# TITLE VII: A SHIFT FROM SEX TO RELATIONSHIPS

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## Introduction

Over the past few years, the so-called "Don't Ask, Don't Tell" policy[1] has dominated headlines,[2] courtrooms,[3] and policy discussions,[4] culminating in its repeal in December 2010.[5] Comparatively, little public attention has been given to non-military employment discrimination based on sexual orientation.[6] In some respects, this may be unsurprising: a 2007 poll found that only one-third of American adults were aware that federal law, as currently interpreted, does not provide protection for employees on the basis of sexual orientation.[7] At the same time, public opinion polls suggest that Americans do not find the idea of protection against employment discrimination based on sexual orientation particularly controversial. A 2008 Gallup poll found

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[1] *See* 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub L. No. 111–321, 124 Stat. 3515 (2010).

[2] *See, e.g.*, Naftali Bendavid, Julian E. Barnes, Adam Entous, *GOP Halts Repeal of 'Don't Ask Don't Tell,'* Wall St. J., Sept. 22, 2010, at A1; William Branigin, *Justices Decline 'Don't Ask' Challenge; Supreme Court Refuses Appeal on the Policy*, Wash. Post, June 9, 2009, at 8; Katherine Skiba, *Obama Renews Pledges to Gays; He Says He'll End 'Don't Ask, Don't Tell' But Does Not Give A Timetable*, L.A. Times, Oct. 11, 2009, at A1.

[3] *See generally* Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008) (holding that "Don't Ask, Don't Tell" policy advances important government interests); Witt v. U.S. Dep't of Air Force, 739 F. Supp. 2d 1308 (W.D. Wash. 2010) (holding that "Don't Ask, Don't Tell" policy violates substantive due process rights, but not procedural due process); Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (holding that "Don't Ask, Don't Tell violates the First and Fifth Amendments).

[4] *See generally* David Benkof, Editorial, *Don't Rush Repeal of 'Don't Ask, Don't Tell,'* Buffalo News, Apr. 24, 2009, at A8; Joe Davidson, *Time Has Come To Repeal 'Don't Ask, Don't Tell,'* Wash. Post, Feb. 24, 2009, at D4; Editorial, *Don't Enforce 'Don't Ask, Don't Tell,'* N.Y. Times, Sept. 17, 2010, at A26.

[5] *See* 124 Stat. 3515; Peter Nicholas, *'Don't Ask, Don't Tell' Repeal Signed by Obama, But the Policy Remains in Effect Until the Military Certifies it is Ready to Comply*, L.A. Times, Dec. 23, 2010, at A8.

[6] That is not to say that the issue has been entirely ignored, but it has not received comparable coverage. For example, an October 2011 Westlaw search of "Don't Ask, Don't Tell" in U.S. News for the last three years gets over seven thousand hits. A similar search for "employment discrimination" and "sexual orientation" and "Title VII" gets only seventy hits. Westlaw Search of "Don't Ask Don't Tell," Westlaw, www.westlaw.com (search "Don't Ask Don't Tell" and search "employment discrimination" and "sexual orientation" and "Title VII") (last searched October 2011).

[7] *Significant Majority of All Adult Americans Believe it is Unfair that Federal Law Allows Employers to Fire Someone Because They are Gay or Lesbian*, Harris Interactive (Sept. 10, 2007), http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1248.

that support for homosexuals having equal rights in job opportunities has jumped from fifty-six percent in 1977 to eighty-nine percent.[8]

While Americans are largely unaware of the lack of federal protection against sexual orientation discrimination, courts are almost hyperaware, frequently reiterating that Title VII does not protect against discrimination on the basis of sexual orientation.[9] Courts have even gone so far as to reject the claims of plaintiffs with legitimate theories of discrimination under the current case law as mere attempts at bootstrapping sexual orientation claims.[10]

This Article challenges the common assumption that Title VII does not protect against discrimination on the basis of sexual orientation.[11] The district and circuit courts have now consistently held that Title VII protects an individual who is discriminated against because of his or her relationship with someone of a different race or national origin[12]—a form of discrimination that this Article refers to as "relational discrimination." Properly understood, these relational discrimination cases have interpreted Title VII's otherwise ambiguous language protecting against discrimination "because of such individual's [protected characteristic]"[13] as a robust phrase that takes into account human interactions and relationships, as opposed to a narrow understanding limited to an individual's protected characteristic viewed in isolation.[14] The underlying logic of these cases is that any time an employer discriminates against an individual because of his or her interracial relationship, that employer is necessarily considering the race of the individual employee, viewed relationally to the other person in the relationship, in making that determination.[15]

This Article establishes that the relational discrimination interpretation of Title VII necessarily applies not only to discrimination based upon an individual's relationship with a person of the opposite sex, as a few courts have begun to hold,[16] but also to the more common factual scenario of discrimination based upon an individual's relationship with a person of the

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[8] *Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Oct. 26, 2011) (question phrased as "In general, do you think homosexuals should or should not have equal rights in terms of job opportunities?").

[9] *See infra* Part II.

[10] *See infra* Part II.D.

[11] Some have argued that discrimination on the basis of sexual orientation is not a problem. *See* Ed Vitagliano, *How ENDA Could Begin an Uncivil War*, AM. FAM. ASS'N J., Sept. 2007, at 24, *available at* http://www.afajournal.org/0907ENDA.asp. However, there is evidence that this is not the case. *See* William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 67 (2001) (finding that in eight out of ten states surveyed, the incidence of sexual orientation discrimination claims filed falls either above or somewhere between the incidence of sex and race discrimination claims).

[12] *See infra* Part I.F–G.

[13] 42 U.S.C. § 2000e-2(a)(1) (2006).

[14] *See infra* Part I.

[15] *Id.*

[16] *See infra* Part III.C.

same sex.[17] This means that Title VII necessarily protects against discrimination on the basis of sexual orientation because any time an employer discriminates against an individual because of his or her sexual orientation the employer must look at the sex of the individual being discriminated against in making that determination.[18]

Applying the holdings of the Title VII interracial relationship cases to sexual orientation is not entirely novel.[19] Courts, scholars, and advocates, however, have not fully recognized, much less embraced, the full significance of the relational discrimination interpretation of Title VII and its implication for sexual orientation cases. The topic merits a full consideration that it has not yet received. This Article fills the gap by offering the first comprehensive analysis of the extension of relational discrimination to the sexual orientation context. This Article adds to the existing literature recognizing a connection between the interracial cases and sexual orientation claims by evaluating and explaining the underlying logic of the relational discrimination cases, establishing the internal validity of those cases,[20] and only then explaining the implications of those cases for the sexual orientation context.[21] In particular, this Article shows how a relational discrimination interpretation ought to be embraced even by those who prefer a textualist reading of Title VII[22] and how such a reading is consistent with scholarship arguing that rights ought to be viewed as relational as a theoretical and moral matter.[23]

The Article proceeds in four parts. Part I examines the development of the jurisprudence interpreting Title VII as protecting against relational discrimination, which has occurred largely, but not exclusively, in the context of race. This section seeks not only to describe the doctrinal shift that has occurred through these cases, but also to show how the logic of a relational discrimination interpretation is sound and thus worthy of application.

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[17] *See infra* Part III.

[18] See *id.*

[19] Others have identified the potential application of cases holding that Title VII applies to discrimination on the basis of an interracial relationship to the sexual orientation discrimination context in various degrees of detail. For the most thorough consideration to date of this concept, *see* Matthew Clark, Comment, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: the Legal Theories Available After* Rene v. MGM Grand Hotel, 51 UCLA L. REV. 313, 328–38 (2003) (discussing what the author calls "the Associative Discrimination Theory" analyzing sexual orientation discrimination as discrimination because of sex). *See also* Mark W. Honeycutt II & Van D. Turner, Jr., Comment, *Third-Party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913, 928–29 (2001); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 7–8 (1992); *Recent Proposed Legislation: Employment Discrimination—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity*, 123 HARV. L. REV. 1803, 1803–05 (2009).

[20] *See infra* Part I.

[21] *See infra* Part III.

[22] *See id.*

[23] See *infra* Part I.H.

Part II critiques the existing jurisprudence involving Title VII and sexual orientation by surveying the history—or perhaps more appropriately the lack thereof—of Title VII protection based on sexual orientation. As reliance on precedent will likely be the largest obstacle to courts' willingness to rethink whether Title VII protects against discrimination on the basis of sexual orientation, this section takes a careful look at the logical validity of that precedent.

Part III presents the argument that a relational discrimination reading of Title VII necessarily requires courts to find that Title VII protects against discrimination based upon sexual orientation. This section describes some recent decisions facially involving relational discrimination on the basis of sex, and explains how sexual orientation claims are actually implicit in these cases. This section also responds to possible critiques of extending a relational discrimination reading of Title VII to encompass sexual orientation.

Finally, Part IV moves beyond the proscriptive implications of the first three parts to consider the broader implications of Title VII protection for discrimination on the basis of sexual orientation. Drawing from literature critical of employment discrimination protections as potentially harmful to their intended beneficiaries, this section examines whether relational discrimination protection would truly benefit those who have been the subject of employment discrimination on the basis of sexual orientation or an interracial relationship. It also briefly considers the comparative benefits and difficulties of an alternative to the judicial approach considered here—legislative expansion of federal law to expressly cover discrimination claims based on sexual orientation.

## I. A Relational Discrimination Interpretation of Title VII

Before it is possible to argue that the relational discrimination concept ought to apply to sexual orientation discrimination claims, it is first necessary to critically examine the origins of relational discrimination protection in other contexts.[24] This Article uses the phrase "relational discrimination" to refer to discrimination against individuals because of their own Title VII-relevant characteristic (race, color, religion, sex, or national origin) when viewed in relation to others.[25] In the race context, for example, relational

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[24] This step is missing from the existing treatments of this subject. In Honeycutt & Turner, *supra* note 19, at 928–931, the authors advocate applying what they call "third-party associative discrimination" to same-sex discrimination. They also state, however, that the race cases reach their conclusions "by disregarding the statute," and that such an interpretation would require "creative construction." *Id.* at 930. In addition, in Clark, *supra* note 19, at 329, the author summarily concludes that the interracial relationship cases' conclusion "rests on . . . solid logic" before advocating to extend it to sexual orientation by analogy. *Id.* at 330.

[25] Others have termed a similar, but not identical concept the "associative discrimination theory." *See* Clark, *supra* note 19, at 328–38. It has also been called "third-party associative discrimination." *See generally* Honeycutt & Turner, *supra* note 19. Simi-

discrimination typically occurs when an individual is discriminated against based on his or her relationship with someone of a different race, and in that way is discriminated against on the basis of his or her own race when viewed vis-à-vis the person with whom he or she is in a relationship. As explained in more detail in this Part of the Article, although initially there was some disagreement among the courts, most jurisdictions have now held that Title VII protects against relational discrimination in the context of race, and some courts have done the same in the contexts of national origin[26] and sex.[27]

Part II of this Article criticizes many of the existing Title VII sexual orientation discrimination cases for blindly following precedent-based arguments without actively considering the logical validity or applicability of the underlying precedent. In order to prevent this Article from making the same mistake of blind adherence to precedent—falling into the formalistic doctrinal trap of arguing "because precedent says so"[28]—this section seeks to go beyond a description of what courts have done with regard to relational discrimination and to evaluate the validity of that approach. This analysis of precedent aims to strengthen the argument in Part III that a relational discrimination interpretation of Title VII ought to provide protection against discrimination on the basis of sexual orientation as well.

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larly, this concept has been referred to as "interracial association" discrimination in the racial context. Bergerson v. N.Y. State Office of Mental Health, 611 F. Supp. 2d 224, 231 (N.D.N.Y. 2009). Although some cases do refer to protection on the basis of "association," this terminology does not sufficiently distinguish the concept from First Amendment associational arguments. *But see* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 Fla. L. Rev. 931, 947–49 (2007) (describing the relational discrimination cases as "at least indirectly advanc[ing] employees' right to associate with whomever they choose"). To be entirely clear, this Article does not address the separate issue of whether Title VII protects against third-party retaliation claims. Alex Long's 2007 article, *supra*, provides an excellent analysis of that topic. In addition, other definitions of this concept have missed the point that it is discrimination against individuals in same-sex relationships because of their *own* Title VII-protected characteristic when viewed in relation to others that is dispositive, not the fact that the *third party* is a member of a protected class. *See* Honeycutt & Turner, *supra* note 19, at 913 (defining third-party associative discrimination as "discrimination against individuals because of their relationships with members of a protected class").

[26] *See infra* Part II.F.

[27] *See infra* Part III.

[28] The existing literature has done a decent job of establishing the "because precedent says so" argument for extending relational discrimination cases to sex. *See* Honeycutt & Turner, *supra* note 19, at 928 (explaining that if the "formalistic" associative discrimination argument of a plaintiff in a same-sex discrimination case "were not accepted, the precedential reasoning of [the relational discrimination cases in the race context] would be seriously undermined").

### A. *Background*

Title VII of the Civil Rights Act of 1964 forms the basis for federal protection against private employment discrimination.[29] However, Title VII only protects individuals from discrimination on the grounds of "race, color, religion, sex, or national origin."[30] Other forms of discrimination, unless expressly prohibited by a different provision,[31] are permissible under federal law, and the employment regime defaults to at-will employment under which an employer can generally terminate an employee for any reason or no reason at all.[32]

On the theory that employers rarely leave smoking gun evidence of their discriminatory motives and therefore solid proof of employment discrimination rarely exists, courts have created a burden-shifting framework that, by design, makes it easier for plaintiffs to succeed on an employment discrimination claim. Under the well-known *McDonnell Douglas* burden-shifting framework, to make out a prima facie case under Title VII, plaintiffs must establish 1) membership in a protected class; 2) competency to perform their job; 3) that their employer took an adverse employment action against them; and 4) the existence of circumstances supporting an inference of discrimination.[33] Once a plaintiff establishes a prima facie Title VII case, the burden shifts to the employer to provide a "legitimate, nondiscriminatory reason" for the employment decision at issue.[34] If the employer satisfies this requirement, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's "proffered reasons [were] pretextual."[35] Given this framework, the first prong of the plaintiff's prima facie case—the ability to establish membership in a protected class—holds the key to the entire burden-shifting kingdom.

