplace Issues: Quick Take*, CATALYST, [https://www.catalyst.org/knowledge/lesbian-gay-bisexual-transgender-workplace-issues#footnoteref16\\_39i39c8](https://www.catalyst.org/knowledge/lesbian-gay-bisexual-transgender-workplace-issues#footnoteref16_39i39c8).

<sup>80</sup> Courson, *supra* note 72.

<sup>81</sup> Compare *supra* note 78, with *infra* note 91.

from sexual orientation discrimination.<sup>82</sup> Reading the statute narrowly, the interpretation would not include sex because the text of Title VII does not explicitly mention sexual orientation as a protected basis.<sup>83</sup> In contrast, some courts have seemingly prioritized the purpose of the statute over its text; they held Title VII includes prohibitions on sexual orientation discrimination based on the statute's intent.<sup>84</sup> As alluded to above, the Supreme Court has accepted the call to rule on the availability of federal LGBTQ+ workplace protections under Title VII by accepting a consolidated appeal for decision during the U.S. Supreme Court's 2020 term.<sup>85</sup>

### C. Cases Affording Title VII Protections On The Basis Of Sexual Orientation

The EEOC was one of the first federal tribunals in the U.S. to find sexual orientation discrimination to be a violation of Title VII. In *Baldwin v. Foxx*, the Commission held for the first time that “sexual orientation is inherently a ‘sex-based consideration;’ accordingly an allegation of discrimination based on sexual orientation is an allegation of sex discrimination under Title VII.” When framing the issue, the tribunal clarified that sexual orientation discrimination claims should be adjudged on “whether the agency has ‘relied on sex-based considerations’ or [took] gender into account.”<sup>86</sup> The agency concluded that “sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.”<sup>87</sup>

Three overarching arguments have been accepted by federal courts that recognize sexual orientation as a protected basis under Title VII. First, sexual orientation discrimination is a function of sex discrimination—sex is necessarily a factor in sexual orientation because “one cannot fully define a person's sexual orientation without identifying his or her sex, sexual

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<sup>82</sup> Courson, *supra* note 72.

<sup>83</sup> See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (holding that Title VII does not provide explicit protection for sexual orientation); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (same).

<sup>84</sup> See generally *infra* note 78.

<sup>85</sup> *Supreme Court Will Hear Cases On LGBTQ Discrimination Protections For Employees*, NAT'L PUB. RADIO, <https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>.

<sup>86</sup> *Baldwin*, EEOC Decision No. 120133080, at 12.

<sup>87</sup> *Id.*; see also *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002) (“Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone.”)

orientation is a function of sex.”<sup>88</sup> Second, an employer may not consider sexual orientation in employment decisions as it amounts to discrimination based on stereotypes about sex.<sup>89</sup> Third, an employee may equally prove sex discrimination under the associational discrimination framework.<sup>90</sup>

#### *D. Denying Title VII Protection On The Basis Of Sexual Orientation*

In contrast, the majority of federal circuit courts in the U.S. have held that sexual orientation discrimination is not recognized under Title VII. All but two federal judicial circuits to date have found Title VII to not include sexual orientation as a protected characteristic.<sup>91</sup> Adding to this discourse, the dissent in *Zarda v. Altitude Express* explained that Congress has not seen fit to include sexual orientation as a protected category: “[t]hose groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not ... Congress is permitted to choose what types of social problems to attack and by which means.”<sup>92</sup>

<sup>88</sup> *Zarda*, 883 F.3d at 113; cf. *Baldwin*, EEOC Decision No. 120133080, at 12–14.

<sup>89</sup> *Zarda*, 883 F.3d at 119 (“Sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.”); *Hively*, 853 F.3d at 346–47.

<sup>90</sup> *Zarda*, 883 F.3d at 128 (stating that this type of discrimination is “motivated by ‘disapprov[al] of [a particular type of] association’”); *Hively*, 853 F.3d at 347–49.

