

TAKING THE FIGHT BACK TO TITLE
VII: A CASE FOR REDEFINING
“BECAUSE OF SEX” TO INCLUDE
GENDER STEREOTYPES, SEXUAL
ORIENTATION, AND GENDER
IDENTITY

WILLIAM C. SUNG*

Human progress is neither automatic nor inevitable. . . . Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.

–Martin Luther King, Jr.

TABLE OF CONTENTS

I. INTRODUCTION.....	488
II. A TALE OF TOO MANY SACRIFICES: THE EMPLOYMENT NON-DISCRIMINATION ACT.....	495
A. FROM BELLA TO ENDA.....	495
1. The First Twenty Years: The Civil Rights Amendment Bills	495
2. The Next Sixteen Years: Introducing ENDA	497
3. Going Forward: A Case for Redefining “Because of Sex”	498
B. UNPRINCIPLED COMPROMISES	501

* Class of 2011, University of Southern California Gould School of Law; B.A. Philosophy 2004, University of California, Irvine. I am eternally grateful to Professor Camille Gear Rich for her wisdom and guidance, the editors of the *Southern California Law Review* for their diligence, and my family—especially my fiancée Eva Chan—for their unwavering love and support. This Note is dedicated to my grandparents; it is through their sacrifices and resolve that my dreams and achievements are made possible.

1. The Defense of Marriage Act Compromise.....	502
2. The Transgender Compromise	503
3. No More Compromises.....	506
C. LESS EFFECTIVE THAN TITLE VII AND THE ADA	508
1. Expansive Religious Exemptions	508
2. No Cause of Action for Disparate Impact	510
3. Lack of Doctrinal Development	511
4. Vulnerability to Legislative Tinkering	512
5. A Case for Amending Title VII.....	513
III. DEFINING “BECAUSE OF SEX”: <i>PRICE WATERHOUSE</i>	
AND <i>ONCALE</i>	514
A. A PLAIN MEANING OF “SEX”	514
1. Sexual Orientation Is Not “Sex”	514
2. Gender Identity Is Not “Sex”	515
3. Effeminacy Is Not “Sex”	517
B. EXPANDING “BECAUSE OF SEX”	518
1. <i>Price Waterhouse v. Hopkins</i>	518
2. The Grooming Code Cases	520
3. <i>Oncale v. Sundowner Offshore Services, Inc.</i>	521
4. A Case for Redefining “Because of Sex” to Include	
Gender Stereotypes.....	523
IV. REDEFINED “BECAUSE OF SEX”: THE PREGNANCY	
DISCRIMINATION ACT	524
V. A CASE FOR REDEFINING “BECAUSE OF SEX” TO	
INCLUDE SEXUAL ORIENTATION AND GENDER	
IDENTITY	527
A. NONCONFORMING GENDER IDENTITY	527
1. Reliance on <i>Holloway</i> and <i>Ulane</i>	527
2. The New Legal Landscape: Slowly but Surely	529
3. ENDA: a Threat to the New Legal Landscape	532
B. GENDER NONCONFORMING AFFECTIONAL CHOICES.....	533
1. Effeminacy Discrimination.....	533
2. Courts’ Fear and Practice of Bootstrapping.....	535
VI. CONCLUSION	537

I. INTRODUCTION

Michael P. Carney was a good cop. Since graduating from the police academy in 1982, he received numerous commendations for his

outstanding work as a police officer and contributions to the community.¹ He had been recognized for saving a man who had jumped from a bridge into the Connecticut River in a suicide attempt, apprehending a bank robber, and cofounding a youth mentorship program.² He had worked as a police academy instructor, an aide to the chief of police, and a detective in the youth assessment center, the narcotics division, and the uniform division.³ But behind closed doors, he was tormented by the need to keep a secret for many years—Carney was gay.⁴

For years Carney stayed in the closet out of fear of reprisal and being ostracized.⁵ He went to work every day afraid to talk about his personal life, including a date from the night before, his weekend, or his family.⁶ He went into every domestic or gun call thinking if he were gunned down, who would notify his life partner? Would his life partner learn of his death on the eleven o'clock news? How would his colleagues treat his life partner at his funeral?⁷ This fear led to years of isolation and heavy drinking, which took their toll; in 1989, beaten and defeated, Carney resigned from his post.⁸

After this turning point and over the next three years, Carney worked tirelessly to reclaim his life. He sought professional help and got sober; he came out and lived openly as a gay man; and he cofounded the Gay Officers Action League of New England, a support group for homosexual law enforcement officers.⁹ But the one thing he wanted most was to return to the job he loved.¹⁰ He applied for reinstatement along with four other colleagues; he was denied while they were reinstated.¹¹ He reapplied for reinstatement twice more and was denied twice more.¹² When he complained to the police commission, it defended itself by claiming that “other candidates were more enthusiastic and more forthright.”¹³

1. See *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing on S. 1584 Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1, 3–4 (2009) (statement of Michael P. Carney, Police Officer, Springfield, Massachusetts), available at <http://help.senate.gov/imo/media/doc/Carney.pdf>.

2. *Id.* at 3–4.

3. *Id.* at 3.

4. See *id.* at 1.

5. *Id.*

6. *Id.*

7. *Id.* at 2.

8. See *id.*

9. *Id.*

10. See *id.*

11. *Id.* at 2–3.

12. *Id.* at 3.

13. *Id.*

Humiliated, Carney spent the next two and a half years pursuing a sexual orientation discrimination lawsuit against the police commission in Massachusetts's Commission Against Discrimination.¹⁴ In 1994, the Commission ruled that sexual orientation discrimination had in fact occurred, and Carney finally got his job back.¹⁵

Carney was one of the luckier ones. He was lucky because he lived in Massachusetts, one among a minority of states with an antidiscrimination statute that includes sexual orientation or gender identity as a protected class.¹⁶ Had he lived in a state without such protection or had he sought to be reinstated to a federal post, he would have had no redress whatsoever because no federal law currently exists to protect an individual from employment discrimination on the basis of sexual orientation or gender identity.

Compare Carney with Laura Elena Calvo. Calvo was a preoperative male-to-female transsexual, and from 1980 to 1996 worked as a law enforcement officer for the Josephine County Sheriff's Office in Grants Pass, Oregon.¹⁷ Like Carney, Calvo received numerous commendations for her outstanding work as a police officer, which included saving an automobile accident victim from a burning vehicle, delivering a baby alongside a roadway, and disarming an armed, suicidal man, and she was also named Deputy of the Year in 1994.¹⁸ Calvo, however, was transgender; born male, she had to express her female gender identity by cross-dressing in private—she went as far as renting a storage unit to store her feminine things.¹⁹ When the Josephine County Sheriff's Office discovered her need to express her gender identity, it found that she “would no longer be able to perform [her] duties” and terminated her

14. *See id.*

15. *See id.*

16. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-135R, SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT DISCRIMINATION: OVERVIEW OF STATE STATUTES AND COMPLAINT DATA 1 (2009). According to the Government Accountability Office's report, as of 2009 twenty-one states and the District of Columbia had antidiscrimination statutes that prohibit employment discrimination on the basis of sexual orientation: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *Id.* at 1 n.2. Twelve of these states and the District of Columbia also had statutes that prohibit employment discrimination on the basis of gender identity: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.* at 2 n.9.

17. *See Why ENDA Matters: True Stories of Anti-LGBT Employment Discrimination from the ACLU*, BILERICO PROJECT (Oct. 31, 2009, 10:00 AM), http://www.bilerico.com/2009/10/why_enda_matters_true_stories_of_anti-lgbt_employ_1.php.

18. *Id.*

19. *Id.*

employment.²⁰ Unlike Carney, Calvo had no legal recourse because, at the time, Oregon had not yet enacted an antidiscrimination statute that prohibited gender identity discrimination in employment.²¹

Across America, millions of lesbian, gay, bisexual, and transgender (“LGBT”) individuals like Carney and Calvo live and work in states that do not protect them against job discrimination based on their sexual orientations or gender identities. In 2009, the Williams Institute at the UCLA School of Law estimated that there are over 8.157 million LGBT Americans in the workforce, over 6.948 million of whom work in the private sector while over 1.208 million work for local, state, and federal governments.²² Over 3.313 million LGBT workers in the private sector and over 520,000 LGBT local, state, and federal government employees work in states that do not protect them against sexual orientation *or* gender identity discrimination.²³ Moreover, an estimated 4.486 million LGBT workers in the private sector and over 748,000 LGBT local, state, and federal government employees work in states that do not protect them against gender identity discrimination.²⁴ Overall, an estimated 47 percent of LGBT workers across the nation are not protected from sexual orientation and gender identity discrimination and about 64 percent of LGBT workers across the nation are not protected against gender identity discrimination.²⁵

20. *Id.*

21. *See id.* In 2007, after thirty-four long years of struggle, Oregon finally enacted the Oregon Equality Act, an omnibus civil rights bill that protects lesbian, gay, bisexual, and transgender (“LGBT”) individuals from discrimination in employment and other areas. *See* Jason N. Reed, *Senate Passes Oregon Equality Act, Granting Rights, Outlawing Discrimination*, OR. DAILY EMERALD, Apr. 23, 2007, at 3; Press Release, Lambda Legal, *The Oregon Equality Act: Protection for Lesbian, Gay, Bisexual and Transgender People 1* (Sept. 19, 2007), http://data.lambdalegal.org/pdf/fs_oregon-equality-act.pdf. Calvo has emerged from her plight as a champion of LGBT rights and a community leader in Portland, Oregon. *See* Catherine Cole, *Laura Calvo Brings It Every Damn Day*, PORTLAND MERCURY, June 5, 2008, <http://www.portlandmercury.com/portland/Content?oid=791774&category=791724>. In fact, Calvo was the only transgender person to testify in front of the Oregon legislature in support of the Oregon Equality Act. *Id.* For nearly 380 more examples of workplace discrimination against individuals because of their actual or perceived sexual orientations or gender identities, see BRAD SEARS, CHRISTY MALLORY & NAN D. HUNTER, WILLIAMS INST., *Specific Examples of Employment Discrimination by State and Local Governments, 1980–Present*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 13-1 (2009), http://escholarship.org/uc/uclalaw_williams_enda.

22. *See* BRAD SEARS, CHRISTY MALLORY & NAN D. HUNTER, WILLIAMS INST., *Estimates of LGBT Public Employees*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT, *supra* note 21, at 3-1, 3-6 [hereinafter *Estimates of LGBT Public Employees*].

23. *See id.* at 3-4 to 3-6.

24. *See id.*

25. *See id.*

Considering that fewer than a quarter of the states have banned job discrimination based on sexual orientation *and* gender identity, many legal scholars as well as LGBT groups have argued for a federal solution—what they differ on, however, is the best way to achieve this result.²⁶ On the one hand, the majority advocates an approach that has been around since the early 1990s: enacting a stand-alone statute that provides protections that are comparable to other stand-alone antidiscrimination statutes.²⁷ This approach was adopted in an effort to take advantage of what was learned from the successful enactment of other freestanding antidiscrimination legislation, such as the Americans with Disabilities Act of 1990, and to respond to the social and political realities facing the LGBT community in the 1990s.²⁸ The latest incarnation of this approach is the Employment

26. Compare Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149, 178–87 (John D’Emilio, William B. Turner & Urvasi Vaid eds., 2000) (advocating the Employment Non-Discrimination Act, a stand-alone antidiscrimination bill), Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 30–31 (2009) (same), Regina L. Stone-Harris, Comment, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY’S L.J. 269, 315–24 (1996) (same), and Shannon H. Tan, Student Work, *When Steve Is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 609 (2008) (same), with Jennifer S. Hendricks, *Instead of ENDA, a Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 212–15 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/43/LRColl2008n43Hendricks.pdf> (advocating amending Title VII to include discrimination against LGBT individuals), and J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1546–56 (2000) (same).

For a third, interdisciplinary approach, see Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713 (2010). McGinley relies on gender studies to argue that the distinction between impermissible gender stereotype discrimination and permissible sexual orientation or gender identity discrimination is “inadvisable and impossible” because the

vast majority of the sexual orientation cases are brought by men in traditionally male workplaces and all of the transgender cases are brought by [male-to-female transsexuals]. In both cases, the harassment or other discriminatory behavior occurs because the plaintiff, who is identified by the perpetrators as a man, threatens the definition and concept of masculinity. . . . In this way, . . . discrimination against sexual minorities is inherently “because of sex” and therefore prohibited by Title VII.

Id. at 770. Unless and until courts understand that much of the discriminatory or harassing conduct is gender motivated, neither a stand-alone statute nor an amendment to Title VII will be able fully to protect LGBT individuals against workplace discrimination. *See id.* at 715–16, 770–72.

Although this Note also argues that it is virtually impossible to distinguish among gender-stereotype discrimination (protected), gender identity discrimination (sometimes protected), and sexual orientation discrimination (rarely protected), this Note’s argument diverges from McGinley’s in one critical respect. McGinley focuses on the gender-based motivations of those who discriminate or harass LGBT workers. This Note examines the gender-nonconforming preferences or expressions of LGBT individuals.

27. *See infra* Part II.A.1–2.

28. *See infra* Part II.A.2.

Non-Discrimination Act (“ENDA”) of 2009.²⁹ ENDA 2009 would make it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual’s actual or perceived sexual orientation or gender identity.”³⁰

This Note, on the other hand, advocates the minority view: amending Title VII of the Civil Rights Act of 1964’s (“Title VII”) prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity. While the stand-alone approach was probably a more practical solution at the time, an examination of the legislative history of ENDA and the progress LGBT plaintiffs made litigating under Title VII since the 1990s has revealed that this approach is no longer the better solution. Fifteen years’ worth of compromises and concessions have weakened the efficacy of ENDA to a point at which it would no longer provide comparable legal protections as an amended Title VII.³¹ Enacting such a watered-down bill would only perpetuate the idea that discrimination against LGBT individuals is somehow different from—and less pernicious than—discrimination against people of color or women.³² Moreover, in the last two decades the LGBT community as a whole has made progress, although in varying degrees and consistency, litigating Title VII sex discrimination claims under the gender-stereotyping theory.³³ Amending Title VII will complement and confirm their progress while enacting a freestanding bill may only go as far as undermining the progress made by transgender³⁴ people.

29. H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009). This Note will distinguish versions of ENDA introduced in different sessions of Congress by their years of introduction, and versions proposed in the same session by their bill numbers.

30. H.R. 3017 § 4(a)(1).

31. See *infra* Part II.B–C.

32. See Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 50 (2000) (“[I]dentifying gender identity as a distinct classification may reinforce the perception, which is already so pervasive and damaging in the case law, that transgender people are somehow fundamentally distinct from—and by implication, inferior to—non-transgender people, i.e., that transgender people are not men or women, but something other or in-between.”).