### B. *Textual Basis for Relational Discrimination*

The relational discrimination cases are entirely consistent with the text of Title VII. Title VII provides in relevant part, "[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to dis-

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[29] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

[30] *Id.* at § 2000e-2(a)(1).

[31] For example, discrimination on the basis of disability is covered by the Americans with Disabilities Act, 28 U.S.C. §§ 12101–12213 (2006 & Supp. III 2010).

[32] *See* Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 U. Mo. Kan. City L. Rev. 1, 7 (2008) ("[E]mployment-at-will is still the default rule in almost every jurisdiction in the United States . . . .").

[33] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[34] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (quoting Tex. Dept. of Cmty. Affairs v. Burdine*,* 450 U.S. 248, 254 (1981)).

[35] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 530 (1993) (citing *Burdine*, 450 U.S. at 256).

charge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ."[36]

Others have read this language as a "problem" for relational discrimination cases on the theory that "[l]iterally interpreted," the statutory phrase "because of such individual's" necessarily precludes a relational interpretation of Title VII.[37] On the contrary, the statutory language is ambiguous (or one might say silent) with respect to relational discrimination. The statute does not expressly provide for protection against relational discrimination, but its language is broad enough that it does not exclude the possibility of this relational interpretation. In other words, there are two possible interpretations of the relevant phrase: 1) a reading that precludes protection for relational discrimination: "because of such individual's race, color, religion, sex or national origin" *when considered in isolation*; or 2) a reading that allows protection for relational discrimination: "because of such individual's race, color, religion, sex or national origin"[38] *including when considered in relation to others*. Nothing in the language of the statute necessarily distinguishes between these two possible readings of the phrase, and therefore facially both interpretations are plausible. Most cases considering relational discrimination do not expressly acknowledge this statutory ambiguity, but instead imply that one reading or the other is required by the statute.[39] Although not explicitly discussed by the courts, the relational discrimination interpretation adopted by most jurisdictions should be viewed as entirely consistent with the text of Title VII.

### *C. Early Rejection of Relational Discrimination*

The Northern District of Alabama's 1973 decision in *Ripp v. Dobbs Houses, Inc.*[40] is often cited as one of the first cases to confront the question of whether Title VII protects against relational discrimination.[41] In reality, however, the court in *Ripp* dodged that question. In *Ripp*, a white employee alleged that he was "illegally discharged because of his association and sociable attitude toward his fellow employees who were of the Black race."[42]

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[36] 42 U.S.C. § 2000e-2(a)(1) (2006).

[37] Honeycutt & Turner, *supra* note 19, at 915–17 (arguing that the relational discrimination cases are inconsistent with the text of the statute, but that they appropriately reject that text in order to further the spirit of the law).

[38] 42 U.S.C. § 2000e-2(a)(1) (2006).

[39] *See, e.g.*, Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975); discussion of the failure to expressly acknowledge the statutory ambiguity *infra* Part I.D.

[40] 366 F. Supp. 205 (N.D. Ala. 1973)

[41] *See, e.g.*, Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d. Cir. 2008); Honeycutt & Turner, *supra* note 19, at 919–20.

[42] *Ripp*, 366 F. Supp. at 207.

The court might have been able to infer from the historical context that this claim meant that the plaintiff was illegally discharged because his employer considered it inappropriate for a *white* man to associate with blacks, and therefore he was discriminated against *because of his race when viewed in relation to others*. The plaintiff did not, however, explicitly phrase his claim in terms of relational discrimination by referencing his own race in this way. Instead, the plaintiff focused the inquiry on the race of the people with whom he was associating.[43]

Although later courts would willingly make this leap on behalf of plaintiffs, the *Ripp* court turned a blind eye to this obvious implication of the plaintiff's complaint and chose to read it as based solely on the race of the people with whom the plaintiff was associating, rather than on the plaintiff's own race.[44] This allowed the court to point easily to the text of the statute and the requirement that the employer action be taken on behalf of "such individual's [protected characteristic]" to reject the plaintiff's claim.[45]

As a result of this shortcoming in the framing of the complaint, the *Ripp* court did not expressly adopt a reasoned interpretation of Title VII as applicable only for protected characteristics *viewed in isolation*. Instead, the court avoided the relational discrimination issue entirely and easily concluded that "[s]ignificantly, plaintiff makes no complaint that he has suffered any detriment on account of his race" and therefore failed to state a claim under Title VII for which the court could grant relief.[46] In fact, given the phrasing, the court viewed the complaint as a claim that the defendants "abridged his freedom to associate with persons of his own choosing" and thus looked at the case through the lens of his freedom to associate.[47]

### D. *Early Acceptance of Relational Discrimination*

Relational discrimination is not an area of the law in which the trend was heading in one direction and then reversed course, but rather one in which different courts initially reached different conclusions.[48] In 1975, two years after the Alabama district court in *Ripp* avoided considering a relational discrimination claim, the Southern District of New York ruled oppositely. In *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, the plaintiff alleged that the defendant disapproved of a social relationship be-

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* This is precisely the reason for referring to the theory as relational rather than associative discrimination. *See supra* note 25.
[48] Although the dates of the cases confirm that the courts were split during the same time period, others have portrayed this inconsistency as the courts beginning to recognize the fallacy of their reasoning and thus changing course. *See, e.g.*, Long, *supra* note 25, at 947–48 ("Initially, courts were somewhat reluctant" but "[i]n time, courts began to recognize the fallacy in their reasoning.").

tween a white woman and a black man and therefore "she was discharged because she, *a white woman*, associated with a black."[49] Although the underlying facts were similar, unlike the plaintiff in *Ripp*, the plaintiff in *Whitney* expressly brought the claim in reference to her own race.

The Southern District of New York rejected the defendant's argument that the plaintiff was discharged not because of her race but because of the race of her friend.[50] The court explained that being discharged because she, as a white woman, associated with a black man placed her complaint squarely within the statutory language that she was "discharged because of her race."[51] In doing so, the court implicitly adopted a relational discrimination interpretation of Title VII.

In addition to its statutory language analysis, the *Whitney* court also explained that this reading of the statute is consistent with a number of administrative decisions in which the EEOC found "a Title VII violation had occurred where a white employee was discharged because of [the employee's] friendly associations with black employees."[52] Finally, although the court could have distinguished the prior *Ripp* holding based on the wording of the complaint, it instead acknowledged that *Ripp* was "factually on point" but disagreed with its conclusion.[53]

The following year, the Western District of Pennsylvania reached the same conclusion in *Holiday v. Belle's Restaurant*.[54] In *Holiday*, the plaintiff contended that she was unlawfully discriminated against "based solely upon her race and the belief that she was married to a black man."[55] Furthermore, the plaintiff coherently articulated a relational discrimination interpretation of the statute: "treatment of the plaintiff by the defendant was based solely on plaintiff's race, that had it not been for the *fact plaintiff was white*, said discrimination would not have occurred."[56] With the argument presented in this way, the court agreed that the "plaintiff's allegation that the discrimina-

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[49] 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (emphasis added). Although it is not necessary for a relational discrimination analysis, these relational discrimination cases can also be framed in terms of racial and gender stereotypes. Noah Zatz might frame this same claim as the defendant disapproving because plaintiff violated a stereotype that a proper white woman does not associate with a black man. *See* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 Ind. L.J. 63, 108–09 (2002).

[50] 401 F. Supp. at 1366.

[51] *Id.*

[52] *Id.* at 1366–67.

[53] *Id.* at 1367.

[54] 409 F. Supp. 904, 908–09 (W.D. Pa. 1976). It is likely that the Pennsylvania court was unaware of the *Whitney* decision in New York. This can be inferred from the fact that the Pennsylvania court does not cite to the New York decision. *Id.* The four months between the September 1975 decision in *Whitney* and the January 1976 decision in *Holiday* was also likely not enough time for the court or parties to become aware of the decision. It is also of interest to note that in 1976, the Supreme Court held that Title VII prohibited discrimination against white as well as black persons. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295–96 (1976).

[55] *Holiday*, 409 F. Supp. at 905.

[56] *Id.* at 908 (emphasis added).

tion occurred because of *her race*, in itself, complies with the proscriptions of the statute."[57] Like the *Whitney* court, the Western District of Pennsylvania took "cognizance of the policy of the EEOC" in support of this position.[58] Unlike the *Whitney* court, however, this court did not choose to express a fundamental disagreement with the court in *Ripp*, instead finding that the *Ripp* plaintiff "did not allege[] that he was discriminated against because of his own race."[59] Thus, in the 1970s, one court that could have confronted a relational discrimination case avoided doing so, whereas two other courts facing the same issue allowed recovery on a relational discrimination theory.[60]

### *E. Georgia Courts Struggle With Relational Discrimination Cases*

In the first half of the 1980s, relational discrimination cases arose on three separate occasions, all in Georgia's district courts. First, in *Adams v. Governor's Committee on Postsecondary Education*, the plaintiff contended that he was terminated "because he, *a white male*, was then married to a black woman."[61] Despite this express claim of discrimination on the basis of the plaintiff's own race, the court rejected the plaintiff's claim, concluding that the "[p]laintiff does not contend that he has been discriminated against because of 'his' race" or other protected characteristic, but rather "contends that he has been discriminated against because of the race of his wife."[62] This is a clear misrepresentation of the plaintiff's claim.

The court may have meant to suggest by its misrepresentation that a relational discrimination claim is not covered under Title VII because it necessarily and impermissibly references the race of others. In support of this position, the court could have argued that Title VII's language should be interpreted as "because of his race *considered in isolation*." Instead, the court rejected the plaintiff's claim without analysis, using the conclusory reasoning that "[n]either the language of the statute nor its legislative history supports a cause of action for discrimination against a person because of his relationship to persons of another race."[63]

Next, two years later, in *Parr v. United Family Life Insurance Co.*, the Northern District of Georgia again faced a relational discrimination case.[64]

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[57] *Id.* (emphasis added).
[58] *Id.* at 909.
[59] *Id.* at 908.
[60] *Compare* Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 207 (N.D. Ala. 1973) (avoiding relational discrimination argument), *with* Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) *and* Holiday v. Belle's Restaurant, 409 F. Supp. 904, 908 (W.D. Pa. 1976) (addressing and ruling in favor of relational discrimination argument).
[61] No. C80-624A, 1981 WL 27101, at *1 (N.D. Ga. Sept. 3, 1981) (emphasis added).
[62] *Id.* at *3.
[63] *Id.* (citing Ripp v. Dobbs House, Inc., 366 F. Supp. 205 (N.D. Ala. 1973)).
[64] No. C-83-26-6, 1983 WL 1774 (N.D. Ga. June 15, 1983).

As in *Adams*, the judge in *Parr* erroneously, or at least misguidedly, stated that the "plaintiff's complaint [did] not allege that he was denied employment because of his race" but rather "because he is married to a black female."[65] The court phrased the question presented as "whether alleging that an employer refused to hire a prospective employee due to his or her interracial marriage states a claim cognizable under Title VII."[66]

The court in *Parr* offered a new argument. Noting the difference between Title VII's statutory language prohibiting discrimination based on the "individual's [protected characteristic]" and more general protection for *federal* workers elsewhere in Title VII without reference to the individual,[67] the court concluded that had Congress intended to prohibit discrimination on the basis of association with a member of another race in private employment, it would have used the broader language throughout the statute.[68]

This structural argument for interpreting an ambiguous statutory provision improves upon the lack of analysis by earlier courts in support of the same conclusion.[69] Nevertheless, the court's argument fails to recognize that the reference to the "individual" is not fatal to a claim of relational discrimination. As explained in this Article, even within Title VII's framework limiting claims to discrimination against the individual, the question is whether those claims should be for the individual viewed in isolation, or for the individual when viewed through the lens of that individual's relationships.[70] Title VII's broader protection for federal employees does not expressly address whether the individual should be viewed in isolation or relationally.[71] Therefore, even though Congress provided broader protection for federal employees, there is no implication that Congress meant to exclude relational discrimination in the general nondiscrimination provisions of Title VII. In order for the argument made by the *Parr* court to hold, Title VII's federal employee provision would have needed to state something like, "forbids discrimination based on that individual's race or the race of those in association or in a relationship with that individual." Had the federal employee provision included such language, then the court's implication that Congress

[65] *Id.* at *1.

[66] *Id.*

[67] *Compare* 42 U.S.C. § 2000e-(2)(a) (2006), *with* 42 U.S.C. § 2000e-16(a) (2006) (prohibiting discrimination in "[a]ll personnel actions affecting employees or applicants for employment . . . based on race, color, religion, sex, or national origin.").

[68] *Parr*, 1983 WL 1774, at *1.

[69] Statutory interpretation requires courts to look to "the structure and purpose of the Act" as a whole when construing statutory language. N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). Even a textualist such as Justice Scalia is willing to consider other words in the same statute in interpreting a particular statutory provision. *See* William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1140 (1991–92) (explaining that Justice Scalia's three acceptable textual sources of interpretation include consideration of "the surrounding textual material within the statute").

[70] *See supra* Part I.B.

[71] *See* 42 U.S.C. § 2000e-16(a) (2006).

knows how to draft a statute protecting against relational discrimination when it wishes to do so would have been more logical. Instead, the difference in language within Title VII demonstrates that Congress may have meant for federal workers to have broader protections, but even so, it does not follow that these broader protections would necessarily cover relational discrimination while Title VII's narrower general protections would not.

