NOTE

WRONGFUL TERMINATION: A COMPARATIVE ANALYSIS OF EMPLOYMENT NON-DISCRIMINATION LAWS AND LGBTQ+ WORKPLACE PROTECTIONS IN SOUTH AFRICA AND THE UNITED STATES

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INTRODUCTION

Every American deserves the freedom and opportunity to dream the same dreams, chase the same ambitions, and have the same shot at success.[] A growing number of Americans recognize that their LGBTQ+ family members, friends, and neighbors deserve to be treated like everyone else in the United States. Yet today in America, in the majority of states, LGBTQ+ Americans live without the protection of fully-inclusive non-discrimination laws. I believe America is ready to take the next steps forward in the march for fairness, equality, and opportunity for every American. It is time to take bold legislative action.1

- U.S. Senator Tammy Baldwin

Although the United States has made great strides toward equality for its LGBTQ+ citizens in recent years, South Africa has demonstrated far greater progress concerning equal protection and employment non-discrimination of its LGBTQ+ citizens. The South African Constitution, for example, expressly prohibits all unfair discrimination on the basis of sex, gender, or sexual orientation, whether the government or a private party committed it. In December 2005—a whole decade before Obergefell v. Hodges2—the South African Constitutional Court handed down Minister of Home Affairs v. Fourie, a landmark decision that legalized marriage equality.3 Moreover, unlike the United States, South Africa has federal laws that prohibit employment discrimination against its LGBTQ+ citizens and provide them with robust workplace protections.

This Note contends that employment non-discrimination laws and workplace protections for LGBTQ+ citizens in the United States are woefully inadequate. Although some states

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3 2006 (1) SA 524 (CC) (S. Afr.).
afford robust protections for those who reside within their borders, many states do not. This results in a legal system in which some citizens are protected by law against employment discrimination on the basis of sexual orientation and gender identity while others are not. “[E]qual dignity in the eyes of the law” cannot and should not depend on one’s zip code. Thus, this Note further contends that the U.S.’ lawmakers and policymakers should look to South Africa as a model for implementing federal laws that prohibit employment discrimination against LGBTQ+ citizens and provide substantial workplace protections.

Although it is unlikely that the U.S. Constitution will be amended to join the South African Constitution in prohibiting discrimination on the basis of sexual orientation or gender identity, there are other avenues to provide equally robust workplace protections for LGBTQ+ individuals. Perhaps the most promising avenue is federal legislation that mirrors South African laws. Indeed, members of Congress have proposed pieces of legislation that would effectuate significant progress in this area of the law. But not all of the proposed pieces of

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4 See infra subpart II.A.
5 Obergefell, 135 S. Ct. at 2608.
6 Other commentators have also advocated that the United States’ lawmakers and policymakers should look to South Africa as a model for protecting the rights of LGBTQ+ citizens. See, e.g., Eric C. Christiansen, Exporting South Africa’s Social Rights Jurisprudence, 5 Loy. U. Chi. Int’l L. Rev. 29, 41 (2007) (“[The South African social rights jurisprudence model] is exportable to other nations seeking to enforce enumerated socio-economic rights because South Africa has created its affirmative social rights jurisprudence that internalizes country-specific justiciability concerns.”); Lisa Newstrom, Note, The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage, 40 Cornell Int’l L.J. 781, 803–04 (2007) (“Until American judges and lawmakers are willing to learn from Fourie’s analysis by adapting and improving upon it . . . the balance will remain skewed against same-sex families before the doors to the courtroom even open.”).
8 See infra subpart I.C.
9 See infra Part IV.
legislation are adequate. The United States should strive to implement non-discrimination laws and workplace protections that are equally as forceful as those in South Africa. The Equality Act, rather than the Employment Non-Discrimination Act, is therefore the better piece of proposed legislation to adopt. In the absence of federal non-discrimination laws and workplace protections, each state should continue to “serve as a laboratory” and “try novel . . . experiments.” Additionally, Fortune 500 companies should continue to lead the way in the private sector by providing substantial workplace protections to their LGBTQ+ employees.

In Part I, this Note reviews South African non-discrimination and equal-protection law and jurisprudence by discussing the South African Constitution, landmark Constitutional Court cases, and significant legislation. The cornerstone of South African non-discrimination and equal-protection law and jurisprudence is the Bill of Rights, which explicitly protects LGBTQ+ South Africans from discrimination. The government has reaffirmed the Constitution’s commitment to equal rights for LGBTQ+ South Africans through court decisions and acts of Parliament. This Note argues that South Africa's progressive non-discrimination and equal-protection legal regime should serve as a model for the United States, which currently lags behind much of the Western democratic world.

In Part II, this Note assesses the current state of non-discrimination and equal-protection law and jurisprudence in the United States. Some states have stringent employment non-discrimination laws and provide robust workplace protections to its LGBTQ+ citizens. But other states have no workplace protections for its LGBTQ+ citizens. And on the federal level, there is no legislation prohibiting employment discrimination based on sexual orientation or gender identity in the private sector.


12 See infra subpart IV.C.
In Part III, this Note considers the extension of the protections included in Title VII of the Civil Rights Act of 1964 to LGBTQ+ individuals. The Equal Employment Opportunity Commission has adopted this approach. The federal courts, however, have been more reluctant to do so because the Supreme Court has not expressly decided the issue. Indeed, the Supreme Court recently denied a petition for writ of certiorari in a case dealing with employment discrimination on the basis of sexual orientation and gender identity.

In Part IV, this Note discusses two proposed pieces of federal legislation that address employment discrimination based on sexual orientation and gender identity. Although LGBTQ+ advocacy organizations and their allies once supported the Employment Non-Discrimination Act, they have since withdrawn their support for the Act because of its modesty. The better piece of legislation, this Note argues, is the Equality Act. The Equality Act extends Title VII’s protections to LGBTQ+ individuals and better follows the non-discrimination and equal-protection law and jurisprudence of South Africa.

I

SOUTH AFRICAN NON-DISCRIMINATION LAW AND JURISPRUDENCE

A. The South African Constitution

After South Africa dismantled its apartheid regime, the country adopted a “new and powerful constitution that provide[s] protections for individual rights and remedies for their violation.”13 Chapter 2 of the South African Constitution includes the Bill of Rights, which “enshrines the rights of all people in [South Africa] and affirms the democratic values of human dignity, equality and freedom.”14 The South African Constitution not only directs the government to “respect” the rights enumerated in the Bill of Rights but also to “protect, promote and fulfill” the rights.15 The Bill of Rights extends to “all law” and regulates the government and “all organs of the state.”16 The Bill of Rights also regulates “natural” and “juris-

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13 Newstrom, supra note 6, at 786.
15 Id., ch. 2, § 7(2).
16 Id., ch. 2, § 8(1) (emphasis added).
tic” persons in certain circumstances. Furthermore, the Bill of Rights mandates that courts promote “the values that underlie an open and democratic society based on human dignity, equality and freedom” and “the spirit, purport and objects of the Bill of Rights.”

Section 9 of Chapter 2 of the South African Constitution establishes the right of equality. Section 9(1) boldly declares, “Everyone is equal before the law and has the right to equal protection and benefit of the law.” Section 9(3) further states, “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Discrimination on the basis of one of the grounds in Section 9(3) is presumptively unconstitutional.

The inclusion of sexual orientation in Section 9(3) of the South African Constitution was the product of victory over an oppressive and discriminatory apartheid regime. After apartheid, South Africa began the process of transforming itself into a “human rights state.” Indeed, upon signing the new

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17 Id., ch. 2, § 8(2); see also id., ch. 2, §§ 8(2)–(3) (explaining when a court will apply the Bill of Rights to regulate a natural or juristic person and what factors the court will consider).

18 Id., ch. 2, §§ 39(1)–(2). The South African Constitution discusses the “spirit, purport and objects of the Bill of Rights” throughout its text. For example, in Chapter 1, the Constitution notes that South Africa is founded on the values of human dignity, equality, human rights, and freedom, among others. See id., ch. 1, § 1. The Preamble includes a similar discussion. See id. at pmbl.

19 Id., ch. 2, § 9(1) (emphasis added).

20 Id., ch. 2, § 9(3) (emphasis added).

21 See id., ch. 2, § 9(5) (“Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”).

22 Hereinafter referred to as the “Equality Clause.”


24 Makau wa Mutua, Hope and Despair for a New South Africa: The Limits of Rights Discourse, 10 HARV. HUM. RTS. J. 63, 65 (1997); see also Albie Sachs, Constitutional Developments in South Africa, 28 N.Y.U. J. INT’L L. & POL. 695, 695 (1996) (“The goal [of the new Constitution] was to move from a racial autocracy to a non-racial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights.”).
South African Constitution, Nelson Mandela declared, “By our presence here today, we solemnly honour the pledge we made to ourselves and to the world, that South Africa shall redeem herself and thereby widen the frontiers of human freedom.”

With the new South African Constitution, South Africa became the first country to codify equal protection and freedom from discrimination on the basis of sexual orientation in its constitution. This is especially significant given the state of equality for LGBTQ+ individuals in the rest of the world, and in contrast to other African countries.

It is curious that South Africa became the first country in which “[LGBTQ+ individuals] possessed a level of constitutional

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protection greater than that of any other nation—a level of legal protection that remains pre-eminent twenty years later.”

Professor Eric Christiansen notes that, despite South Africa’s religiosity and conservatism, the combination of three factors unique to South Africa in the 1990s ultimately led the drafters to include progressive constitutional protections for LGBTQ+ individuals. The three factors include the (1) history and timing, (2) ideology and non-racialism, and (3) constrained drafting process.

First, South African LGBTQ+ advocacy organizations started to realize a level of legitimacy and political recognition in the years preceding the “fundamental constitutional re-creation of a state that had existed for forty-seven years with discrimination as its primary political and social reality.” The greater legitimacy of LGBTQ+ advocacy organizations and the effort to include representation of various oppressed groups led to the involvement of LGBTQ+ leaders in the anti-apartheid movement. The LGBTQ+ rights movement was also gaining momentum outside of South Africa’s borders. In the early 1990s, the European Court of Human Rights twice affirmed its Dudgeon v. United Kingdom decision holding that Section 11 of the United Kingdom’s law criminalizing homosexual acts violated Article 8 of the European Convention on Human Rights. Similarly, the United Nations Human Rights Commission condemned the Australian state of Tasmania for criminalizing ho-

29 Substantive Equality and Sexual Orientation, supra note 26, at 585.
30 Id.
31 Id. at 585–87.
32 Id. at 587.
33 Id. at 586. Professor Christiansen also notes that “unrelated occurrences,” including the outing of an anti-apartheid leader as well as homophobic remarks uttered by a key African National Congress Party figure, also contributed to recognition and involvement of LGBTQ+ organizations in the anti-apartheid movement. Id.; see also Derrick Fine & Julia Nicol, The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement, in Defiant Desire: Gay and Lesbian Lives in South Africa 269, 269–70 (Mark Gevisser & Edwin Cameron eds., 1995) (describing the unrelated occurrences and how the occurrences led to the African National Congress Party recognizing the importance of equality for LGBTQ+ South Africans).
mosexual acts.\textsuperscript{36} And although the Canadian Supreme Court upheld a law that excluded same-sex spouses from collecting guaranteed income supplements, the Court held that Section 15 of the Canadian Charter of Rights and Freedoms includes sexual orientation as a protected ground.\textsuperscript{37} In sum, the fall of apartheid and the process of drafting a new constitution transpired concurrently with the LGBTQ+ rights movement gaining momentum both within and beyond South Africa’s borders.