33. See *infra* Part III.

34. This Note uses the term “transgender” to refer to preoperative, postoperative, and nonoperative transsexuals—“those who identify emotionally or psychologically with the sex other than their biological or legal sex at birth, and who present themselves on a daily basis as a member of that sex.” Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 466 n.5 (2001). In contrast, some legal scholars have used the term more broadly to cover individuals who do not conform to stereotypical gender norms. See, e.g., Currah & Minter, *supra* note 32, at 37 n.1 (defining the term “transgender” “in its most inclusive sense” as transsexuals as well as cross-dressers, feminine men and

For these reasons, this Note proposes that instead of enacting ENDA, Congress should amend Title VII's prohibition on discrimination "because of sex"³⁵ to cover LGBT individuals. Specifically, the statutory amendment would revise the first sentence in the definition of "because of sex" in 42 U.S.C. § 2000e(k) to state: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of gender stereotypes; actual or perceived sexual orientation; gender identity; and pregnancy, childbirth, or related medical conditions" (the "Title VII Amendment").³⁶

In Part II, this Note will examine the legislative history of ENDA, including the social and political pressures that created the freestanding bill, and the compromises and concessions that have significantly weakened its efficacy to a degree in which it no longer provides comparable protections to the Title VII Amendment. In Part III, this Note will examine two landmark Supreme Court cases, *Price Waterhouse v. Hopkins*³⁷ and *Oncale v. Sundowner Offshore Services, Inc.*,³⁸ and how

masculine women, intersexed people, and anyone whose gender expression "differs from conventional expectations of masculinity or femininity"). This Note does not define the term transgender in its broadest sense to cover all gender nonconforming individuals in order to preserve the ability to examine critically current categorical distinctions in antidiscrimination jurisprudence between gender stereotypes (protected), gender identity (sometimes protected), and sexual orientation (rarely protected). This Note will argue that such categorical distinctions are doctrinally indefensible, and that discrimination against a person on the basis of sexual orientation or gender identity is virtually indistinguishable from discrimination on the basis of gender stereotypes.

35. 42 U.S.C. § 2000e(k) (2006).

36. The Title VII Amendment draws its inspiration from Jennifer S. Hendricks's article, *Instead of ENDA, a Course Correction for Title VII*, Hendricks, *supra* note 26, and refines her Title VII gender amendment thesis. Her gender amendment thesis proposes two revisions to Title VII: First, replace the term "sex" with "gender" wherever it appears in 42 U.S.C. §§ 2000e–2000e17. Second, define "because of sex" to include sexual orientation and gender identity. *Id.* at 212.

The Title VII Amendment refines Hendricks's thesis in two ways. First, instead of replacing "sex" with "gender," it proposes to leave "sex" as is. This approach addresses two critical issues with her proposed replacement upon which her article does not touch. One, how will the proposed replacement weaken Title VII's existing sex-based protections? And two, will the replacement be viewed as a symbolic loss by some—perhaps feminists—thereby possibly alienating one group of potential allies in the fight to amend Title VII?

Second, in addition to adding sexual orientation and gender identity, the Title VII Amendment also proposes to add gender stereotypes to the definition of "because of sex." Central to this Note is the premise that since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), courts have interpreted discrimination on the basis of gender stereotypes as discrimination "because of sex," and sexual orientation- and gender identity-based discrimination are natural extensions of gender stereotype-based discrimination. Therefore, redefining "because of sex" to provide antidiscrimination protection for LGBT workers must necessarily include gender stereotypes as well as sexual orientation and gender identity.

37. *Price Waterhouse*, 490 U.S. 228.

38. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

they provided the framework to expand the “because of sex” provision under Title VII beyond a strict, anatomical interpretation to a prohibition of discrimination “because of gender.” In Part IV, this Note will argue by analogy to the Pregnancy Discrimination Act that Congress would be more receptive to an amendment to Title VII that redefines “because of sex” than to a free-standing ENDA. In Part V, this Note will explore the slow but definite progress LGBT individuals have made litigating sex discrimination claims under *Price Waterhouse’s* gender-stereotyping theory. Finally, Part VI will conclude.

II. A TALE OF TOO MANY SACRIFICES: THE EMPLOYMENT NON-DISCRIMINATION ACT

A. FROM BELLA TO ENDA

1. The First Twenty Years: The Civil Rights Amendment Bills

Amending the Civil Rights Act of 1964 (“Civil Rights Act”) to include some form of antidiscrimination protection for LGBT individuals is not a novel idea. Efforts to amend the Civil Rights Act began over three and a half decades ago when Congresswoman Bella S. Abzug introduced the Equality Act of 1974,³⁹ an omnibus civil rights bill that proposed to add sex, marital status, and sexual orientation as protected classes under the Civil Rights Act.⁴⁰ The introduction of the Equality Act of 1974 marked

39. H.R. 15692, 93d Cong. (1974); H.R. 14752, 93d Cong. (1974).

40. While sex was included as a protected class in Title VII of the Civil Rights Act, it was left out of other titles, resulting in a prohibition against discrimination on the basis of sex in employment (Title VII) but not in public accommodations (Title II), public facilities (Title III), or federally assisted programs (Title VI). *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243–66 (codified as amended in scattered sections of 42 U.S.C.). In proposing to amend the Civil Rights Act, Congresswoman Abzug intended for sex, marital status, and sexual orientation to stand on equal legal footing as race, color, religion, and national origin.

The reason why only Title VII included sex as a protected class is an interesting piece of legislative history. The term “sex” was added as a last-minute amendment to Title VII of House Bill 7152—the House version of the Civil Rights Act—by Congressman Howard Smith of Virginia, a conservative Southern critic of the civil rights movement. *See* CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–18 (1985). Many believe that Congressman Smith offered the sex amendment in hopes of ultimately killing the bill. *See, e.g., id.*; Weinberg, *supra* note 26, at 5–6. *But see* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–38, 150–53 (1997) (“Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women.”); Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 178 (1991) (“The vote on the ‘sex’ amendment was

the first time that a “gay rights” bill was proposed on a federal level.⁴¹ The bill, however, never made it out of the House Committee on the Judiciary.⁴² When Congresswoman Abzug returned to Congress a year later, she bifurcated her bill—the Equality Act of 1975 retained its “sex” and “marital status” coverage while the Civil Rights Amendments of 1975 focused on discrimination based on “affectional or sexual preference.”⁴³ For the next two decades, numerous bills (collectively, the “civil rights amendment bills”) were proposed in the House and Senate to amend the Civil Rights Act to prohibit discrimination on the basis of sexual orientation or preference.⁴⁴ Although none of these bills made it to the House or Senate floor for a vote, they slowly built up congressional support over the years—in the House the number of cosponsors grew steadily from

the largest counted vote that day. The overall voting pattern implies that there was a large group of Congressmen (in addition to the Congresswomen) that was serious about adding ‘sex’ to Title VII, but only to Title VII. That is not consistent with an interpretation that the addition of ‘sex’ was part of a plot to scuttle the bill.”); *id.* at 172–79. Congressman Smith’s supposed plan backfired, however, because on February 8, 1964, the same day as the addition of “sex” to Title VII, the Civil Rights Act passed the House with a vote of 168 to 133, and ultimately passed the Senate with a vote of 73 to 27. *See* WHALEN & WHALEN, *supra*, at 114–17, 215.

In the end, “What began as an insidious plot to defeat the civil rights bill has become a nightmare for judicial interpretation, particularly in more contemporary cases involving gender stereotypes.” Weinberg, *supra* note 26, at 6. Due to the last-minute nature of the sex amendment, Congress provided little guidance on the meaning of “sex” as a prohibited basis of discrimination in employment. As the Supreme Court noted, “The legislative history of Title VII’s prohibition of sex discrimination is notable primarily for its brevity.” *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976). This brevity of legislative guidance came front and center as courts struggled to make sense of Title VII sex discrimination lawsuits brought by LGBT or gender-nonconforming plaintiffs. This Note will examine the courts’ struggles in Part III.

41. Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 *SEXUALITY RES. & SOC. POL’Y* 155, 156 (2010).

42. *See* H.R. 15692.

43. *Compare* Equality Act of 1975, H.R. 4477, 94th Cong. (1975), with Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975).

44. In the House of Representatives, the following bills were proposed to amend the Civil Rights Act of 1964 to include sexual orientation or preference as a protected class: H.R. 431, 103d Cong. (1993); H.R. 423, 103d Cong. (1993); H.R. 1430, 102d Cong. (1991); H.R. 655, 101st Cong. (1989); H.R. 709, 100th Cong. (1987); H.R. 230, 99th Cong. (1985); H.R. 2624, 98th Cong. (1983); H.R. 427, 98th Cong. (1983); H.R. 3371, 97th Cong. (1981); H.R. 1454, 97th Cong. (1981); H.R. 2074, 96th Cong. (1979); H.R. 12149, 95th Cong. (1978); H.R. 10575, 95th Cong. (1978); H.R. 8269, 95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 7775, 95th Cong. (1977); H.R. 5239, 95th Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 2998, 95th Cong. (1977); H.R. 451, 95th Cong. (1977); H.R. 13928, 94th Cong. (1976); H.R. 13019, 94th Cong. (1976); H.R. 10389, 94th Cong. (1975); H.R. 5452; H.R. 2667, 94th Cong. (1975); H.R. 166, 94th Cong. (1975). In the Senate, the following bills were proposed to amend the Civil Rights Act of 1964 to include sexual orientation or preference as a protected class: S. 574, 102d Cong. (1991); S. 47, 101st Cong. (1989); S. 2109, 100th Cong. (1988); S. 464, 100th Cong. (1987); S. 1432, 99th Cong. (1985); S. 2081, 96th Cong. (1979).

0 in 1974 to 110 in 1991, and in the Senate from 3 in 1979 to 16 in 1991.⁴⁵

2. The Next Sixteen Years: Introducing ENDA

Despite the fact that omnibus civil rights amendment bills were gaining momentum in Congress, a major shift in strategy occurred in 1994 when Senator Edward Kennedy and Congressman Gerry Studds introduced ENDA 1994, a freestanding bill that prohibited job discrimination based on sexual orientation without amending the Civil Rights Act.⁴⁶ This shift in strategy was a direct response to the political realities facing gays and lesbians during that time. First, the loss in the fight against “Don’t Ask, Don’t Tell”—the U.S. military’s ban on openly gay, lesbian, or bisexual people from military service⁴⁷—had seriously “weakened the perceived political power of the gay rights organizations.”⁴⁸ Second, a decade-long battle against the AIDS epidemic had exhausted the gay and lesbian community’s resources.⁴⁹ Third, the passage of the freestanding Americans with Disabilities Act of 1990 (“ADA”)⁵⁰ had demonstrated that a stand-alone civil rights statute was more palatable to Congress than an amendment to existing civil rights legislation.⁵¹ As a result of these political realities, gay rights activists abandoned an omnibus civil rights bill in favor of a narrower social issue that they believed had “the highest level of public support[:] . . . employment nondiscrimination.”⁵²

In the 1990s, political realities forced gay rights activists to abandon their efforts to amend the Civil Rights Act and pursue a stand-alone piece of equal employment legislation. Indeed, the year 1992 marked the first time that “gay rights lawyers and mainstream civil rights lawyers [came] together to develop the content of the [gay rights] bill.”⁵³ Known then as

45. See H.R. 14752 (1974, 0 sponsors); H.R. 1430 (1991, 110 cosponsors); S. 2081 (1979, 3 cosponsors); S. 574 (1991, 16 cosponsors). For a detailed discussion on how the civil rights amendment bills gained momentum in Congress, see Feldblum, *supra* note 26, at 158–69.

46. See H.R. 4636, 103d Cong. (1994); S. 2238, 103d Cong. (1994).

47. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, sec. 571, § 654, 107 Stat. 1547, 1670–73 (1993) (repealed 2010) (“Policy concerning homosexuality in the armed forces.”).

48. Feldblum, *supra* note 26, at 178.

49. Kay Longcope, *Rally Renewed for National Gay Rights Bill*, BOS. GLOBE, June 2, 1990, at 8.

50. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.). Other examples of stand-alone civil rights legislation include the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006), and the Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, and 42 U.S.C.).

51. See Feldblum, *supra* note 26, at 177.

52. *Id.* at 178.

53. *Id.* at 176.

“*the* movement of the moment,” it was during this period that gay issues—such as antigay violence, AIDS, gay rights, and gays in the military—entered into the spotlight before the nation.⁵⁴ For example, on April 25, 1993, hundreds of thousands of gay men, lesbian women, and gay rights supporters marched from the Washington Monument to the Capitol in one of the largest civil-rights demonstrations, and the largest gay and lesbian demonstration, to date.⁵⁵

3. Going Forward: A Case for Redefining “Because of Sex”

By 2010, however, the political and social conditions had changed for the LGBT movement. In October 2009, for example, the LGBT movement won a major legislative victory when President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (“HCPA”),⁵⁶ which added hate-motivated crimes based on gender, sexual orientation, gender identity, and disability to existing federal law aimed at combating crimes motivated by race, color, religion, or national origin.⁵⁷ The passage of this legislation signaled that the LGBT movement has moved beyond the political realities it faced during the 1990s and has gained political power as well as increased visibility, acceptance, and legitimacy in mainstream American society. Moreover, the HCPA demonstrated that there is popular political support in Congress—at the very least in the context of threats or acts of violence—to allow gender-, sexual orientation-, and gender identity-related issues to stand on equal footing as issues related to race, color, religion, or national origin.⁵⁸ By proposing to amend Title VII, this Note is advocating that workplace discrimination on the bases of sexual orientation and gender identity, as in the hate-motivated crimes context, be allowed to stand on equal footing as job discrimination motivated by race, color, religion, or national origin. As

54. Andrew Kopkind, *The Gay Moment*, NATION, May 3, 1993, at cover.

55. Lisa Pope, *Gays Rally in Washington: Huge Crowds Press Demands for Equal Rights*, DAILY NEWS L.A., Apr. 26, 1993, at N1.

56. See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4707, 123 Stat. 2835, 2838–40 (2009) (to be codified at 18 U.S.C. § 249); Editorial, *A Civil Rights Advance: A Federal Law Targets Violence Based on Sexual Orientation*, WASH. POST, Oct. 28, 2009, at A22. The HCPA “will provide federal, state and local law enforcement with powerful new tools to investigate, prosecute and counter hate-motivated violence.” Andrew L. Rosenkranz, *Overdue Hate Crimes Law Remains a Powerful Tool*, SUN-SENTINEL (Fort Lauderdale), Nov. 10, 2009, http://articles.sun-sentinel.com/2009-11-10/news/0911130082_1_crimes-legislation-hate-motivated-law-enforcement.

57. See 18 U.S.C. § 245 (2006).

58. *But see* Currah & Minter, *supra* note 32, at 50 (arguing that, at least for transgender individuals, “[d]esignating gender identity as a freestanding classification sends a powerful message that transgender people are entitled to full equality and legitimacy”).

will be discussed below, however, ENDA—as it is currently written—will be unable to provide the same protections for LGBT workers as Title VII does for female employees or people of color.⁵⁹

Critics of a federal solution might point to corporate-based protections for LGBT workers as evidence that job equality can be achieved without federal interference. As stated above, nearly half of the states provide some form of protection for LGBT workers, and over three hundred top American corporations, collectively employing over nine million full-time employees, have aided the struggle for job equality for LGBT workers by providing comprehensive employment protections for LGBT employees.⁶⁰ The existing patchwork of local and private protections, however, is far from adequate.⁶¹ A statute that covers employment discrimination on a federal level is necessary to regulate the two largest groups of employers in the nation: small businesses and state governments. According to the U.S. Small Business Administration, in 2007 small businesses (firms with fewer than five hundred employees) represented 99.7 percent of all employer firms, employed about half of all private sector employees (59.9 million out of 120.6 million), and have generated 65 percent of net new jobs in the past seventeen years.⁶² Moreover, state governments are the single largest employer in every state; the fifty states collectively employ over 6.2 million Americans nationwide.⁶³ Due to the uncertainty and ambiguity created by all of these factors, it is extremely difficult for LGBT workers to navigate the patchwork of local and private protections; therefore, a federal solution is still necessary.