Finally, facing a relational discrimination case for the third time only a year later in *Gresham v. Waffle House, Inc.*, the Northern District of Georgia rejected the precedent in the District by endorsing the theory of relational discrimination.[72] The plaintiff, a white female, alleged that she had been discharged from her job because of her marriage to a black man.[73] The court began by noting that the judges in *Parr* and *Adams* had already rejected interracial association-based employment discrimination claims "because such discrimination was not based on *that individual's* race."[74] The court then embraced the contrary decisions from other jurisdictions, concluding:

> [T]he logic of the *Whitney* and *Holiday* decisions is irrefutable. Clearly, if the plaintiffs in those cases, or the plaintiff in the instant case, had been black, the alleged discrimination would not have occurred. In other words . . . *but for* their being white, the plaintiffs in these cases would not have been discriminated against.[75]

The court acknowledged but rejected the *Parr* court's argument "that Congress used somewhat broader language to prohibit discrimination against federal employees" as "simply immaterial" because the discrimination in this case "falls even within the narrower scope of the prohibition applicable to private employers."[76]

### *F. Expanding Beyond Race to National Origin*

Relational discrimination is not limited to race. As a matter of structural interpretation, because the statutory language "because of such individual's"[77] applies to each of the protected characteristics, the relational discrimination interpretation of that phrase ought to apply equally to Title VII's other protected characteristics including national origin.[78] A year after the *Gresham* decision recognized a Title VII relational discrimination claim for race, a Colorado district court first considered a relational discrimination claim outside the context of a black/white interracial relationship in *Reiter v.*

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[72] 586 F. Supp. 1442, 1445 (N.D. Ga. 1984).
[73] *Id.* at 1443.
[74] *Id.* at 1444.
[75] *Id.* at 1445.
[76] *Id.*
[77] 42 U.S.C. § 2000e-(2)(a) (2006).
[78] *See id.* (noting that "national origin" is a protected characteristic).

*Center Consolidated School District*.[79] The plaintiff alleged that the defendant refused to renew her employment contract because of, among other factors, her "close association with the Spanish citizens of the district."[80] The court thus faced the question of "whether Title VII prohibits discriminatory employment practices based on an individual's association with people of a particular national origin."[81]

Although the plaintiff had not expressly stated that she was discriminated against because the employers disapproved of the fact that she, as a person of a non-Spanish national origin, closely associated with the Spanish citizens of the district, the court in effect interpreted her complaint as such.[82] The court expressed disagreement with *Ripp*, explaining that a plaintiff who believes she has been the victim of employment discrimination "should not have to plead" her claim "with such particularity."[83]

The *Reiter* court then stated the "underlying rationale" of the relational discrimination cases in the race context: "that the [plaintiffs were] discriminated against on the basis of [*their*] *race* because [*their*] *race* was different from the race of the people [they] associated with."[84] Having made that connection, the court held that "discriminatory employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII."[85]

Admittedly, the exact wording of the court's holding could be read to suggest that the race or national origin of the plaintiff himself or herself is irrelevant.[86] Such a reading would be inconsistent with the statutory text and would stretch the meaning of Title VII too far.[87] A more nuanced reading, however, is that the court meant that discriminatory employment practices based on an individual's association with people of a particular race or national origin *because of disapproval of such associations due to the individual's own race or national origin* are prohibited under Title VII.[88] This reading of the court's holding is consistent with its recognition of the rationale of earlier cases as being about discrimination on the basis of the *plaintiff's* race.[89]

The inference that disapproval of relationships between non-Spanish and Spanish citizens fueled the discrimination in *Reiter* may seem less obvious than the inferences made in the race context that disapproval of relation-

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[79] 618 F. Supp. 1458 (D. Colo. 1985).
[80] *Id.* at 1459.
[81] *Id.*
[82] *See id.* at 1460 n.1.
[83] *Id.*
[84] *Id.* (emphasis added).
[85] *Id.* at 1460.
[86] *See id.*
[87] *But see* Long, *supra* note 25, at 948 (suggesting that the relational discrimination cases can be viewed as "at least indirectly" advancing an "employee's right to associate with whomever they choose" in the constitutional sense).
[88] *See* Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1460 (D. Colo. 1985).
[89] *See id.*

ships between white individuals and African Americans fueled the discrimination in those cases. Although the history of discrimination against interracial couples due to disapproval of their relationships is well documented and widely known,[90] it is less obvious that a claim for discrimination because of a relationship with "the Spanish citizens of the district"[91] is necessarily due to societal disapproval in the contemporaneous context. A look at the history of Colorado, however, demonstrates that the inference drawn by the court does in fact seem to be supported by the local contemporaneous context. For example, in 1973, the Supreme Court faced a case involving an effort to integrate segregated schools located in downtown and northeast Denver, Colorado.[92] In the context of that case, the majority explained, "Denver is a tri-ethnic, as distinguished from a bi-racial, community"[93] with a significant population of "Hispanos."[94] The Court went on to recognize the existence of "Hispano" segregated schools and a history of discrimination against "Hispano" individuals in Colorado.[95] In light of this history, it makes sense that the *Reiter* court inferred relational discrimination from the plaintiff's claims and concluded that Title VII prohibits relational discrimination based on national origin.[96]

### *G. The Circuits Get Involved*

The Eleventh Circuit became the first Circuit to hold that Title VII protects against relational discrimination in the racial context in a 1986 appeal arising out of Georgia.[97] By contrast, it took the Second Circuit until 2008 to adopt the Southern District of New York's holding in *Whitney* and accept the relational discrimination argument.[98] Every Circuit to consider the issue has since followed the Eleventh Circuit's lead and concluded that Title VII protects against relational discrimination, at least in the interracial context.[99]

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[90] *See generally* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 214–80 (2003) (discussing the enforcement of antimiscegenation laws).

[91] *Reiter*, 618 F. Supp at 1459.

[92] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973); Tom I. Romero, II, *The "Tri-Ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 TEMP. POL. & CIV. RTS. L. REV. 817, 817 (2004).

[93] *Keyes*, 413 U.S. at 195.

[94] *Id.* The court defines the term "Hispanos" as "refer[ring] to a person of Spanish, Mexican, or Cuban heritage." *Id.* at 195 n.6.

[95] *Id.* at 196–98; *see* Romero, *supra* note 92, at 849–53 (tracing the history of discrimination against Mexican Americans in Denver including "severe employment discrimination, [and] de facto residential and educational segregation," *id.* at 849, and describing various anti-integrationist efforts to maintain the tri-ethnic segregation).

[96] *See* Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1460 (D. Colo. 1985).

[97] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986).

[98] Holcomb v. Iona Coll., 521 F.3d 130, 132 (2d. Cir. 2008).

[99] *See id.*; Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998) *vacated in part on other grounds by* Williams v. Wal-Mart

### 1. *Eleventh Circuit Takes the Lead*

In 1986, the Eleventh Circuit in *Parr v. Woodmen of the World Life Insurance Company* became the first Circuit to hold that Title VII protects against relational discrimination.[100] In *Woodmen*, the court faced the now-familiar situation in which facially, the plaintiff, "a white man married to a black woman,"[101] had not stated a claim in terms of *his own* race.[102] Instead, the plaintiff more generally contended that "the company discriminated against him '*because* of race.'"[103] The court filled in the implication in the plaintiff's complaint and read the claim as one based on his race.[104] The Eleventh Circuit surveyed conflicting district court case law on the subject[105] but ultimately found *Whitney's* logic in support of a relational discrimination reading "irrefutable."[106]

In support of its position, the Eleventh Circuit cited three factors, two of which are familiar from the earlier district court decisions. First, the court noted that it is "obliged to give Title VII a liberal construction."[107] Second, the court pointed to the fact that the EEOC had consistently held that discrimination against an employee because an interracial relationship violates Title VII,[108] and the EEOC's interpretation is entitled to "great deference."[109] Third, the court held that a relational discrimination reading of Title VII is necessary for internal consistency because in a different portion of the decision the court held that "Parr could state a claim of discrimination based upon an interracial marriage" under § 1981.[110] Although the court acknowledged that the two statutes "are not coextensive in coverage," it concluded that "it would be inconsistent to hold that Parr could state a claim of discrimination based upon an interracial marriage pursuant to section 1981, but

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Stores, Inc., 182 F.3d 333 (5th Cir. 1999); Drake v. 3M, 134 F.3d 878, 884 (7th Cir. 1998).

[100] 791 F.2d 888, 892 (11th Cir. 1986). This case was brought by the same plaintiff in Parr v. United Family Life Ins. Co., No. C-83-26-6, 1983 WL 1774 (N.D. Ga. June 15, 1983) (discussed *supra* Part I.E.

[101] *Woodmen,* 791 F.2d at 889.

[102] *See id.*

[103] *Id.*

[104] *Id.* at 892.

[105] *Id.* at 891–92. Although as discussed *supra* Part I.F, *Reiter* itself was far from clear on this point. Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458 (D. Colo. 1985). When discussing *Reiter*, the court in *Woodmen* adopted a reading of *Reiter* consistent with the statute, explaining that the *Reiter* "court stated that its rationale was that 'the plaintiff was discriminated against on the basis of [her] race because [her] race was different from the race of the people [she] associated with.'" Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 891 (11th Cir. 1986) (brackets in original) (citing *Reiter*, 618 F. Supp. at 1460). Note that the Eleventh Circuit does not distinguish between race and national origin in making this point. *See Woodmen*, 791 F.2d at 891.

[106] *Woodmen*, 791 F.2d at 892.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id. See* 42 U.S.C. § 1981 (2006).

not Title VII."[111] This third rationale is suspect. If the two statutes are not coextensive in coverage, then logically Parr might be able to state a claim of discrimination under one and not the other.

In another potentially problematic aspect of this case, the plaintiff in *Woodmen* had expressly argued that a party "need not specifically allege that he was discriminated against because of *his* race, but only show that adverse actions taken against him involved racial considerations."[112] When phrased in that way, Plaintiff's argument contradicts Title VII's statutory language. Under Plaintiff's contention that racial considerations of any sort are sufficient, the language in Title VII requiring discrimination "because of such *individual's* race, color, religion, sex, or national origin"[113] would be read out of the statute. Although the plaintiff prevailed, the Eleventh Circuit did not adopt this overly broad rationale. Instead, the court found that "discrimination based upon interracial marriage or association" is "*by definition*" discrimination based on race."[114] Although the court wrote that it does not matter "whether the plaintiff specifically alleges in his complaint that he has been discriminated against because of *his* race,"[115] this phrase does not adopt the plaintiff's notion that all that is needed to state a claim for discrimination is *some* racial consideration.[116] Rather, the court is simply saying that a plaintiff need not write the specific words "because of *his* race" in his complaint in order to allege discrimination against *him*. This can be presumed where "a plaintiff claims discrimination based upon his interracial marriage or association.[117]

Finally, it is worth mentioning that the defendant argued that, strictly speaking, the plaintiff could not "claim that *but for* his race being different from his wife's, he would have been hired."[118] The defendant noted that because Parr had also claimed that the defendant discriminated against blacks in general, that if these allegations were true, had the plaintiff been a black man, "he still would not have been hired" even though his race would have been the same as his wife's.[119] The court rejected a strict *but for* argument, noting that whether the plaintiff would have been hired if he were black "is a lawsuit for another day."[120] This interpretation will become im-

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[111] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986).
[112] *Id.* at 891.
[113] 42 U.S.C. § 2000e–2 (2006) (emphasis added).
[114] *Woodmen*, 791 F.2d at 891 (emphasis added).
[115] *Id.* at 892.
[116] *See id.* at 891.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id. But see* Zatz, *supra* note 49, at 101 (criticizing *Woodmen* as "retreat[ing] conceptually by simply waiving off the hypothetical . . . as a 'lawsuit for another day'" and refusing to engage this *but for* argument). Although the Eleventh Circuit could have expanded its analysis, this Article interprets the court's decision as rejecting the *but for* test; that understanding is consistent with Zatz's thesis that discrimination is not a zero-sum game. *Id.* at 69–70. The court also fails to note another potential critique of the

portant later in considering and rejecting a similar argument in the sexual orientation context.[121]

2. *Defining Relationships*

The Eleventh Circuit decision and most of the district court cases involved interracial romantic relationships.[122] This left open the question of whether relational discrimination applied to relationships of a different nature, until the Seventh Circuit in *Drake v. 3M Co.* held that the degree of association is irrelevant[123] and the "key inquiries should be whether the employee has been discriminated against and whether that discrimination was 'because of' the employee's race."[124]

Subsequently, in *Tetro v. Elliot Popham Pontiac*, *Oldsmobile, Buick & GMC Trucks*, the Sixth Circuit considered a claim of relational discrimination in the racial context under Title VII for the first time, but did so in a case involving a plaintiff alleging he was discriminated against because he had a biracial daughter.[125] Unlike prior cases, the Sixth Circuit correctly recognized that the statutory language of Title VII is ambiguous with regard to relational discrimination.[126] The court explained that Title VII could have stated that an employer "could not discriminate based *directly* on such individual's race" thus expressly precluding a claim for relational discrimination,[127] or alternatively it could have stated "that an employer could not discriminate based *directly or indirectly* on such individual's race," thus permitting recovery for relational discrimination.[128] Instead, "Title VII as actually worded simply prohibits discrimination 'because of such individual's race'" without clarifying whether it means *directly* or *indirectly*, resulting in ambiguous statutory language.[129]

Given the ambiguity, the court examined both the purpose of the statute and the interpretation of the government agency charged with enforcing it.

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defendant's argument: it presumes that race is binary. If Parr had been Asian, for example, the defendant may not have discriminated against him due to his own race in isolation (because defendant does not discriminate against the Asian race), but might still have discriminated against Parr due to his interracial relationship (because defendant discriminates against non-blacks who associate with blacks). When viewed in this way, the court correctly notes that "[i]t would be folly" to find that a "plaintiff cannot state a claim," *id.* at 892, because the plaintiff still would likely not have been hired in this hypothetical.

[121] See *infra* Part III.

[122] *See* discussion of these cases, *supra* Part I.C–I.G.1.

[123] *See* 134 F.3d 878, 884 (7th Cir. 1998) (finding that white employees could sue under Title VII for discrimination against them resulting from their friendship with black coworkers, but holding that the Drakes themselves were not discriminated against in this case).

[124] *Id.*

[125] 173 F.3d 988, 994 (6th Cir. 1999).

[126] *Id.* at 995.

[127] *Id.* at 994.

[128] *Id.*

[129] *Id.* at 995.