Second, the principles of “non-racialism” and substantive equality guided the African National Congress Party (ANC) and the anti-apartheid movement more broadly.\textsuperscript{38} The principle of non-racialism demands that the government both safeguard human rights and immediately terminate any and all discrimination.\textsuperscript{39} Indeed, the ANC’s 1955 Freedom Charter declares, “All Shall be Equal Before the Law!” and “All Shall Enjoy Equal Human Rights!,” and generally expresses a commitment to equality and anti-discrimination.\textsuperscript{40} This vision of a South Africa “founded on the principles of equality, multi-racial democracy, and human dignity” persevered from its initial articulation in the 1955 Freedom Charter through the fall of apartheid.\textsuperscript{41} Fortunately for the National Coalition for Gay and Lesbian Equality (NCGLE) and other LGBTQ+ advocacy organizations, this vision favored both including the groups in the process of drafting a new constitution and expressly codifying LGBTQ+ rights in the new constitution.\textsuperscript{42} Additionally, the NCGLE and other LGBTQ+ advocacy organizations formed coalitions with the ANC and other anti-apartheid political


\textsuperscript{37} See Egan v. Canada, [1995] 2 S.C.R. 513 (Can.) (holding that sexual orientation is a protected ground under Section 15 of the Canadian Charter of Rights and Freedoms); see generally Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11, § 15(1) (U.K.) (“Every 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.”).

\textsuperscript{38} Substantive Equality and Sexual Orientation, supra note 26, at 586.

\textsuperscript{39} Id. at 587.


\textsuperscript{41} Substantive Equality and Sexual Orientation, supra note 26, at 586.

\textsuperscript{42} Ending the Apartheid of the Closet, supra note 23, at 1037–38.
organizations prior to the abolition of apartheid in South Africa.43

Third, party-based delegates and other experts largely negotiated and drafted the new constitution behind closed doors.44 Small thematic committees consisting only of a relatively small number of delegates and experts were responsible for sequentially drafting and revising the text of each section of the constitution.45 Additionally, the drafting process occurred under "tight time constraints" and "strong political pressure"—from both within and beyond South Africa’s borders.46 This process resulted in a few influential party elites and experts dictating a substantial portion of the new constitution’s text.47 Many of these drafters wholeheartedly espoused the principles of “non-racialism” and substantive equality, and staunchly advocated for the inclusion of LGBTQ+ protections and rights in the new constitution’s text.48 Moreover, the NCGLE and other LGBTQ+ advocacy organizations leveraged their preexisting coalition with the ANC to ensure that the constitution included protections on the basis of sexual orientation.49

Although the South African Constitution is a progressive document that enshrines human dignity, equality, and freedom for LGBTQ+ South Africans, this Note recognizes that it is not without shortcomings. Section 16 of Chapter 2 of the South African Constitution establishes the right of freedom of expression.50 Subsection 2 of Section 16 excepts certain acts of expression from constitutional protection.51 The exceptions include: war propaganda, incitement of imminent violence, and hate speech based on protected grounds that incites harm.52 While the hate speech exception renders hate speech based on race, ethnicity, gender, or religion unprotected expression, it does not explicitly do so for sexual orientation.53

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44 Substantive Equality and Sexual Orientation, supra note 26, at 587.
45 Id.
46 Id.
47 Id.
48 Id.
49 See Newstrom, supra note 6, at 786.
51 See id., ch. 2, § 16(2).
52 Id., ch. 2, § 16(2)(a)–(c).
53 Compare id., ch. 2, § 16(2)(c), with id., ch. 2, § 9(3).
Section 37 similarly does not include sexual orientation as a protected ground. Section 37 of Chapter 2 of the South African Constitution establishes when a state of emergency may be declared and the implications of such a declaration concerning the rights established in Chapter 2. Subsection 5 of Section 37 states:

No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

According to the Table of Non-Derogable Rights, the right of equality is protected from legislation related to a state of emergency declaration only “[w]ith respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.” Thus, both Sections 16 and 37 demonstrate that the South African Constitution, which boldly prohibits discrimination on the basis of sexual orientation, still fails to provide the broadest protections for LGBTQ+ South Africans. Nonetheless, the United States can look to the South African Constitution as a model for enacting robust legal protections for LGBTQ+ citizens.

B. South African Constitutional Court Cases

After successfully advocating to include LGBTQ+ rights and protections in the South African Constitution, the NCGLE and other LGBTQ+ advocacy organizations immediately began challenging discriminatory laws still in effect from the apartheid era. In response to these challenges, the Constitutional Court, South Africa’s highest court, used the Equality Clause to unanimously strike down countless discriminatory laws. By using the Equality Clause to invalidate the discrimi-

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54 Compare id., ch. 2, § 37(5)(c), Table of Non-Derogable Rights, with id., ch. 2, § 9(3).
55 Id., ch. 2, § 37.
56 Id., ch. 2, § 37(5)(c).
57 Id. Table of Non-Derogable Rights.
58 Substantive Equality and Sexual Orientation, supra note 26, at 588; Maguire, supra note 27, at 11.
59 See, e.g., J v. Dir. Gen. 2003 (5) SA 621 (CC) at 15–16 para. 23 (S. Afr.) (striking down a prohibition of registering both the non-biological and biological homosexual parents on the birth certificate of a child born from artificial insemination); Du Toit v. Minister for Welfare and Population Dev. 2003 (2) SA 198 (CC) at 25 para. 25, 34–35 para. 44 (S. Afr.) (striking down sections of the Child Care Act that unconstitutionally discriminated on the basis of sexual orientation in the
natory laws, the Constitutional Court unequivocally reaffirmed equal protection under the law for LGBTQ+ South Africans.\textsuperscript{60} South African Equal Protection jurisprudence, unlike that in the United States, mandates applying the same level of scrutiny and protection to each protected class recognized in the Equality Clause.\textsuperscript{61} Another key difference between South African Equal Protection jurisprudence and American Equal Protection jurisprudence is the judicial system’s consideration of “dignity.”\textsuperscript{62} The Constitutional Court has held that the equality rights provided in Section 9 of the South African Constitution’s Bill of Rights inextricably intertwine with the dignity rights

\textsuperscript{60} Substantive Equality and Sexual Orientation, supra note 26, at 588.

\textsuperscript{61} Compare Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs 2000 (2) SA 1 (CC) at para. 98 (S. Afr.) (striking down a section of the Aliens Control Act of 1991 that unconstitutionally discriminated on the basis of sexual orientation in the immigration context); Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice 1999 (1) SA 6 (CC) at para. 106 (S. Afr.) (striking down sodomy laws that unconstitutionally targeted homosexuals in the criminal law context).


See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) at pmbl. (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . .”); ICCPR, supra note 36, at pmbl. (“[T]he inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . .”); G.A. Res. 2200 (XXI) A. annex, International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966) at pmbl. (“[T]he inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . .”);
provided in Section 10.\textsuperscript{63} Three landmark cases, which this Note discusses below, demonstrate the South African government’s dedication to equal rights and equal protection under the law for LGBTQ+ South Africans. The United States—whether through legislation or judicial decisions—should follow South Africa’s example.

Although South African courts routinely invoke the South African Constitution to enforce equal protection and equal dignity, problems still persist for many. While attitudes in South Africa are improving, studies show overwhelming opposition to homosexual conduct.\textsuperscript{64} The level of opposition to homosexuality in South Africa also far exceeds the level of opposition in nations with similar legal protections.\textsuperscript{65} And LGBTQ+ individuals still face discrimination and violence from private actors.\textsuperscript{66} Indeed, in 2014, Minister of Justice Jeff Radebe noted, “Notwithstanding the comprehensive constitutional and legal framework and protection for LGBT[Q+] persons, we have sadly witnessed acts of discrimination and violent attacks being perpetrated against LGBT[Q+] persons.”\textsuperscript{67} The problems are amplified for LGBTQ+ individuals who are poor, Black, or female.\textsuperscript{68} For example, the practice of “corrective rape,” which is used primarily but not exclusively against Black lesbians, entails sexually assaulting LGBTQ+ individuals to “cure” them

\textsuperscript{63} See, e.g., Nat’l Coal. for Gay & Lesbian Equal. 1999 (1) SA 6 (CC) at para. 28 (S. Afr.) (“[T]he common-law crime of sodomy [in addition to an infringement of the right to equality] also constitutes an infringement of the right to dignity which is enshrined in section 10 of our Constitution.”). Justice Sachs also underscored the interrelation of the rights to equality and dignity. \textit{See id.} at 150, 156–57 paras. 120, 125.

\textsuperscript{64} See \textit{Tom W. Smith, NORC/U. Chi., GSS CROSS-NATIONAL REPORT NO. 31: CROSS-NATIONAL DIFFERENCES IN ATTITUDES TOWARDS HOMOSEXUALITY 1, 17 (2011)} (explaining that a 2008 study found that about 84% of South Africans indicated that same-sex sexual activity was “always wrong” while only about 8% of South Africans indicated that it was “not wrong at all”); \textit{The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries, PEW RES. CTR.} (June 4, 2013), http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/ [https://perma.cc/E2PL-UHE5] (explaining that a 2013 study found that about 61% of South Africans indicated that homosexuality should not be accepted by society” while only 32% of South Africans indicated that homosexuality “should be accepted”).

\textsuperscript{65} See supra note 64.


\textsuperscript{68} See \textit{Human Rights Watch, supra} note 66, at 187–96.
of their homosexuality. This Note does not argue that the fight for equality in South Africa is over. Rather, this Note argues that South Africa is a model to which the United States should look concerning employment non-discrimination laws and workplace protections.

1. National Coalition for Gay and Lesbian Equality v. Minister of Justice

In National Coalition for Gay and Lesbian Equality (NCGLE) v. Minister of Justice, the Constitutional Court of South Africa unanimously invalidated the common-law crime of sodomy and struck down a section of the Sexual Offences Act. The Court based its decision on the Bill of Rights of the South African Constitution, including the rights to equality, dignity, and privacy. One commentator describes the case as “the most meaningful judicial victory for the gay rights movement since the abolition of apartheid.”

The Afrikaner ideology’s oppressive commitment to maintaining “morality” in South Africa produced a legal regime that targeted and discriminated against LGBTQ+ South Africans.
Indeed, South Africa did not recognize sodomy as a crime until Dutch colonizers brought the Roman-Dutch common law to South Africa in the seventeenth century. The common law of sodomy criminalized a range of sexual activities and prohibited any sexual act lacking the purpose of procreation. An individual convicted of sodomy was often sentenced to death.

When the British gained control of South Africa from the Dutch in 1806, the British preserved the common-law crime of sodomy. The British went even further in the nineteenth century, enacting and enforcing criminal codes that criminalized homosexual conduct between men. Furthermore, by the twentieth century, the government continued to enforce the common-law crime of sodomy and other “unnatural” sexual-activity prohibitions for homosexual conduct but not for heterosexual conduct.