<sup>91</sup> *Higgins*, 194 F.3d at 259 (“Title VII does not proscribe [discrimination] simply because of sexual orientation.”); *Bibby*, 260 F.3d at 261 (“Title VII does not prohibit discrimination based on sexual orientation.”); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) (abrogated on other grounds by *Oncale*, 523 U.S. at 118) (“Title VII does not afford a cause of action for discrimination based upon sexual orientation ...”); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) (“Discharge for homosexuality is not prohibited by Title VII ...”); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) (citing *De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330 (9th Cir. 1979)) (“Title VII does not prohibit discrimination against [LGBT individuals].”); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc) (“[A]n employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action ...”); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections, however, do not extend to harassment due to a person’s sexuality ... Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”) (internal quotations omitted); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1261 (11th Cir. 2017) (Pryor, J. concurring) (“Because Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court.”); *Diaz v. Wash. Metro. Area Transit Auth.*, 243 F. Supp. 3d 86, 89 (D.D.C. 2017) (citations omitted) (“Title VII does not prohibit discrimination based on sexual orientation or sexual preference.”).

<sup>92</sup> *Zarda*, 883 F.3d at 147–48 (2d Cir. 2018) (Lynch, J. dissenting) (emphasis added); see also *id.* (internal citations omitted) (“When Representative Emanuel Celler of New York, floor manager for the Civil Rights Bill in the House, rose to oppose Representative Smith’s proposed amendment, he expressed concern that

2020]

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A major contention of Judge Lynch’s dissenting opinion also relies on the anti-gay history surrounding the passage of Title VII. At this time, members of the LGBTQ+ community were stigmatized as suffering from mental illness during this time.<sup>93</sup> Roughly ten years before the passage of Title VII, an executive order was passed that allowed “[assumedly gay federal employees to be] systematically hounded out of the service as “security risks” during Cold-War witchhunts.” Protection for discrimination on the basis of sexual orientation could not have been on the minds of legislators for debate at the time of Title VII.<sup>94</sup> To this point, the dissent also notes that there have been over fifty proposals and rejections to add sexual orientation to Title VII.<sup>95</sup> While cautioning reliance on legislative inaction, the opinion notes that—with this many failed attempts—it is unreasonable to believe Title VII’s sex discrimination provision encompasses sexual orientation.<sup>96</sup>

#### IV. CANADA

##### A. *Relevant Statutory History*

With the earliest adoptions of sexual orientation discrimination protection in the work place, Canada is a frontrunner in progressive

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it would lead to such supposed travesties as the elimination of ‘protective’ employment laws regulating working conditions for women, drafting women for military service, and revisions of rape and alimony laws. He did not reference the prohibition of sexual orientation discrimination. The idea was nowhere on the horizon.”) *But see Oncale*, 523 U.S. at 78–80 (“[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”). Although judges are bound by precedent to rule otherwise, as seen in the cases above, a number of federal court judges have expressed negative sentiments toward sexual orientation discrimination. The First Circuit Court of Appeals asserted that “[discrimination] because of sexual orientation ... is a noxious practice, deserving of censure and opprobrium.” *Higgins*, 194 F.3d at 259. To that point, the *Zarda* dissent’s Judge Lynch concedes that “[none of the opinion’s reasoning] remotely suggest[s] that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong.” 883 F.3d at 148. These accounts, along with others, highlight judicial interest in providing protection from this form of discrimination. *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 140.

<sup>95</sup> *Id.* at 155.

<sup>96</sup> *Id.* *But see* Cary Franklin, Comment, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1379–1380 (“Yet, ... the notion that sex discrimination refers only, and always, to practices that divide workers into two perfectly sex-differentiated groups was not deeply rooted in American history—it emerged in response to the passage of the 1964 Civil Rights Act. They developed an arsenal of arguments for limiting the statute’s reach, and among them was the argument that Title VII’s prohibition of sex discrimination should be interpreted in a narrow, formalistic way.”).

legislation. The civil rights of Canadian citizens are enumerated in the Canadian Charter of Rights and Freedoms.<sup>97</sup> One of the most important provisions of the Act is § 15(1), which provides equal benefit and protection of the law to all citizens of Canada: “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>98</sup>

Similar to the U.S. Civil Rights Act of 1964, Canada has federal employment regulations that prohibit discrimination on the basis of protected characteristics—but with a notable difference.<sup>99</sup> In 1996, Canada amended the Canadian Human Rights Act (“CHRA”) to include sexual orientation as one of the prohibited grounds of discrimination.<sup>100</sup> In relevant part, the Act states: “It is a discriminatory practice, directly or indirectly, [hire, terminate, or publish a written or verbal advertisement for employment] that expresses or implies limitation, specification or preference based on ‘sexual orientation.’”<sup>101</sup> The CHRA also created the Canada Human Rights Commission, which works with lawmakers to provide research and policy, administer complaints, and audit federal government equality compliance.<sup>102</sup> The Canada Human Rights Commission is analogous to the EEOC in the U.S.