Notably, the court did not require any evidence of specific congressional intent regarding Title VII protecting against interracial discrimination. Instead, the court more generally noted the need to read the statute broadly, stating that Title VII provides a "clear mandate from Congress that no longer will the United States tolerate this form of discrimination."[130] Given this identified congressional mandate, the court found that it had a duty "to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in battle with semantics."[131] Then, the Sixth Circuit quoted from a previous decision stating that "the cardinal canon of statutory construction [is] that statutes should be interpreted harmoniously with their dominant legislative purpose."[132] The court also noted that the EEOC "has consistently held that an employer who takes adverse action against an employee . . . because of an interracial association violates Title VII."[133] The court concluded that "both the purpose of Title VII and the EEOC's interpretation are consistent with allowing a cause of action for the type of discrimination that [Plaintiff] has alleged" and allowed for recovery.[134] The court failed to note that the text of Title VII is also consistent with allowing a relational discrimination cause of action.

Some have argued that the Sixth Circuit's extension of relational discrimination to a parent-child relationship is suspect and an unfair extension of the logic of the earlier cases.[135] Nothing in the logic or textual basis behind relational discrimination, however, suggests that the nature of the relationship is in any way dispositive to the analysis. The key to the textually based inquiry is whether the plaintiff was discriminated against because of the plaintiff's race. Here there is a plausible argument that the discrimination against Plaintiff *was* on the basis of *his* race because the difference between his race and his daughter's race was a cause of the discrimination.[136] As the court clearly explained, "[a] white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child."[137]

The Sixth Circuit expanded upon this idea that the nature or degree of the relationship is irrelevant to the analysis in *Barrett v. Whirlpool Corp.*[138] The district court had held that the plaintiffs, three Caucasian employees

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[130] *Id.* at 994 (quoting Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 886, 892 (11th Cir. 1986)).

[131] *Id.*

[132] *Id.* at 995 (brackets in original) (quoting United States v. Barry, 888 F.2d 1092, 1096 (6th Cir. 1989)).

[133] *Id.* at 994.

[134] *Id.* at 995.

[135] *See* Honeycutt & Turner, *supra* note 19, at 926 (describing the court's reasoning as "convoluted").

[136] Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, 173 F.3d 988, 994 (6th Cir. 1999).

[137] *Id.*

[138] 556 F.3d 502, 512–13 (6th Cir. 2009).

who were friendly with African American coworkers, had alleged an insufficient degree of association because the underlying relationship was nothing more than "standard workplace familiarity and collegiality."[139]

In overturning the district court's decision, the Sixth Circuit adopted the Seventh Circuit's holding in *Drake* that the degree of association is irrelevant.[140] In doing so, the court rearticulated the holding of *Drake* too broadly, leaving out the necessary focus on the plaintiff's race, and articulating the requirement for discrimination as that Plaintiff merely must show she is: 1) "discriminated against at work"; 2) "because she associated with members of a protected class."[141]

Despite failing to explicitly focus on the plaintiff's protected characteristic, the court seemed to implicitly retain this requirement. The court found that two out of three plaintiffs did not have a successful claim because most of the evidence presented constituted discrimination against the African American coworkers, and not against the plaintiffs for associating with African Americans.[142] By contrast, the court held that the third plaintiff had a claim because she was additionally subjected to "a regular stream of offensive comments about her relationship with an African-American coworker, and the same relationship was allegedly used as a reason to prevent her from applying for improved job positions."[143] The facts of the case reveal that the offensive comments about her relationship were because of *her* race as she stated that she was told "approximately on a weekly basis that she 'needed to stay with her own kind.'"[144] Thus, in the application if not in the articulation of its rule, the court embraced an appropriate relational discrimination interpretation of Title VII.

### 3. *Protected Class*

Notably absent from the analysis of the case law thus far is an explanation of how the relational discrimination analysis fits into the *McDonnell Douglas* burden-shifting framework to make out a prima facie case under Title VII. That framework requires not only discrimination based on a prohibited characteristic, but also that the plaintiff establish membership in a protected class.[145] The cases discussed thus far held that plaintiffs could make out a successful claim for relational discrimination, but did not explain

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[139] Barrett v. Whirlpool Corp., 543 F. Supp. 2d 812, 826 (N.D. Tenn. 2008).

[140] *Barrett*, 556 F.3d at 512–13; *see also* Drake v. 3M, 134 F.3d 878, 884 (7th Cir. 1998).

[141] *Barrett*, 556 F.3d at 513. For example, a statement like "Title VII forbids discrimination on the basis of association with or advocacy for a protected party," *id.* at 511, misses the point that the plaintiff's claim still needs to be about the plaintiff's own status.

[142] *Id.* at 517–18.

[143] *Id.* at 519.

[144] *Id.* at 510.

[145] *See supra* Part I.A for a discussion of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

whether that meant that such plaintiffs were members of a protected class. In *Deffenbaugh-Williams v. Wal-Mart Stores*, the Fifth Circuit faced this issue squarely for the first time.[146] In *Deffenbaugh-Williams*, a jury had "found that race was a motivating factor in Wal-Mart's decision to discharge [a white plaintiff]; specifically, that she was discharged because of her association with a black person."[147] On appeal, Wal-Mart argued that the plaintiff had failed to show that she was a member of a protected class and also asserted "quite half-heartedly, that Title VII does not apply to employment discrimination premised on an interracial relationship."[148]

Facing an issue of first impression, the Fifth Circuit noted that Wal-Mart had not provided "any sound reason" why Title VII would not apply to plaintiff's case, but also recognized that "Title VII's plain language does not address this precise point."[149] The court concluded that a relational discrimination claim is consistent with the statutory language, noting that "[i]n essence, the claim, as made by [plaintiff], is that she was discriminated against, as proscribed by the following language from Title VII, 'because of [her] race' (white), as a result of her relationship with a black person."[150] The court rejected Wal-Mart's claim that the relevant protected class is blacks and suggested, but did not outright state, that the plaintiff is therefore a member of a protected class.[151]

Finally, in *Holcomb v. Iona College*, thirty-three years after the Southern District of New York's decision in *Whitney,* the Second Circuit held "for the first time, that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race"[152]—validating protection for relational discrimination. The court also explicitly held for the first time that such an employee is a member of a protected class.[153]

The facts of the case are necessary to understand the court's conclusion.[154] In 1995, Iona College hired plaintiff Craig Holcomb as an assistant coach for its basketball team, and in 1998 promoted Holcomb to top assistant to new head coach Jeff Ruland.[155] From 1998 to 2004, Ruland super-

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[146] 156 F.3d 581 (5th Cir. 1998), *vacated on other grounds by* Williams v. Wal-Mart Stores, 182 F.3d 333 (5th Cir. 1999).
[147] *Deffenbaugh-Williams*,156 F.3d at 586.
[148] *Id.* at 588.
[149] *Id.*
[150] *Id.* at 588–89.
[151] *See id.* at 589.
[152] 521 F.3d 130, 132 (2d. Cir. 2008).
[153] *Id.* at 139.
[154] This Article's factual discussion of this case is extremely thorough, in order to provide a flavor for the sort of facts and evidence that are relevant in establishing a relational discrimination case under the burden-shifting framework given the inherent complexities involved.
[155] *Id.* at 132.

vised three assistant coaches, Holcomb who is white, Tony Chiles who is African American, and Rob O'Driscoll who is white.[156]

In June 2000, Holcomb married Pamela Gauthier, an African American woman.[157] Subsequently, head coach Ruland, who is also white, began a relationship with Iris Hansen, an African American woman, and she and Gauthier often attended games and post-game events together.[158]

The Iona Gaels initially enjoyed on-court success, winning the conference tournament and a spot in the NCAA Tournament in 1998, 2000, and 2001.[159] But after its initial success, the basketball program took a downturn both on and off the courts, including academic performance dismissals and suspensions, NCAA rule infraction investigations, and fraud accusations against several players.[160] In 2004, Iona College fired Holcomb and Chiles, while retaining O'Driscoll and Ruland.[161]

Holcomb sued the College contending that two of the five officers involved in the termination decision—the athletic director and a vice president—had a history of "racially questionable conduct," and that the decision to terminate him was based at least in part on a perceived need to appeal to the school's mostly-white alumni who were displeased that his wife was African American.[162] Holcomb asserted that African American high school students had been banned from events run by Goal Club, an alumni fundraising and social organization overseen by the athletic director,[163] under the auspices of concerns about NCAA recruiting rules violations.[164] In addition, Holcomb was told that his wife and Ruland's girlfriend should no longer attend Goal Club functions, as they were neither alumni nor donors.[165] Holcomb suggested that these explanations were just pretextual and that the athletic director in fact wished to reduce African American attendance at Goal Club events.[166] Holcomb also pointed to testimony that the athletic director, upon observing some of the basketball team's African American players wearing "hip-hop clothing,"[167] asked Ruland whether he could "get these colored boys to dress like the white guys on the team."[168] Finally, Holcomb introduced evidence that the vice president repeatedly made ra-

[156] *Id.*

[157] *Id.* In certain places this Article uses the term "black," and in others "African American." This reflects a choice to retain the language used by the various courts.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 134–35.

[161] *Id.* at 132.

[162] *Id.* at 133.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 134.

[166] *Id.* at 133–34.

[167] *Id.* at 134.

[168] *Id.*

cially offensive comments, including an insulting remark about Holcomb's plan to marry Gauthier.[169]

According to the College, after the basketball program began to suffer, the Board of Trustees asked the athletic director to prepare written recommendations for reform.[170] The resulting reports found that the "[n]umber one problem" was a "[f]undamental lack of discipline."[171] The reports did not specifically criticize Holcomb, but did criticize the coaching staff as a whole.[172] The substantial cost of terminating head coach Ruland's contract prevented serious consideration of firing the entire coaching staff.[173] The final report therefore advocated leaving the coaching staff intact conditional on developing a strategic plan to get the program back on track, and subject to change if the situation did not improve.[174]

Despite that recommendation, in a later conference involving only the College President and three Vice Presidents, the decision was collectively reached to terminate Holcomb and Chiles.[175] The school did not explain why O'Driscoll, who was white and had not been in an interracial relationship, was retained. The College maintained that the athletic director did not have any role in that decision, but the director himself claimed that he had been informed that two of the assistant coaches would be fired, and that he recommended that the best person to remain on staff would be O'Driscoll.[176] After O'Driscoll nonetheless took an attractive position elsewhere, the College hired three replacement coaches, including one African American.[177]

The district court granted summary judgment to the College because Holcomb had produced "'no evidence' that his firing was the product of improper discriminatory motives."[178]

The Second Circuit reversed.[179] The court explained that "Holcomb allege[d] that he was discriminated against, not solely because of his own race, but as a result of his marriage to a black woman."[180] Noting that this was an issue of first impression, the court held "that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race."[181] The court rejected the

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[169] *Id.*
[170] *Id.* at 135.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* at 136.
[176] *Id.* Notably, after the termination decisions, the NCAA informed the college that the program had several secondary violations of the Association's rules, but none of these violations related to the Goal Club, and whereas one of the violations was attributed to O'Driscoll, none was attributed to Holcomb or Chiles. *Id.*
[177] *Id.*
[178] *Id.* at 137 (quoting Holcomb v. Iona Coll., No. 05 Civ. 0848 CM, 2006 WL 1982764, at *13 (S.D.N.Y. July 11, 2006).
[179] *Id.* at 144.
[180] *Id.* at 138.
[181] *Id.* at 132.

early cases that had reached the opposite conclusion for the "simple" reason that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."[182] The court also noted that to avoid summary judgment in a Title VII employment discrimination case "the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors."[183]

Applying these principles, the court found under the *McDonnell Douglas* test: 1) "that Holcomb has established a prima facie case of discrimination"; 2) "that the college has produced evidence that it acted for a race-neutral reason"; and 3) "that plaintiff has established genuine issues of material fact as to the merits of his claim."[184] Prior courts had not explicitly referenced the burden-shifting framework in this way. The most interesting part of the court's decision, for the purposes of this Article, is its first step finding that Holcomb established a prima facie case of discrimination.[185] The key question was whether Holcomb was a member of a protected class—a question that earlier court decisions had left unclear. The court explained that, "Holcomb, in claiming that he suffered an adverse employment action because of his interracial marriage, has alleged discrimination as *a result of his membership in a protected class* under Title VII."[186] The court concluded that the evidence sufficed to survive summary judgment, but noted that a jury might still reject Holcomb's claim.[187]

In summary, every circuit court to consider the issue has held that Title VII should be properly interpreted as permitting a relational discrimination claim. Courts have occasionally been imprecise with the language of their holdings, but the logic and facts of the cases reveal that although the individual's own protected characteristic needs to be the subject of the discrimination, that characteristic may be viewed in relation to others.[188]

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[182] *Id.* at 139.

[183] *Id.* at 138 (quoting Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203 (2d Cir. 1995)).

[184] *Id.*

[185] Interestingly, the district court also found that Holcomb established a prima facie case of discrimination, and the Second Circuit only disagreed with its conclusions on the third step of the burden-shifting framework. *Id.* at 140.

[186] *Id.* at 139 (emphasis added).

[187] *Id.* at 144.

[188] *See* Zatz, *supra* note 49, at 117 (advocating notions of race and gender as "active processes rather than static traits," and as "fundamentally social, constituted through the practices of human interactions and institutions").

### *G. A Theoretical Defense of Relational Discrimination*

Up until this point, this Article has defended the reasoning of the cases holding that Title VII ought to be interpreted as protecting against relational discrimination using largely textual arguments. Theoretical and moral justifications of this interpretation also exist—most notably the literature arguing that rights ought to be viewed as relational as a theoretical and moral matter.[189] As Holning Lau notes, Western rights are traditionally based on an "individualist paradigm" in which the most important factor is the "individual's right to autonomous self-development."[190] This traditional notion would suggest that courts ought to reject the relational discrimination interpretation of Title VII in favor of a strict "individualist paradigm" interpretation in which the individual's protected class can only be considered in isolation.[191]

Lau goes on to note that more recent literature, however, has criticized the individualist paradigm on the basis that individuals "do not develop their notions of self in an abstract vacuum."[192] The scholarship challenging the individualist paradigm suggests that the very notion of an individual is necessarily informed by the individual's relationships to others.[193] The moral philosopher Peter Jones wrote that "some of what is fundamentally important for people relates to identities that they can possess and to practices in which they can engage only in association with others."[194]

This moral philosophy concept is entirely consistent with the relational discrimination interpretation of Title VII. It is true that the statutory language refers to an individual's protected characteristic, but the insight of the scholarship criticizing the individualist paradigm is that that individual's protected characteristic can only be truly understood by that individual's membership in various relationships. To be clear, the idea is not that we should

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[189] *See generally* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271 (2006). Although Lau specifically applies his theoretical conclusions to protection for couples in the public accommodations sphere, the underlying moral theory is equally applicable in the employment discrimination context.