When the Afrikaner Reunited National Party gained control of the South African House of Assembly from the British Union Party in 1948, the Afrikaner Reunited National Party began enacting a myriad of oppressive laws. The post-1948 apartheid laws included laws that codified the common-law criminalization of sodomy and homosexual conduct between men. For example, the Immorality Act of 1957 prohibited certain conduct “relating to brothels and unlawful carnal intercourse and other acts in relation thereto,” which included also motivated the apartheid policies aimed at preserving the moral purity of the white nation. See Voris E. Johnson, Comment, Making Words on a Page Become Everyday Life: A Strategy to Help Gay Men and Lesbians Achieve Full Equality Under South Africa’s Constitution, 11 Emory Int’l L. Rev. 583, 591 (1997).


76 Id. at 274–75. But sentencing individuals convicted of sodomy to death became disfavored by 1886. See Botha & Cameron, supra note 74, at 11–12.


78 See Schmid, supra note 74, at 165.

79 Johnson, supra note 73, at 592.


81 Johnson, supra note 73, at 592.

acts such as interracial sex, prostitution, and cruising.  

Although the Immorality Act of 1957 did not explicitly criminalize homosexual conduct between men, the government later did so using the Act as the basis. 

Following a police raid in Forest Town, South Africa involving a party of homosexual men, the government amended the Immorality Act of 1957 to include Section 20A. The amended section imposed punishment on “[any] male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification . . . .” The amendment also raised the age of consent for homosexual men to nineteen, while maintaining the age of consent for everyone else at sixteen.

In 1997, the NCGLE and the South African Human Rights Commission filed a constitutional challenge to sodomy laws in the High Court. The challengers contended that the sodomy laws targeted only men and homosexual conduct between men. This targeting, the challengers argued, violated the Equality Clause of the South African Constitution by unfairly discriminating based on gender and sexual orientation. The High Court agreed.

On appeal, the Constitutional Court unanimously affirmed the High Court’s decision and struck down the challenged sodomy laws. Justice Ackermann, addressing the principal issue of whether the sodomy laws violated the right of equality,
applied a three-step discrimination analysis. The analysis asks whether: (1) the action discriminates based on a particular ground, (2) the discrimination is unfair, and (3) the unfair discrimination is justified.

Concerning the first inquiry of the analysis, the Court concluded that the challenged sodomy laws targeted men and specifically homosexual conduct between men. Thus, the challenged sodomy laws discriminated on the basis of gender and sexual orientation. Addressing the second inquiry, the Court noted that discrimination based on a ground stated in the Equality Clause is presumptively unfair. In the alternative, the Court considered several factors to determine whether the discrimination was unfair. Justice Ackermann elaborated:

In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include: (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage . . . ; (b) the nature of the provision or power and the purpose sought to be achieved by it . . . ; (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The Court concluded that: (a) homosexual men are a “permanent minority in society” and have been disadvantaged; (b) the nature of the sodomy laws is to criminalize “private conduct of consenting adults which causes no harm to anyone else”; and (c) the discrimination has “gravely affected” the rights and “deeply impaired” the fundamental dignity of homosexual

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93 See id. at paras. 15–19 (describing the discrimination analysis and citing Harksen v. Lane 1998 (1) SA 300 (CC) at para. 53 (S. Afr.)). The discrimination analysis which Justice Ackermann applied has since become the “standard analysis for all discrimination questions.” Substantive Equality and Sexual Orientation, supra note 26, at 589.
94 Nat’l Coal. for Gay & Lesbian Equal. 1999 (1) SA 6 (CC) at paras. 16–17 (S. Afr.).
95 Id. at paras. 11–13, 26.
96 Id.
97 Id. at paras. 17–18.
98 Id. at para. 19.
99 Id. (citing Harksen v. Lane NO 1998 (1) SA 300 (CC) at paras. 50–51 (S. Afr.)).
men.\textsuperscript{100} Thus, the challenged sodomy laws discriminated unfairly.\textsuperscript{101} Finally, concerning the third inquiry, the Court stated that the unfair discrimination may be justified only if it satisfied the Limitations Clause of the Constitution.\textsuperscript{102} The Court ultimately held, however, that “there is nothing which can be placed in the other balance of the scale” and that “[t]he inevitable conclusion is that the discrimination in question is unfair. . . .”\textsuperscript{103} Thus, the challenged sodomy laws violated Section 9 of Chapter 2 of the South African Constitution.\textsuperscript{104}

In its analysis of whether the challenged sodomy laws violated the rights of dignity and privacy, the Court considered court cases from other countries dealing with sodomy laws.\textsuperscript{105} The Court recognized a trend in which Western democracies began decriminalizing sodomy and adopting more liberal legal attitudes toward LGBTQ+ individuals.\textsuperscript{106} The Court also noted that the United States was an exception to the trend.\textsuperscript{107} Justice Ackermann and the Court aptly noted that \textit{Bowers v. Hardwick} was decided by a narrow majority of the United States Supreme Court,\textsuperscript{108} the case was the “subject of sustained criticism,”\textsuperscript{109} and the case was largely inconsistent with the more
recent case of *Romer v. Evans*. In addition to disregarding *Bowers* for those reasons, the Court also observed that the South African Constitution is far more progressive in its protections for its LGBTQ+ citizens than the U.S. Constitution. Even though the United States Supreme Court eventually struck down sodomy laws, the South African Constitutional Court did so nearly a decade earlier. The *NCGLE Sodomy Constitutional Court* case demonstrates South Africa’s commitment to equal protection for its LGBTQ+ citizens—a model to which the United States can and should look. The same is true for the *Satchwell* and *Fourie* cases, which this Note discusses below.

2. Satchwell v. President of the Republic of South Africa

In *Satchwell v. President of the Republic of South Africa*, the Constitutional Court of South Africa unanimously invalidated sections of the Judges’ Remuneration and Conditions of Employment Act of 1989. The Court held that denying same-sex spouses of judges the same employment benefits that the government affords to opposite-sex spouses of judges violated the Bill of Rights of the South African Constitution. Similar to the Sexual Offences Act and the other sodomy laws of the oppressive apartheid regime, the Judges’ Remuneration and Conditions of Employment Act targeted and discriminated against LGBTQ+ South Africans. The Act stipulated that the surviving spouse of a deceased judge would receive a portion of the judge’s salary. In 2001, Kathy Satchwell, an openly lesbian judge, and her partner, Lesley Louise Carnelley, filed a constitutional challenge to the Act in the High Court. Although Satchwell and Carnelley were not legally married, they had been in an “intimate, committed, exclusive, and permanent relationship since about 1986” and “live[d] in every

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112 2002 (6) SA 1 (CC) at paras. 21, 37 (S. Afr.); see also Judges’ Remuneration and Conditions of Employment Act 88 of 1989 (S. Afr.).
113 *Satchwell* 2002 (6) SA 1 (CC) at paras. 23, 37 (S. Afr.).
114 See Judges’ Remuneration and Conditions of Employment Act, supra note 112.
115 Id.
116 See *Satchwell v. President of the Republic of South Africa* 2001 (12) BCLR 1284 (T) (S. Afr.).
respect as a married couple . . . ." They argued that the Judges' Remuneration and Conditions of Employment Act provided benefits to the spouses of heterosexual judges, but withheld benefits from the partners of homosexual judges. This unequal treatment, Satchwell and Carnelley contended, violated the Equality Clause of the South African Constitution by unfairly discriminating based on sexual orientation. The High Court agreed, holding that the word “spouse” be read as “spouse or partner, in a permanent same-sex life partnership.”

On appeal, the Constitutional Court unanimously affirmed in large part the High Court's decision and held that denying equal benefits to homosexual partners is unconstitutional. The Court noted that it recognized various forms of legal partnerships in a previous case. Additionally, the Court pointed to woman-to-woman marriages in traditional African societies. The Court next applied the three-step discrimination analysis applied in the Harksen and NCGLE Sodomy Constitutional Court cases. The Court concluded that the Judges' Remuneration and Conditions of Employment Act discriminated based on sexual orientation. Thus, the Court presumed the discrimination to be unfair and unconstitutional. Finally, the Constitutional Court held that the word “spouse” instead be read as “spouse or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.”

117 Satchwell 2002 (6) SA 1 (CC) at para. 4 (S. Afr.). See id. at para. 5 for further “evidence of their emotional and financial inter-dependence.”
118 Id. at para. 3.
119 Id. at para. 14.
120 Id. at para. 1.
121 Id. at para. 26.
122 Id. at para. 12 (citing Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Home Affairs 2000 (2) SA 1 (CC) at para. 36 (S. Afr.).)
123 Satchwell 2002 (6) SA 1 (CC) at para. 12 (S. Afr.); see generally C.O. Akpamgbo, A “Woman to Woman” Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, 14 AFR. L. STUD. 87, 92 (1977) (“If the local law recognises a ‘woman to woman’ marriage, and the incidents of such status are sought to be enforced, it is not the place of the law to invoke the repugnancy test to exclude the application of such customary rules.”).
124 Satchwell 2002 (6) SA 1 (CC) at paras. 20–21 (S. Afr.); see also supra note 93 and accompanying text.
125 Satchwell 2002 (6) SA 1 (CC) at para. 21 (S. Afr.).
126 Id. at para. 23; see also S. AFR. CONST., ch. 2, § 9(5), 1996.
127 Satchwell 2002 (6) SA 1 (CC) at paras. 34, 37 (S. Afr.) (emphasis added).
3. Minister of Home Affairs v. Fourie

In Minister of Home Affairs v. Fourie, the Constitutional Court of South Africa unanimously invalidated the common-law definition of marriage and struck down a section of the Marriage Act. The Court held that denying same-sex couples the same status and benefits of marriage that the government affords to opposite-sex couples violated the Bill of Rights of the South African Constitution.

The Marriage Act governs the formation of marriages and the procedures of marriage ceremonies. Although the Act does not specifically stipulate that a marriage is only between one man and one woman, some courts interpreted the Act to mean exactly that. Additionally, according to the South African common law, which developed from Roman-Dutch law, marriage is the “union of one man with one woman, to the exclusion . . . of all others.” In 2002, Marie Fourie and her partner, Cecelia Bonthuys, filed a constitutional challenge in the High Court to the limitation of marriage to one man and one woman. Fourie and Bonthuys had been in a relationship for more than ten years and wished to get married and obtain legal recognition as spouses. They argued that excluding homosexual couples from civil marriages and legal recognition as spouses violated the Equality Clause of the South African Constitution by unfairly discriminating based on sexual orientation. The High Court disagreed and refused to invalidate the exclusion of homosexual couples from marriage.