#### *B. Canadian Cases Interpreting Employment Protections Based On Sexual Orientation*

Four years prior to the sexual orientation amendment of the Canadian Human Rights Act, there was a pro-LGBTQ+ decision by Canada’s Court of Appeals that read sexual orientation protections into a previous version of the Act.<sup>103</sup> The Court held that the Act should be “interpreted, applied and administered as though it contained ‘sexual orientation’ as a prohibited ground of discrimination under [section] 3 of the Act.”<sup>104</sup> In *Haig v. Canada*,

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<sup>97</sup> *Id.*

<sup>98</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, (UK), c. 11, 1982.

<sup>99</sup> Canadian Human Rights Act, 1985, c. H-6, *reprinted in* R.S.C. 2017 (Can.).

<sup>100</sup> *Id.* In 2017, Canada amended the Canadian Human Rights Act to also protect gender identity or expression. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *About Us*, CANADIAN HUMAN RIGHTS COMM’N, <https://www.chrc-ccdp.gc.ca/eng/content/about-us>.

<sup>103</sup> *Haig v. Canada* (1992), 16 C.H.R.R. D/226 (Ont. C.A.)

<sup>104</sup> *Id.*

a captain within the Canadian Armed Forces filed suit against his employer. The plaintiff was barred from “promotions, postings and further military career training” after disclosing his sexual orientation to his commanding officer.<sup>105</sup> He testified that the new career restrictions caused such “humiliation and stigmatization” that he was unable to continue working under these conditions.<sup>106</sup> Because of his inability to work with the new restrictions, he was released on medical grounds, which indicated that he was “unfit for further employment with the Canadian Armed Forces.”<sup>107</sup> The Court noted that the Canadian Attorney General has recognized sexual orientation as a covered ground in Section 15 of the Canadian Charter.<sup>108</sup> The Court followed by stating that the “larger context, social, political and legal, must also be considered [when considering whether homosexuals are the object of discrimination on analogous grounds.]”<sup>109</sup> Following Canadian precedent, the Court “read in” sexual orientation into the Act, ultimately reasoning that this protection “not only leaves the purpose of the Act intact, but enhances it by making it conform to Charter values.”<sup>110</sup>

### C. Canadian Judiciary’s Stance On Provincial Legislation

After the sexual orientation amendment of CHRA, Canada’s Supreme Court overturned provincial legislation that did not include protections from sexual orientation discrimination. In *Vriend v. Alberta*, a gay employee was terminated shortly after an inquiry into his sexuality by his employer.<sup>111</sup> Prior to his termination he had a history of positive reviews and salary increases related to his work performance.<sup>112</sup> The sole reason stated for the employee’s termination was his non-compliance with the employer’s policy on homosexual practice.<sup>113</sup> As a result of his termination, the plaintiff filed a complaint with the provincial human rights commission.<sup>114</sup>

First, the Court began its analysis by reinforcing the relationship between judicial review and deferral to legislature. In this case, the province’s legislation omits sexual orientation as a protected ground, which included

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

characteristics like “race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.”<sup>115</sup> Respondents argued that with the province’s legislature choosing not to include sexual orientation—a legislative omission—the Court should defer to this choice.<sup>116</sup> The *Vriend* Court advised that “[t]he notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from Charter scrutiny.”<sup>117</sup> The Court addressed this argument by stating that “it is the Constitution, which must be *interpreted by the courts*, that limits the legislatures.”<sup>118</sup> If the respondents’ argument was accepted, “the form, rather than the substance, of the legislation would determine whether it was open to challenge [which is] illogical and more importantly unfair.”<sup>119</sup> This goes to say that the respondent’s argument would allow discriminatory legislation so long as it is not affirmatively stated, defying the supposed aims of the Charter.<sup>120</sup>

Second, under Canadian precedent, the Court analyzed the substance of the legislation by determining: “(1) whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and (2) whether this denial constitutes discrimination on the basis of an enumerated or analogous ground.”<sup>121</sup> Under the first prong, the Court finds a distinction for two reasons. First, formal protection for lesbians and gays is comparable to the other characteristics enumerated in the Act.<sup>122</sup> The Court emphasized that the “under inclusive state [of the province’s legislation] denies substantive equality to [lesbians and gays].”<sup>123</sup> As elaborated in the opinion: “the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals.”<sup>124</sup> Under the second prong, the Court noted that the effect of the distinction is that “lesbians or gay men who experience

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<sup>115</sup> *Id.* at 10.