[190] Lau, *supra* note 189, at 1281. *See also* Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1246 (1991) (discussing the problems inherent in an "individualist conception of the self"); *see generally* Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (critiquing the individualist paradigm) (1990). For a discussion of how Western notions of rights have been applied in foreign constitutions *see* Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution*, 32 HASTINGS INT'L & COMP. L. REV. 101, 145 (2009) (noting that the bill of rights section of the Russian constitution was largely modeled after the Anglo-American system).

[191] *See* Lau, *supra* note 189, at 1281.

[192] Lau, *supra* note 189, at 1281 (citing Addis, *supra* note 190, at 1246; and Walzer, *supra* note 190).

[193] *See generally* Lau, *supra* note 189; Addis, *supra* note 190; Walzer, *supra* note 190.

[194] Peter Jones, *Group Rights and Group Oppression*, 7 J. POL. PHIL. 353, 353 (1999).

entirely abandon the individualist paradigm. Rather, the individualist paradigm is incomplete because the individual pursuing her rights does so both in isolation and in relation to others. Therefore, in the employment discrimination context, the relational discrimination interpretation expands the definition of an individual's characteristics to encompass not only her own protected characteristic when viewed in isolation, but also a complete protection of the individual's rights including consideration of the individual in relationship to others.[195]

## II. A Critical History of Title VII and Sexual Orientation

Contrary to the belief of the vast majority of Americans, under current judicial interpretations none of the federal discrimination laws governing discrimination in private employment[196] prohibits discrimination on the basis of sexual orientation.[197] This includes Title VII, which facially protects individuals from discrimination only on the basis of that individual's "race, color, religion, sex or national origin."[198] Sexual orientation is notably not mentioned in the statute. Therefore, under existing interpretations of federal

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[195] This Article does not undertake to intervene in the debate as to whether antidiscrimination law should function according to anticlassification or antisubordination principles. *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9 (2003). This author intends to save consideration of how the relational discrimination interpretation fits within that conversation for future scholarship.

[196] By contrast, twenty-one states, the District of Columbia, and some local governments have enacted employment protection on the basis of sexual orientation. *See State Nondiscrimination Laws in the U.S*, National Gay and Lesbian Task Force (Jun. 14, 2011), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_11.pdf; *see e.g.*, N.J. Stat. Ann. § 10:5-4 (West 2006) ("All persons shall have the opportunity to obtain employment . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, gender identity or expression . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."); Romer v. Evans, 517 U.S. 620, 623–24 (1996) (explaining that Aspen, Boulder and Denver had passed various laws protecting sexual orientation in employment, such that the state passed a law prohibiting such protection).

[197] This Article restricts its focus to private employment discrimination on the basis of sexual orientation and reserves the issue of governmental discrimination on the basis of sexual orientation, including in security-sensitive positions in agencies such as the CIA and the military, for possible future scholarship. *See generally* Webster v. Doe, 486 U.S. 592 (1988) (holding that the termination of a CIA employee because his "homosexuality posed a threat to security" is not subject to judicial review under the Administrative Procedure Act, but constitutional claims are reviewable).

[198] 42 U.S.C. § 2000e-2(a) (2010); *see* discussion *supra* Part I.B. In addition, discrimination on the basis of disability is covered by the Americans with Disabilities Act ("ADA"), 28 U.S.C. §§ 12101–12213 (2006 & Supp. III 2010). Sexual orientation in the context of the ADA is beyond the scope of this Article, however, because discrimination on the basis of disability has a number of features that distinguish it from discrimination on the basis of race, color, religion, sex, and national origin.

law, an employer can openly terminate, demote, reduce the pay of, or otherwise engage in an adverse employment action against an employee because of his or her sexual orientation.[199]

Furthermore, to date no court has explicitly used a relational discrimination interpretation to hold that Title VII's protection against discrimination on the basis of sex applies to protection against discrimination on the basis of sexual orientation.[200] Rather, every court to address the issue has concluded that those who have been discriminated against on the basis of sexual orientation are not members of a protected class under Title VII.[201] As explained in Part I of this Article, in the race and national origin contexts courts have explicitly or implicitly interpreted Title VII's phrase "because of an individual's" as encompassing relational concepts. By contrast, in cases involving sexual orientation, and in particular cases involving homosexual plaintiffs, courts have largely focused on the individual's protected characteristic viewed in isolation, which has caused courts to focus on the meaning of the word "sex" in the statute.[202]

Viewed through an individualistic lens, courts have continuously held that the term "sex" in Title VII refers to gender and not to sexual orientation, and therefore plaintiffs who have been discriminated against on the basis of their sexual orientation have been consistently denied protection under Title VII.[203] The reasoning behind the holdings that Title VII does not apply to sexual orientation is often extremely thin and can generally be sum-

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[199] *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 50 (2001) (noting that "the absence of a federal law prohibiting employers from discriminating . . . [based on] sexual orientation means that where no local or state law dictates otherwise, law affirmatively gives employers permission to discriminate openly against gay, lesbian, or transgendered employees, by refusing to grant such employees a remedy for discrimination.").

[200] This Article uses "explicitly," because, as discussed *infra* Section III(C)(2), in a trio of cases the Eastern District of New York has in effect held such, but not *explicitly*. Because the plaintiffs in these cases were heterosexual and their heterosexuality was assumed, the court acted as if they were making a pure gender claim, when in fact they were making a sexual orientation claim, with their sexual orientation being heterosexual. *See also* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. Rev. 205, 208 (2009) (noting that courts rarely acknowledge the existence of heterosexuality as a sexual orientation).

[201] See *infra* Part III.C.

[202] The academic literature has also largely been focused on ways to get around Title VII's perceived inapplicability to sexual orientation. *See generally* Angela Gilmore, *Employment Protection for Lesbians and Gay Men*, 6 L. & SEXUALITY 83 (1996) (exploring the legal claims—including those based on "lifestyle protection" statutes—open to homosexual men and women challenging employment discrimination on grounds of sexual orientation, given the lack of federal legislation protecting employees from employment-related decisions based on sexual orientation); Jonathan A. Hardage, Nichols v. Azteca Restaurant Enterprises, Inc. *and the Legacy of* Price Waterhouse v. Hopkins*: Does Title VII Prohibit 'Effeminacy' Discrimination?*, 54 ALA. L. REV. 193 (2002) (examining the willingness of courts to accept claims for discrimination for failure to confirm to gender stereotypes).

[203] *See, e.g.*, Higgins v. New Balance Athletic Shoe, 194 F.3d 252, 259 (1st Cir. 1999).

marized in two main categories: 1) because precedent says so, and 2) because congressional intent or legislative history says so. Furthermore, in many cases where an employee otherwise has an actionable claim based upon existing Title VII law, such as for gender stereotyping or for sexual harassment, courts have often focused on the fact that the plaintiff's sexual orientation happened to be homosexual[204] in order to reject the valid claim as an attempt to bootstrap the forbidden sexual orientation claim.[205] In other words, courts have refused to consider valid arguments made by gay plaintiffs, even when those arguments are not based upon sexual orientation.

### *A. Precedent Says So*

In a common law system, courts necessarily rely on precedent to ensure predictability and consistency. Occasionally, however, courts also inappropriately rely on precedent to do the heavy lifting for them, especially when they wish to avoid any real thinking about a difficult or sensitive issue. This seems to be the strategy in the line of cases concluding that Title VII does not include protection on the basis of sexual orientation "because other courts have said so." In their rush to reach such a conclusion, these courts do not always examine the reasoning underlying the precedent, or even determine whether the precedent is a true holding or merely dicta.

For example, in *Higgins v. New Balance Athletic Shoe*, the First Circuit considered a case involving harassment on the basis of sexual orientation.[206] The court explained that an employee has no legal claim under Title VII unless the employee "presents a plausible legal theory" that the discriminatory action occurred "because of such individual's race, color, religion, sex, or national origin."[207] Applying this principle, although the court strongly condemned the harassment as "a noxious practice, deserving of censure and opprobrium," the court nevertheless affirmed summary judgment against the plaintiff because "we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[208] Surprisingly, given its apparent indignation at the

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[204] *See* Kramer, *supra* note 200, at 228–29 (noting that society tends to use the term "sexual orientation" as if it were a synonym for "homosexuality," when in fact heterosexuality is a sexual orientation as well). This Article attempts to be conscious of Kramer's valid point.

[205] *Id.* at 207–08 (critiquing so-called "bootstrapping" cases in which courts reject valid discrimination claims for fear of impermissibly bootstrapping protection for sexual orientation into Title VII).

[206] 194 F.3d at 258–61.

[207] *Id.* at 258.

[208] *Id.* at 259. The plaintiff also attempted to bring a "gender stereotype" claim, but the First Circuit rejected this attempt as the plaintiff had failed to assert this theory at the trial court level. *Id.* at 261. Although not the focus of this article, the issue of whether "gender stereotype" claims are covered by Title VII has been resolved. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding that discrimination based on sex stereotypes is forbidden by Title VII and "we are beyond the day when an em-

conduct, the court only cited two cases in support of its claim that this area of law had been definitively "settled."[209] The *Higgins* court first cited the Fourth Circuit's decision in *Hopkins v. Baltimore Gas & Electric Co.*, in support of its claim that it was "settled" law that Title VII does not apply to sexual orientation.[210] In *Hopkins*, the court addressed "the question of whether same-gender sexual harassment is actionable under Title VII."[211] In the course of explaining why same-gender sexual harassment *was* actionable under Title VII because the sole focus of the statute was on the gender of the employee, the court went on to opine in dicta that "[i]t follows that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability."[212] It is only in that context of explaining why same-gender sexual harassment was actionable that the court opined, again in dicta, that "[s]imilarly, Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee's sexual orientation and not at the fact that the employee is a man or a woman."[213] Therefore, the first case *Higgins* cites as "settled" law reaches its conclusion only as a matter of unreasoned dicta.

The second and final case cited by the *Higgins* court in support of its "settled law" conclusion is the Eighth Circuit's one page per curiam decision in *Williamson v. A.G. Edwards & Sons, Inc.*[214] In *Williamson,* a black plaintiff who also happened to be homosexual claimed that he was discharged on the basis of his race in violation of Title VII.[215] Based on the district court's finding that the plaintiff's complaint and deposition testimony suggested that he believed that he had been treated differently because of his homosexuality and not because of his race, the court observed that "Title VII does not prohibit discrimination against homosexuals."[216] The plaintiff in *Williamson* had not, however, claimed that he was discharged on the basis of his sexual orientation—rather, his claim was that he was discharged while

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ployer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"); Nichols v. Azteca Rest. Enter., 256 F.3d 864, 875 (9th Cir. 2001) (holding that a male employee's claim of harassment based on his perceived effeminacy was actionable under Title VII); *see also* Hardage, *supra* note 202, at 199–205 (describing *Price Waterhouse*, 490 U.S. 228, and Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998), as recognizing gender stereotyping as actionable under Title VII).

[209] *Higgins*, 194 F.3d at 259.

[210] *Id.* (citing *Hopkins*, 77 F.3d 745, 751–52 (4th Cir. 1996)).

[211] 77 F.3d at 749.

[212] *Id.* at 751 (citation omitted).

[213] *Id.* at 751–52.

[214] Higgins v. New Balance Athletic Shoe, 194 F.3d 252, 259 (1st Cir. 1999) (citing *Williamson*, 876 F.2d 69 (8th Cir. 1989)).

[215] *Williamson*, 876 F.2d at 70.

[216] *Id.*

other homosexuals he worked with—who were *white*—were not.[217] The court refused to read this as a claim based on race because the plaintiff was not specific enough that it was the race of his coworkers and not their sexual orientation that led them to be treated differently.[218] Nonetheless, these weak arguments in dicta were the only ones cited by the seemingly sympathetic First Circuit court in support of its contention that the law in this area was "settled."[219]

Similarly, in *Simonton v. Runyon*, the Second Circuit rejected the plaintiff's suit for abuse and harassment by reason of sexual orientation because "Title VII does not prohibit discrimination based on sexual orientation."[220] Like the First Circuit in *Higgins*, the court made a point of detailing the incidents of the plaintiff's abuse and condemning it as "morally reprehensible."[221] Despite this condemnation, under the guise of reluctant deference, the court stated that "the role of a court is limited to discerning and adhering to legislative meaning. The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."[222] The court further noted, "we are not writing on a clean slate."[223]

### *B. Congressional Intent Arguments*

Not all cases concluding that Title VII does not apply to sexual orientation, however, rely on mere dicta in earlier precedents; some cases provide further analysis relying on congressional intent arguments in support of the conclusion that Title VII does not protect individuals based on sexual orientation. For example, in *DeSantis v. Pacific Telephone & Telegraph Co.*, the Ninth Circuit squarely faced the question of whether Title VII applies to claims for employment discrimination based on sexual orientation.[224] In that consolidated case, gays and lesbians brought three separate federal district court actions claiming discrimination in employment decisions because of their sexual orientation in violation of Title VII.[225] According to the Ninth Circuit's decision, Appellants argued that, "in prohibiting certain employment discrimination on the basis of 'sex,' Congress meant to include discrimination on the basis of sexual orientation."[226] Whether framed that way

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[217] *Id.*
[218] *Id.*
[219] *Higgins*, 194 F.3d at 259.
[220] 232 F.3d 33, 34 (2d Cir. 2000).
[221] *Id.* at 35.
[222] *Id.*
[223] *Id.* at 36.
[224] 608 F.2d 327, 329–32 (9th Cir. 1979), *overruled on other grounds by* Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001).
[225] *Id.* at 328.
[226] *Id.* at 329.

initially by the appellants or simply reframed that way by the court,[227] as soon as the focus became whether Congress deliberately prohibited employment discrimination on the basis of "sexual orientation" when it prohibited discrimination on the basis of "sex," appellants were fighting an uphill battle.