The time is now better than ever to enact legislation that would protect LGBT workers from discrimination on a national level. Popular and political support for job equality for LGBT workers is at its highest since Congresswoman Abzug first proposed the Equality Act of 1974. Current legislative efforts to ban employment discrimination on the basis of sexual

59. See *infra* Part II.C.

60. See HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2010, at 2–4, 10–11 (2010), available at http://www.hrc.org/documents/HRC_Corporate_Equality_Index_2010.pdf. Of the 590 Fortune 1000 businesses and AmLaw 200 law firms studied, 99 percent provided employment protections on the basis of sexual orientation and 72 percent provided employment protections on the basis of gender identity. *Id.* at 3–4, 10–11. The Index gave 305 businesses the top rating of 100 percent in terms of providing LGBT workers with discrimination protection and equal employment opportunities. *Id.* at 2.

61. See McGinley, *supra* note 26, at 728–29.

62. Office of Advocacy, *Frequently Asked Questions*, U.S. SMALL BUS. ADMIN., 1, http://archive.sba.gov/idc/groups/public/documents/ma_boston/sba_036309.pdf (last updated Sept. 2010).

63. *Estimates of LGBT Public Employees*, *supra* note 22, at 3-1.

orientation and gender identity enjoy 202 cosponsors in the House,⁶⁴ 45 cosponsors in the Senate,⁶⁵ and President Obama's pledged support.⁶⁶ The federal legislation that this Note advocates is to move away from ENDA toward the Title VII Amendment.

It is important to recognize at the outset that there is no guarantee that all of the political and popular support from ENDA would be freely transferable to the Title VII Amendment. Pragmatically, some supporters of ENDA would be reluctant to change their support to the Title VII Amendment out of fear that it might take another fifteen years for the Title VII Amendment to attain the support that ENDA currently enjoys. In addition, some supporters might oppose the Title VII Amendment on doctrinal grounds, believing that the LGBT experience in the workplace is different from the experience of women or people of color, and a freestanding statute can be designed better to address the needs of LGBT workers.⁶⁷

Two considerations, however, lean in favor of more transferability. When the shift in strategy occurred in 1994, ENDA was able to ride the momentum of the civil rights amendment bills.⁶⁸ Accordingly, one would assume that the Title VII Amendment would also be able to ride, to some degree, ENDA's momentum. Moreover, while this Note proposes to restart efforts to amend the Civil Rights Act, unlike Congresswoman Abzug's

64. See H.R. 3017, 111th Cong. (2009).

65. See S. 1584, 111th Cong. (2009).

66. See, e.g., David Crary, *Key Backing for Gay Rights*, CHI. TRIB., Aug. 31, 2009, at C13; Editorial, *Obama's Promise to Gays*, L.A. TIMES, May 22, 2009, at A32.

67. One example would be the use of restroom, shower, and dressing facilities by transgender workers. Because a stand-alone bill can be tailored to address issues specific to LGBT individuals, this is certainly one—and probably not the only—area in which ENDA enjoys an advantage over the Title VII Amendment. This Note argues, however, that any such advantage is outweighed by ENDA's statutory and legislative defects. See *infra* Part II.B–C.

The shower and dressing facility issue is addressed in section 8(a)(3) of ENDA 2009, which states,

Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

H.R. 3017 § 8(a)(3); S. 1584 § 8(a)(3).

68. When the civil rights amendment bills were proposed in the 102nd Congress, they had 110 cosponsors in the House, H.R. 1430, 102d Cong. (1991), and 16 cosponsors in the Senate, S. 574, 102d Cong. (1991). When ENDA was first introduced in the 103rd Congress, it enjoyed 137 cosponsors in the House, H.R. 4636, 103d Cong. (1994), and 30 cosponsors in the Senate, S. 2238, 103d Cong. (1994).

broad omnibus civil rights bills, the Title VII Amendment is limited to employment discrimination. Therefore, it is reasonable to suppose that some, if not most, of the support would transfer from ENDA to the Title VII Amendment. Even if some of the support is ultimately lost in translation, it is better to lose some support and switch to the Title VII Amendment rather than enact a bill that is less effective at protecting LGBT individuals against workplace discrimination.

B. UNPRINCIPLED COMPROMISES

Since its initial introduction in the 103rd Congress, new versions of ENDA have been introduced in each session of Congress except the 109th.⁶⁹ While ENDA has picked up where the civil rights amendment bills left off and has been gaining congressional⁷⁰ and popular⁷¹ support with each introduction, only two versions of ENDA made it out of the House or Senate committees to which they were assigned—ENDA 1995 was defeated in the Senate by a vote of 49-50,⁷² and ENDA 2007 passed the House but subsequently died in the Senate.⁷³ Yet even these so-called progresses were riddled with so much controversy that they can hardly be called victories for the advancement of LGBT rights.⁷⁴ In each of these progresses, principles on which ENDA was founded were sacrificed for the sake of political expediency.

69. See H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 2015, 110th Cong. (2007); H.R. 3685, 110th Cong. (2007); H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003); H.R. 2692, 107th Cong. (2001); S. 1284, 107th Cong. (2001); H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997); H.R. 1863, 104th Cong. (1995); S. 932, 104th Cong. (1995); H.R. 4636, 103d Cong. (1994); S. 2238, 103d Cong. (1994). For a timeline of ENDA, see *Timeline: The Employment Non-Discrimination Act*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/issues/workplace/5636.htm> (last visited Dec. 30, 2010).

70. See, e.g., H.R. 3017 (2009, 202 cosponsors); H.R. 2355 (1999, 173 cosponsors); H.R. 4636 (1994, 137 cosponsors); S. 1584 (2009, 45 cosponsors); S. 1276 (1999, 36 cosponsors); S. 2238 (1994, 30 cosponsors).

71. See Editorial, *Gay Rights Issue Won't Go Away: Senate Fluke Isn't Enough to End the Quest for Employment Equality*, L.A. TIMES, Sept. 12, 1996, at B8 [hereinafter *Gay Rights Issue Won't Go Away*] (noting that a poll conducted by Newsweek in 1996 showed that “84% of Americans surveyed thought gay men and lesbians deserve the same treatment in employment as everyone else”); Kara Swisher, *Odd Jobs*, WASH. POST, July 31, 1994, at H7 (“[A] 1992 Newsweek poll showed that 75 percent support laws to protect gays from discrimination in the workplace.”).

72. 142 CONG. REC. 22,477 (1996) (recording the bill's failed passage in Senate by yea-nay vote of 49-50).

73. See H.R. 3685, 110th Cong. (2007); Weinberg, *supra* note 26, at 12.

74. But see Editorial, *A Civil Rights Watershed: The House Votes to Outlaw Job Discrimination Based on Sexual Orientation*, WASH. POST, Nov. 11, 2007, at B6 [hereinafter *A Civil Rights Watershed*] (calling ENDA's passage in the House a “victory”).

1. The Defense of Marriage Act Compromise

On September 10, 1996, ENDA 1995 suffered a hair-thin defeat on the Senate floor by a vote of 49-50.⁷⁵ While some may interpret this hair-thin defeat as a sign of progress,⁷⁶ a closer examination of ENDA 1995's legislative history reveals otherwise. In 1996, Congress took up the Defense of Marriage Act ("DOMA"), a bill that provided that no state would be required to give effect to same-sex marriages legally recognized in another state, and defined the term "marriage" and "spouse" in federal law as a legal union between a man and a woman.⁷⁷ In hopes of killing DOMA, gay rights activists offered various amendments to DOMA, including ENDA and healthcare and gun control bills.⁷⁸ In response, Republican senators struck a deal with Senator Edward Kennedy, ENDA's main sponsor: "[A]n up-or-down vote on DOMA, with no extraneous amendments . . . , in return for an up-or-down vote on ENDA, [also] with no extraneous amendments"⁷⁹ ENDA's sponsors had expected ENDA to pass the Senate: the fiftieth vote coming from Senator David Pryor and Vice President Al Gore casting the tie-breaking vote for ENDA.⁸⁰ Prior to the vote, however, Senator Pryor was unexpectedly called away to the bedside of his ailing son, and ENDA lost.⁸¹ DOMA, on the other hand, passed the Senate and was signed into law.⁸²

Whatever progress ENDA 1995's near victory represented, it was overshadowed by the sacrifice the LGBT community had to make merely to get ENDA to a vote: a federal disaffirmation of same-sex marriage. Moreover, the political gamesmanship by ENDA's supporters here, however benign their intentions might have been, was quite shocking. Following an ends-justifies-means tactic, they attempted to harness congressional resistance to ENDA—in other words, antigay animus—to defeat a piece of legislation that is inherently antigay. Yet how can one expect broad-based political support for a civil rights bill founded on

75. 142 CONG. REC. 22,477.

76. See Feldblum, *supra* note 26, at 185–86.

77. Defense of Marriage Act, H.R. 3396, 104th Cong. §§ 2(a), 3(a) (1996) (enacted).

78. See Feldblum, *supra* note 26, at 185.

79. *Id.* See also Weinberg, *supra* note 26, at 10.

80. Feldblum, *supra* note 26, at 185.

81. *Id.*; *Gay Rights Issue Won't Go Away*, *supra* note 71. Eight Republicans voted for ENDA, while five Democrats, four of whom are from the South, voted against it. John E. Yang, *Senate Passes Bill Against Same-Sex Marriage; In First Test on Hill, Measure to Prohibit Employment Discrimination Is Defeated*, 50-49, WASH. POST, Sept. 11, 1996, at A01.

82. See Defense of Marriage Act, Pub. L. No. 104-199, sec. 3(a), § 7, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)). DOMA passed the Senate with a vote of 85-14. Yang, *supra* note 81, at A01. "No Republicans opposed the same-sex marriage bill while 32 Democrats supported it" *Id.*

combating antigay sentiments if it is strategically used to exploit antigay animus in Congress? The DOMA compromise is but one of two examples in which ENDA traded principle for political expediency, which ultimately backfired and tarnished the image of this civil rights statute. The other instance was the passage of ENDA 2007 in the House.

2. The Transgender Compromise

The passage of ENDA 2007 in the House was even more controversial than the DOMA compromise. Transgender activists as well as many gay-rights groups called ENDA 2007 a betrayal because, in a political compromise, gender identity coverage was cut from the final version of the bill that passed the House.⁸³ There is a saying in the transgender community that “the ‘T’ in LGBT is silent”⁸⁴—indeed, the T had been silent throughout most of the history of ENDA (and the civil rights amendment bills). All versions of ENDA introduced in Congress from 1994 to 2003 were transexclusive⁸⁵ even though, “[s]ince the first drafting of ENDA, trans[gender] activists have fought to have gender identity protections included”⁸⁶ For example, in July 1994, when the first version of ENDA was introduced in Congress, transgender activists Karen Kerin and Phyllis Randolph Frye attempted, but were denied the opportunity, to speak before the Senate hearings on ENDA on the exclusion of gender identity from the bill.⁸⁷ And in March 1995, six

83. E.g., Christine Daniels, Editorial, *Civil Rights for LGB . . . and T*, L.A. TIMES, Oct. 10, 2007, at A21; Shailagh Murray, *Quandary Over Gay Rights Bill: Is It Better to Protect Some or None?*, WASH. POST, Oct. 18, 2007, at A23; John Aravosis, *How Did the T Get in LGBT?*, SALON.COM, Oct. 8, 2007, <http://www.salon.com/opinion/feature/2007/10/08/lgbt/>; Winnie Stachelberg, *One Inch at a Time: On the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (Oct. 22, 2007) <http://www.americanprogress.org/issues/2007/10/enda.html>.

84. Alexia Elejalde-Ruiz, *TransAmerica*, CHI. TRIB., Nov. 18, 2009, at 7. Elias Vitulli argues that the exclusion of transgender individuals from ENDA and the LGBT movement in general is due to “homonormative strategies” that attempt to “normalize gay and lesbian community and rights.” Vitulli, *supra* note 41, at 156. Specifically,

The exclusion of gender identity from [ENDA] is homonormative in the sense that gender non-normative people are excluded in favor of a vision of a completely gender-normative gay and lesbian “community”. The bill in general is homonormative because it represents an attempt to assimilate gay and lesbian people into the “American dream” and the (white-washed, class-unconscious) normative discourse of individualism, hard work, and personal responsibility.

Id. at 158.

85. See, e.g., H.R. 3285, 108th Cong. § 4 (2003) (prohibiting job discrimination because of an individual’s sexual orientation but not gender identity); S. 1276, 106th Cong. § 4 (1999) (same); H.R. 4636, 103d Cong. § 2 (1994) (same).

86. Vitulli, *supra* note 41, at 161.

87. Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS, *supra* note 26, at

transgender activists lobbied Congress for a transinclusive ENDA; their efforts marked the “first organized transgender lobbying event in [the] nation’s capital.”⁸⁸ Yet, despite the efforts of these activists, ENDA continued to exclude transgender workers for over a decade.

In April 2007, Congressman Barney Frank ended the trend of transexclusion when he introduced House Bill 2015, which would have prohibited employment discrimination because of an “individual’s actual or perceived sexual orientation or *gender identity*.”⁸⁹ House Bill 2015, however, was not the version of ENDA that passed the House by a vote of 235-184 on November 7, 2007; the version that passed was the transexclusive House Bill 3685.⁹⁰ Apparently, 2007 was the first year that ENDA had a real chance of passing the House, but only if it were transexclusive.⁹¹ Therefore, political expediency triumphed over principle⁹² and on September 27, 2007, the T’s were sacrificed for the benefit of the LGB’s.⁹³

The decision to drop gender identity from ENDA 2007 polarized the LGBT community.⁹⁴ On the one hand, the transgender community and many LGBT advocacy groups were infuriated and felt they were “low-bridged” by the politicians on Capitol Hill.⁹⁵ In a letter to Speaker of the House Nancy Pelosi (D-CA), a coalition of around three hundred gay, lesbian, and transgender organizations said they would oppose legislation “that leaves part of [their] community without protections and basic security.”⁹⁶ The National Center for Transgender Equality announced that it “would rather have no ENDA than a bill that left [transgender people] behind.”⁹⁷ Transgender as well as gay and lesbian groups lobbied

451, 462. For a chronicle of the modern transgender movement, see *id.* at 451–68.

88. *Id.* at 463.

89. H.R. 2015, 110th Cong. § 4 (2007) (emphasis added).

90. See 153 CONG. REC. H13,252 (daily ed. Nov. 7, 2007).

91. See Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 397–98 (2009) (quoting Aravosis, *supra* note 83).

92. One of the principles on which ENDA was founded was “to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity.” Employment Nondiscrimination Act of 2007, H.R. 2015, 110th Cong. § 2(1) (2007).