<sup>116</sup> *Id.* at 51.

<sup>117</sup> *Id.* at 54.

<sup>118</sup> *Id.* at 56 (emphasis added).

<sup>119</sup> *Id.* at 61.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 74.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

discrimination ... are denied recourse [and a legal remedy],”<sup>125</sup> thus sending the message “that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation.”<sup>126</sup> Finally, the Court noted public policy concerns stating, “[f]ear of discrimination will logically lead to concealment of true identity” and the implication that gays and lesbians “are not worthy of protection.”<sup>127</sup> In light of the above, the Court interprets the rule to include protections to individuals on the basis of sexual orientation.<sup>128</sup>

## V. UNITED KINGDOM

### A. *Struggles Before Legislative Action*

In comparison to the U.S., the LGBTQ+ population in the U.K. has not seen as much progress through courts. In *Dudgeon v. U.K.*, the ECHR overturned legislation that criminalized homosexual conduct between men in Northern Ireland, setting a precedent for the entirety of the sovereign nation.<sup>129</sup>

Turning to LGBTQ+ protections in the workplace, the U.K. previously denied workplace protections to LGBTQ+ individuals.<sup>130</sup> The U.K. heard arguments that sexual orientation discrimination is derivative of sex discrimination, analogous to the *Zarda* holding.<sup>131</sup> In *Smith v. Gardner Merchant*, the Court held that sex discrimination does not encompass sexual orientation discrimination.<sup>132</sup> In this case, an employee, a gay male, was terminated because of complaints from a “homophobic colleague” that “he had diseases” and “should be put on an island.”<sup>133</sup> The employee sued for wrongful termination, claiming that he would have been treated differently

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<sup>125</sup> *Id.* at 97.

<sup>126</sup> *Id.* at 101.

<sup>127</sup> *Id.* at 102.

<sup>128</sup> *Id.*

<sup>129</sup> *Dudgeon v. UK*, App. No. 7525/76, 3 Eur. H.R. Rep. 40, 54 (1982).

<sup>130</sup> *Grant v. South-West Trains*, Case C-249/96, 1998 E.C.R. I-621 (stating that the appropriate comparison for finding discrimination for a lesbian woman is to a gay man); *R. v. Sec’y of State*, [1997] I.R.L.R. 297 (Q.B.) (upholding government policy that barred enlistment in the armed forces on the basis of sexual orientation).

<sup>131</sup> See *Regina v. Ministry of Defense ex parte Smith*, [1996] Q.B. 517, *affid.*, [1996] Q.B. 551 (Eng. C.A.) (denying that sexual orientation discrimination is derivative of sex discrimination); *Smith v. Gardner Merchant*, [1996] I.C.R. 790 (E.A.T.), *appeal allowed*, [1998] 3 All E.R. 852, 875 (C.A.) (same).

<sup>132</sup> *Smith*, [1996] I.C.R. 790 at 875.

<sup>133</sup> *Id.*

if he would have been a homosexual woman.<sup>134</sup> The court stated that the issue turned on the employee's sexuality rather than his sex.<sup>135</sup> It continued that "nothing [in the current legislation] suggests that the draftsmen of those instruments were addressing their minds in any way whatever to problems of discrimination on grounds of sexual orientation."<sup>136</sup> On these grounds, the Court stated that sexual orientation discrimination is not derivative of sex discrimination.<sup>137</sup> With obstacles through courts, the U.K. LGBTQ+ community has seen stronger results through its formal legislation process.

### *B. Legislation*

The U.K., unlike both the U.S. and Canada, has a more robust history of legislation targeting the LGBTQ+ community. The Buggery Act of 1533 criminalized sodomy between males.<sup>138</sup> Following the Buggery Act, the Criminal Law Amendment (1885) criminalized any homosexual conduct between males.<sup>139</sup> Legislation specifically affecting LGBT communities changed after the Wolfenden Report (1957), which recommended the decriminalization of same-sex relations.<sup>140</sup> Roughly ten years after the report's initial publication, the Sexual Offences Act (1967) was passed by Parliament to legalize private same-sex acts between men over 21 years old.<sup>141</sup> The legislative tide turned again with the passage of Section 28 of the Local Government Act (1988), which prohibited the promotion of homosexuality and halted funding for LGBTQ+ education.<sup>142</sup> The Act was in place for over twenty years before its repeal in 2003.<sup>143</sup> For the next ten years, a series of acts were promulgated to recognize same-sex marriage in England, Scotland, and Wales.<sup>144</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Steven Dryden, *A Short History of LGBT Rights in the UK*, BRITISH LIBR., <https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk>.