On appeal, the Supreme Court of Appeal reversed the High Court’s decision. The Supreme Court unanimously found that excluding homosexual couples from marriage unfairly discriminated based on sexual orientation and the majority opinion interpreted the common-law definition of marriage to include homosexual couples. The majority opinion, how-

\[\text{\textsuperscript{128}}\text{2006 (1) SA 524 (CC) at paras. 118, 120 (S. Afr.); see also Marriage Act 25 of 1961 (S. Afr.).}\]
\[\text{\textsuperscript{129}}\text{Fourie 2006 (1) SA 524 (CC) at paras. 78–79, 114 (S. Afr.).}\]
\[\text{\textsuperscript{130}}\text{Marriage Act, supra note 128; Fourie 2006 (1) SA 524 (CC) at para. 3.}\]
\[\text{\textsuperscript{131}}\text{Fourie 2006 (1) SA 524 (CC) at para. 7 (S. Afr.) (discussing the decision of the High Court).}\]
\[\text{\textsuperscript{132}}\text{Id. at paras. 3–4 (S. Afr.) (citing Mashia Ebrahim v. Mahomed Essop 1905 TS 59, 61 (S. Afr.).}\]
\[\text{\textsuperscript{133}}\text{Minister of Home Affairs v. Fourie (2002) ZAGPHC 1 (S. Afr.).}\]
\[\text{\textsuperscript{134}}\text{Fourie 2006 (1) SA 524 (CC) at para. 1 (S. Afr.).}\]
\[\text{\textsuperscript{135}}\text{Id. at paras. 2–3.}\]
\[\text{\textsuperscript{136}}\text{Id. at para. 7.}\]
\[\text{\textsuperscript{137}}\text{Id. at para. 12.}\]
\[\text{\textsuperscript{138}}\text{Id. at paras. 12, 22.}\]
ever, did not render judgment on the Marriage Act. The minority opinion, on the other hand, would have interpreted the Marriage Act to include homosexual couples.

Justice Albie Sachs, writing for a unanimous Constitutional Court, first reviewed the prior Constitutional Court cases dealing with unfair discrimination based on sexual orientation. According to the Court, those cases proclaimed that equality, dignity, freedom, and human rights form the foundation of South African society and its legal system. The Court elaborated:

[What is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practice with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.]

The Court then discussed the importance of marriage and concluded that exclusion of homosexual couples from marriage constitutes unfair discrimination. Thus, the Court held that both the common-law definition of marriage and Section 30(1) of the Marriage Act violate Section 9 of the Bill of Rights. The Court, however, deferred implementation of its ruling for one year in order to provide Parliament the opportunity to correct the violation. Justice O’Regan, while disagreeing with “very little in the comprehensive and careful judgment of [Justice] Sachs,” dissented on the choice of remedy. The proper remedy, Justice O’Regan opined, is a decision by the Constitutional Court reading-in language to Section 30(1) of the Marriage Act that comports with the provisions of Section 9 of the Bill of Rights.

In 2006, Parliament passed the Civil Unions Act, which legalized marriage equality in South Africa. With the Civil

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139 Id. at paras. 21–22.
140 Id. at paras. 30–31.
141 See id. at paras. 49–59; see also supra note 59 and accompanying text.
142 Fourie 2006 (1) SA 524 (CC) at para. 60 (S. Afr.).
143 Id.
144 Id. at paras. 64, 71, 78.
145 Id. at para. 78.
146 Id. at para. 162.
147 Id. at para. 165 [O’Regan, J., dissenting].
148 Id. at para. 169 [O’Regan, J., dissenting].
149 Substantive Equality and Sexual Orientation, supra note 26, at 596; see also Civil Union Act 17 of 1996 (S. Afr.).
Unions Act, South Africa became the fifth country in the world to legalize marriage equality. The United States would not legalize marriage equality for nearly another decade. Fourie is simply another example demonstrating that South Africa should serve as a model for the United States in the realm of equal protection for LGBTQ+ individuals. Although the United States has since legalized marriage equality, "justice too long delayed is justice denied." The same is true in the employment discrimination context.

C. South African Non-Discrimination Laws

1. The Employment Equity Act

In 1998, the South African Parliament enacted the Employment Equity Act (EEA) pursuant to the mandate set forth in Section 9(4) of the Bill of Rights. The EEA specifically forbids discrimination in the employment context and seeks to correct the disparities, disadvantages, and discrimination caused by apartheid. The purpose of the EEA is to attain employment equity by "promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination" and "implementing affirmative-action measures to redress the disadvantages in employment experienced by designated groups." To fulfill this purpose, the EEA requires that every employer update their employment policies and practices to eliminate any unfair discrimination on the enumerated protected grounds. The EEA includes both gender and sexual orientation as protected grounds on the basis of

151 See supra Introduction.
153 Martin Luther King Jr., The Negro Is Your Brother, ATLANTIC MONTHLY, Aug. 1963, at 78, reprinted in Martin Luther King Jr., Letter from Birmingham Jail, ATLANTIC (Feb. 2018), https://www.theatlantic.com/magazine/archive/2018/02/letter-from-birmingham-jail/552461/ [https://perma.cc/K8RG-43ZF] (emphasis added) (“For years now I have heard the word ‘wait.’ It rings in the ear of every Negro with piercing familiarity. This ‘wait’ has almost always meant ‘never.’ . . . We must come to see, with the distinguished jurist of yesterday, that ‘justice too long delayed is justice denied.’”).
154 Employment Equity Act 55 of 1998 (S. Afr.); see also S. AFR. CONST., ch. 2, § 9(4), 1996 (“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”).
156 Id. § 2.
157 Id. § 5.
which employers may not unfairly discriminate. The prohibition of unfair discrimination also extends to harassment in the workplace based on a protected ground.

Not only does the EEA prohibit unfair discrimination but it also mandates that certain employers implement affirmative-action measures. The EEA defines affirmative-action measures as “measures designed to ensure that suitably qualified people from designated groups have equal-employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”

To implement affirmative-action measures, the EEA provides that certain employers must consult with its employees, conduct an analysis, prepare an employment equity plan, and report on its progress to the Director-General. Finally, to help advise the Minister of Labour and monitor and enforce the provisions of the EEA, the Act establishes a Commission for Employment Equity.

2. The Promotion of Equality and Prevention of Unfair Discrimination Act

Like the EEA, Parliament passed the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) pursuant to Section 9(4) of the Bill of Rights. The PEPUDA seeks to eliminate “deeply embedded” “social and economic inequalities” and unfair discrimination remaining from “colonialism, apartheid and patriarchy.” To achieve its end, the PEPUDA prohibits unfair discrimination, harassment, and hate speech based on the enumerated protected grounds. Like Section 9 of the Bill of Rights, the PEPUDA includes gender and sexual orientation as protected grounds. Although the PEPUDA specifically highlights race, gender, and disability throughout its text, the Act does not differentiate between the enumerated

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158 Id. § 6(1).
159 Id. § 6(3).
160 Id. § 13(1).
161 Id. § 15(1).
162 Id. § 13(2); see also id. §§ 16, 19–21 (further elaborating on the steps enumerated in § 13(2)).
163 Id. ch. 4.
166 Id. ch. 2.
167 Id. ch. 1.
protected grounds.\textsuperscript{168} Finally, the PEPUDA establishes special Equality Courts to address discrimination by private parties.\textsuperscript{169}

The PEPUDA and EEA are more than mere non-discrimination laws; they both impose a duty to promote equality on state and non-state actors.\textsuperscript{170} The acts are not only reactive but also proactive.\textsuperscript{171} Some commentators note that legislation like the PEPUDA and EEA recognize that discrimination and inequality are systemic and structural.\textsuperscript{172} Although the first step for the United States is to implement federal employment non-discrimination laws and robust workplace protections for LGBTQ+ individuals,\textsuperscript{173} the ultimate goal should be to implement legislation like the PEPUDA and EEA. States that have already enacted robust workplace protections for LGBTQ+ individuals should begin to “experiment” with legislation modeled after the PEPUDA and EEA.\textsuperscript{174}

II

THE CURRENT STATE OF NON-DISCRIMINATION LAW AND JURISPRUDENCE IN THE UNITED STATES AND THE POST-\textit{OBERGEFELL} LGBTQ+ RIGHTS MOVEMENT

In the aftermath of \textit{Windsor},\textsuperscript{175} \textit{Hollingsworth},\textsuperscript{176} and \textit{Obergefell}\textsuperscript{177}—the recent landmark marriage equality cases—the focus of the LGBTQ+ rights movement in the United States has shifted from marriage equality to employment and housing discrimination.\textsuperscript{178} Chad Griffin, President of the Human

\textsuperscript{168} Jagwanth, \textit{supra} note 164, at 741; see also Promotion of Equality and Prevention of Unfair Discrimination Act, \textit{supra} note 165, §§ 7–9.

\textsuperscript{169} \textit{Id.} at ch. 4.

\textsuperscript{170} Jagwanth, \textit{supra} note 164, at 741.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} See SANDRA FREDMAN, DISCRIMINATION LAW 122 (2002) (“The duty [to promote equality] becomes that, not just of compensating identified victims, but of restructuring institutions. Correspondingly, the duty-bearer is identified as the body in the best position to perform this duty.”).

\textsuperscript{173} See infra Part IV.

\textsuperscript{174} See infra note 181 and accompanying text.

\textsuperscript{175} United States v. Windsor, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act for denying equal treatment to same-sex marriages).

\textsuperscript{176} Hollingsworth v. Perry, 570 U.S. 693 (2013) (affirming the California Supreme Court’s decision to invalidate Proposition 8’s definition of marriage as a union between a heterosexual couple).


\textsuperscript{178} This is not to say that problems concerning the realization of the right to marriage equality did not persist after \textit{Obergefell}. See, e.g., Barber v. Bryant, 860 F.3d 345, 350–51 (5th Cir. 2017) (considering Mississippi’s version of the First Amendment Defense Act (HB 1523), which Mississippi passed in response to \textit{Obergefell}); Miller v. Davis, 123 F. Supp. 3d 924, 930–32 (E.D. Ky. 2015) (consid-
Rights Campaign, notably said, “Even after this 50 state marriage victory at the Supreme Court, in most states in this country, a couple who gets married at 10 a.m. remain[s] at risk of being fired from their jobs by noon and evicted from their home by 2 p.m. simply for posting their wedding photos on Facebook.”

A. State Employment Non-Discrimination Protections

**Figure 1**

Current U.S. LGBT(Q+) employment discrimination laws.

- Sexual orientation and gender identity: all employment
- Sexual orientation: all employment, gender identity only in state employment
- Sexual orientation: all employment
- Sexual orientation and gender identity: state employment only
- Sexual orientation: state employment only
- No state-level protection for LGBT(Q+) employees

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180 LGBT Employment Discrimination in the United States, WIKIPEDIA (last edited
Currently in the United States, over half of the states and territories have employment non-discrimination statutes that protect both on the basis of sexual orientation and gender identity in both the public and private sector.\footnote{For a comprehensive discussion of the states and territories, see Know Your Rights: Transgender People and the Law, ACLU \cite{smart:2018}} Two states have employment non-discrimination statutes that protect only on the basis of sexual orientation in both the public and private sector.\footnote{These states include New Hampshire and Wisconsin. \cite{Hunt:2012}} Several states have an executive order, administrative order, or a similar action prohibiting discrimination on the basis of sexual orientation and gender identity in only the public sector.\footnote{See sources cited \cite{Hunt:2012}; see also Mosbergen, supra note 182 (discussing the New Hampshire House of Representatives’s approval of a new transgender non-discrimination law).} Finally, a few states have an executive order, administrative order, or a similar action prohibiting discrimination only on the basis of sexual orientation and only in the public sector.\footnote{See Hunt, supra note 181.} The remaining seventeen states have no employment non-discrimination protections for LGBTQ+ Americans.\footnote{Some cities and localities in these states, however, have passed local non-discrimination ordinances. See, e.g., Lauren McGaughy, Shreveport Becomes Second City in Louisiana After New Orleans to Pass Non-Discrimination Ordinance, TIMES-PICAYUNE (Dec. 10, 2013), http://www.nola.com/politics/index.ssf/2013/12/fairness_ordination_shreveport_lgbt_gay_la.html [https://perma.cc/SJ4V-2TM]. Similarly, cities and localities in states that do not prohibit protections on the basis of either gender identity or sexual orientation have passed local non-discrimination ordinances. See, e.g., Dustin Gardiner & Amy B. Wang, Phoenix City Council Votes to Amend Discrimination Law, AZ CENTRAL (Feb. 28, 2013, 9:38 AM), http://archive.azcentral.com/community/phoenix/articles/20130226phoenix-nix-discrimination-law-amend.html [https://perma.cc/XPM9-D5UV]; Eric M. Johnson, Anchorage Lawmakers Pass LGBT Anti-Discrimination Law, REUTERS (Sept. 30, 2015, 4:10 PM), https://www.reuters.com/article/us-usa-alaska-lgbt/anchorage-lawmakers-pass-lgbt-anti-discrimination-law-idUSKCN0R2UX20150930 [https://perma.cc/8AJL-7CUF]; Sanjay Talwani, Nondiscrimination Ordinance Passes Unanimously in Helena, BILLINGS GAZETTE (Dec. 18, 2012), http://}
B. Federal Employment Non-Discrimination Protections