93. See Rose, *supra* note 91, at 397–98 (quoting Aravosis, *supra* note 83).

94. *Id.*

95. Daniels, *supra* note 83. A “low-bridge” is the dirtiest foul in basketball, defined as “the act of suddenly taking out a player’s legs as he or she leaps for a rebound, pass or jump shot.” *Id.*

96. Murray, *supra* note 83. See also Gabrielle Russon, *Gay-Rights Milestone Draws Transgender Activists’ Outcry*, CHI. TRIB., Oct. 18, 2007, at C8.

97. Murray, *supra* note 83.

Democratic House members to oppose the bill,⁹⁸ and seven Democrats voted against the bill because of its transexclusion.⁹⁹

On the other hand, Congressman Frank, the bill's main sponsor, and others in the LGBT community felt that incremental progress was the best strategy on which to move ENDA forward.¹⁰⁰ Defending his decision, Congressman Frank stated: "You protect people when you can . . . The notion you don't do anything until you do everything is self-defeating."¹⁰¹ Supporting Congressman Frank's decision, the Human Rights Campaign ("HRC") stated that his "legislative path for action on ENDA, while not [the HRC's] choice, follows the path of other civil rights and business regulatory legislation."¹⁰² And thus ends the chapter on the most successful version of ENDA to date.

In her article, Elias Vitulli presents a convincing case that ENDA stands for the continued ostracism and marginalization of transgender people from mainstream LGBT political discourse.¹⁰³ Why else would ENDA be transexclusive for so many years despite transgender activists' repeated efforts to include gender identity since its first introduction in 1994? Indeed, even Congressman Frank, ENDA's main sponsor in the House, a gay man, and an avowed supporter of LGBT rights,¹⁰⁴ expressed the same kind of anxiety regarding transgender individuals as mainstream society. According to Paisley Currah, Frank evoked the "'transgender sublime' response to unexpected bodies showing up in gender-segregated

98. *Id.*

99. Vitulli, *supra* note 41, at 165 n.12. The seven Democrats were New York Representatives Yvette Clark, Jerrold Nadler, Edolphus Towns, Nydia Velasquez, and Anthony Weiner, and Representatives Rush Holt from New Jersey and Michael Michaud from Maine. *Id.*

100. See, e.g., *A Civil Rights Watershed*, *supra* note 74 (calling ENDA's transexclusion a "wise choice"); Murray, *supra* note 83; Aravosis, *supra* note 83; Stachelberg, *supra* note 83.

101. Russon, *supra* note 96, at C8. Even if ENDA 2007 had passed the Senate, President George W. Bush probably would have vetoed it. David M. Herszenhorn, *Party's Liberal Base Proves Trying to Democrats Back in Power*, N.Y. TIMES, Oct. 12, 2007, at A23; Johanna Neuman, *House OKs Gay-Worker Rights Bill; Legislation Faces Veto Threat Even If It Clears the Senate*, CHI. TRIB., Nov. 8, 2007, at C3.

102. Murray, *supra* note 83. See also Aravosis, *supra* note 83.

103. See Vitulli, *supra* note 41, at 158.

104. See Press Release, Statement of U.S. Representative Barney Frank on the Inclusion of People Who Are Transgender in Antidiscrimination Protection Legislation, Testimony in Support of H.1728/S.1687 (July 14, 2009), available at <http://www.house.gov/frank/pressreleases/2009/07-14-09-frank-testimony-antidiscrimination.html> ("I do have things I would like to see adopted on behalf of gay, lesbian, bisexual and transgender people: they include the right to marry the individual of our choice; the right to serve in the military to defend our country; and the right to a job based solely on our own qualifications.").

spaces”¹⁰⁵ in defending his decision to exclude transcoverage in the *Advocate* in 1999: “It’s not about who is being covered, it’s about what activity is being covered. Transgendered people want a law that mandates a person with a penis be allowed to shower with women. They can’t get that in ENDA.”¹⁰⁶ Such marginalization of transgender individuals by the rest of the LGBT community is not uncommon.¹⁰⁷ This type of anxiety demonstrates the difficulties that transgender individuals face in their struggle to be accepted as equal members of the LGBT coalition who deserve the same range of protections. Although ENDA 2009 is transinclusive,¹⁰⁸ as a result of ENDA’s transexclusive legislative history and the continued ostracism of transgender individuals from mainstream LGBT political discourse, there is no telling whether they will again become bargaining chips on Capitol Hill.¹⁰⁹

3. No More Compromises

Unlike ENDA’s history of exclusion, the Title VII Amendment is based on the premise that LGBT individuals must be protected equally under the law. Transgender workers must be protected because they too are victims of pervasive workplace discrimination and harassment.¹¹⁰ Some ENDA proponents will no doubt argue that it is better to protect somebody

105. Paisley Currah, *Expecting Bodies: The Pregnant Man and Transgender Exclusion from the Employment Non-Discrimination Act*, 36 WOMEN’S STUD. Q. 330, 333 (2008).

106. Mubarak Dahir, *Whose Movement Is It?*, *ADVOCATE*, May 25, 1999, at 50, 56. Ironically, similar shower arguments were used against gays and lesbians in the military in support of “Don’t Ask, Don’t Tell.” See Timothy J. McNulty, *Gay Debate Goes to Core of Military Ethos*, *CHI. TRIB.*, Jan. 31, 1993, at C1.

107. See, e.g., Dahir, *supra* note 106, at 55 (quoting Frank as saying: “Frankly, to a lot of gay men, transgendered people are an embarrassment. The unspoken attitude is, Let’s keep them in the closet. They’re freaks and they hurt us”); Vitulli, *supra* note 41, at 158 (quoting blogger Andrew Sullivan as writing: “I’ve been sitting here sort of picking my own brain and asking myself if gay and trans people do in fact have some crucial thing in common. I’ve read tons of opinion pieces and blog posts on the ENDA war in recent weeks, but none of them really opened my eyes. What do I have in common with a guy who wants to remove his willy, grow breasts, become a woman and get married to a man? From where did this relatively new concept of ‘the LGBT community’ come?”).

108. H.R. 3017, 111th Cong. § 4(a) (2009); S. 1584, 111th Cong. § 4(a) (2009).

109. Even if a transinclusive ENDA is passed, its negative legislative history may create problems for transgender workers down the road in the context of judicial interpretation. This problem is addressed below in Part V.A.3.

110. A 2009 survey of 6450 transgender individuals conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that, due to being transgender, 97 percent had experienced harassment or mistreatment at work, 44 percent had been denied a job, 26 percent had been fired, 15 percent lived on \$10,000 per year or less—double the rate of poverty of the general population—and 19 percent were, or had been, homeless. NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2009), http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf.

than nobody, and that the passage of a transexclusive ENDA would at least provide antidiscrimination relief to the majority of people in the LGBT community.¹¹¹

Transgender plaintiffs, however, have made some progress litigating gender identity–based workplace discrimination and harassment under *Price Waterhouse v. Hopkins*'s gender-stereotyping theory of liability.¹¹² The resulting patchwork of judicial protections—although volatile and far from providing adequate and consistent protection—nonetheless offers some relief. But if Congress passes a transexclusive bill, this patchwork of protections is at risk of being invalidated by courts that might reason that, in enacting a transexclusive ENDA, Congress does not intend to ban job discrimination against transgender workers. As such, a transexclusive bill will protect gays and lesbians, but at the same time, undermine the progress that transgender litigants have made in court.

Although there is no guarantee that legislators would not also try to remove transprotection from the Title VII Amendment, the recent political battles over, and mobilization against, ENDA 2007's transexclusion would serve as a cautionary tale for anyone contemplating this course of action. Recall that when Congressman Frank removed transprotection from ENDA 2007, a coalition of around three hundred LGBT organizations sent a letter to House Speaker Pelosi opposing the move and even seven Democrats voted against ENDA 2007 because of its transexclusion. As a result of the intense social reaction to ENDA 2007, in 2009, Congressman Frank reintroduced a version of ENDA that included gender identity as a protected class.¹¹³ This suggests that, after years of effort—going all the way back to the drafting of the first ENDA—transgender activists have built a solid base of support in the LGBT movement, making it harder for politicians to justify and garner support for removing transprotection from the Title VII Amendment.

While the same argument can be made for ENDA—that its sponsors would think twice about removing transprotection—the political horse trading that took place during the DOMA and transgender compromises has tarnished the image of ENDA. Even if it is enacted, it would no longer represent the same symbolic victory it would have before these controversies. The Title VII Amendment, on the other hand, represents a clean start for the LGBT movement's struggle for job equality for its

111. See *supra* text accompanying notes 100–02.

112. See *infra* Part V.A.

113. See H.R. 3017 § 4(a); S.1584 § 4(a).

constituents. Moreover, as will be demonstrated below, ENDA, as it is currently drafted, would be less effective at protecting LGBT workers than the Title VII Amendment. Thus, even if some support will be lost in translation, the better federal solution is the Title VII Amendment.

C. LESS EFFECTIVE THAN TITLE VII AND THE ADA

ENDAs 1995 and 2007 are just two examples of a series of compromises that have seriously weakened the efficacy of ENDA. Many commentators, including Vitulli, Shannon H. Tan, and J. Banning Jasiunas, have argued that, while ENDA is drafted to provide the same antidiscrimination protection as Title VII, its prophylactic provisions have been so watered down by numerous concessions that it would provide nowhere near the same level of protection as amending Title VII.¹¹⁴ Moreover, the watering down of ENDA perpetuates the view that discrimination against LGBT individuals is different from—and less objectionable than—discrimination against people of color or women.¹¹⁵ The latest iteration of ENDA perpetuates this view and would be less effective than amending Title VII in several important ways.

1. Expansive Religious Exemptions

First, and perhaps the most controversial difference, is ENDA 2009's expansive exemption for religious organizations.¹¹⁶ Compared to ENDA, Title VII provides very limited exemptions under which religious groups may discriminate. Under Title VII, (1) a religious organization may discriminate on the basis of religion, sex, or national origin only if religion, sex, or national origin is a bona fide occupational qualification ("BFOQ"),¹¹⁷ and (2) a qualified religious educational institution may discriminate, without a BFOQ, on the basis of religion, but not race, sex, or national origin.¹¹⁸ ENDA, on the other hand, simply exempts, without restriction, any "corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of [T]itle

114. See Vitulli, *supra* note 41, at 159 ("[A]s the new homonormativity developed, the bill reflected these changes, becoming less inclusive, less expansive, and continued to accommodate more and more exclusions and compromises."); Tan, *supra* note 26, at 608 ("The proposed ENDA is generally similar to Title VII, but it contains a number of exemptions designed to make the bill more palatable to its opponents."); Jasiunas, *supra* note 26, at 1557 ("[I]t is virtually certain that the protection offered by ENDA will fall far below that offered under Title VII.").

115. See Currah & Minter, *supra* note 32, at 50.

116. See H.R. 3017 § 6; S. 1584 § 6.

117. 42 U.S.C. § 2000e-2(e)(1) (2006).

118. See *id.* § 2000e-2(e)(2).

VII.”¹¹⁹ This expansive exemption would permit a qualified religious organization to discriminate virtually at will on the bases of sexual orientation and gender identity without having to justify its actions with a BFOQ or under some other exception.

Moreover, ENDA’s religious exemptions seem to get broader with each rewriting. When ENDA was first introduced in 1994, it prohibited, under any circumstances, a religious organization from discriminating on the basis of sexual orientation with respect to its for-profit activities.¹²⁰ By the time ENDA 2007 (House Bill 2015) was introduced, it provided three broad exemptions for religious groups. First, a religious organization was exempt from coverage if its primary purpose was religious worship or teaching.¹²¹ Second, any religious group not exempt under the provision above could discriminate on the basis of religion in hiring individuals whose primary duties would consist of supervising, teaching, or spreading religious doctrine or belief.¹²² Third, any religious organization could require applicants and employees to conform to those religious tenets that it endorsed.¹²³ When ENDA 2007 (House Bill 3685) passed the House, its religious exemption became broader yet again, containing the same expansive language as the 2009 version of ENDA.¹²⁴ Yet for religious groups, even this blanket exemption is not enough. For example, on September 23, 2009, Craig L. Parshall, General Counsel for the National Religious Broadcasters, testified before the House Committee on Education and Labor and argued that “if passed into law, [ENDA 2009] would impose a *substantial and crippling burden* on religious organizations”¹²⁵

If the goal of ENDA is to stamp out pervasive job discrimination against LGBT workers, then its religious exemptions have gone too far. Considering that many Christian, Jewish, and Muslim groups and business owners consider homosexuality and other gender-deviant behavior to be “dangerous, sinful and not in keeping with basic morality,”¹²⁶ how will

119. H.R. 3017 § 6.

120. See H.R. 4636, 103d Cong. § 6 (1994).

121. H.R. 2015, 110th Cong. § 6(a) (2007).

122. *Id.* § 6(b).

123. *Id.* § 6(c).

124. See H.R. 3685, 110th Cong. § 6 (2007).

125. *Employment Non-Discrimination Act: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. (2009) (statement of Craig L. Parshall, General Counsel, National Religious Broadcasters) (emphasis added).

126. Concerned Women for Am., CWA: *ENDA Would Dismantle First Amendment Liberties*, CHRISTIAN NEWSWIRE, May 11, 2007, <http://www.christiannewswire.com/news/355623091.html>. See also Laurie Goodstein, *Christian Leaders Unite on Political Issues*, N.Y. TIMES, Nov. 20, 2009, at A22 (stating that Roman Catholic and Orthodox Christian leaders signed a declaration saying they will not

ENDA protect LGBT workers if it allows qualified religious organizations to harass or discriminate against them at will? It is one thing to allow, for example, a Catholic school to hire only a straight, male Catholic priest under the BFOQ theory. It is quite another to permit the school to refuse to hire or allow to fire anyone for any position simply because that person is, or is perceived to be, homosexual or transsexual. And it is exactly this type of invidious discriminatory behavior that antidiscrimination statutes such as Title VII and the ADA are designed to prevent.

2. No Cause of Action for Disparate Impact

Second, ENDA 2009 prohibits disparate impact claims;¹²⁷ Title VII, however, permits claims brought under the disparate impact doctrine.¹²⁸ In other words, a claim under ENDA cannot be “based on statistical disparities between the number of gay people in a particular workplace and the number of gay people generally.”¹²⁹ As Tan observed, this concession was written into ENDA for no better reason than to “make the bill more palatable to its opponents.”¹³⁰ Moreover, both Tan and Jasiunas would agree that the inability of LGBT litigants to bring disparate impact claims under ENDA reinforces the idea that discrimination on the basis of gender identity or sexual orientation is somehow different—and less objectionable—than other forms of discrimination.¹³¹

More importantly, ENDA would deny LGBT individuals the benefits associated with being able to bring a disparate impact claim. Ann C. McGinley presented an excellent case study with respect to how a transgender person might benefit from being able to assert a cause of action for disparate impact.¹³² ENDA 2009 requires employers reasonably to accommodate transgender workers with access to showering or dressing facilities “in which being seen unclothed is unavoidable.”¹³³ It is silent, however, on whether employers may deny transgender workers access to

cooperate with laws recognizing same-sex couples because such marriages are immoral).