<sup>139</sup> *Id.* Lesbianism was never specifically discussed in Parliament until about 40 years later. *Id.* Even then, acts proscribing this type of behavior between women failed because legislators did not want to "encourage" women to explore female-to-female conduct. *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Namely, Parliament passed the Civil Partnership Act (2004) (U.K.) and Marriage (Same-Sex Couples) Act (2013) (U.K.). *See* Dryden, *supra* note 138. To date, same-sex marriage is not recognized in Northern Ireland. *Id.*

Focusing specifically on LGBT employment legislation, the U.K. Parliament has passed two far-reaching pieces of legislation that deal with LGBTQ+ workplace protections in the last twenty years. First, the U.K. passed its first federal directive directly dealing with LGBTQ+ discrimination: the Employment Equality (Sexual Orientation) Regulations 2003 (colloquially called the “Employment Directive”).<sup>145</sup> The Directive explicitly protected employees from discrimination on the basis of sexual orientation.<sup>146</sup> The Directive was advanced for two reasons: (1) simple justice and fairness and (2) new interpretations by courts to recognize same sex protections. “If lesbian and gay people [are] regarded as equal [then] their same sex relationships should be treated with equal respect.”<sup>147</sup> Just prior to the Directive, recent advancements in housing law began recognizing protections for same-sex relationships.<sup>148</sup>

Second, Parliament passed The Equality Act (2010), which prohibits sexual orientation discrimination in the workplace.<sup>149</sup> The Act explicitly lists sexual orientation as a protected characteristic<sup>150</sup> and aims to advance equal opportunity.<sup>151</sup> Compared to the U.S. and Canada, there are parallels in employee protections.<sup>152</sup> The prohibited employer activities include consideration of a sexual orientation when making decisions about hiring, termination, promotion, transfer, or terms of employment.<sup>153</sup>

### C. Judicial Interpretation Of Sexual Orientation

Analyzing case law under the two acts above, *Whitfield v. Cleanaway U.K.* was one of the first successful sexual orientation discrimination cases after the Employment Directive.<sup>154</sup> In this case, an employee was subject to harassment for several months because of the homophobic environment

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<sup>145</sup> *Employment Equality Regulations: Religion and Sexual Orientation Research Paper*, HOUSE OF COMMONS LIBR., <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP03-54#fullreport>.

<sup>146</sup> *An Introduction to the Equality Act 2010*, EQUALITY AND HUM. RTS. COMM’N, <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act> (last visited Oct. 20, 2018).

<sup>147</sup> *Id.* at 35.

<sup>148</sup> *Id.*

<sup>149</sup> The Equality Act, 2010, c 15 (U. K.).

<sup>150</sup> *Id.* at P.4.

<sup>151</sup> *Id.* at P.1.

<sup>152</sup> Compare The Equality Act 2010, P. 4, with 42 U.S.C. § 2000e- *et seq.*, and Canadian Human Rights Act (2017), R.S.C., 1985, c. H-6.

<sup>153</sup> The Equality Act, 2010, c 15 (U.K.).

<sup>154</sup> *Anti-Gay Taunts Made My Life Hell*, GUARDIAN (U.K.), <https://www.theguardian.com/uk/2005/jan/30/gayrights.world>.

perpetuated by the employer.<sup>155</sup> Upon conclusion of the suit, the employee was awarded £35,345 (roughly \$40,000 USD), which he stated has shown that “[the Employment Directive] is a new weapon for [LGBTQ+ individuals] to use and I am proud that, despite the nightmare I’ve been through, I have publicised and clarified that for everyone else.”<sup>156</sup>