The *DeSantis* court pointed to an earlier decision, *Holloway v. Arthur Andersen & Co.*, in which a plaintiff had argued that she was discriminated against because she was undergoing treatment in preparation for a gender reassignment operation and that this type of employer behavior constituted discrimination on the basis of "sex" under Title VII.[228] In that case the court rejected the plaintiff's claim, concluding that, "Congress had only the traditional notions of 'sex' in mind," and that Congress "intended to place women on an equal footing with men."[229] The *Holloway* court had also noted that "[l]ater legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference.' None have been enacted into law."[230] Therefore the court declined to expand Title VII's application "to situations that Congress clearly did not contemplate."[231]

Following the logic of the earlier *Holloway* decision, the Ninth Circuit in *DeSantis* concluded 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."[232] To summarize, the Ninth Circuit's reasoning[233] can be broken down as follows: Title VII does not apply to sexual orientation because: 1) earlier case law has determined that the congressional intent behind Title VII's prohibition of "sex" discrimination was to "put women on an equal footing with men";[234] and 2) later Congresses have not passed proposed bills extending Title VII to sexual orientation.[235] The Ninth Circuit is used here only as an example; it is

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[227] If it was the appellants who themselves phrased the argument in this way, then they unnecessarily bought themselves into a congressional intent framework, rather than relying on a statutory construction focusing on the meaning of the language. For example, appellants might instead have argued that "in prohibiting certain employment discrimination on the basis of 'sex' the language of Title VII includes discrimination on the basis of sexual orientation."

[228] DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (citing *Holloway*, 566 F.2d 659, 661 (9th Cir. 1977)).

[229] *Holloway*, 566 F.2d at 662.

[230] *Id.*

[231] *Id.* at 664.

[232] *DeSantis* 608 F.2d at 329–30.

[233] Later in the opinion the *DeSantis* court also briefly addressed a relational discrimination-like argument. This portion of the court's opinion will be discussed further *infra* Part III.

[234] *Id.* at 329.

[235] *Id.*

not alone in using such reasoning to reach this conclusion.[236] The remainder of this section will examine these dual bases for concluding that legislative intent prevents Title VII from being applied to sexual orientation.

At the outset, it is important to note that legislative intent arguments typically contain debates about the value of relying upon legislative history at all. There are a number of articles, scholars, and even Supreme Court Justices who have more generally critiqued excessive reliance on legislative history and congressional intent, in part because members of Congress can strategically insert statements in the record that contradict the views of the majority that passed the statute.[237] At the most elementary level, these critiques question what it even means to have 'congressional intent' in a system in which the passage of a law generally requires both houses of Congress and a signature by the President.[238] Although there may be validity to these general critiques of the use of legislative history, this Article does not rely on overarching arguments against this method of statutory interpretation. Rather, it argues that even assuming that looking at legislative history may at times be appropriate,[239] the use of congressional intent and legislative history

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[236] *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation").

[237] *See* Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President"); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 3, 29–30 (Amy Gutmann ed., 1997) ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."). At least one scholar has concluded that the recent decrease in the Supreme Court's reliance on legislative history documents is attributable in part to Justice Scalia's criticism of their use. *See generally* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 Harv. J. on Legis. 369 (1999) (updating the work of Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the use of Legislative Histories: A Statistical Analysis*, 22 Jurimetrics J. 294, 297–306 (1982)); *see also* Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 Duke L.J. 371, 375 (1987) ("[Legislative materials] at best can shed light only on the 'intent' of that small portion of Congress in which such records originate; they therefore lack the holistic 'intent' found in the statute itself.").

[238] *See generally* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988) (discussing the concern by scholars and judges as to whether legislative history can signify the coherent view of a singular congress).

[239] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute."); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 306 (1990) ("If we are serious about respecting the will of Congress, how can we ignore Congress' chosen methods for expressing that will? . . . [L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the country at large.").

arguments to hold that Title VII does not provide a claim for sexual orientation-based discrimination is particularly problematic.

1. *A Dearth of Legislative History*

Ordinarily, to determine congressional intent, courts delve into the history of the statute and examine such evidence as statements made on the Senate floor and Congressional committee reports.[240] Here, however, the *Holloway* case relied upon by *DeSantis* to conclude that "Congress had only the traditional notions of 'sex' in mind"[241] actually begins its analysis of the legislative history of Title VII with the insightful statement: "There is a dearth of legislative history on [Title VII]."[242] The court explained that the major concern of Congress at the time of Title VII, unsurprisingly, was race discrimination.[243] In fact, "[s]ex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate."[244] Earlier courts had recognized that "[i]ronically, the amendment was introduced by Representative Howard Smith of Virginia, who had opposed the Civil Rights Act, and was accused by some of wishing to sabotage its passage by his proposal of the 'sex' amendment."[245] There-

[240] *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 296 (1993) (Souter, J., concurring in part, dissenting in part) (noting a remark by a Senator who managed the bill on the Senate floor was extratextual evidence of congressional intent); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (looking to the conference report and a statement by a sponsoring senator in deciding that "the legislative history consistently sets out [a] clear intention").

[241] DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)).

[242] *Holloway*, 556 F.2d at 662.

[243] *Id.*

[244] *Id.*; *see also* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1090 (5th Cir. 1975) ("We discover, as have other courts earlier considering the problems before us, that the meager legislative history regarding the addition of 'sex' in Sec. 703(a) provides slim guidance for divining Congressional intent."); *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) ("The passage of the amendment, and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America.")

[245] *Willingham*, 507 F.2d at 1090 (citing *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968; *Developments in the Law*, *supra* note 244, at 1167). A number of scholars have argued, however, that this derailment account of the legislative history of Title VII's inclusion of the term "sex" is inaccurate. *See generally* 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 (1997) (framing the inclusion of sex in the statute in light of the contemporaneous racial and women's rights movement political struggles); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–25 (1995) (arguing that the sex amendment fits within the larger attempts at sex equality). As Zachary Kramer has noted, however, "courts have largely ignored these accounts in favor of the traditional view." Kramer, *supra* note 200, at 213.

fore, the entire linchpin of the congressional intent argument is contingent on cases which explicitly admit that there is a scarcity of legislative history explaining what Congress had in mind when it included the term "sex."

Later cases relying upon this congressional intent analysis, however, subtly fail to mention that there is a scarcity of legislative history for Title VII. For example, the Ninth Circuit in *DeSantis* fails to cite *Holloway*'s statement that there is a dearth of legislative history on Title VII.[246] Similarly, in *Smith v. Liberty Mutual Insurance Co.*, the Fifth Circuit stated that "[a]n examination of legislative history in *Willingham* led us to the concrete conclusion that Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females."[247] The *Smith* court failed to mention *Willingham*'s discussion[248] of "the meager legislative history" that "provides slim guidance for divining Congressional intent."[249] By contrast, the Second Circuit in *Simonton*—quoting from a more recent case Supreme Court case interpreting the language of Title VII—admitted that there is "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[250]

Thus, even if congressional intent arguments may make sense in certain situations, they certainly make no sense in those situations where courts admit that there is very little or no legislative history to support such an argument. To be clear, this Article is not arguing that the contemporaneous Congress that originally passed Title VII intended for it to prohibit discrimination on the basis of sexual orientation. Rather, the point is that given the lack of a clear congressional intent of what Congress meant by adding "sex" to Title VII, legislative intent should not be used by courts to reject plaintiffs' arguments that "sex" can cover sexual orientation. Indeed, the Supreme Court has repeatedly applied Title VII in ways Congress could not have contemplated.[251] Therefore, in the absence of clear evidence that Congress did not want Title VII to apply to sexual orientation, courts should not apply legislative history-based interpretation tools to decide whether the ambiguous language of Title VII covers sexual orientation-based discrimination.

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[246] *See generally DeSantis*, 608 F.2d at 327.

[247] 569 F.2d 325, 326–27 (5th Cir. Ga. 1978).

[248] *See generally id.*

[249] Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1090 (5th Cir. 1975).

[250] Simonton v. Runyon, 232 F.3d 35, 36 (2d Cir. 2000) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

[251] *See, e.g.*, Oncale v. Sundowner Offshore Serv., 523 U.S. 75, 79 (1998) ("male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

### 2. *Inferring Congressional Intent From Failure To Pass Legislation*

Undeterred by their inability to find legislative history for Title VII to support the pre-ordained conclusion that "Congress had only the traditional notions of 'sex' in mind,"[252] courts have turned to legislative history *since* the passage of Title VII for guidance. The court in *DeSantis*, for example, noted that several bills have been introduced to prohibit discrimination against "sexual preference," but that none have been enacted into law.[253] Similarly, the *Simonton* court argued that despite the lack of legislative history, it was "informed by Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences."[254] The court acknowledged that "congressional inaction subsequent to the enactment of a statute is not always a helpful guide."[255] Despite this admission, it inexplicably argued that Congress' refusal to act "in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation" is "strong evidence of congressional intent."[256]

Scholars and courts have long debated the appropriateness of relying upon legislative inaction in attributing a legislative intent to Congress.[257] Although there are various forms of legislative inaction, the courts in this context largely rely on what William Eskridge calls "rejected proposal."[258] Courts suggest that Congress has ratified the existing interpretation of Title VII as not covering sexual orientation by failing to pass a proposed statute that would reject that interpretation and extend protection to sexual orientation.[259]

Eskridge correctly identifies a number of problems with inferring legislative intent from legislative inaction in this way.[260] First, Congress is a discontinuous decision maker, and the intent that should be relevant (if any) is the intent of the Congress that actually enacted the legislation.[261] Second,

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[252] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

[253] DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979); *see generally* Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149 (John D'Emilio et al. eds., 2000) (describing the history of the various bills considered by Congress since the 1970s to expressly expand protection based on sexual orientation).

[254] *Simonton*, 232 F.3d at 35.

[255] *Id.*

[256] *Id.*

[257] *See e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67 (1988) (identifying the debate by both courts and scholars).

[258] *Id.* at 84–89.

[259] *See* Jacob E. Gersen & Eric Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 610 (2008) (describing the rejected proposal rule as "presum[ing] majoritarian approval of a prior interpretation when an amendment altering a judicial interpretation (or changing the text of a statute to clarify) is considered, but rejected in Congress.").

[260] *See* Eskridge, *supra* note 257, at 94–99.

[261] *Id.* at 95–97.

Congress is a collective decision maker, making it very difficult to determine exactly what the intent of Congress is when it fails to do something.[262] Third, the structure of Congress makes if far more likely that something will not happen than that it will, making it hard to infer affirmative intent from Congress's failure to pass a proposed statute.[263]

In addition to the concerns Eskridge identifies, inferring legislative intent from Congress's failure to pass proposed legislation creates a Catch-22 for advocates. In light of Title VII's ambiguity on the subject, an advocate of prohibiting sexual orientation-based discrimination in the workplace could lobby for Congress to pass a new unambiguous statute, and could advocate for courts to interpret the ambiguous statute in their favor. But if courts infer legislative intent from congressional failure to pass proposed legislation, then a lobbying effort which succeeded in getting a bill prohibiting discrimination based on sexual orientation proposed, and potentially even through committee—but which failed to ultimately get that bill enacted—would actually harm the advocate's efforts with the courts. That very failed legislative attempt would be used by the court as evidence that Congress has acquiesced to the interpretation of Title VII that it does not apply to sexual orientation.

Instead, courts should infer nothing more from the fact that Congress has repeatedly considered and failed to pass statutes that would expressly prohibit discrimination on the basis of sexual orientation than that the particular congress considering the issue for a variety of complicated reasons either did not have the time or the political will to pass this specific bill.

### *C. Structural Arguments*

In addition to precedential and congressional intent arguments, the Second Circuit in *Simonton* briefly discussed an earlier Second Circuit decision, *DeCintio v. Westchester County Medical Center*,[264] which contained the most sophisticated analysis of any of the cases discussed thus far in Part II of this Article. In *DeCintio*, the court looked at the text of Title VII and attempted to apply a structural analysis to reach its conclusion as to what is meant by "sex."[265] The court "reversed a plaintiff's verdict in a Title VII suit alleging that a male employer had passed over several male applicants for a promotion in order to hire a woman with whom the employer had a romantic relationship."[266] Although the *DeCintio* case notably did not involve sexual orientation, which perhaps explains the more sophisticated analysis in this case, the Second Circuit had been called upon to interpret the

[262] *Id.* at 98.
[263] *Id.* at 98–99.
[264] Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (discussing DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304 (2d. Cir. 1986)).
[265] *DeCintio*, 807 F.2d at 306–07.
[266] *Simonton*, 232 F.3d at 36 (discussing *DeCintio*, 807 F.2d at 305).

definition of "sex" in Title VII. The *Simonton* court quoted *DeCintio*'s interpretation of the definition of "sex" in Title VII:

> [T]he other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion or nationality. 'Sex,' when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender . . . . The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations.[267]

The structural argument offered by this case offers a fairly compelling argument for why "sex" should be interpreted as referring to gender.[268] As will be explored in Part III of this Article, however, a relational discrimination interpretation of Title VII is consistent with a reading that sex is limited to gender, while still allowing protection for sexual orientation.