127. See H.R. 3017, 111th Cong. § 4(g) (2009).

128. See 42 U.S.C. § 2000e-2(k) (2006) (permitting disparate impact claims). The disparate impact theory was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”). It was later codified in the Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105, § 703, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)).

129. Feldblum, *supra* note 26, at 179.

130. Tan, *supra* note 26, at 608.

131. *Id.* at 609; Jasiunas, *supra* note 26, at 1556.

132. See McGinley, *supra* note 26, at 761–63.

133. H.R. 3017, 111th Cong. § 8(a)(3) (2009).

the restroom for the gender with which they identify.¹³⁴ If ENDA is enacted, the restroom issue will probably have to be litigated in court; the outcome will likely be a crapshoot, as it has been with state laws. For example, the State of Minnesota enacted the Minnesota Human Rights Act, which prohibits employers from discriminating on the basis of gender identity.¹³⁵ Notwithstanding this Act, the Supreme Court of Minnesota held that an employer may deny a male-to-female transsexual employee access to the restroom for the gender with which she identifies.¹³⁶ McGinley argues that the result of such cases may be different if the transgender plaintiff was able to assert a disparate impact cause of action, rather than relying solely on disparate treatment claims.¹³⁷ Specifically, McGinley argues that a transsexual transitioning from male to female needs to avoid using the men's restroom due to the danger of being attacked by men and

a policy requiring transsexuals who are in transition to use the restroom that accords with their biological sex and their genitals has a disparate effect on men because of the dangers of [a male-to-female transsexual's] use of the men's room far exceeds the dangers that [a female-to-male transsexual] encounters using the women's restroom.¹³⁸

If ENDA is enacted, however, a plaintiff would be unable to succeed with an argument of the kind that McGinley made because it does not permit a cause of action for disparate impact.

3. Lack of Doctrinal Development

Another reason why ENDA would be less effective than the Title VII Amendment is its lack of doctrinal development. If enacted, ENDA would be a brand new statute with many issues that would no doubt need to be resolved through litigation. Title VII, on the other hand, has had over forty-five years of doctrinal development.

One example of an issue that has been resolved under Title VII but might need to be litigated under ENDA is whether voluntary affirmative action programs would be allowed under ENDA. Section 4(g) of ENDA 2009 expressly disallows quotas and preferential treatment for LGBT

134. *See id.*

135. *See* MINN. STAT. ANN. §§ 363A.03.44, .08.2 (2004) (prohibiting employers from discriminating on the basis of sexual orientation, and defining "sexual orientation" as, among other things, "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness").

136. *Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001).

137. McGinley, *supra* note 26, at 761–63.

138. *Id.* at 762.

people. Tan implied that this provision would foreclose employers from adopting voluntary affirmative action programs.¹³⁹ And if an employer's voluntary affirmative action program that benefits LGBTs is challenged in court, there is a possibility that it may be held invalid. This holding would result in a divergence between ENDA and Title VII jurisprudence and further perpetuate the idea that gender identity or sexual orientation discrimination should be treated differently from other forms of discrimination.¹⁴⁰

The validity of affirmative action programs, however, has been upheld under Title VII's doctrinal jurisprudence.¹⁴¹ In the seminal case *United Steelworkers of America v. Weber*, the Supreme Court held that an employer's race-based voluntary affirmative action plan is permissible if it is "designed to break down old patterns of racial segregation and hierarchy, . . . does not unnecessarily trammel the interests of white employees, . . . [and] is a temporary measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."¹⁴² If the Title VII Amendment is adopted, LGBT workers will be afforded the same doctrinal protections that people of color and women enjoy under Title VII, whereas if ENDA is enacted, many of Title VII's doctrines, including affirmative action programs, will have to be litigated under ENDA before their benefits can be enjoyed by LGBT workers.

4. Vulnerability to Legislative Tinkering

In addition, freestanding statutes such as ENDA are inherently vulnerable to legislative tinkering. In ENDA's case, fifteen years' worth of compromises and concessions have made it even less effective than the ADA, the stand-alone antidiscrimination statute after which ENDA was modeled.¹⁴³ First, the ADA, like Title VII, permits both disparate treatment and disparate impact claims.¹⁴⁴ ENDA, however, allows only disparate treatment claims. Second, ADA's religious exemptions allow religious

139. See Tan, *supra* note 26, at 608.

140. *Id.* at 609; Jasiunas, *supra* note 26, at 1556.

141. *E.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616, 642 (1987) (condoning an employer's affirmative action plan as "embod[ying] the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace"); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) ("Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.").

142. *Weber*, 443 U.S. at 195.

143. The ADA makes it unlawful for an employer to "discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . [the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2006).

144. See *id.* § 12112(b)(6).

organizations to discriminate only on the basis of religion, not disability.¹⁴⁵ Religious organizations may also, under a limited general exception applicable to all businesses, discriminate on the basis of disability if it is job related and consistent with business necessity, or if providing a reasonable accommodation for the disabled person would cause an undue hardship on the operation of the organization.¹⁴⁶ ENDA, however, gives qualified religious groups broad discretion to discriminate against LGBT individuals on the basis of their sexual orientations and gender identities.¹⁴⁷

As a result of its inherent vulnerability, ENDA has been “rewritten almost every time it has been reintroduced to make it less ‘threatening’ and consequentially weaker.”¹⁴⁸ It has been weakened to a point at which, compared to Title VII and the ADA, it hardly provides comparable protection for LGBT workers. As Tan and Jasiunas argued, the weakening of ENDA endorses the idea that sexual orientation and gender identity discrimination is somehow different from—and even less objectionable than—race and sex discrimination.¹⁴⁹

5. A Case for Amending Title VII

The Title VII Amendment, on the other hand, is more resistant to legislative tinkering. If legislators want to water down the Title VII Amendment as they did with ENDA, they will have to craft amendments into the statute itself. For example, in order to prohibit disparate impact claims and to exempt all qualified religious organizations from the Title VII Amendment, 42 U.S.C. § 2000e-2(e) and (k) would have to be amended. And if legislators attempt to amend these sections—even if they draft the amendment in such a way as to leave the other protected classes unaffected—it would be very probable that the groups covered under the other protected classes—race, sex, religions, and national origin—would mobilize against these amendments in order to protect their interest in these doctrines.

More importantly, the Title VII Amendment will be more effective at protecting LGBT individuals because it will provide them with the same protections that people of color and women currently enjoy under Title VII. As stated above, political concessions such as the DOMA and transgender compromises have seriously damaged the image of ENDA. The Title VII

145. *See id.* § 12113(c).

146. *See id.* §§ 12111(9)–(10), 12113(a).

147. *See* H.R. 3017, 111th Cong. § 6 (2009).

148. Vitulli, *supra* note 41, at 160.

149. *See supra* note 131 and accompanying text.

Amendment represents a clean start and an opportunity for the LGBT community's struggle for equality to be symbolically placed on the same footing as the struggle for racial and gender equality.

Finally, LGBT litigants as a whole have made slow but definite progress litigating job discrimination and harassment claims under Title VII's gender-stereotyping theory.¹⁵⁰ This is because, as will be discussed below, discrimination on the basis of sexual orientation and gender identity is virtually indistinguishable from discrimination on the basis of gender nonconformity.¹⁵¹ Accordingly, the Title VII Amendment is a better fit for Title VII doctrinally than ENDA, which, if enacted, could go as far as to invalidate the progress that transgender plaintiffs have made.

III. DEFINING "BECAUSE OF SEX": *PRICE WATERHOUSE AND ONCALE*

A. A PLAIN MEANING OF "SEX"

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's . . . sex.*"¹⁵² Courts in early Title VII sexual discrimination cases adopted a plain meaning interpretation of "sex," limiting the term to its strict, biological definition. The plain meaning interpretation of sex was applied to deny Title VII protection to homosexuals, bisexuals, transsexuals, and effeminate men alike.¹⁵³ The following cases illustrate how courts narrowly interpreted "sex" in the 1970s and 1980s.

1. Sexual Orientation Is Not "Sex"

DeSantis v. Pacific Telephone & Telegraph Co. involved a consolidation of three district court sex discrimination claims brought by

150. See *infra* Part III.B.

151. See *infra* Part III.B.4.

152. 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added).

153. *E.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–87 (7th Cir. 1984) (rejecting a transsexual airline pilot's sex discrimination claim); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (denying Title VII relief to homosexual plaintiffs); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326–27 (5th Cir. 1978) (holding that Title VII does not prohibit discrimination against males who are "effeminate"); *Parrella v. Lawrence & Mem'l Hosp.*, No. 3:08-CV-1445 (PCD), 2009 U.S. Dist. LEXIS 37892, at *7 (D. Conn. May 5, 2009) (rejecting a bisexual plaintiff's Title VII claim).

four gay men and two lesbian women alleging that their employers (and potential employer in one case) had discriminated against them because of their sexual orientations.¹⁵⁴ The Ninth Circuit held that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”¹⁵⁵ To reach its holding, the court argued that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning,” and courts should “not expand Title VII’s application in the absence of Congressional mandate.”¹⁵⁶

2. Gender Identity Is Not “Sex”

Like homosexual and bisexual litigants, transgender plaintiffs in early Title VII cases were also denied relief because the courts adopted a plain meaning of sex.¹⁵⁷ For example, in *Holloway v. Arthur Andersen & Co.*, Ramona Holloway, a male-to-female transsexual, was terminated soon after she informed her supervisor that she was preparing for sex reassignment surgery and requested that her company records be changed to reflect her feminized first name.¹⁵⁸ Holloway then filed a Title VII sex discrimination complaint, alleging that she was terminated because she was

154. *DeSantis*, 608 F.2d at 328–29. During that period, it was common for courts to use the terms sex and gender interchangeably. While the two terms may have been synonymous at one point, they are now conceptually distinct—sex refers to the anatomical characteristics that define men and women, while gender refers to the cultural norms associated with masculinity and femininity. *See infra* text accompanying notes 208–11.

155. *DeSantis*, 608 F.2d at 329–30 (footnote omitted).

156. *Id.* at 329 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977)).

157. *E.g.*, *Ulane*, 742 F.2d at 1085 (“The phrase in Title VII prohibiting discrimination based on sex, in its *plain meaning*, . . . do[es] not outlaw discrimination against a person who has a sexual identity disorder . . .” (emphasis added)); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (rejecting a male-to-female preoperative transsexual’s sex discrimination claim because “for the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”); *Terry v. EEOC*, No. 80-C-408, 1980 U.S. Dist. Lexis 17289, at *8 (E.D. Wis. Dec. 10, 1980) (denying relief to a preoperative male-to-female transsexual because Title VII “does not protect males dressed or acting as females and vice versa”); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (holding that to grant relief to a male-to-female transsexual waitress would be “inconsistent with the plain meaning of the words” of Title VII); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (finding that Title VII “speaks of discrimination on the basis of one’s ‘sex,’” but “[n]o mention is made of change of sex or of sexual preference”), *aff’d*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *7 (D.N.J. Sept. 10, 1975) (“In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.”), *aff’d*, 538 F.2d 319 (3d Cir. 1976).

158. *Holloway*, 566 F.2d at 661.

a transsexual.¹⁵⁹ According to the Ninth Circuit, the district court dismissed the case because “transsexualism was not encompassed within the definition of ‘sex’ as the term appears in [Title VII].”¹⁶⁰

On appeal, the Ninth Circuit affirmed the district court’s judgment, arguing that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”¹⁶¹ The court found that “Holloway [had] not claimed to have [been] treated discriminatorily because she is male or female, but rather because she [is] a transsexual who chose to change her sex.”¹⁶² Discrimination based on “[a] transsexual individual’s decision to undergo sex change surgery,” the Ninth Circuit reasoned, “does not bring that individual, nor transsexuals as a class, within the scope of Title VII.”¹⁶³

Similarly, the Seventh Circuit, like the Ninth Circuit, also precluded recovery for a transgender plaintiff by restricting the interpretation of sex in Title VII to its plain meaning. In *Ulane v. Eastern Airlines, Inc.*, Karen Frances Ulane, a male-to-female transsexual commercial airline pilot, underwent sex reassignment surgery after years of seeking psychiatric treatment and taking female hormones.¹⁶⁴ After the surgery, Eastern Airlines terminated Ulane, citing, among other reasons, that the surgery had “changed [her] from the person Eastern ha[d] hired into a different person.”¹⁶⁵ Ulane filed a Title VII lawsuit against Eastern Airlines, alleging that she was discriminated against as a female and as a transsexual.¹⁶⁶ The District Court for the Northern District of Illinois found that Eastern Airlines had discriminated against Ulane because she was a transsexual, and that transsexuals are protected by Title VII because “the term, ‘sex,’ as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity.”¹⁶⁷

159. *Id.*

160. *Id.*

161. *Id.* at 663.

162. *Id.* at 664.

163. *Id.*

164. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082–83 (7th Cir. 1984).

165. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 832 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081.

166. *Ulane*, 742 F.2d at 1082.

167. *Ulane*, 581 F. Supp. at 825. The district court conceded that “there [was] not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term, ‘sex,’ would include transsexuals. The matter simply was not thought of.” *Id.* The court, however, continued: “I believe that working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way. I believe that the term, ‘sex,’ literally applies to transsexuals and that it applies scientifically to transsexuals.” *Id.*

On appeal, the Seventh Circuit, making a plain meaning argument, reversed the district court's decision.¹⁶⁸ The court found that

[t]he phrase in Title VII prohibiting discrimination based on sex, in its *plain meaning*, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder . . . ; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.¹⁶⁹

The Seventh Circuit then went on to reject Ulane's sex discrimination claim, finding that if Eastern Airlines discriminated against Ulane, it was not "because she is female, but because [she] is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."¹⁷⁰

3. Effeminacy Is Not "Sex"

Courts have even refused to extend Title VII's prohibition of sex discrimination to effeminate men. For example, in *Smith v. Liberty Mutual Insurance Co.*, Bennie E. Smith applied for and was denied employment as a mail room clerk for Liberty Mutual Insurance because his interviewer thought he was effeminate.¹⁷¹ Smith brought a Title VII action against Liberty Mutual Insurance, alleging both sex and race discrimination.¹⁷² The district court granted summary judgment in favor of the defendant on the sex discrimination claim, allowing the race discrimination claim to proceed to trial, but dismissed it later, and, on appeal, the Fifth Circuit affirmed.¹⁷³ Limiting sex to its plain meaning, the Fifth Circuit found that Smith was not claiming that he was discriminated against because he was a male, but because "as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.'"¹⁷⁴ Thus, the court argued, Title VII's prohibition on sex discrimination cannot be extended "to situations of questionable application without some

168. *Ulane*, 742 F.2d at 1085–87.

169. *Id.* at 1085 (emphasis added).

170. *Id.* at 1087 (footnote omitted).

171. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

172. *Id.*

173. *Id.* at 326–27, 330.