In *Lisboa v Realpubs Ltd. & Ors*, an appeals court deemed unlawful any employment policies that (1) treated lesbian and gay patrons less favorably, and (2) ultimately lead to the constructive discharge of employees. The employer, a gastropub operator, made changes to an establishment popular in the LGBTQ+ community.<sup>157</sup> The employee, an openly gay man, was directed to implement two key policies: (1) placing a sign that read “this is not a gay pub” in the front of the establishment; and (2) seating customers who did not appear to be gay in more prominent places within the pub.<sup>158</sup> The employee also alleged that the director of the pub terminated another employee because of his attractiveness to gay customers, criticized gay behaviors in other employees, and referred to some gay customers as “queens.”<sup>159</sup> The employee resigned and brought a claim of constructive wrongful dismissal.<sup>160</sup> The initial employment tribunal denied the claim because the Court found that the employer resigned from mistaken perceptions about the homophobic policy rather than the director’s offensive treatment.<sup>161</sup>

The Court began its analysis by stating that the employee’s perception of the homophobic policies was not mistaken.<sup>162</sup> The Court highlighted the fact that the use of “disparaging language” on three separate occasions, the termination of certain employees, and the seating policy when taken together “plainly and unarguably [make] the case that gay customers were treated less favourably on the grounds of their sexual orientation.”<sup>163</sup> Finally, the Court explained that the constructive dismissal claim is based on two theories. The employee’s resignation was in response to the unlawful discrimination, which amounted to a repudiatory breach accepted by the employee.<sup>164</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *English*, [2008] EWCA Civ 1421 at para 4.

<sup>158</sup> *Id.* at para 6i-iii.

<sup>159</sup> *Id.* at para 6v,viii, ix.

<sup>160</sup> *Id.* at para 10.

<sup>161</sup> *English*, [2008] EWCA Civ 1421 at para 26.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at para 25–26.

<sup>164</sup> *Id.* at para 28.

Conversely, the three discriminatory remarks were a contributory factor in the employee's resignation, which the Court held was sufficient to make out a discrimination claim.<sup>165</sup>

#### VI. PROPOSAL FOR ADDING SEXUAL ORIENTATION AS A PROTECTED GROUND FOR WORKPLACE DISCRIMINATION

This Comment argues for a dual-pronged strategy for federal LGBTQ+ workplace discrimination in the U.S., which includes new legislation from Congress and judicial interpretation by federal courts. This Section will analyze the costs and benefits of both prongs. Incorporating lessons from both the U.K. and Canada, these countries provide insight on the likelihood of each prong's success. In terms of new legislation from Congress, the U.K. provides a model on implementation and the use of a religious exemption. When litigants look to courts to advance progress, Canada teaches us that advocacy by expert agencies (e.g. Canadian Human Rights Commission) and the Canada Attorney General is integral in finding success for the LGBTQ+ community in courts. On balance, the promulgation of new legislation may prove to be the better solution as a statement of public consensus and legal legitimacy.

##### A. *Legislative Prong: Sexual Orientation Discrimination Protections Through Legislation*

Because of the likelihood that even the Supreme Court's holding could be overturned by later developments or subsequent legislation, the power may ultimately rest with Congress to provide explicit protection to LGBTQ+ workers. The U.K. provides an example of the use of legislation for LGBTQ+ rights.<sup>166</sup> The U.K.'s Parliament has a similar lawmaking process when compared to the U.S. Congress.<sup>167</sup> Both lawmaking bodies are bicameral and subject to political pressures of constituents throughout their respective nations.<sup>168</sup> By studying the progression of legislation throughout U.K.

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<sup>165</sup> *Id.* at para 28.

<sup>166</sup> *See* Part II.

<sup>167</sup> *Id.*

<sup>168</sup> *Compare The Two-House System*, PARLIAMENT (U.K.) (“[Some lawmakers are] publicly elected [and] debate the big political issues of the day and proposals for new laws.”) with Sarah Binder, *Going Nowhere: A Gridlocked Congress*, BROOKINGS, <https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress/> (“Some argue that [the gridlock in Congress] is a constant of American political life”).

history, it shows that legislation is possible through consistent advocacy by lawmakers.<sup>169</sup>

The legislative prong of providing workplace protections for the LGBTQ+ community allows for legal legitimacy: “formal amendments serve the function of mopping up pockets of resistance to a national consensus, making what otherwise would be merely a dominant rule into the universal rule.”<sup>170</sup> “Codification of [formal legislation] is a high priority in the early stages of a democracy because textual amendments build trust and understanding by making [discrimination] law explicit [to order politics].”<sup>171</sup>