Although LGBTQ+ advocacy organizations and their allies have put ample resources into pushing federal legislation that provides protections for LGBTQ+ citizens, they have very little to show for their efforts. The only federal law that expressly prohibits discrimination on the basis of sexual orientation or gender identity is the Violence Against Women Act. Two other significant pieces of federal legislation that protect LGBTQ+ citizens are the Hate Crimes Prevention Act and the Don’t Ask, Don’t Tell Repeal Act. When Congress repealed Don’t Ask, Don’t Tell, however, only lesbian, gay, and bisexual service members enjoyed the “significant victory.” The law still barred transgender service members from serving in the armed forces openly. Given the lack of support in Congress


186 See Lisa Bornstein & Megan Bench, Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections, 22 WM. & MARY J. OF WOMEN & L. 31, 46 (2015); Lupu, supra note 178, at 12.

187 Violence Against Women Act, 42 U.S.C. § 13925(b)(13) (2012) (current version at 34 U.S.C. § 12291(b)(13) (2018)) (”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 . . . .”); Lupu, supra note 178, at 12.

188 See Bornstein & Bench, supra note 186, at 46; Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835, 2839 (2009) (codified at 18 U.S.C. § 249(a)(2) (2012)) (adding sexual orientation and gender identity as protected classes under the federal hate crime law); Don’t Ask, Don’t Tell Repeal Act, Pub. L. No. 111-321 (2010) (repealing the policy that barred openly LGB citizens from serving in the armed forces). By the time Congress repealed Don’t Ask, Don’t Tell, some federal courts had already ruled the policy to be unconstitutional. See, e.g., 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) (”Plaintiff has demonstrated it is entitled to the relief sought on behalf of its members, a judicial declaration that the Don’t Ask, Don’t Tell Act violates the Fifth and First Amendments, and a permanent injunction barring its enforcement.”).

189 See Bornstein & Bench, supra note 186, at 47.

for more substantial protections for LGBTQ+ citizens, LGBTQ+ advocacy organizations and their allies have explored other options. In fact, the executive and judicial branches are responsible for bestowing most of the current LGBTQ+ protections.

In 1998, President Bill Clinton signed Executive Order 13,087, which prohibits discrimination based on sexual orientation in the federal civilian workforce. But President Clinton noted the limited scope of his Executive Order: “This Executive Order states Administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination Act.” In 2014, President Obama signed Executive Order 13,672, which adds gender identity to the classes afforded workplace protections in the federal civilian workforce. Additionally, Executive Order 13,672, in tandem with Executive Order 13,673, added both sexual orientation and gender identity to the protected classes in the federal government contractor and sub-contractor workforce policy. President Trump, however, issued an Executive Order in March 2017, that effectively guts key parts of President Obama’s Executive Orders.

191 See Lupu, supra note 178, at 12.
192 See Bornstein & Bench, supra note 186, at 46.
194 Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (2014); see also 41 C.F.R. § 60-1.1 (2017) (“The purpose of the regulations in this part is to achieve the aims of [certain Executive Orders] for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts.” (emphasis added)).
In other words, federal government contractors and sub-contractors will again be able to discriminate based on sexual orientation and gender identity.

At the federal level, however, there are no employment non-discrimination laws or LGBTQ+ workplace protections for employees in the private sector. Currently, members of Congress have introduced the Equality Act, but no meaningful action has yet been taken.\textsuperscript{197} Given the grim prospects of passing the Equality Act into law,\textsuperscript{198} LGBTQ+ advocacy organizations and their allies have sought alternative strategies for ensuring employment non-discrimination protections. One of these alternative strategies is arguing that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation and gender identity.

III
TITLE VII

The drafters of the Civil Rights Act of 1964 included Title VII to eradicate employment discrimination based on race.\textsuperscript{199} But Title VII is not limited merely to employment discrimination based on race.\textsuperscript{200} Indeed, Title VII states:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or

\textsuperscript{197} Equality Act of 2017, S. 1006, 115th Cong. (2017) ("A bill . . . [t]o prohibit discrimination on the basis of sex, gender identity, and sexual orientation . . . ."); see also infra subpart III.B. The Equality Act was introduced in the U.S. Senate on May 2, 2017, but still has not been considered by the Senate Judiciary Committee as of August 2018. See S.1006 - Equality Act, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/1006/committees?q=%7B%22search%22%3A%22Employment+Non-Discrimination+Act%22%5B%22Employment+Non-Discrimination+Act%22%5D%7D&r=2 [https://perma.cc/T3YH-R9HS].

\textsuperscript{198} See e.g., Ana Valens, The LGBTQ Equality Act is Headed Back to Congress—But It Faces a Tough Crowd, DAILY DOT (Mar. 15, 2017, 6:14 AM), https://www.dailydot.com/irl/lgbtq-equality-act-headed-back-congress-faces-tough-crowd/ [https://perma.cc/86M2-F76W] ("[W]ith the Republicans holding a majority in both the House and Senate, activists fear that the act will be shot down before any substantial progress can be made.").

\textsuperscript{199} Melissa Wasser, Note, Legal Discrimination: Bridging the Title VII Gap for Transgender Employees, 77 OHIO ST. L.J. 1109, 1123 (2016) (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)).

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.\textsuperscript{201}

To bring a cognizable claim under Title VII, a plaintiff must show that an employer adversely treated a plaintiff qualified for the position but did not adversely treat similarly situated individuals, and the plaintiff’s race, color, religion, sex, or national origin motivated the difference in treatment.\textsuperscript{202} For a cognizable employment discrimination claim on the basis of sex, a plaintiff can show that an impermissible motive based on sex or sex stereotyping caused the adverse treatment.\textsuperscript{203} Some courts have held that the term “sex” in Title VII applies both to sex and gender.\textsuperscript{204}

A. The Equal Employment Opportunity Commission

In 2012 and 2015, respectively, the Equal Employment Opportunity Commission (EEOC) ruled that Title VII prohibits employment discrimination on the basis of gender identity and sexual orientation as a form of sex discrimination.\textsuperscript{205} The EEOC has determined that both sex-stereotyping and per se discrimination based on sexual orientation or gender identity are prohibited by Title VII.\textsuperscript{206} These determinations not only...

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{201} Id.
\item \textsuperscript{202} See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
\item \textsuperscript{203} See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
\item \textsuperscript{204} See, e.g., Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (“Thus, under Price Waterhouse, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.”); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (“As Judge Posner has pointed out, the term ‘gender’ is one ‘borrowed from grammar to designate the sexes as viewed as social rather than biological classes.’ . . . The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination . . . .” (citation omitted)).
\item \textsuperscript{206} See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594 (E.D. Mich. 2015) (holding that Title VII prohibits both sex-stereotyping and
\end{enumerate}
\end{footnotesize}
bind federal agencies but federal courts may also give the determinations deference.\(^{207}\) This Note further discusses two of these cases below. Attorney General Jeff Sessions and the Department of Justice, however, have since issued legal guidelines declaring that employment discrimination on the basis of sexual orientation or gender identity is legal under Title VII.\(^{208}\) This has resulted in confusion concerning the law and the U.S. government taking inconsistent positions in litigation.\(^{209}\)

In *Macy v. Holder*, the EEOC ruled that discrimination on the basis of gender identity is tantamount to sex discrimination.\(^{210}\) The complainant, Mia Macy, alleged that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) discriminated against her based on her gender identity.\(^{211}\) Macy applied for a job at the ATF’s crime laboratory in Walnut Creek, California.\(^{212}\) After applying, she spoke with the Director of the Wal-

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\(^{209}\) See Feuer, supra note 208 ("In its brief, the Trump administration’s Justice Department said the E.E.O.C., which had also filed court papers supporting [the plaintiff in an employment discrimination action], was ‘not speaking for the United States.’").


\(^{211}\) Id. at *1, *3.

\(^{212}\) Id. at *1.
nut Creek lab, who assured Macy that she would get the position pending a simple background check. But once she disclosed her transition from male to female on her background check, the ATF hired someone else for the position. The EEOC noted that in *Price Waterhouse* the Supreme Court held that under Title VII’s protection an employer may only consider gender for employment decisions when gender is an occupational qualification. Therefore, the EEOC held that discrimination on the basis of gender identity violates Title VII of the Civil Rights Act of 1964 because it “by definition, [is] discrimination ‘based on . . . sex.’”

Similarly, in *Baldwin v. Foxx*, the EEOC ruled that discrimination on the basis of sexual orientation equates to sex discrimination. The complainant, David Baldwin, alleged that the Federal Aviation Administration (FAA) discriminated against him based on his sexual orientation. After working at the FAA’s Miami facility in a temporary role and expressing his desire for an open permanent position as a Front Line Manager, the FAA did not hire him for the position. Baldwin alleged that his supervisor, who was involved in the selection process for the permanent position, made several disparaging comments concerning Baldwin’s sexual orientation. The EEOC again cited *Price Waterhouse* for the proposition that employers may not “rely upon sex-based considerations” or “take gender into account when making employment decisions.” That proposition applies to claims brought by LGBTQ+ complainants just as it would to heterosexual complainants. And because “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms,” the EEOC concluded that discrimination on the basis of sexual orientation violates Title VII of the Civil Rights Act of 1964.