174. *Id.* at 327.

stronger Congressional mandate,”¹⁷⁵ and, therefore, sex discrimination “cannot be strained” to include discrimination on the basis of effeminacy.¹⁷⁶

B. EXPANDING “BECAUSE OF SEX”

The United States Supreme Court in two cases dramatically changed Title VII sex discrimination jurisprudence by embracing an expansive view of sex that went beyond its strict, anatomical definition. In the first case, *Price Waterhouse v. Hopkins*, the Court recognized adverse employment decisions based on gender stereotyping as a form of sex discrimination under Title VII.¹⁷⁷ In the second case, *Oncale v. Sundowner Offshore Services, Inc.*, the Court unanimously held that Title VII prohibits same-sex harassment.¹⁷⁸ Although neither case involved homosexual, bisexual, or transgender plaintiffs, nor can they be said to have held that Title VII covers individuals discriminated against on the basis of their sexual orientations or gender identities, the Court laid down the doctrinal foundation for later courts and plaintiffs to drive Title VII’s jurisprudence from a narrow prohibition of discrimination based on one’s biological sex toward a broader prohibition on discrimination based on gender nonconformity. And because, as will be argued below, effeminate men and masculine women, gay men and lesbian women, and transgender individuals are by definition gender nonconformists, discrimination against or harassment of them because they defy conventional gender expectations is discrimination on the basis of sex.

1. *Price Waterhouse v. Hopkins*

In *Price Waterhouse*, Ann Hopkins was a senior manager at the Washington, D.C. office of Price Waterhouse and became a candidate for partnership.¹⁷⁹ As part of the partnership selection process, partners in the firm were asked to submit written comments on the candidates, which played an important role in their selection.¹⁸⁰ While some partners endorsed Hopkins’s candidacy, others did not; those who did not endorse her submitted comments that were often critical of her personality and

175. *Id.* (quoting *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc)).

176. *See id.*

177. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

178. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

179. *Price Waterhouse*, 490 U.S. at 231.

180. *Id.* at 232.

physical appearance, which did not conform to female gender norms.¹⁸¹ For example, some described her as “macho” and “overcompensat[ing] for being a woman,” while others suggested that she take “a course at charm school” and “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁸²

When Hopkins was denied partnership, she sued the firm under Title VII, alleging that Price Waterhouse had discriminated against her on the basis of her sex in its partnership selection decision.¹⁸³ The District Court for the District of Columbia ruled in Hopkins’s favor, finding that Price Waterhouse had discriminated against Hopkins on the basis of her sex when it relied on the partners’ gender-stereotyping comments.¹⁸⁴ The District of Columbia Circuit Court of Appeals affirmed the district court’s ruling and the matter was appealed to the U.S. Supreme Court.¹⁸⁵

The Supreme Court held that discrimination based on gender stereotyping is a form of sex discrimination under Title VII.¹⁸⁶ The Court stated that

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹⁸⁷

The Court thus recognized that discrimination based on sex under Title VII was no longer limited to discrimination triggered purely by physical anatomy, but also included discrimination motivated by physical appearance and behavioral characteristics that might be considered “masculine” or “feminine.”¹⁸⁸ Although Hopkins was not discriminated against because she was a woman per se, she was discriminated against because she did not conform to stereotypical characteristics expected of her

181. *Id.* at 234–35.

182. *Id.* at 235. For a presentation of Ann Hopkins and this case in a different light, see generally Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, in *EMPLOYMENT DISCRIMINATION STORIES* 65, 65–103 (Joel Wm. Friedman ed., 2006).

183. *Price Waterhouse*, 490 U.S. at 231–32.

184. *See id.* at 236–37.

185. *Id.* at 232.

186. *See id.* at 250.

187. *Id.* at 251 (alteration in original) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

188. *See id.* at 250–51.

gender.¹⁸⁹ Thus, according to the Supreme Court, discrimination on the basis of gender nonconformity is discrimination because of sex under Title VII.

2. The Grooming Code Cases

Critics of the gender-stereotyping theory of liability¹⁹⁰ might point to the “grooming code cases”¹⁹¹ as evidence that *Price Waterhouse* does not stand for the proposition that discrimination on the basis of gender stereotypes is discrimination because of sex. The grooming code cases are a line of lower court decisions that upheld sexually disparate grooming policies even though such policies require employees to conform to stereotypical norms associated with their genders. For example, in the seminal *Jespersen v. Harrah’s Operating Co.*, a female casino employee brought a Title VII claim against the casino’s “Personal Best” policy, which required male employees to wear their hair short, trim their finger nails, and refrain from wearing makeup or nail polish, and required female employees to wear their hair “teased, curled, or styled,” as well as wear stockings, and placed limits on the types of nail polish to be worn.¹⁹² The Ninth Circuit, en banc, held that such sexually disparate grooming policies are permissible under Title VII as long as they do not impose unequal burdens on men and women.¹⁹³ Furthermore, the court distinguished the case from *Price Waterhouse*, finding that there was “no evidence . . . to indicate that the policy was adopted to make women bartenders conform to

189. *See id.*

190. *See, e.g.,* Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*, 21 LAB. LAW. 213, 246 (2006) (“[T]he notion that Title VII, as currently written, renders sex stereotyping per se impermissible strays beyond legitimate judicial interpretation or Supreme Court precedent, properly construed.”).

191. *See, e.g.,* *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1111–12 (9th Cir. 2006) (en banc) (declining to apply the reasoning of *Price Waterhouse* in a lawsuit involving appearance and grooming standards); *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (holding that different hair length standards for men and women do not violate Title VII); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908–09 (2d Cir. 1996) (per curiam) (same); *Rathert v. Vill. of Peotone*, 903 F.2d 510, 515–16 (7th Cir. 1990) (upholding a restriction on police officers from wearing ear studs even when not on duty); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 U.S. Dist. LEXIS 237, at *29 (N.D. Ind. Jan. 5, 2009) (granting the employer’s motion for summary judgment on a claim involving a grooming policy that required a male-to-female transsexual to dress less femininely); *Bedker v. Domino’s Pizza, Inc.*, 491 N.W. 2d 275, 277 (Mich. Ct. App. 1992) (upholding a male-only hair-length grooming standard); *Lockhart v. La.-Pac. Corp.*, 795 P.2d 602, 602–04 (Or. Ct. App. 1990) (upholding a rule allowing women, but not men, to wear “facial jewelry while on the job”).

192. *Jespersen*, 444 F.3d at 1107–08.

193. *Id.* at 1109–10.

a commonly-accepted stereotypical image of what women should wear.”¹⁹⁴

Despite courts such as the Ninth Circuit upholding sexually disparate grooming codes, the Supreme Court has yet to adjudicate this issue. If it does, there is a real possibility that the Supreme Court would overturn these cases, which are undoubtedly inconsistent with *Price Waterhouse*. As Mary Ann C. Case stated, “It is difficult to see how disparate grooming standards for the two sexes can survive *Hopkins*’s holding that it constitutes evidence of sex discrimination to suggest to a female employee that she ‘dress more femininely, wear make-up, have her hair styled, and wear jewelry.’”¹⁹⁵ Even the Seventh Circuit has openly questioned the extent to which, if at all, a grooming policy that prohibits a male teacher from wearing an earring survives *Price Waterhouse*.¹⁹⁶ Moreover, irrespective of how critics of the stereotyping theory may leverage the grooming code cases, the trend in the courts is to read *Price Waterhouse* as standing for the proposition that discrimination on the basis of gender nonconformity is a form of sex discrimination,¹⁹⁷ and some have even applied this theory of liability to transgender plaintiffs.¹⁹⁸ Accordingly, the grooming code cases should be seen as what they are with respect to the gender-stereotyping theory of liability: a line of cases at odds with binding Supreme Court precedent and the judicial trend in many jurisdictions.

3. *Oncale v. Sundowner Offshore Services, Inc.*

Nine years after *Price Waterhouse*, in 1998, the U.S. Supreme Court,

194. *Id.* at 1111–12.

195. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 61 (1995) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989)).

196. *Doe v. City of Belleville*, 119 F.3d 563, 584 n.17 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

197. *E.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) (“[W]e are presented with the tale of a [gay] man who was repeatedly grabbed in the crotch and poked in the anus This is precisely what Title VII forbids: ‘discriminat[ion] . . . because of . . . sex.’” (third alteration and second and third ellipses in original)); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (“*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. . . . To the extent [that *DeSantis*] conflicts with *Price Waterhouse*, as we hold it does, *DeSantis* is no longer good law.”); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (“The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.” (citation omitted)).

198. *See infra* Part V.A.

in *Oncale*, further added to Title VII's doctrinal foundation by clarifying the scope of Title VII's sexual harassment theory of liability with respect to same-sex harassment. Prior to 1998, Regina L. Stone-Harris observed that "whether a claim is actionable when the parties to a sexual harassment lawsuit are of the same gender" is a "judicial lottery" as many courts "facing this issue for the first time continue to struggle" in the "absence of legislative guidance or direction" by the Supreme Court.¹⁹⁹ In 1998, the Court took on the issue of same-sex harassment by granting certiorari to a case that involved a male oil platform worker, Joseph Oncale, who was repeatedly physically assaulted in a sexual manner, threatened with rape, and called homosexual names by his coworkers.²⁰⁰ Oncale filed a sexual harassment lawsuit against his employer, Sundowner, and two of his coworkers and a supervisor.²⁰¹ The District Court for the Eastern District of Louisiana granted summary judgment in favor of the defendants, finding that a male "has no cause of action under Title VII for harassment by male co-workers."²⁰² On appeal, the Fifth Circuit affirmed.²⁰³

The U.S. Supreme Court reversed and unanimously held that Title VII's sexual harassment cause of action is not, and should not be interpreted to be, limited to instances in which the harasser is of a different gender from the harassee, but instead should be read to cover situations in which the harasser is of the same gender as the harassee.²⁰⁴ Justice Scalia, writing for the majority, stated that, while Congress was certainly not concerned with the evil of male-on-male sexual harassment when it enacted Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."²⁰⁵

In addition to recognizing that the statutory language of Title VII is sufficiently broad to be read as covering same-sex harassment, the Court observed that the harassing conduct need not be motivated by sexual desire in order to give rise to an inference of sex discrimination.²⁰⁶ Thus, while

199. Stone-Harris, *supra* note 26, at 271–72.

200. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998).

201. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–19 (5th Cir. 1996), *rev'd*, 523 U.S. 75.

202. *Oncale v. Sundowner Offshore Servs., Inc.*, Civ. A. No. 94-1483, 1995 U.S. Dist. LEXIS 4119, at *5 (E.D. La. Mar. 24, 1995), *aff'd*, 83 F.3d 118, *rev'd*, 523 U.S. 75.

203. *Oncale*, 83 F.3d at 121.

204. *Oncale*, 523 U.S. at 79–82.

205. *Id.* at 79.

206. *Id.* at 80–81.

Oncale did not specifically rule on the issue of whether same-sex harassment motivated by gender stereotypes is actionable, the Court laid down the doctrinal foundation for later courts to extend the sex-stereotyping doctrine to sexual harassment claims.²⁰⁷ These courts' reasoning is clear: if discrimination on the basis of gender nonconformity is discrimination because of sex, and same-sex harassment not motivated by sexual desire is actionable, then it must follow that same-sex harassment motivated by the harassee's nonconforming gender traits is also actionable under Title VII.

4. A Case for Redefining "Because of Sex" to Include Gender Stereotypes

Both *Price Waterhouse* and *Oncale* represent judicial breakthroughs that provided the foundation to expand the "because of sex" provision beyond a strict, anatomical reading. As Marvin Dunson III observed: "After *Price Waterhouse*, it seems clear that the term 'sex,' as used in Title VII, encompasses more than just anatomy. It includes one's physical appearance, language, behavior, manner of interacting with others, and other characteristics that might be labeled 'masculine' or 'feminine.'"²⁰⁸ *Oncale* further advanced the gender perspective by making it possible for sexual harassment claims to be brought under the gender-stereotyping theory. Therefore, while neither case held, or can be interpreted to have held, that Title VII prohibits discrimination or harassment on the basis of sexual orientation and gender identity, the cases make it possible for courts to grant relief to LGBT litigants who are discriminated against or harassed at work because of their *gender nonconforming characteristics*.

Although the doctrinal foundation is in place, many courts post-*Price Waterhouse* and *Oncale* still do not extend Title VII's protections to LGBT

207. *E.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) ("[W]e are presented with the tale of a [gay] man who was repeatedly grabbed in the crotch and poked in the anus This is precisely what Title VII forbids: 'discriminat[ion] . . . because of . . . sex.'" (third alteration and second and third ellipses in original)); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) ("[T]here are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex—the harasser was motivated by sexual desire, the harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim's noncompliance with gender stereotypes."); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) ("The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex."); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex.');" *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

208. *Dunson*, *supra* note 34, at 476.

workers. This Note will critically evaluate these courts' decisions below. The Title VII Amendment will codify the gender-stereotyping theory by adding gender stereotypes to the definition of sex. It is important that Title VII address the distinction between sex and gender because courts have historically used the terms interchangeably.²⁰⁹ While sex might have been synonymous with gender at one point, they are now conceptually distinct. As Justice Scalia articulated: "The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male."²¹⁰ As a result, "Many of the social imperatives that used to be explained through the biologicistic prism of sex difference are now framed as gender norms."²¹¹ Thus, by adding gender stereotypes to the definition of sex, Title VII will recognize the distinction between sex and gender and *Price Waterhouse's* emphasis of protection against harassment based on gender norms in addition to harassment over anatomical differences, and explicitly cover straight-identified, effeminate men like Bennie Smith just as it protects masculine women like Ann Hopkins.²¹²

IV. REDEFINED "BECAUSE OF SEX": THE PREGNANCY DISCRIMINATION ACT

Proponents of ENDA will no doubt point to freestanding civil rights statutes such as the ADA²¹³ as evidence of Congress's preference of passing stand-alone civil rights bills over amending Title VII to include new protected classes.²¹⁴ The ADA, for example, provides wide-ranging civil rights protections for disabled people in the areas of employment, local and state public entities, public accommodations, and

209. See *supra* note 154. The current interchangeability of the term "sex" with "gender" in law can be traced back to Justice Ginsburg's litigation of constitutional sex discrimination cases in the 1970s. Case, *supra* note 195, at 9–10. Fearing that "the word 'sex' may conjure up improper images," Justice Ginsburg, then a leading litigator of Supreme Court sex discrimination cases, stopped referring to "sex discrimination" and started to use the phrase "gender discrimination." See *id.*

210. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

211. Currah, *supra* note 105, at 335.

212. If Title VII does not explicitly cover perceived sexual orientation, some courts might take the position that straight-identified, effeminate men or masculine women are not protected by Title VII because they are not discriminated against or harassed because of their homosexuality or gender nonconformity, but because they are simply perceived to be gay or lesbian.

213. See *supra* note 50 and accompanying text.

214. See Feldblum, *supra* note 26, at 177–78. *But see* Currah & Minter, *supra* note 32, at 50 ("Pragmatically, it may be easier to persuade legislators to amend the definition of an existing protection than to add a new category of protected persons to the law, which is likely to be seen as a more radical step.").

telecommunications.²¹⁵ It is probably true that Congress as well as the civil rights community might be more receptive to freestanding legislation than to adding new categories to Title VII.²¹⁶ At the same time, however, Congress has also demonstrated a willingness to redefine and expand Title VII's existing protections as long as no new classes are added. The Pregnancy Discrimination Act of 1978 ("PDA")²¹⁷ provides a perfect example of such willingness.