Canada and the U.K. have both promulgated specific legislation to address the issue of sexual orientation discrimination. Canada, as a front runner in the push for LGBTQ+ workplace discrimination legislation, offers guidance by eliciting case law and legislation that show that LGBTQ+ individuals are the “object of invidious discrimination and are [a] historically disadvantaged group.”<sup>172</sup> Roughly fifteen years after the promulgation of Canada’s directives, the U.K. confirmed the Equality Act for the purpose of “reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics.”<sup>173</sup> These directives all align with what the legislature could hope to adopt to protect all of its American people. As evident from the discussion above, we could use explicit legislation as a tool and statement by the law for those who wish to protect themselves from sexual orientation discrimination. “Equal opportunity in the workplace for all should be a basic tenet that even the most ideologically divided Congress can agree upon.”<sup>174</sup>

When weighing both prongs, it is important to consider the power dynamic that the LGBTQ+ community must navigate. Scholars have noted that “[c]hanges in civil rights often pit minority groups against a majority refusing to recognize protections for new groups.”<sup>175</sup> This fact underscores

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<sup>169</sup> *Employment Equality Regulations: Religion and Sexual Orientation Research Paper*, HOUSE OF COMMONS LIBR., <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP03-54#fullreport>.

<sup>170</sup> David Strauss, Commentary, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1505.

<sup>171</sup> Jonathan Marshfield, Commentary, *Respecting the Mystery of Constitutional Change*, 65 BUFFALO L. REV. 1057, 1068.

<sup>172</sup> *See Haig*, 16 C.H.R.R. D/226 (Ont. C.A.).

<sup>173</sup> The Equality Act, 2010, c 15 (U.K.).

<sup>174</sup> CTR. FOR AM. PROGRESS, *supra* note 48.

<sup>175</sup> Marshfield, *supra* note 171, at 1072.

the necessity of courts: “when opponents of ... formal [legislation] lose, they will likely pursue their agenda in court by testing the limits of the formal amendment.”<sup>176</sup> Even more importantly, “courts may be relatively more sympathetic to minority interests because they are generally tasked with checking the political branches through the enforcement of individual rights.”<sup>177</sup> “In general, the more difficult it is to formally amend the constitution, the more likely it is that adjustments will be made through judicial interpretation.”<sup>178</sup>

### *B. Litigation Prong: Advancing LGBT Employment Protections Through Courts*

As explained above in Part III, the bulk of rights for LGBTQ+ individuals within the U.S. have been brought about through case law.<sup>179</sup> As seen in *Zarda*, the interpretation is viable. Title VII sets a precedent for the federal system’s interest in solving these kinds of issues. Twenty-eight of the fifty states have not enacted laws that protect LGBTQ+ individuals within the workplace.<sup>180</sup> The issue of LGBTQ+ protections in the workplace could turn on a question of interpretation rather than promulgation of new law. Canada’s CHRC efforts seem to have spearheaded the implementation of pro-LGBTQ+ protections in the workplace.

#### *1. Canada’s “Reading In” Technique*

Canada’s “reading in” technique sits at odds with the settled power of courts for judicial review in the U.S. As mentioned above in the discussion of *Haig v. Canada*, the Court explained that “reading in” protections for LGBTQ+ workers was a proper justification.<sup>181</sup> In *Haig*, reading in enhanced the purpose of the Act by making it “align with Charter values and did not change the nature of the legislative scheme.” Further, this technique “would be less intrusive than the total destruction of the objective that would result from striking the provision down.”<sup>182</sup> U.S. federal courts expressly prohibit the

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<sup>176</sup> *Id.* at 1074–75 (citing Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 L. & SOC’Y REV. 749, 756 (2012)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1065 (citing 1 INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, CONSTITUTIONAL AMENDMENT PROCEDURES 13 (2014)).

<sup>179</sup> See Part III.B.

<sup>180</sup> CATALYST, *supra* note 79.

<sup>181</sup> *Haig*, 16 C.H.R.R. D/226 (Ont. C.A.).