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213 *Id.* at *2.
214 *Id.* at *2–3.
215 *Id.* at *6 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989)).
216 *Id.* at *11.
218 *Id.* at *1.
219 *Id.* at *2.
220 *Id.*
221 *Id.* at *4 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)).
222 *Id.* at *5.
223 *Id.*
B. In the Courts

The federal courts’ findings that Title VII bans employment discrimination on the basis of gender identity or sexual orientation have generally cited two Supreme Court cases for support. In *Price Waterhouse v. Hopkins*, the Supreme Court held that employment discrimination on the basis of gender stereotyping is unlawful sex discrimination under Title VII.\(^ {224}\) The case involved a female senior manager, Ann Hopkins, at a nationwide professional accounting firm.\(^ {225}\) Some of the partners in her office recommended Hopkins for partnership candidacy.\(^ {226}\) The process of selecting new partners entailed the firm soliciting written comments about each partnership candidate.\(^ {227}\) The partners ultimately decided not to admit Hopkins to the partnership, but rather to “hold” her for reconsideration the next year.\(^ {228}\) Some of the comments indicated that she was too “aggressive,” “harsh,” “difficult to work with,” “impatient,” and “macho.”\(^ {229}\) One partner even remarked that she needed “a course at charm school.”\(^ {230}\) Additionally, Hopkins was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” to improve her partnership admission prospects.\(^ {231}\) As a result of this experience, Hopkins alleged that her firm, Price Waterhouse, violated Title VII by discriminating against her based on sex.\(^ {232}\)

Just three years prior, the Supreme Court held that sexual harassment constitutes sex discrimination under Title VII.\(^ {233}\) The Court, quoting *City of Los Angeles Department of Water & Power v. Manhart*,\(^ {234}\) stated that Title VII’s “because of sex” provision includes “the entire spectrum of disparate treatment of men and women resulting from [gender] stereotypes.”\(^ {235}\) The Court emphasized its view that “[the United States is] beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated

\(^ {224}\) 490 U.S. at 258.
\(^ {225}\) Id. at 232.
\(^ {226}\) Id.
\(^ {227}\) Id.
\(^ {228}\) Id. at 233.
\(^ {229}\) Id. at 235.
\(^ {230}\) Id.
\(^ {231}\) Id.
\(^ {232}\) Id. at 232.
\(^ {234}\) 435 U.S. 702, 707 n.13 (1978) (citation omitted).
with their group . . . .”

The Court’s reasoning ostensibly prohibits employers from disciplining employees if they would not similarly discipline employees of a different sex for identical conduct or expression. Thus, *Price Waterhouse* seemingly “permit[s] an enormous range of discrimination claims.”

Nine years later, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex harassment constitutes unlawful sex discrimination under Title VII. The case involved several male coworkers committing “sex-related, humiliating actions” against the petitioner, Joseph Oncale. The harassment, however, did not stop there; the coworkers also “physically assaulted Oncale in a sexual manner” and threatened to rape him. Oncale complained to supervisors, but they did nothing. Eventually, Oncale quit and requested that the documentation show that he “voluntarily left due to sexual harassment and verbal abuse.”

Justice Scalia, writing for the majority, declared, “Title VII prohibits ‘discriminat[ion] . . . because of . . . sex’ . . . . [This] must extend to [sex-based discrimination] of any kind that meets the statutory requirements.” He reasoned that Title VII prohibits any workplace conduct that meets the statutory requirements, including same-sex sexual harassment. But the Supreme Court has never explicitly addressed the issue of extending Title VII protections to LGBTQ+ individuals alleging employment discrimination on the basis of gender identity or sexual

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236 *Id.*


239 *Id.* at 77.

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.* at 79–80.

244 *Id.* at 80.
orientation. Thus, most federal Circuit Courts of Appeals remain reluctant to do so.\footnote{245 See, e.g., 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."); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) ("[A] gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’"); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII’s protections . . . do not extend to harassment due to a person’s sexuality."); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); see also Ayres & Luedeman, supra note 237, at 719 ("Congress has repeatedly failed to include sexual orientation as an explicitly protected category under Title VII. In deference to Congress, even the most progressive of courts have therefore only granted relief to bi/homosexual plaintiffs who focus on their nonsexual gender-nonconformity—such as their manner of speech or dress—rather than on their bi/homosexuality itself.").}

1. Federal District Courts and Circuit Courts of Appeals

Some federal courts, however, have been willing to find a private right of action under Title VII for employment discrimination on the basis of gender identity.\footnote{246 See, e.g., Kastl v. Maricopa Cty. Cnty. Coll. Dist., 325 Fed. Appx. 492, 493 (9th Cir. 2009) ("[T]ransgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim’s real or perceived non-conformance to socially-constructed gender norms. After [Price Waterhouse v. Hopkins and Schwenk v. Hartford], it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women."); Roberts v. Clark Cty., Sch. Dist., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) ("[B]ecause it appears that the Ninth Circuit would hold that gender-identity discrimination is actionable under Title VII. I see no reason to depart from the heavy weight of this authority. Nothing in the few contrary decisions cited by the [defendant] persuades me otherwise. The contrary Seventh and Tenth Circuit decisions provide no cogent analysis of Title VII’s language or Supreme Court caselaw."); Doe v. Arizona, No. CV-15-02399-PHX-DGC, 2016 U.S. Dist. LEXIS 36229, at *6 (D. Ariz. Mar. 21, 2016) ("[P]laintiff states that he is transgender, thereby satisfying the ‘protected status’ element of a gender discrimination claim. Plaintiff alleges that his supervisors have tolerated harassment of him and have breached his confidentiality by informing prison inmates of his transition. These allegations satisfy the ‘adverse employment action’ and ‘disparate treatment’ elements of a gender discrimination claim.” (citations omitted)).} For example, in Mickens v. General Electric Co., a federal district court denied a defendant-employer’s motion to dismiss a Title VII sex-discrimination claim in which a transgender plaintiff-employee was fired for supposed attendance issues.\footnote{247 No. 3:16CV-00603-JHM, 2016 U.S. Dist. LEXIS 163961, at *9–10 (W.D. Ky. Nov. 29, 2016).} The supposed attendance issues, however, resulted from Mykel Mickens, the plaintiff-employee, having to use a distant bathroom after his
employer denied him use of a more proximal male bathroom.248 Additionally, Mickens’s supervisor targeted Mickens for harassment and reprimand and told Mickens that nothing could be done about it.249 The court acknowledged that the Sixth Circuit and the Supreme Court were in a position at the time to address the issue of discrimination on the basis of gender identity, albeit in the context of Title IX.250 Nonetheless, the court held that Mickens sufficiently pled that his employer discriminated against him because “he did not conform to the gender stereotype of what someone who was born female should look and act like.”251

Similarly, in Chavez v. Credit Nation Auto Sales, the Eleventh Circuit reversed summary judgment for the defendant-employer when the plaintiff-employee claimed that she was terminated because she was transgender and there was sufficient circumstantial evidence to create triable issues of fact concerning “her employer’s discriminatory intent” and “[her employer’s] gender bias [as] ‘a motivating factor’ in [her termination].”252 The plaintiff-employee, Jennifer Chavez, met with the president of her employer, Credit Nation, to discuss her gender transition.253 At this meeting, the president said he was “nervous” about Chavez’s “condition,” told Chavez not to “bring up” the issue of her transition, and instructed Chavez not to wear “a dress or miniskirt.”254 A few days later, Credit Nation’s vice president told Chavez to “tone it down” and to be “very careful” because [the president] ‘didn’t like’ the implications of Chavez’s planned gender transition.”255 After disclosing her gender transition, Chavez became the subject of heightened scrutiny and unusual discipline.256 Finally, Credit Nation did not follow its own policies in the events leading up to Chavez’s termination.257 The court, considering the totality of this evidence,

248 Id. at *2–3.
249 Id. at *3.
251 Id. at *9 (“W[hat is clear is that the Plaintiff’s complaint sufficiently alleges facts to support discrimination or disparate treatment claims based upon . . . gender non-conformity or sex stereotyping.”).
253 Id. at 885.
254 Id. at 890–91.
255 Id. at 891.
256 Id.
257 Id. at 892.
determined that Chavez put forth sufficient evidence to constitute a triable issue of fact concerning her Title VII claim. 258

Most recently, in EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., the Sixth Circuit reversed summary judgment for the employer–defendant and granted summary judgment for the EEOC on behalf of the employee–plaintiff. 259 In doing so, the court held that Title VII prohibits discrimination on the basis of gender identity. 260 The case involved a funeral home director, Aimee Stephens, who worked for a closely held for-profit funeral home. 261 The funeral home’s mission statement reflected the Christian values of its owners, and its dress policy imposed different requirements for male and female employees. 262 The owner of the funeral home terminated Stephens after Stephens informed him that she would be transitioning from male to female. 263 Additionally, she had indicated that she would be dressing as a woman while at work. 264 Although the Sixth Circuit noted that the district court correctly held that Stephens was fired due to sex stereotyping, it also noted that the district court erred when determining that discrimination based on gender identity is not actionable under Title VII. 265 The court cited to Hively v. Ivy Tech Community College of Indiana, 266 Price Waterhouse v. Hopkins, 267 G.G. v. Gloucester County School Board, 268 Oncale v. Sundowner Offshore Services, Inc., 269 and Zarda v. Altitude Express 270 for support. 271
The same is true for employment discrimination on the basis of sexual orientation. For example, in *EEOC v. Scott Medical Health Center*, a federal district court denied a defendant–employer’s motion to dismiss, ruling, “Title VII’s ‘because of sex’ provision prohibits discrimination on the basis of sexual orientation.” The case involved a telemarketing manager making offensive remarks to an employee, Dale Baxley, based on Baxley’s sexual orientation. Baxley is a gay man and had a male partner. Baxley’s employer, Scott Medical Health Center, later constructively terminated him. The EEOC discovered the workplace discrimination and sexual harassment directed at Baxley in the course of a separate investigation concerning the same manager’s workplace discrimination and sexual harassment directed at five of Baxley’s former female coworkers. The EEOC filed a complaint against Scott Medical Health Center on behalf of Baxley, alleging that the manager’s conduct created a hostile work environment and violated Title VII. The court rejected Scott Medical Health Center’s contention that Title VII does not prohibit discrimination based on sexual orientation. The district court reasoned that the Supreme Court’s decision in *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Services, Inc.* compelled its finding that Title VII protected employees from workplace discrimination based on sexual orientation. In reaching its

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272 See, e.g., Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (“[T]he line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”); Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (“[T]he Equal Employment Opportunity Commission [correctly concluded] that claims of sexual orientation-based discrimination are cognizable under Title VII.”).


274 Id. at 836 (“Specifically, the Complaint alleges [the telemarketing manager] ‘routinely made unwelcome and offensive comments about [Mr.] Baxley, including but not limited to regularly calling him “fag,” “faggot,” “[expletive] faggot,” and “queer,” and making statements such as “[expletive] queer can’t do your job.””

275 Id.

276 Id.

277 Id.

278 Id. at 835.

279 Id. at 839–40 (“The Court sees no meaningful difference between sexual orientation discrimination and discrimination ‘because of sex’ [under Title VII].”)

280 490 U.S. 228 (1989).


282 *Scott Med. Health Ctr.*, 217 F. Supp. 3d at 841 (“Forcing an employee to fit into a gendered expectation—whether that expectation involves physical traits, clothing, mannerisms or sexual attraction—constitutes sex stereotyping and, under *Price Waterhouse*, violates Title VII. Simply put, [the telemarketing manager’s] alleged conduct toward Mr. Baxley ‘stemmed from an impermissibly
decision, the court also noted that other federal district courts have reached the same conclusion. Finally, the court cited Obergefell to suggest that there is “a growing recognition of the illegality of discrimination on the basis of sexual orientation.”