The PDA was enacted by Congress in response to the U.S. Supreme Court's decision in *General Electric Co. v. Gilbert*.²¹⁸ In *Gilbert*, a class of female employees sued General Electric under Title VII, alleging that the company's employee disability plan, which excluded from coverage disabilities arising from pregnancy, constituted sex discrimination.²¹⁹ The District Court for the Eastern District of Virginia held that General Electric's exclusion of pregnancy-related disability benefits violated Title VII,²²⁰ and the Fourth Circuit affirmed.²²¹ The Supreme Court reversed, relying on a 1974 opinion that rejected other female plaintiffs' equal protection challenge to a similar disability plan,²²² and found that "an exclusion of pregnancy from a disability-benefits plan . . . is not a gender-based discrimination."²²³

Two years later when Congress superseded *Gilbert* by statute, Congress neither passed a freestanding, ADA-like statute nor added pregnancy to Title VII's list of protected categories. Instead, Congress defined the terms "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."²²⁴ By defining the "because of sex" provision to include pregnancy, Congress has demonstrated a willingness to amend Title VII

215. See 42 U.S.C. §§ 12111–12117 (2006) (employment); *id.* §§ 12131–12134, 12141–12150, 12161–12165 (public entities); *id.* §§ 12181–12189 (public accommodations); 47 U.S.C. § 225 (2006) (telecommunications).

216. See *supra* notes 50–51 and accompanying text.

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

218. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, *as recognized in* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983).

219. *Gilbert*, 429 U.S. at 127–28.

220. *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 385–86 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125.

221. *Gilbert*, 519 F.2d at 668.

222. See *Geduldig v. Aiello*, 417 U.S. 484, 486, 496–97 (1974).

223. *Gilbert*, 429 U.S. at 136.

224. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, sec. 1, § 701, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

when it does not involve adding new protected categories. The ADA and other freestanding civil rights statutes do not fit this framework because characteristics such as disability, age, and genetic information are so categorically distinct from race, color, religion, sex, and national origin that they cannot be amended into Title VII without creating new protected classes.

The Title VII Amendment, however, fits this framework perfectly. Since *Price Waterhouse*, courts have recognized that Title VII's "because of sex" provision encompasses more than just the anatomical differences between men and women—it covers stereotyped expectations associated with gender. And homosexual, bisexual, and transgender people, by definition, do not conform to conventional expectations of masculinity or femininity. Gays, lesbians, and bisexuals do not conform to gender expectations in their affectional preferences—gay men are attracted to other men, lesbian women are attracted to other women, and bisexual people are attracted to both genders.²²⁵ Transgender people are nonconforming in their gender expression—each needs to express an identity associated with the sex other than his or her biological sex at birth.²²⁶ When LGBT individuals are discriminated against because of their sexual orientations or gender identities, they are discriminated against because they are gender nonconformists,²²⁷ and discrimination based on sexual orientation and gender identity, like pregnancy, is a natural extension of sex discrimination. Therefore, as Jennifer S. Hendricks proposed, "Rather than enact a stand-alone ENDA or add 'sexual orientation' to the list of prohibited classifications within Title VII, Congress should do what it did with the PDA."²²⁸ Whereas ENDA imposes categorical distinctions among gender, sexual orientation, and gender identity, the Title VII Amendment reflects the inseparability of gender, sexual orientation, and gender identity.

225. See *infra* Part V.B.

226. See *infra* Part V.A.

227. Here is where my argument aligns with Currah and Shannon Minter's inclusive definition of transgender, which includes anyone whose gender expression "differs from conventional expectations of masculinity or femininity." See Currah & Minter, *supra* note 32, at 37 n.1.

228. Hendricks, *supra* note 26, at 212.

V. A CASE FOR REDEFINING “BECAUSE OF SEX” TO INCLUDE SEXUAL ORIENTATION AND GENDER IDENTITY

A. NONCONFORMING GENDER IDENTITY

1. Reliance on *Holloway* and *Ulane*

When the Supreme Court in *Price Waterhouse* affirmed gender stereotyping as a theory of liability under Title VII, a promising new avenue for recovery opened up for transgender litigants. Transgender people, by definition, do not conform to traditional gender norms associated with their biological sexes. For example, according to the Seventh Circuit in *Ulane*, Karen Ulane was a man who was fired for taking female hormones, cross-dressing, and appearing to look like a woman.²²⁹ Therefore, she was fired because her gender expression did not meet the stereotyped expectations of a man. The Seventh Circuit concluded that this did not constitute discrimination based on sex under Title VII,²³⁰ but now, according to *Price Waterhouse*, discrimination against someone like Ulane on the basis of gender stereotypes is discrimination on the basis of sex. Transgender people thus appear to fit the gender-stereotyping framework perfectly. Early sex discrimination cases involving transgender plaintiffs decided after *Price Waterhouse*, however, did not find it controlling and instead relied on the *Holloway* and *Ulane* line of cases.²³¹

*James v. Ranch Mart Hardware, Inc.*²³² was one of the first sex discrimination cases involving transgender plaintiffs decided after *Price Waterhouse*. In *James*, Barbara Renee James, a preoperative male-to-female transsexual, filed a Title VII sex discrimination complaint against Ranch Mart, alleging that it terminated her employment because she “intended to begin living and working full time as a female.”²³³ The District Court for the District of Kansas did not mention *Price Waterhouse* in its opinion; instead it adopted the narrow interpretation of sex from the *Holloway* and *Ulane* line of cases.²³⁴ The court cited *Holloway* and *Ulane* and then found that “[e]ven if [James] is psychologically female, Congress

229. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984). And recall that the Seventh Circuit found discrimination based on these acts to be permissible discrimination under Title VII. *Id.*

230. *See id.* at 1085.

231. *See infra* notes 232–40 and accompanying text.

232. *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 U.S. Dist. LEXIS 19102 (D. Kan. Dec. 23, 1994).

233. *Id.* at *2.

234. *See id.* at *3.

did not intend ‘to ignore anatomical classification and determine a person’s sex according to the psychological makeup of that individual.’”²³⁵

The second case involving a transgender plaintiff decided after *Price Waterhouse* was *Broadus v. State Farm Insurance Co.*²³⁶ *Broadus* involved a Title VII sex harassment claim²³⁷ by a preoperative female-to-male transsexual who alleged, among other things, his supervisor “harassed him because he did not conform to a stereotype of how a woman should look.”²³⁸ The District Court for the Western District of Missouri recognized that under *Price Waterhouse* discrimination based on gender stereotypes is actionable under Title VII.²³⁹ But the court nonetheless distinguished its case from *Price Waterhouse* because “[i]n *Price Waterhouse*, the plaintiff was not a transsexual,” and “[i]t [wa]s unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII.”²⁴⁰

Both *James* and *Broadus* presented opportunities for courts to adopt *Price Waterhouse*’s gender-stereotyping theory with respect to sex discrimination claims brought by transgender plaintiffs. The *James* court, however, made no mention of the *Price Waterhouse* precedent and instead relied on *Ulane*’s congressional intent analysis. In addition, although the *Broadus* court considered but ultimately distinguished its case from *Price Waterhouse*, it committed the same error as *James* by relying too heavily on congressional intent. The dearth of legislative history behind Title VII’s sex amendment certainly means that it is unclear whether transsexuals are covered by Title VII. But neither court’s approach is consistent with the guidance provided by Justice Scalia in *Oncale*, who stated that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”²⁴¹ Thus, while Congress certainly did not consider the evils of gender

235. *Id.* at *3 (quoting *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (per curiam)).

236. *Broadus v. State Farm Ins. Co.*, No. 98-4254-CV-C-SOW-ECF, 2000 U.S. Dist. LEXIS 19919 (W.D. Mo. Oct. 11, 2000).

237. The *Broadus* court did not cite *Oncale*. This is probably because *Broadus* did not involve a same-sex harassment claim. Thus, the sole issue before the court with respect to the sex discrimination claim was whether a transsexual is protected by Title VII. *Id.* at *10–11.

238. *Id.*

239. *Id.* at *11 (“Sexual stereotyping which plays a role in an employment decision is actionable under Title VII.”). The *Broadus* court called what occurred in *Price Waterhouse* “sexual stereotyping,” but it is referred to as “gender stereotyping” throughout this Note.

240. *Id.*

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

identity-based discrimination when it approved Title VII's sex amendment,²⁴² Title VII's prohibition of sex discrimination is sufficiently broad to cover gender identity under *Price Waterhouse's* gender-stereotyping framework.

2. The New Legal Landscape: Slowly but Surely

Despite *James* and *Broadus*, the legal landscape for transgender litigants is changing. As Ilona M. Turner observed: "Before *Price Waterhouse* was decided in 1989, . . . transgender employees who sought to rely on Title VII's sex discrimination were out of luck. Since *Price Waterhouse*, however, the tide has been turning slowly but surely."²⁴³ The tide has been turning indeed, as more and more courts have embraced *Price Waterhouse* with respect to sex discrimination claims by transgender individuals,²⁴⁴ and some have even gone as far as finding that *Price Waterhouse* overruled the *Holloway* and *Ulane* line of cases.²⁴⁵

The most notable case example is *Smith v. City of Salem*, in which Jimmie L. Smith was a preoperative male-to-female transsexual

242. In fact, the legislative history behind the sex amendment indicates that it was initially proposed as a way to sabotage the passage of the Civil Rights Act, and therefore it could be said that Congress did not even consider the evils of traditional sex-based discrimination in passing the sex amendment. *See supra* note 40.

243. Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 595 (2007).

244. *See, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) ("Following the holding in *Smith*, [the male-to-female transsexual plaintiff] established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes."); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse* . . ."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) ("Even if the decisions that define the word 'sex' in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach 'has been eviscerated by *Price Waterhouse*,' the [defendant's] refusal to hire [the plaintiff] after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex.'" (citation omitted)); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 U.S. Dist. LEXIS 6521, at *5 (W.D. Pa. Feb. 17, 2006) ("Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions, [the transgender] plaintiff has sufficiently pleaded claims of gender discrimination."); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ. 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825, at *10 (D. Ariz. June 3, 2004) ("[T]o create restrooms for each sex but to require a [trans]woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII.").

245. *See, e.g.*, *Smith*, 378 F.3d at 573 ("[T]he approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*."); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.").

firefighter.²⁴⁶ When he began “‘expressing a more feminine appearance’ . . . at work,” he was told by his coworkers that he was not “‘masculine enough.’”²⁴⁷ Further, Salem city officials devised a plan to force Smith to resign by requiring him to undergo psychological evaluations, and if he refused, they would terminate him for insubordination.²⁴⁸ Smith then filed suit in federal court, asserting Title VII sex discrimination.²⁴⁹ Dismissing the case, the District Court for the Northern District of Ohio concluded that, although Smith claimed he was a victim of gender stereotyping, the discrimination he alleged was, “‘in reality, based upon his transsexuality.’”²⁵⁰

On appeal, the Sixth Circuit reversed, holding that Title VII covers transgender individuals who are discriminated against because they do not fit stereotypical notions of masculinity or femininity associated with their biological sexes.²⁵¹ The court first announced that the strict, biological interpretation of sex adopted by the *Holloway* and *Ulane* line of cases “‘ha[d] been eviscerated by *Price Waterhouse*.”²⁵² The *Smith* court also acknowledged that courts in the past “‘regarded Title VII as barring discrimination based only on ‘sex’ (referring to an individual’s anatomical and biological characteristics), but not on ‘gender’ (referring to socially-constructed norms associated with a person’s sex).”²⁵³ This anatomical reading of sex, the Sixth Circuit reasoned, had changed after *Price Waterhouse* because that case prohibits discrimination against women because they “‘do not wear dresses or makeup” as well as men because they “‘do wear dresses and makeup.”²⁵⁴ The Sixth Circuit thus concluded that

discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “‘transsexual,” is not fatal to a sex discrimination claim

246. *Smith*, 378 F.3d at 567.

247. *Id.* at 568.

248. *Id.* at 569.

249. *Id.*

250. *Smith v. City of Salem*, No. 4:02CV1405, 2003 U.S. Dist. LEXIS 26301, at *9 (N.D. Ohio Feb. 26, 2003), *rev’d*, 378 F.3d 566.

251. *See Smith*, 378 F.3d at 575.

252. *Id.* at 573.

253. *Id.*

254. *Id.* at 574.

where the victim has suffered discrimination because of his or her gender non-conformity.²⁵⁵

As more and more courts adopt *Price Waterhouse* and its expansive view of sex, some courts have even extended this precedent to non-Title VII cases.²⁵⁶ For example, in *Schwenk v. Hartford*, Crystal Schwenk, a preoperative male-to-female transsexual prisoner, was sexually assaulted by a prison guard.²⁵⁷ Schwenk filed a complaint under the Gender-Motivated Violence Act (“GMVA”), which prohibits “crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”²⁵⁸ The Ninth Circuit found that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.”²⁵⁹ The court held that because GMVA parallels Title VII’s protections, Schwenk’s case constituted a valid claim under the GMVA.²⁶⁰

In 2000, Currah and Shannon Minter noted that “[e]mployment discrimination jurisprudence at both the federal and state levels . . . captures transsexuals in a discourse of exclusion from social participation. This wide net . . . snags all claims launched by transsexuals and reveals that no matter how a transsexual frames [his or] her discrimination claim, it will fail.”²⁶¹ In 2011, however, this statement needs to be reexamined. Even though a handful of courts since *Smith* have continued to distinguish their cases from *Price Waterhouse*,²⁶² and courts do not consistently protect transgender workers from job discrimination or

255. *Id.* at 575.

256. *Schwenk v. Hartford*, 204 F.3d 1187, 1198–1201 (9th Cir. 2000) (applying *Price Waterhouse* to a transsexual plaintiff’s sexual assault claim under the Gender-Motivated Violence Act); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (applying *Price Waterhouse* to a transsexual plaintiff’s Equal Credit Opportunity Act claim).

257. *Schwenk*, 204 F.3d at 1193–94.

258. 42 U.S.C. § 13981(d)(1) (2006).

259. *Schwenk*, 204 F.3d at 1202.

260. *See id.* at 1202–03.

261. Currah & Minter, *supra* note 32, at 40 (first omission in original) (quoting Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 310 (1997)). *See also* Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205, 218 (2007) (“[L]ower courts typically reject claims by plaintiffs whose unconventional behavior or presentation of self can be seen to implicate their . . . transgendered identity.”).

262. *See, e.g., Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634, at *12 (D. Utah June 24, 2005) (declining to apply *Price Waterhouse* to a preoperative male-to-female transsexual who was terminated because she had to use female restrooms while she still had male genitalia), *aff’d*, 502 F.3d 1215 (10th Cir. 2007); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *27–28 (E.D. La. Sept. 16, 2002) (declining to apply *Price Waterhouse* to a heterosexual cross-dresser who was fired for cross-dressing in public).

harassment, transgender litigants have made progress, slowly but surely, in this area of the law. They will continue to make progress as more and more courts recognize that transgender individuals are, by definition, gender nonconforming, and apply the gender-stereotyping theory to sex discrimination cases involving transgender plaintiffs.