### *D. Bootstrapping Arguments*

Finally, in a number of cases courts have rejected plausible theories of recovery on the basis that they are impermissible attempts to obtain protection on the basis of sexual orientation. In these cases, an employee appears to have an actionable case based upon existing Title VII law, such as for gender-stereotyping or sexual harassment, but courts have focused on the fact that the plaintiff's sexual orientation happened to be homosexual in order to reject the valid claim as an attempt to bootstrap the forbidden sexual orientation claim.[269]

For example, in the Second Circuit's decision in *Simonton*, the court rejected various arguments made by the plaintiff for why the harassment he suffered could be considered discrimination based on sex rather than sexual orientation.[270] Notably, relational discrimination was neither raised by the plaintiff nor considered by the court. First, the court considered Plaintiff's argument that under the Supreme Court's decision in *Oncale v. Sundowner Offshore Services* he had alleged sufficient facts to make out a claim of

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[267] *Simonton*, 232 F.3d at 36 (quoting *DeCintio*, 807 F.2d at 306–07).

[268] *Cf.* 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, 2 (1995) (noting that although the word "gender" has come to be used synonymously with the word "sex" in the law of discrimination, in women's studies and related disciplines the terms have distinct meanings).

[269] *See* Kramer, *supra* note 200, at 219–20 (discussing the case of Dawson v. Bumble & Bumble (*Dawson II*), 398 F.3d 211 (2d Cir. 2005), as a good example of the way in which courts reject a legitimate gender-stereotyping claim as a "litigation sleight of hand" attempt to bootstrap protection for sexual orientation into Title VII). Kramer has extensively described this phenomenon in his work, and therefore this Article merely touches upon the issue.

[270] Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000).

same-sex harassment.[271] Explicitly embracing a heterosexual view of the world, the Second Circuit rejected this argument, stating that "[i]n the context of male-female sexual harassment, involving more or less explicit sexual proposals, it is easy to infer discrimination because of sex since 'it is reasonable to assume those proposals would not have been made to someone of the same sex.'"[272] Although a plaintiff in a male-female sexual harassment case need not prove that the harasser is heterosexual, the Second Circuit, following the Supreme Court in *Oncale*, held that "[t]he same chain of inference is available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual."[273] Here the plaintiff had failed to offer such evidence.[274] Therefore, the court returned to the assumption that "the only inference we can draw is that he was harassed because of his sexual orientation" and "such harassment is not cognizable under Title VII."[275]

Next, the court used a bootstrapping argument to reject the plaintiff's argument that discrimination based on sexual orientation disproportionately affects men.[276] Rather than take up the argument on its own merits, the court merely concluded "[w]e decline to adopt a reading of Title VII that would also 'achieve by judicial "construction" what Congress did not do and has consistently refused to do on many occasions.'"[277]

## III. Applying Relational Discrimination To Sexual Orientation

In the past thirty years, every case to consider a relational discrimination claim in the context of race has held that Title VII applies to such claims.[278] At the same time, every case to consider a sexual orientation discrimination claim has held that Title VII does not apply to those claims.[279] Part III of this Article seeks to establish that applying the relational discrimination interpretation of Title VII to the protected category of "sex" should result in statutory protection on the basis of sexual orientation as a matter of logic and structural consistency.[280] Furthermore, the ability to bring such a claim is not limited to those in romantic or sexual relationships at the time of the discrimination, nor to homosexuals.[281] Although existing precedent has ignored the relational discrimination interpretation in cases viewed as sexual

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[271] *Id.* at 36–37 (discussing Oncale v. Sundowner Offshore Serv., 523 U.S. 75, 79–81 (1998)).
[272] *Id.* at 37 (quoting *Oncale*, 523 U.S. at 80).
[273] *Id.* (quoting *Oncale*, 523 U.S. at 80).
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* (quoting DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 330 (9th Cir. 1979)).
[278] *See supra* Part I.
[279] *See supra* Part II.
[280] *See infra* Part III.A.
[281] *See infra* Part III.B.

orientation-based claims,[282] courts have begun to adopt relational discrimination interpretations in cases with fact patterns involving heterosexual plaintiffs, which avoid explicit discussions of sexual orientation.[283] Finally, this section concludes by anticipating and trying to address potential concerns triggered by applying law created largely in the race context to the sexual orientation context.[284]

### A. *Obtaining Protection On the Basis of Sexual Orientation*

Part I of this Article has established that courts have endorsed a relational discrimination interpretation of Title VII—allowing for consideration of an individual's protected status in relation to others—in the context of race and national origin. "Sex" is listed as parallel to these characteristics in Title VII's relevant statutory language, which prohibits discrimination *"because of such individual's race, color, religion, sex or national origin."*[285] So as a matter of interpretive structural integrity, the phrase "because of such individual's," which is interpreted relationally by the courts in the race context, ought to be interpreted identically in the context of the protected category of "sex" as well.[286] In other words, it would be structurally inconsistent to treat the phrase as relational for some of the protected characteristics in the list, but viewed in isolation for others.[287]

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[282] *See supra* Part II.
[283] *See infra* Part III.C.
[284] *See infra* Part III.D.
[285] 42 U.S.C. § 2000e-2(a)(1) (2006).
[286] Some might contend that it is unreasonable to hold courts to such a high level of doctrinal consistency. *See generally* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (contending that under public choice theory, inconsistency is inevitable); *but see* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2205–11 (1990) (arguing that despite social choice theory, consistency remains within reach). Even if Easterbrook is correct that perfect consistency is impossible, courts ought to be held to a high standard of doctrinal consistency, especially when it comes to interpreting the exact same language of a statute in the same way.
[287] It is true that there are other differences between the way race and sex are treated under Title VII law, the most notable difference being the existence of the Bona Fide Occupational Qualification ("BFOQ") exception for sex, but not for race. 42 U.S.C. §2000e-2(e)(1) (2006)

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Nevertheless, the BFOQ exception is a narrow statutory exception permitting otherwise forbidden intentional discrimination in certain circumstances in which such discrimination is "reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C. §2000e-2(e)(1) (2006); *see also* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (noting that the BFOQ "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex," but that the particular factual circumstances of the underlying case fell within the "narrow ambit of the

Once courts accept that for purposes of Title VII all of an individual's protected characteristics, including sex, should be viewed relationally, they must also conclude that Title VII protects against sexual orientation based discrimination.[288] The reasoning is straightforward. Title VII expressly protects against discrimination because of an individual's sex.[289] Applying the relational discrimination interpretation, this means that Title VII protects against discrimination because of an individual's sex when viewed in relation to others. Accordingly, in addition to the traditional protection for discrimination based on an individual's sex when viewed in isolation, relational discrimination means that courts would also take into account claims in which an individual is discriminated against based on his or her sex when viewed in relation to others.

One benefit of this relational interpretation argument, as opposed to previous attempts to apply Title VII to sexual orientation, is that courts need not reinterpret "sex" to mean anything other than gender. In fact, a gender-based interpretation is at the core of the argument. Rather than focusing on the meaning of the word "sex," the question is reframed as whether one is being discriminated against based on one's gender vis-à-vis the person with whom they are in a relationship.

By definition, discrimination on the basis of sexual orientation is a subcategory of discrimination because of an individual's sex when viewed in relation to others. After all, sexual orientation is an inherently relational concept.[290] For example, if a female is discriminated against for being a lesbian, she is discriminated against for her sex (female) in relation to her sexual relationships with others (female). Therefore, her claim for discrimination on the basis of her sexual orientation is necessarily a claim that she is being discriminated against on the basis of her sex when viewed in relation to others.

### *B. Scope of The Argument*

Having established the argument that the relational discrimination interpretation of Title VII provides protection for sexual orientation claims, it is

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BFOQ exception.") Nothing about that distinction suggests that the relational discrimination interpretation ought to apply differently to race- and sex-based claims.

[288] *See also* Zatz, *supra* note 49, at 103–05 (arguing that by focusing on romantic and marital relationships, the interracial relationship relational discrimination cases are merely a subset of those cases in which individuals are discriminated against for failing to act the way a person of that race or gender is stereotyped to act in relation to other races and genders). Zatz is entirely correct, although he fails to address the implications of his conclusions for sexual orientation claims.

[289] *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

[290] *See* Kramer, *supra* note 200, at 226 (noting that sexual orientation is relational based on sex, and quoting the statement of Mary Anne Case: "It takes two women to make a lesbian."); Lau, *supra* note 189 at 1286 ("[O]ne's sexual orientation is necessarily relational. Although an individual's sexual interests are internal, those interests are directed at the external: other individuals.")

next important to explore the scope of that argument. As an initial matter, under a relational discrimination interpretation, Title VII's protection should not be limited to those in romantic or sexual relationships at the time of the discrimination. In developing the relational discrimination theory in the race context, courts have held that the closeness or degree of the relationship is irrelevant and that the key inquiry in determining whether a person has a relational discrimination claim is "whether the employee has been discriminated against . . . 'because of' the employee's race."[291] The idea is that the employer is motivated by animus against employees in any interracial relationships, regardless of the nature or degree of closeness of those relationships. That animus against interracial relationships is directed against a particular employee because she is of the wrong race, thus creating the interracial relationship in the first place. This analysis does not change just because the person is not currently in such an interracial relationship. The employer's animus could be maintained on the basis that this particular employee is willing to engage in such relationships that the employer views as problematic.

The same is true for sexual orientation. As explained above, sexual orientation is inherently a relational concept.[292] An employer who is motivated by animus based on an employee's sexual orientation likely is so motivated regardless of the specific status of that employee's relationships. That animus against the individual's sexual orientation is directed against the particular employee only because she is of the wrong sex in relation to the sex of the people she generally associates with romantically, thus creating the disapproved sexual orientation. Therefore, any time an individual is discriminated against because of animus against that person's sexual orientation, that discrimination is necessarily because of that person's sex vis-à-vis another person. This is consistent with Lau's position that long-term couples, short-term couples, and even potential couples are entitled to "moral recognition."[293]

Next, the claim that relational discrimination extends to sexual orientation is not limited to the same-sex context. Discrimination on the basis of sexual orientation of any sort is discrimination on the basis of "sex" when viewed through the lens of relational discrimination. Indeed, as discussed further in the next Part of this Article, heterosexual employees have already prevailed in relational discrimination claims based on sex, but those cases

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[291] Drake v. 3M, 134 F.3d 878, 884 (7th Cir. 1998) (finding that white employees can sue under Title VII for discrimination against them resulting from their friendship with black coworkers, but holding that the Drakes themselves were not discriminated against in this case); *see also* Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) (holding that a relational discrimination claim could proceed for a plaintiff alleging he was discriminated against because he had a biracial daughter)

[292] *See* discussion of sexual orientation as a relational concept *supra* note 290.

[293] Lau, *supra* note 189, at 1289–91.

have simply not treated the cases as involving sexual orientation.[294] Just as with cases involving race, religion, and other characteristics that can lead to discrimination, we do not limit protection to those who are members of the minority group.[295] Likewise, a relational discrimination claim based on sex could also be brought by a heterosexual person who faced discrimination based on his or her sexual orientation.

This does not mean, however, that every person will now have a valid Title VII claim just because everyone has a sexual orientation. The limiting factor, as with claims based on race or other protected characteristics, is the causation element. The plaintiff will still need to establish that the defendant's discriminatory behavior was because of the plaintiff's sexual orientation. Just as the plaintiff in *Holcomb* could not just allege that he was in an interracial marriage, but also had to provide some evidence that he was fired at least in part because of disapproval of that interracial relationship,[296] similarly plaintiffs in sexual orientation cases will need to do more than merely allege that they have a sexual orientation, or even that they have a minority sexual orientation.

Furthermore, just as courts have developed alternatives to the traditional burden-shifting framework when dealing with claims by racial majorities,[297] courts that might be reluctant to infer discrimination in the unusual cases where an employee alleges discrimination based on his or her heterosexuality could add different requirements for these scenarios.[298] For example, courts could develop a default rule for pleading purposes that is consistent with the contemporaneous understanding of relationships within a particular protected class, allowing claims to move forward with less specific allegations when they allege discrimination based on a relationship that

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[294] *See* Kramer, *supra* note 200 (noting that heterosexuality is often not viewed as a sexual orientation).

[295] *See, e.g.*, Breiner v. Nev. Dep't of Corr., 610 F.3d 1202, 1216 (9th Cir. 2010) (holding that precluding men from serving in supervisory positions in women's prisons violates Title VII); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–80 (1976) (holding that Title VII prohibits discrimination against persons of the racial majority); Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 733 (5th Cir. 1986) (holding that Title VII prohibits discrimination based on national origin "whether that birthplace is the United States or elsewhere" (quoting Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669, 675 (N.D. Ill. 1984))).

[296] *See supra* Part I.G.3 (discussing Holcomb v. Iona Coll., 521 F.3d 130 (2d. Cir. 2008)).

[297] *See, e.g.*, *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003) (explaining that "The Sixth Circuit has adapted [the burden-shifting framework] to cases of reverse discrimination, where a member of the majority is claiming discrimination on the basis of race. In such cases . . . the plaintiff must demonstrate background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority") (citations and internal quotation marks and brackets omitted).

[298] Although not the focus of this Article, an identical application of the relational discrimination interpretation to religion would result in Title VII protection for those in interfaith relationships as well. There is a dearth of case law involving claims of discrimination against individuals in interfaith relationships. Exploring the reasons for this gap is beyond the scope of this piece, but this author intends to address it in a future Article.

has a clear history of discrimination (such as interracial and same-sex relationships). Where the inference of discrimination is less obviously based on the contemporaneous context—such as, for example, an allegation of discrimination based on heterosexuality—courts could legitimately require more specific allegations of the relational discrimination.[299]

### C. *Courts Struggle with Sex-Based Relational Discrimination*

Applying a relational discrimination reading of Title VII to sexual orientation would require contradicting extensive precedent holding that Title VII does not apply to sexual orientation.[300] Although precedent can be an important tool for courts to achieve consistency and to build upon the wisdom of other courts,[301] when precedent is based upon faulty analysis or no analysis at all, other courts need to critically decide whether that precedent is worth following.[302] Much of the analysis underlying the precedent holding that Title VII does not apply to sexual orientation is suspect.[303] Furthermore, existing precedent rejecting the application of Title VII to sexual orientation has not properly considered a relational discrimination-based argument in reaching that conclusion. In fact, some recent cases *have* begun to apply a relational discrimination reading of Title VII in the sex context, albeit in a heterosexual context which has avoided explicit discussion of sexual orientation.[304]

#### 1. *DeSantis Does Not Reject a True Relational Discrimination Argument*

The earliest court to even come close to addressing relational discrimination in the sex-based context was the Ninth Circuit in *DeSantis*.[305] In a

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[299] To be perfectly clear, I am suggesting that plaintiffs could still plead relational discrimination in these lower likelihood scenerios, such as discrimination based on heterosexual sexual orientation, but that courts could require them to do so explicitly rather than inferring relational discrimination claims on their behalf. For example, if the plaintiff is heterosexual, alleging that she is heterosexual need not be enough to state a claim for relational discrimination based on sex. Instead, courts could require plaintiff to specifically allege that she was discriminated against *because of* her relationship with a person of a different sex and that the defendant disapproved of such relationships.