Similarly, in Hively v. Ivy Tech Community College Of Indiana, the en banc Seventh Circuit reversed dismissal of the plaintiff–employee’s complaint alleging a Title VII violation. In doing so, the Seventh Circuit seemingly overruled contrary prior precedent and held that Title VII’s prohibition on sex discrimination extends to discrimination on the basis of sexual orientation. Hively involved an openly lesbian adjunct professor at Ivy Tech Community College (Ivy Tech). Ivy Tech denied Kimberly Hively’s application to become a full-time professor at least six times between 2009 and 2014. Additionally, in 2014, Ivy Tech refused to renew Hively’s part-time contract. Alleging that Ivy Tech denied her applications on the basis of her sexual orientation in violation of Title VII, Hively filed a pro se complaint against her former employer. The district court dismissed Hively’s complaint with prejudice for failure to state a claim upon which relief may be granted, which a panel of the Seventh Circuit affirmed. The Seventh Circuit then vacated the panel’s decision and granted a rehear-

289 Baldwin v. Foxx, 231 F.3d 1080 (7th Cir. 2000).

290 Id.

291 Id.


ing en banc,294 at which the full Seventh Circuit held that Hively’s Title VII claim may proceed and that Title VII prohibits employment discrimination based on sexual orientation.295 The court noted that the decision “must be understood against the backdrop of the Supreme Court’s decisions”296 in Price Waterhouse v. Hopkins,297 Oncale v. Sundowner Offshore Services, Inc.,298 Romer v. Evans,299 Lawrence v. Texas,300 United States v. Windsor,301 and Obergefell v. Hodges,302 as well as the EEOC’s decision in Baldwin v. Foxx.303 This monumental decision by the en banc Seventh Circuit created a circuit split.304

Most recently, in Zarda v. Altitude Express, Inc., the en banc Second Circuit held that the employee–plaintiff’s claim of discrimination based on sexual orientation against the employer–defendant is actionable under Title VII.305 In doing so, the Second Circuit overturned prior precedents that held that discrimination based on sexual orientation is not prohibited by Title VII.306 The case involved an employer–defendant termi-

295 Hively, 853 F.3d at 352.
296 Id. at 349–50.
297 490 U.S. 228 (1989).
301 133 S. Ct. 2675 (2013).
305 Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d Cir. 2018) (en banc) (“Although sexual orientation discrimination is ‘assuredly not the principal evil that Congress was concerned with when it enacted Title VII,’ ‘statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.’ In the context of Title VII, the statutory prohibition extends to all discrimination ‘because of . . . sex’ and sexual orientation discrimination is an actionable subset of sex discrimination.” (citations omitted)).
306 Id. at 132 (overturning Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) and Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000)). The Second Circuit also noted the cases in its “sister circuits” that were consistent with Simonton and Dawson. Id. at 107 (citing Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290 (3d Cir. 2009); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000);
ating an employee–plaintiff because of his sexual orientation. Donald Zarda, the employee–plaintiff, served as a skydiving instructor at Altitude Express. Donald Zarda also was a gay man. Zarda often disclosed his homosexuality to the female clients which he would be connected to during the skydive when they were accompanied by their husband or boyfriend. He did so to prevent any awkwardness resulting from his contact with the women during the skydiving. On one occasion, a woman informed her boyfriend of Zarda’s sexuality while discussing their skydives. The boyfriend complained about Zarda’s behavior to Altitude Express. Altitude Express terminated Zarda soon after receiving the complaint. Similar to the full Seventh Circuit in Hively, the full Second Circuit noted that the case is heavily influenced by the Supreme Court’s decisions in Price Waterhouse and Oncale, among others.

Prior to this momentous decision by the full Second Circuit, two recent panels of the Second Circuit held that Title VII does not extend to discrimination based on sexual orientation because they are bound by prior precedent. In one of the panel decisions, Chief Judge Katzmann proposed that the full Second Circuit “revisit” the question concerning Title VII and

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308 Id. at 109.
309 Id. at 108.
310 Id.
311 Id.
312 Id.
313 Id.
314 Id. at 109.
316 Zarda, 883 F.3d at 119–21.
317 See Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 199 (2d Cir. 2017) (citing Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) and Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000)); Zarda v. Altitude Express, 855 F.3d 76, 82 (2d Cir. 2017) (citing Simonton and Omnicom). Both the Omnicom and Zarda panels, however, noted that gender stereotyping is actionable under Title VII. See Omnicom, 852 F.3d at 200–201; Zarda, 855 F.3d at 82. Before the Omnicom and Zarda panels held that Title VII does not extend to discrimination based on sexual orientation, panels of the Second Circuit made similar determinations in Dawson and Simonton. See Dawson, 398 F.3d at 218; Simonton, 232 F.3d at 36.
discrimination based on sexual orientation. The Second Circuit then vacated these panel decisions and granted a re-hearing en banc to determine whether Title VII prohibits discrimination based on sexual orientation. The Second Circuit, sitting en banc, heard oral arguments for Zarda on September 26, 2017. The Second Circuit panel determined that “Zarda may receive a new trial only if Title VII’s prohibition on sex discrimination encompasses discrimination based on sexual orientation—a result foreclosed by Simonton.” Although the panel noted that it is bound by controlling precedent, the court intimated that Zarda would be entitled to a new trial if Title VII prohibited employment discrimination based on sexual orientation. It seems likely that Altitude Express will appeal the case to the Supreme Court.

2. Evans v. Georgia Regional Hospital

Although some of the Circuit Courts of Appeals have ruled on the issue, the Supreme Court has never expressly decided whether federal workplace protections apply on the basis of sexual orientation and gender identity. In the 2017-2018 Term, the Supreme Court passed on an opportunity to extend Title VII protections to LGBTQ+ individuals. Indeed, the Court refused to grant Jameka Evans’s petition for writ of certiorari after the Eleventh Circuit dismissed her lawsuit claiming employment discrimination on the basis of sexual orientation.

[References]
318 Omnicom, 852 F.3d at 202 [Katzmann, C.J., concurring] (noting the “changing legal landscape that has taken shape in the nearly two decades since Simonton issued”).
321 Zarda, 855 F.3d at 82.
322 Id. (“In sum, if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial.”).
324 See Andrew Chung, U.S. High Court Turns Away Dispute Over Gay Worker Protections, REUTERS (Dec. 11, 2017, 9:36 AM), https://www.reuters.com/article/us-usa-court-lgbt/u-s-high-court-turns-away-dispute-over-gay-worker-protections-idUSKBN1E51OT [https://perma.cc/7TM6-VQLH ] (“The U.S. Supreme Court on Monday refused to hear an appeal by a Georgia security guard who said she was harassed and forced from her job because she is a lesbian, avoiding an opportunity to decide whether a federal law that bars gender-based bias also outlaws discrimination based on sexual orientation.”).
and gender non-conformity. Evans was a gay woman who identified with the male gender, and faced a hostile work environment because of her identity. She alleged that during her tenure as a security officer at Georgia Regional Hospital, she was "denied equal pay or work, harassed, . . . physically assaulted or battered[,] . . . [and] discriminated against on the basis of her sex and targeted for termination for failing to carry herself in a ‘traditional womanly manner.’”

Evans further alleges that the hospital punished and retaliated against her after she informed its human resources personnel of the hostility and unfair discrimination she faced.

In her pro se complaint, Evans argues that Title VII’s prohibition of employment discrimination on the basis of sex extends to her claims of discrimination based on sexual orientation and gender non-conformity. A magistrate judge recommended dismissing claims with prejudice for failure to plead an actionable claim, which the district court adopted. Reviewing the case de novo, the Eleventh Circuit affirmed the district court’s dismissal of Evans’s claim of discrimination based on sexual orientation, but vacated and remanded with instructions to allow Evans leave to amend her claim of discrimination based on gender non-conformity.

The Eleventh Circuit held that the district court correctly dismissed Evans’s sexual orientation claim because Title VII does not extend to discrimination based on sexual orientation. The court cited Blum v. Gulf Oil Corp., which held that Title VII does not prohibit an employer from terminating an employee on the basis of sexual orientation. The Eleventh Circuit also rejected Evans’s argument that Price Waterhouse and Oncale support extending Title VII to dis-

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326 Id. at 1251.
327 Id.
328 Id. at 1250–52.
329 Id. at 1252.
330 Id.
331 Id. at 1257.
332 Id. at 1255.
333 Id.
334 597 F.2d 936, 938 (5th Cir. 1979).
335 See Evans, 850 F.3d at 1255. Although Blum is a Fifth Circuit case, the Eleventh Circuit has held that any decision from the former Fifth Circuit preceding September 20, 1981 is binding precedent. See id. at 1255 n.4 (citing Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)).
336 See supra subpart III.B.
Wrongful Termination

Wrongful termination discrimination based on sexual orientation. Furthermore, although the Eleventh Circuit held that Title VII prohibits discrimination based on gender non-conformity, the court concluded that Evans had yet to plead facts indicating that the hospital punished and retaliated against her based on her gender non-conformity. Nonetheless, the Eleventh Circuit ruled that the district court erred in failing to provide Evans an opportunity to amend her complaint. Evans appealed to the Supreme Court, which denied certiorari.

By denying Evans’s petition, the Supreme Court failed to live up to the words engraved on the pediment of its building. If the United States is to truly afford its citizens “equal justice under law,” as South Africa does, the Supreme Court should have granted certiorari, reversed the Eleventh Circuit’s decision, and extended Title VII to cover gender identity and sexual orientation. Fortunately, the Supreme Court will likely get a second opportunity once the Second Circuit decides the Zarda case. One must wonder, however, whether the Supreme Court will grant certiorari for the Zarda case since the Court denied certiorari in the Evans case.

337 Evans, 850 F.3d at 1256 (“The fact that claims for gender non-conformity and same-sex discrimination can be brought pursuant to Title VII does not permit us to depart from Blum. . . . Price Waterhouse and Oncale are neither clearly on point nor contrary to Blum.”).

338 Id. at 1254.

339 Id.


342 Cf. Patricia N. Jjemba, Expanding the Scope of Title VII: Will Sexual Orientation Become a New Basis for Employment Discrimination?, CBA RECORD, September 2017, at 40, 41 (“The plaintiff in Zarda may not have been an ideal plaintiff to further the theory of sex discrimination on sexual orientation grounds. . . . The split between circuits already exists, and Ms. Jameka Evans of Atlanta, Georgia may present the right set of facts for the Supreme Court to hear her case,” (citation omitted)). Evans and Zarda deal predominantly with extending the “based on sex” provision in Title VII to cover sexual orientation. But the Supreme Court also has the opportunity to conclude that “based on sex” also includes discrimination based on gender identity, albeit in the context of Title IX. See Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034, 1039 (7th Cir. 2017) (holding that Title IX’s “based on sex” provision prohibits discrimination based on gender-identity), petition for cert. filed, No. 17-301, 2018 WL 1147062 (Mar. 5, 2018). The Court was able to dodge a similar question in 2017 after the Trump administration rescinded the Obama Administration’s protections for transgender students in public schools. See Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239,
Supreme Court ruling extending Title VII protections to LGBTQ+ individuals, Congress must act by passing robust workplace protections for LGBTQ+ citizens.\footnote{343}

IV
PROPOSED PIECES OF LEGISLATION IN CONGRESS

A. The Employment Non-Discrimination Act

The Employment Non-Discrimination Act (ENDA) prohibits employment discrimination on the basis of sexual orientation and gender identity.\footnote{344} ENDA, in its current form, states:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity; or (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual’s actual or perceived sexual orientation or gender identity.\footnote{345}

ENDA’s language is nearly identical to that of Title VII.\footnote{346} ENDA also prohibits employers from retaliating against any employee who reports an employer for violating ENDA.\footnote{347}

After previous defeats and a lack of success, LGBTQ+ advocacy organizations and their allies altered their strategy con-

\footnote{343} Cf. Symone D. Shinton, Married on Saturday, Fired on Monday: The Seventh Circuit Attempts to Navigate LGBT Rights After Obergefell, 12 SEVENTH CIR. REV. 33, 61 (2016) (“Regardless of how the Seventh Circuit rules in Hurley, Congress must act to provide protections for LGBT[Q+] employees against this invidious discrimination.”).