<sup>182</sup> See *id.*

judiciary from making policy decisions of this type.<sup>183</sup> Case in point, courts are not able to explicitly create law in this way.<sup>184</sup> “The Court is not a legislature. The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely [...] has long since been discarded.”<sup>185</sup> The reasoning of *Haig* is pertinent to the judicial restraint consideration that is central to Title VII’s application to sexual orientation discrimination: it is the law which must be interpreted by courts in light of the aims behind them.<sup>186</sup> In this balance between judicial restraint and full-faith interpretation, courts should favor interpretation as authorized by Article III of the U.S. Constitution.<sup>187</sup>

### C. *Political Pressures: Litigation Setbacks In the Current American Legal System*

Even following the directives from Canada’s history, the use of employment agencies could prove to be unavailable at this time. On January 25, 2017, President Donald Trump appointed Victoria A. Lipnic to serve as the Acting Chair of the EEOC.<sup>188</sup> This raises an issue of concern for some LGBTQ+ advocates because Lipnic did not join in the EEOC’s decision in *Baldwin v. Dep’t of Transp.*, which held that discrimination based on sexual orientation is a form of sex discrimination that violates Title VII.<sup>189</sup> Sources claim that Lipnic, will “rein back on the commission’s more progressive or activist policy efforts supported by the previous administration.”<sup>190</sup>

Turning to another avenue, if advocates pursue federal protections through courts, the U.S. Supreme Court could rule otherwise. Consistent with the dissent in *Obergefell v. Hodges*, courts may be reluctant to find protections for concern that they would “substitute their [social] beliefs for

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<sup>183</sup> See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“We do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”); cf. *Lochner v. New York*, 198 U.S. 45, 76, (1905).

<sup>184</sup> See generally U.S. CONST. art. III.

<sup>185</sup> *Obergefell*, 135 S. Ct. at 2611–2617.

<sup>186</sup> *Vriend*, [1998] 1 S.C.R. at 493.

<sup>187</sup> *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (“Article III of the Constitution establishes an independent Judiciary ... with the ‘province and duty ... to say what the law is’ in particular cases and controversies.”).

<sup>188</sup> Victoria A. Lipnic, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/lipnic.cfm>.

<sup>189</sup> *Baldwin v. Dep’t of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015); Paul Patten et al., *President Appoints Victoria Lipnic EEOC Acting Chair*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=2bdc6bbb-6cd1-4b4c-88e2-c1b010f587dd>.

<sup>190</sup> Benjamin I. Han & Kevin J. White, *Lipnic’s EEOC: A Look Into The Future Through The Past*, LAW 360, <https://www.law360.com/articles/909243/lipnic-s-eeoc-a-look-into-the-future-through-the-past>.

the judgments of legislative bodies, who are elected to pass laws.”<sup>191</sup> Indeed, it may be the case that courts should not short-circuit the decision by ruling on the issue of Title VII expansion. Alternatively, even if the court were to find that extension of Title VII includes varying sexualities as a protected class, Congress may still supersede the judgment of the Supreme Court by passing a statute.<sup>192</sup>

Nonetheless, litigation efforts could still serve three primary purposes. First, the litigation could continue the narrative for raising awareness around LGBTQ+ discrimination issues for the general public. Second, to the previous point, it could also be a record of the public sentiment for legislators. By citizens bringing suit, it shows the citizens’ expectation of redress through courts after being discriminated against on the basis of sexual orientation. Third, the stalled progress on the litigation front could underscore the need for Congress to address this issue and prompt the public to increase pressure on legislators to that effect.

#### CONCLUSION

LGBTQ+ protections within the workplace should include unified regulation at the federal level in the U.S. The interpretations of Title VII differ widely across circuits. The arguments range from being one of strict textual interpretation or aligning with the “spirit” or “intent” of the law when enacted by Congress, to reading the doctrine to include sexual orientation as inclusive of sex. To better protect LGBTQ+ citizens, the legislature or federal governments should create/interpret protections in favor of employees. By looking at countries like the U.K. and Canada, we learn that the broader international community has legislation that evidences concern for individuals’ rights not to be discriminated in all regards. Although political issues may cause obstacles, the U.K. and Canada both show that creating protections for the LGBTQ+ community is very much possible.

CLINTON FORD\*

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<sup>191</sup> See *Obergefell*, 135 S. Ct. at 261 (Roberts, C.J. dissenting) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

<sup>192</sup> See e.g., *General Electric Co v. Gilbert*, 429 U.S. 125 (1976) (abrogated by the Pregnancy Discrimination Act); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (abrogated by Civil Rights Act of 1991); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (abrogated by Lilly Ledbetter Fair Pay Act of 2009).

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special thanks to Professors Timothy R. Holbrook and Deborah Dinner for their wisdom, patience, and invaluable insight. To Sophia and Carolyn, thank you for your hard work in making this possible. And finally to my friends at Emory and the Black Law Students Association, thank you for your inspiration, authenticity, and support.