3. ENDA: a Threat to the New Legal Landscape

Arguably a bigger threat to transgender people is the passage of a stand-alone federal antidiscrimination statute like ENDA, because it would place them in a Catch-22. On the one hand, as Hendricks pointed out, the passage of “a stand-alone ENDA that excludes gender identity will undermine the progress that has been made for sex-plus and sex stereotyping claims.”²⁶³ Courts might interpret this move to mean that Congress does not intend to ban workplace discrimination against transgender people, and invalidate the hard-fought progress that transgender plaintiffs have made, by closing the door with respect to bringing sex discrimination claims under the gender-stereotyping theory. Once the litigation route is closed to transgender workers, they may only seek redress in the handful of states that have antidiscrimination statutes that include gender identity as a protected class. Although the events of the last transgender compromise serve as a tale of caution for legislators considering this course of action, ultimately the risk that transprotection will be removed for the sake of political expediency remains real and constant.

On the other hand, if a transinclusive statute passes, it would implicitly endorse the view that discrimination based on gender identity is somehow analytically distinct from discrimination based on gender stereotypes. This artificial distinction might leave the door open for courts to reject claims brought by transgender plaintiffs under some obscure reasoning that shoehorns their claims into a category that is not covered by the transinclusive ENDA. For example, a court in a jurisdiction that does not recognize that transgender plaintiffs are covered by *Price Waterhouse*'s prohibition on gender stereotyping discrimination might argue that transgender plaintiffs are not discriminated against on the basis of their gender identities, but on the basis of some gender-nonconforming behavior. This court might ultimately reject the transgender plaintiff's claim, finding that the plaintiff is neither covered by ENDA nor Title VII.

263. Hendricks, *supra* note 26, at 212.

Recall that in *Broadus*,²⁶⁴ the U.S. District Court for the Western District of Missouri rejected a male-to-female transsexual's gender-stereotyping claim. It found that "[i]n *Price Waterhouse*, the plaintiff was not a transsexual," and "[i]t is unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII."²⁶⁵ And to date, the Eighth Circuit Court of Appeals—the circuit in which the *Broadus* court resides—has yet to rule on the issue of whether transgender plaintiffs may assert a cause of action under the gender-stereotyping theory. In this jurisdiction, if a transgender plaintiff brings a job discrimination claim, depending on how the facts play out, it is possible that the court could reject the plaintiff's claim, holding that he or she was not discriminated against because of his or her gender identity but on the basis of his or her gender-nonconforming behavior. Although such a possibility is quite remote, it is nonetheless plausible.

The Title VII Amendment, however, will encounter neither of these issues. First, the Title VII Amendment is proposed on the premise that the hard-fought for protections of one group—transgender individuals—cannot be sacrificed so that another group—gays and lesbians—can be protected. Since the progress made by transgender litigants will be undermined if a gender identity-less antidiscrimination bill passes, transcoverage is one compromise that the Title VII Amendment cannot make. Second, the Title VII Amendment does not run the risk of leaving the door open for courts to shoehorn claims brought by transgender plaintiffs into a category unprotected by law: the proposed amendment explicitly affirms the inseparability between gender and gender identity. This affirmation ensures that a Title VII claim will be actionable whether a court finds a transgender plaintiff is discriminated against on the basis of his or her gender identity or gender-nonconforming traits.

B. GENDER NONCONFORMING AFFECTIONAL CHOICES

1. Effeminacy Discrimination

Because gay, lesbian, and bisexual people are also gender nonconforming in their affectional choices, one would expect them to have made some progress litigating under the gender-stereotyping theory, as have transgender litigants. In practice, however, despite near-universal

264. *Broadus v. State Farm Ins. Co.*, No. 98-4254-CV-C-SOW-ECF, 2000 U.S. Dist. LEXIS 19919 (W.D. Mo. Oct. 11, 2000).

265. *Id.* at *11.

judicial recognition of *Price Waterhouse* and *Oncale*,²⁶⁶ homosexual and bisexual plaintiffs have had very limited success litigating under the gender-stereotyping framework. Their successes have been limited to instances in which the plaintiff is an effeminate gay man or a masculine lesbian woman, and even then, only a handful of courts have been willing to extend Title VII protections to them.

Arguably the most important example in this line of cases is *Nichols v. Azteca Restaurant Enterprises, Inc.*²⁶⁷ In *Nichols*, Antonio Sanchez was subject to a “relentless campaign of insults, name-calling, and vulgarities” by his coworkers, such as being referred to as “she” and “her,” mocked for carrying his tray “like a woman,” and called a “faggot” and a “fucking female whore.”²⁶⁸ The Ninth Circuit found that *Oncale* and *Price Waterhouse* were controlling—Sanchez was harassed by same-sex coworkers whose harassing conduct was motivated by Sanchez’s effeminate character—and held that Sanchez was harassed by his coworkers because of his sex.²⁶⁹ The Ninth Circuit, moreover, overruled *DeSantis*’s holding that Title VII does not prohibit effeminacy discrimination because the case “predates and conflicts with the Supreme Court’s decision in *Price Waterhouse*.”²⁷⁰

A year later, in *Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit extended the gender-stereotyping framework to a same-sex harassment claim brought by an openly gay man, Medina Rene.²⁷¹ For two years, Rene was harassed by his coworkers on an almost daily basis.²⁷² His harassers whistled and blew kisses at him, called him “sweetheart” and “muñeca” (“doll” in Spanish), forced him to look at pictures of naked men having sex, grabbed him in the crotch, and poked him in the anus with their fingers.²⁷³ The Ninth Circuit found that a person’s “sexual orientation is irrelevant for purposes of Title VII,” and whether a “harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant.”²⁷⁴ Therefore,

266. *E.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000); *Higgins v. New Balance Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

267. *Nichols*, 256 F.3d 864.

268. *Id.* at 870.

269. *See id.* at 874–76.

270. *Id.* at 875.

271. *Rene*, 305 F.3d at 1063–64.

272. *Id.* at 1064.

273. *Id.*

274. *Id.* at 1063.

the court concluded: “[W]hat we have in this case is a fairly straightforward sexual harassment claim.”²⁷⁵

Despite success stories like *Rene*, the effeminacy discrimination framework cannot consistently protect gays and lesbians against workplace discrimination and harassment. First, effeminacy discrimination will not cover masculine gay men or feminine lesbian women. Second, gay men and lesbian women who are covered are only covered incidentally. That is to say, they are covered not because of a judicial affirmation that discrimination on the basis of sexual orientation is an extension of discrimination because of sex, but because they happen to have an effeminate—or in the case of lesbians, a masculine—character. Gay men who are masculine or lesbian women who are feminine, however, are out of luck. Because the effeminacy discrimination theory does not address the underlying issue of discrimination motivated by sexual orientation, it is unable to provide adequate protection for gay and lesbian workers.

2. Courts’ Fear and Practice of Bootstrapping

Courts have been extremely reluctant to apply *Price Waterhouse* and *Oncale* to cases in which “gender stereotyping is intertwined with sexual orientation.”²⁷⁶ As Jill Weinberg stated, these courts were concerned that “homosexual plaintiffs will ‘bootstrap’ a claim of sexual orientation discrimination onto the sex-stereotyping theory in order to obtain relief in federal court.”²⁷⁷ This concern about bootstrapping was clearly articulated by the Second Circuit in *Dawson v. Bumble & Bumble*.²⁷⁸

In *Dawson*, the Second Circuit rejected a lesbian hairstylist’s sex discrimination claim against her employer for terminating her because “she [did] not meet stereotyped expectations of femininity.”²⁷⁹ The court cautioned that

275. *Id.* at 1068.

276. Weinberg, *supra* note 26, at 14. *See also* Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *22 (6th Cir. Jan. 15, 1992) (rejecting a same-sex harassment claim because the harassing conduct was based on the plaintiff’s perceived sexual orientation).

277. Weinberg, *supra* note 26, at 14 (citing Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 23–24 (1995)). *See also* Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) (“[G]ay plaintiffs bringing claims under Title VII should emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.”).

278. *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

279. *Id.* at 217.

[w]hen utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII.”²⁸⁰

Responding to concerns of bootstrapping, these courts have recharacterized sex discrimination based on gender stereotypes (impermissible) as sexual orientation discrimination (permissible).²⁸¹ Because it is not illegal to discriminate on the basis of actual or perceived homosexuality, “courts can and do (re)characterize sex and gender discrimination as sexual orientation discrimination virtually at will.”²⁸² For example, in *Vickers v. Fairfield Medical Center*, the Sixth Circuit rejected a gender-stereotyping claim because the discrimination was “based on [the plaintiff’s] perceived homosexuality, rather than based on gender non-conformity.”²⁸³ The *Vickers* court announced that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices” and therefore, “recognition of [the plaintiff’s] claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.”²⁸⁴ Similarly, in *Spearman v. Ford Motor Co.*, the Seventh Circuit rejected a same-sex harassment claim

280. *Id.* at 218 (alteration in original) (citation omitted) (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004), and *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000), respectively).

281. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (arguing that the discrimination against an effeminate male plaintiff was “based on [his] perceived homosexuality, rather than based on gender non-conformity”); *Kay v. Independence Blue Cross*, 142 Fed. App’x 48, 51 (3d Cir. 2005) (holding that coworkers who made comments about the plaintiff’s earring and sexual orientation “[were] motivated by sexual orientation bias rather than gender stereotyping”); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1060, 1062–65 (7th Cir. 2003) (holding that coworkers who called the plaintiff a “faggot,” “bisexual,” and “girl scout” were not targeting his gender nonconformity, but his perceived sexual orientation); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082–83, 1085 (7th Cir. 2000) (finding the evidence that the plaintiff was called a “little bitch,” a “gay ass,” and HIV-positive, “clearly demonstrate[d] that [his] problems resulted from . . . his apparent homosexuality”); *Parrella v. Lawrence & Mem’l Hosp.*, No. 3:08-CV-1445 (PCD), 2009 U.S. Dist. LEXIS 37892, at *7 (D. Conn. May 5, 2009) (rejecting a bisexual plaintiff’s argument that “sexual orientation discrimination is inherently a form of sex or gender discrimination”); *Prowel v. Wise Bus. Forms, Inc.*, No. 2:06-cv-259, 2007 U.S. Dist. LEXIS 67792, at *11 (W.D. Pa. Sept. 13, 2007) (arguing that Congress did not intend for Title VII to prohibit discrimination on the basis of sexual orientation, and “[p]ermitt[ing] a plaintiff to simply relabel a sexual orientation claim as one for failure to conform to gender stereotypes would evade the statutory intent of Congress”).

282. Valdes, *supra* note 277, at 24.

283. *Vickers*, 453 F.3d at 763.

284. *Id.* at 764.

brought by a gay Ford factory worker, finding that the plaintiff's "coworkers directed stereotypical statements at him to express their hostility to his perceived homosexuality, and not to harass him because he is a man."²⁸⁵

The courts' recharacterization of claims, however, is conceptually indefensible. Recall that the Sixth Circuit in *Vickers* announced that "all homosexuals . . . fail to conform to traditional gender norms in their sexual practices."²⁸⁶ In other words, men are socially expected to be physically attracted to women, and women to men. But gay men and lesbian women, because of their gender nonconforming affectional choices, do not conform to the stereotypical norms of how men and women should associate themselves intimately. And discrimination or harassment based on their gender nonconforming behavior is impermissible irrespective of the cause of the behavior, whether it be gender expression or affectional preferences.²⁸⁷ In fact, by recharacterizing sex discrimination claims based on gender stereotyping as claims based on a distinct and unprotected category—sexual orientation—it is the courts who are practicing "bootstrapping." Although discrimination or harassment against gay men and lesbian women's nonconforming affectional preference is a natural extension of discrimination on the basis of gender stereotypes, courts have sidestepped the issue either by recharacterizing claims or by limiting the gender-stereotyping framework to effeminate men and masculine women, regardless of their sexual orientations. By amending Title VII's definition of "because of sex" to include actual or perceived sexual orientation, the Title VII Amendment rejects the unreasonable categorical distinction between sexual orientation and gender stereotypes imposed by courts, like the ones that decided *Dawson*, *Vickers*, and *Spearman*.

VI. CONCLUSION

For the estimated eight million LGBT individuals in the workforce, the existing patchwork of antidiscrimination protections is inadequate. In this patchwork, for example, Michael P. Carney was able to obtain relief—but only after years of struggle—while Lauren Calvo was left standing in the rain. As such, a federal solution that protects LGBT individuals on a

285. *Spearman*, 231 F.3d at 1085–86 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

286. *Vickers*, 453 F.3d at 764.

287. This argument echoes the Sixth Circuit's finding in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), that the cause of the gender nonconforming behavior is irrelevant to whether a person was discriminated against on the basis of gender stereotypes. *See supra* text accompanying note 255.

national level is necessary. For them, their gender expressions and affectional preferences are not choices—they are who these individuals are. They cannot, and should not be forced to, keep their expressions and preferences private. Carney tried, but the pressure from keeping such a secret nearly ruined his life. Calvo also tried, but in the end, even her herculean efforts proved futile. Changing the law will not completely resolve the discrimination that folks like Carney and Calvo face every day in the workplace because social ostracism is as problematic as the lack of legal protection. Just as Carney feared, how would his colleagues treat his life partner at his funeral if he were gunned down? Nevertheless, an important step to changing social perception is first to change the law and recognize, on a national level, that workplace discrimination against LGBT individuals is unacceptable under the eyes of the law.

Proponents of ENDA will no doubt argue that the Title VII Amendment is unnecessary because ENDA will also protect LGBT individuals from job discrimination and harassment. This Note, however, has demonstrated that, between the two alternatives, the Title VII Amendment is the better choice. The efficacy of ENDA 2009 has been greatly reduced by numerous compromises and concessions. If enacted, it would be less effective in remedying sexual orientation and gender identity discrimination than the Title VII Amendment. Because ENDA's prophylactic provisions have been greatly watered down, if enacted, ENDA would perpetuate the idea that the discrimination endured by LGBT people is somehow different from—and less objectionable than—the discrimination endured by people of color and women. The Title VII Amendment, on the other hand, represents a clean start on which we may continue the struggle for workplace equality for LGBT individuals.

Moreover, because an LGBT person's gender expression or affectional choices are by definition gender nonconforming, discrimination on the basis of sexual orientation and gender identity—like gender stereotyping—are virtually indistinguishable from discrimination “because of sex.” As such, LGBT litigants have been able to make some progress, although in varying degrees and consistency, litigating Title VII claims under *Price Waterhouse's* gender-stereotyping theory. The Title VII Amendment would redefine Title VII's prohibition on discrimination because of sex to affirm that gender, sexual orientation, and gender identity are not conceptually distinct. ENDA, however, whether it includes gender identity as a protected class, has the potential to cause problems for transgender workers down the road as courts develop ENDA doctrinally. For these reasons, we should take the fight back to Title VII and continue

the struggle for job equality under the Title VII Amendment.