\footnote{345} Id.

\footnote{346} See supra note 201 and accompanying text.

\footnote{347} Employment Non-Discrimination Act, supra note 344.}
cerning federal legislation in the 1970s.\textsuperscript{348} Instead of pursuing an amendment to the Civil Rights Act of 1964,\textsuperscript{349} they began advocating for “a more politically expedient, standalone bill” focusing exclusively on employment non-discrimination.\textsuperscript{350} In 1994, members of Congress first introduced ENDA which they modeled on the Americans with Disabilities Act from just a few years prior.\textsuperscript{351} The bill, however, only included protections for LGB individuals.\textsuperscript{352} In 2007, Congressman Barney Frank introduced a version of ENDA that also included protections for transgender individuals.\textsuperscript{353} The 2013 version of ENDA also includes protections for both sexual orientation and gender identity.\textsuperscript{354} Although ENDA passed the Senate in 2013,\textsuperscript{355} Speaker John Boehner refused to bring the bill to the floor of the House of Representatives for a vote.\textsuperscript{356} LGBTQ+ advocacy organizations and their allies thereafter deserted ENDA and focused their efforts on the Equality Act.\textsuperscript{357}

B. The Equality Act

In 1974, Congresswoman Bella Abzug and Congressman Ed Koch introduced the Equality Act in Congress.\textsuperscript{358} Congresswoman Abzug’s bill, however, only extended protections to LGB citizens.\textsuperscript{359} And not a single other member of Congress

\begin{itemize}
  \item \textsuperscript{348} See Alex Reed, Abandoning ENDA, 51 HARV. J. ON LEGIS. 277, 281–82 (2014) [hereinafter Abandoning ENDA].
  \item \textsuperscript{349} See infra subpart IV.B.
  \item \textsuperscript{350} Bornstein & Bench, supra note 186, at 48.
  \item \textsuperscript{353} Wasser, supra note 199, at 1116.
  \item \textsuperscript{354} Employment Non-Discrimination Act, supra note 344.
  \item \textsuperscript{355} Caulley, supra note 352, at 929.
  \item \textsuperscript{356} Wasser, supra note 199, at 1118.
  \item \textsuperscript{357} Id.
  \item \textsuperscript{359} See Equality Act of 1974, H.R. 14752 (prohibiting discrimination based on sex, marital status, and sexual orientation in public accommodation, federally assisted programs, and the public sector).}


signed onto the bill as a cosponsor.\footnote{360} The bill died in committee without a vote.\footnote{361} In subsequent Congresses, members of Congress reintroduced the Equality Act or an equivalent bill.\footnote{362} While the bills increasingly gained support from cosponsoring members of Congress, the bills died in committee each time.\footnote{363} The Equality Act reappeared in July 2015, after LGBTQ+ advocacy organizations and their allies had abandoned their push for ENDA.\footnote{364}

The Equality Act is similar, but not identical to ENDA.\footnote{365} While ENDA is a stand-alone piece of legislation that applies specifically to LGBTQ+ individuals, the Equality Act serves to add protections for LGBTQ+ individuals by amending existing civil rights laws.\footnote{366} Amongst these civil rights laws is the Civil Rights Act of 1964.\footnote{367} In the context of employment non-discrimination, the Equality Act would amend Title VII to include sexual orientation and gender identity.\footnote{368} The Equality Act thus provides more robust and comprehensive protections for LGBTQ+ individuals—in the employment context and beyond.\footnote{369}

The Equality Act and amending Title VII, according to Professor Alex Reed, have other advantages as well. First, the Equality Act and Title VII provide plaintiffs with the ability to contest discrimination on either a disparate treatment theory or a disparate impact theory.\footnote{370} ENDA, however, only allows for discrimination claims on the basis of disparate treatment.\footnote{371} Second, the Equality Act and Title VII forbid religious
organizations from discriminating on the basis of race, color, national origin, and sex.\footnote{372} Amending Title VII to include sexual orientation and gender identity would presumably also prohibit religious organizations from discriminating on these grounds as well.\footnote{373} ENDA, on the other hand, allows religious organizations to discriminate on the basis of sexual orientation and gender identity.\footnote{374} Finally, the Equality Act and Title VII permit employers to implement temporary affirmative action plans to diversify their workforce.\footnote{375} This provision is similar to that of the PEPUDA and EEA.\footnote{376} ENDA prohibits using quotas or giving special treatment to individuals based on their sexual orientation or gender identity.\footnote{377}

In sum, although ENDA is a step in the right direction, its protections for LGBTQ+ individuals are modest compared to the more comprehensive protections included in the Equality Act and Title VII. Thus, in order to more closely follow South Africa’s robust and progressive protections for its LGBTQ+ citizens, the U.S. Congress should pass the Equality Act. Until that time, LGBTQ+ individuals will remain second-class citizens whose employers may discriminate against them at will.

C. Progress in the Private Sector

Even without federal laws such as ENDA or the Equality Act mandating employment non-discrimination,\footnote{378} many companies still provide equal rights and benefits to LGBTQ+ individuals. The Human Rights Campaign’s annual Corporate Equality Index (CEI) report scores large businesses based on their “policies, benefits[,] and practices” pertinent to LGBTQ+ employees and their families.\footnote{379} The Human Rights Campaign invites Fortune magazine’s 1,000 largest publicly traded businesses and American Lawyer magazine’s top 200 revenue-grossing law firms to participate, while any private-sector business with 500 or more full-time employees can request to par-

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\footnote{372}{Id.}
\footnote{373}{Id.}
\footnote{374}{Id.}
\footnote{375}{Id.}
\footnote{376}{See supra subpart I.C.}
\footnote{377}{Abandoning ENDA, supra note 348, at 281.}
\footnote{378}{See supra subparts II.A–B.}
The 2017 CEI report shows that 515 major businesses earned a perfect score. The report also found that 92 percent of Fortune 500 businesses include sexual orientation in their United States non-discrimination policies, while 82 percent include gender identity. Generally, businesses with top CEI scores receive positive media attention, while those with low scores receive negative or disparaging media attention. Indeed, "businesses know that LGBTQ equality isn’t just the right thing to do, it makes them stronger in our global economy." In the absence of action by Congress or the Supreme Court, the private sector should continue to lead the way by prioritizing non-discrimination policies for employees, including those who identify as LGBTQ+. These policies are not only beneficial for “form[ing] a more perfect Union” but also for business.
Moreover, some commentators have proposed using a certification mark to indicate that a company or employer has committed to the “exact substantive duties of ENDA.” \textsuperscript{389} The certification mark, which takes the form of a symbol with an “FE” \textsuperscript{390} inside a circle, announces to customers and employees that the company or employer is committed to employment non-discrimination on the basis of sexual orientation and gender identity. \textsuperscript{391} Employers and corporations gain the right to use the mark only if they sign a licensing agreement agreeing to follow the provisions of ENDA. \textsuperscript{392} The commentators note that the certification mark is merely an “incremental strategy in the struggle for equality.” \textsuperscript{393}

The commentators also contend that the strategy will have other beneficial effects. \textsuperscript{394} Privatizing ENDA using the certification mark has three additional benefits: (1) amelioration, (2) demonstration, and (3) realignment. \textsuperscript{395} First, in states that do not have robust workplace protections for LGBTQ+ individuals, privatizing ENDA provides an ameliorative private right of action and legal remedy to unprotected workers who are discriminated against based on their sexual orientation or gender identity. \textsuperscript{396} Second, companies and employers adopting the mark will demonstrate to lawmakers the prudence of adopting ENDA or the state equivalent as well as inform them about the operational and litigation-related implications of the law. \textsuperscript{397} Third, the adoption of the mark by a significant number of companies and employers may produce new opportunities ei-


\textsuperscript{390} “FE” stands for “Fair Employment.”

\textsuperscript{391} Ayres & Brown, \textit{supra} note 389, at 1641.

\textsuperscript{392} \textit{Id.}

\textsuperscript{393} \textit{Id.}

\textsuperscript{394} \textit{See id.} at 1641–42.

\textsuperscript{395} \textit{Id.} at 1647.

\textsuperscript{396} \textit{Id.}

\textsuperscript{397} \textit{Id.} at 1648.
ther to compromise in Congress or state legislatures or to serve as a “wedge issue” to pressure politicians to support ENDA.\textsuperscript{398} The proposal to privatize ENDA, however, can just as easily be applied to the Equality Act in the context of employment discrimination and workplace protections.

CONCLUSION

In conclusion, South African non-discrimination and equal protection law and jurisprudence should serve as a model for the United States. The South African Constitution, South African Constitutional Court cases, and laws passed by the South African Parliament all mandate that LGBTQ+ South Africans be treated equally to their heterosexual counterparts. Discrimination against LGBTQ+ South Africans is expressly forbidden—including in the employment context. The United States still lacks comprehensive federal employment non-discrimination laws or workplace protections for LGBTQ+ individuals. Extending Title VII—either via court decision or by passing the Equality Act—will provide robust workplace protections on the basis of sexual orientation and gender identity. This approach is the most effective way to close the gap between South African non-discrimination and equal protection law and jurisprudence and that of the United States. In the meantime, South Africa will be the proverbial “city upon a hill,”\textsuperscript{399} and the United States will continue to abdicate its moral responsibility.

\textsuperscript{398} Id. at 1650.
\textsuperscript{399} John Winthrop, A Model of Christian Charity, WINTHROP SOCY, https://www.winthropsociety.com/doc_charity.php [https://perma.cc/TVB9-RFAF] (presenting a thesis written on board the ship \textit{Arbella} in 1630); see also John F. Kennedy, President-Elect, United States of America, Address at the General Court of Massachusetts (Jan. 9, 1961) (“I have been guided by the standard John Winthrop set before his shipmates on the flagship \textit{Arbella} three hundred and thirty-one years ago. . . . ‘We must always consider,’ he said, ‘that we shall be a city upon a hill—the eyes of all people are upon us.’” (emphasis added)); Ronald Reagan, President, United States of America, “A Vision for America” Election Eve Address (Nov. 3, 1980) (“I have quoted John Winthrop’s words more than once upon the campaign trail this year—for I believe that Americans in 1980 are every bit as committed to that vision of a shining ‘city on a hill’ as were those long ago settlers . . . .” (emphasis added)); Barack Obama, U.S. Senator, Commencement Address at the University of Massachusetts, Boston (June 2, 2006) (“As the earliest settlers arrived on the shores of Boston and Salem and Plymouth, they dreamed of building a City upon a Hill. . . . I see students that have come here from over 100 different countries, believing like those first settlers that they too could find a home in this City on a Hill—that they too could find success in the unlikeliest of places.” (emphasis added)); Mitt Romney, Address at the Hinckley Institute of Politics at the University of Utah (Mar. 3, 2016) (“[Donald Trump’s] domestic policies would lead to recession. His foreign policies would make America and the world less safe. He has neither the temperament nor the judge-
ment to be president. And his personal qualities would mean that America would cease to be a shining city on a hill." (emphasis added)).