[300] *See supra* Part II.

[301] *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 104 (1986) ("It is our desire for consistency that in significant part animates and shapes the rule of stare decisis.").

[302] *See id.* at 105 (explaining that "consecutive inconsistency—the recognition first of one rule and later of a contradictory successor can well be intentional, as when a rule is abandoned because it is thought to be fundamentally wrong, because, for example, it detracts from the coherence of the main corpus of extant rules.").

[303] *See supra* Part II.

[304] *See infra* Part III.C.2.

[305] DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979); *see supra* Part II (discussion of other aspects of the case).

two-paragraph section entitled "Interference with Association," the court addressed the appellant's argument that the EEOC has held that "discrimination against an employee because of the race of the employee's friends may constitute discrimination based on race in violation of Title VII."[306] "[A]nalogously," according to the appellant, "discrimination because of the sex of the employees' sexual partner should constitute discrimination based on sex."[307] The court "assum[es] that it would violate Title VII for an employer to discriminate against employees because of the gender of their friends,"[308] but held that the same logic would not protect employees against discrimination based on their sexual orientation because "homosexual relationship[s] with certain friends . . . [are] not protected by Title VII."[309]

Others have read this section of the *DeSantis* decision as the Ninth Circuit rejecting a relational discrimination claim in the sexual orientation context.[310] On the contrary, while the court's language is reminiscent of relational discrimination arguments, its analysis shows that it misses the essence of those arguments. The relevant question in a relational discrimination claim is not whether it would violate Title VII "for an employer to discriminate against employees because of the gender of their friends,"[311] but rather whether it would violate Title VII for an employer to discriminate against an employee because of *that employee's sex* when viewed in relation to the sex of his or her friends, loved ones, sexual partners or other relationships. In other words, it is not the sex of the third party that is the focus of the analysis, but rather the sex of the employee viewed vis-à-vis the third party. The Ninth Circuit never considers, much less rejects, this properly understood relational discrimination argument.

### 2. *A District Court Applies Relational Discrimination to Sex*

More recently, in 2009, a trio of related cases in New York applied the relational discrimination argument in the sex context.[312] All three cases involved a male supervisor who was allegedly sexually harassing a female employee.[313] The cases, however, were not brought by the sexually harassed female employee. Rather, the plaintiffs in each of the three cases were male coworkers who were in some way impacted by the sexual harassment of the

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[306] *DeSantis*, 608 F.2d at 331.
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *See, e.g.*, Clark, *supra* note 19, at 328.
[311] DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979).
[312] *See* Ventimiglia v. Hustedt Chevrolet, No. 05-4149, 2009 WL 803477 (E.D.N.Y. Mar. 25, 2009); Pratt v. Hustedt Chevrolet, No. 05-4148, 2009 WL 805128 (E.D.N.Y. Mar. 27, 2009); Weiss v. Hustedt Chevrolet, No. 05-4230, 2009 WL 2132444 (E.D.N.Y. July 13, 2009).
[313] *See Ventimiglia*, 2009 WL 803477, at *2; *Pratt*, 2009 WL 805128, at *2; *Weiss*, 2009 WL 2132444, at *2.

female employee.[314] The district court applied a relational discrimination theory to each of the three plaintiffs' cases in order to determine whether the facts of the individual's case constituted a hostile work environment to the individual male coworker based on sex.[315] Likely because the parties in the case were heterosexual, the court discussed the case in terms of sex and not in terms of sexual orientation. Nonetheless, the court was, in actuality, applying the relational discrimination argument in sexual orientation cases.

In *Ventimiglia v. Hustedt Chevrolet*, the Eastern District of New York considered a number of Title VII-based claims including a claim for a hostile work environment based on sex.[316] According to the allegations, the male supervisor was obsessed with one of his female employees and repeatedly "demanded that she engage in a relationship with him," which she consistently refused.[317] Suspicious of the cause of her refusal, the supervisor interrogated the plaintiff and accused him of having an affair with the female coworker.[318] Pointing to the Second Circuit's decision in *Holcomb*, the plaintiff contended that he had a claim "based on what can fairly be characterized as [defendant's] perception of his association with [the female employee]."[319]

The district court agreed with the plaintiff's argument, concluding that based on the allegations in the complaint "a jury could find that Ventimiglia was harassed because of his sex, male, and his association with [another employee], a female."[320] In support of its conclusion, the district court pointed to the language in the Second Circuit's decision in *Holcomb*, that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."[321] Applying this concept, the court further elaborated that "but for his sex, male, his relationship with his co-worker, female . . . would not have been an issue."[322]

Inherent in this conclusion, but never made explicit by the court, is an assumption that the plaintiff is heterosexual. It is only because the court assumes that the plaintiff is heterosexual, or at the very least that the defendant assumes that the plaintiff is heterosexual, that the defendant accuses plaintiff of having an affair with the female employee. Therefore, this is not a case where the defendant disapproved of the plaintiff's sexual orientation, but rather one where defendant harassed plaintiff about having an affair with

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[314] *See Ventimiglia*, 2009 WL 803477, at *2; *Pratt*, 2009 WL 805128, at *2; *Weiss*, 2009 WL 2132444, at *2.

[315] *See Ventimiglia*, 2009 WL 803477, at *12; *Pratt*, 2009 WL 805128, at *9–10; *Weiss*, 2009 WL 2132444, at *10–11.

[316] 2009 WL 803477, at *1.

[317] *Id.* at *12.

[318] *Id.* at *2.

[319] *Id.* at *11.

[320] *Id.* at *12.

[321] *Id.* at *11 (citing Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008)).

[322] *Id.* at *12.

a female employee based on an undisputed assumption that the plaintiff was heterosexual. Based on this assumption, the district court accepted the relational discrimination argument in the heterosexual sexual orientation context, and was able to avoid the bootstrapping arguments and legal stigma that would be triggered had the plaintiff been homosexual.

In the second case, *Pratt v. Hustedt Chevrolet*, the same district court demonstrated an understanding that the focus of relational discrimination claims is whether the plaintiff has alleged discrimination because of his *own* sex, viewed in a relational situation.[323] In *Pratt*, which involved the same supervisor and female employee as in *Ventimiglia*, the plaintiff, another male coworker, alleged that he was discriminated against because he objected to the harassment of the female employee.[324] The court noted that in its *Ventimiglia* decision it had held that "a plaintiff can assert an injury caused by conduct directed against him because of his race or sex and his association with someone of another race or sex,"[325] but that in this case, the plaintiff had not alleged that he was harassed because of his sex, but merely because of his association independent of his sex.[326] In other words, his association with the female employee—sticking up for her—had nothing to do with his sex, as Pratt had not been accused of having an affair with the female employee.

By contrast, in the third case involving the same defendant, *Weiss v. Hustedt Chevrolet*, the same district court held that a jury *could* find that the plaintiff was harassed because of his sex, where he alleged that defendant had accused him of having an affair with the female employee.[327] Therefore, when unburdened from the special concerns raised by claims that expressly allege sexual orientation claims, at least one district court in multiple cases has recognized that relational discrimination applies equally to the "sex" portion of the statute.

#### 3. *Another District Court Declines to Apply Relational Discrimination to Sex*

At around the same time as the Eastern District of New York applied a relational discrimination reading of Title VII to the sex context in cases involving a heterosexual male, the Eastern District of Pennsylvania interpreted a similar situation differently. In *Stezzi v. Aramark Sports, LLC*, the court acknowledged that federal courts have recognized relational discrimination claims, but noted correctly that they are typically based on discrimination against a plaintiff because of race.[328] In *Stezzi*, the plaintiff contended that

[323] No. 05-4148, 2009 WL 805128, at *9–10 (E.D.N.Y. Mar. 27, 2009).
[324] *Id.* at *2.
[325] *Id.* at *9.
[326] *Id* at *10.
[327] No. 05-4230, 2009 WL 2132444, at *11 (E.D.N.Y. July 13, 2009).
[328] No. 07-5121, 2009 WL 2356866, at *4 (E.D. Pa. July 30, 2009).

his supervisor was sexually harassing a coworker (his girlfriend), and that because he was dating her (a female), he was also harassed by defendant on the basis of his sex (male).[329] As in the New York cases, the plaintiff made a claim premised on an assumption of his heterosexuality, claiming that the defendant's harassment of him was motivated by his sex not because the defendant disapproved of heterosexual relationships, but rather because plaintiff, a male, was dating a female employee.[330]

The court rejected the claim on two grounds.[331] First, the court noted that the plaintiff had not pointed to any evidence supporting his contention that he was discharged because he was male.[332] Second, the court stated that there is no precedent for applying a relational discrimination claim in the sex context.[333] Unpersuaded to extend the relational discrimination claim to the sex context, the Eastern District of Pennsylvania noted that the facts of the case had nothing to do with the plaintiff's gender, but rather the relationships between the parties, and therefore plaintiff "failed to establish a connection between these claims and his own gender."[334] The court observed correctly that "[b]eing in a relationship with a person of a different gender who may have been subjected to harassment is not sufficient."[335] The court does not take seriously the possibility that the plaintiff was independently harassed due to his sex in relation to his coworker/girlfriend's, stating that his "complaints center around the [typical] problems sometimes encountered in a workplace."[336] The court left open the possibility that a plaintiff in a different fact pattern might still be able to establish a relational discrimination claim in the sex context.[337] Moving forward, courts should continue to consider the application of relational discrimination arguments, not only in the heterosexual context, but also in the homosexual context more common to sexual orientation-based claims.

### *D. Addressing Concerns About Comparisons Between Race and Sexual Orientation*

This Section addresses anticipated concerns caused by the fact that this Article seeks to apply an interpretation of Title VII originally developed in the context of interracial relationships to sexual orientation claims. There are various concerns triggered whenever comparisons are drawn between

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[329] *Id.*
[330] *Id.*
[331] *Id.* at *4–5.
[332] *Id.* at *4.
[333] *Id.*
[334] *Id.* at *5.
[335] *Id.*
[336] *Id.*
[337] *See id.*

racism and other forms of discrimination.[338] When comparisons are drawn between race and sexual orientation, however, those concerns are elevated to "fierce controversy bordering on enmity."[339] There are various forms of resistance to comparisons between racism and homophobia. One category of resistance, which Russell calls "progressive anti-essentialism," objects to any suggestion that "racism, sexism, heterosexism and other 'isms' are truly comparable in a political, historical or experiential sense."[340] These critiques focus on comparisons that suggest a sort of moral equivalency between racism and other forms of discrimination including sexual orientation. For example, Grillo and Wildman have perceptively argued that comparing racism to other forms of discrimination can marginalize and obscure the impact of racism by 1) taking back center stage from people of color; 2) fostering essentialism or the idea that there is a monolithic racial or other identity; and 3) appropriating the pain or denying its existence by suggesting that other forms of discrimination allows an understanding of the experience of racism.[341]

Recognizing these concerns, it is important to note that this Article does not mean to make a claim of moral, political, or historical equivalency between racism and homophobia, nor is there any need for such moral equivalence. It is possible to extend legal protections to various forms of discrimination without making judgments about the relative pain caused by historical discrimination, comparing political disenfranchisement, or evaluating the morality of various forms of discrimination. This Article does not seek to do any of these things.

Rather, the focus of this Article is on interpreting the exact same language in the exact same phrase of Title VII consistently—and on explaining why a relational reading is the best reading of that phrase. Indeed, even though Title VII, as part of the Civil Rights Act as a whole, may have initially been designed primarily to address the problems of racism, it did not limit its protection to the issue of racism. By protecting other forms of discrimination, Congress did not necessarily create a moral equivalence be-

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[338] *See generally* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms)*, 1991 DUKE L.J. 397 (1991) (noting the problems with comparisons between racism and other forms of discrimination, including the perpetuation of patterns of racial domination); L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997) (discussing the challenges of such comparisons in the context of racial and sexual harassment).

[339] Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33, 37 (1994) ("unlike comparisons beween race and gender, disability, or age, the attempted use of analogies between race and sexual orientation has engendered fierce controversy bordering on enmity, both within and outside of the loosely-defined 'civil rights community.'"); *see generally* Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (arguing that the discourse of equivalents undermines gay rights and the larger civil rights movement).

[340] Russell, *supra* note 339, at 38.

[341] Grillo & Wildman, *supra* note 338, at 401–10.

tween the harms, but rather established that these various forms of discrimination are entitled to protection regardless of any question of historical or moral equivalence. As such, "the use of analogies between race and sex in the context of Title VII's prohibition against discrimination in employment is neither new nor controversial"[342] and the Supreme Court has consistently applied the same standards to both situations.[343]

In fact, the history of Title VII suggests that it has long evolved to protect all groups covered by the protected characteristics, even those that did not have the same history of discrimination. This is particularly apparent in the Court's willingness to protect "majority" groups such as men, whites, and Americans.[344] Therefore, the application of Title VII has long ceased to be solely about restitution for a horrible history of discrimination, and applying Title VII's relational discrimination interpretation to sex with the result of protecting sexual orientation need not trigger any moral equivalence concerns.

On a related note, it is important to point out the differences between the arguments being made here and attempts to compare prohibitions on same-sex marriage to antimiscegenation laws in order to take advantage of the Supreme Court's rejection of antimiscegenation laws in *Loving v. Virginia*.[345] In *Loving*, the Court held that miscegenation statutes adopted by Virginia to prevent marriages between persons solely on the basis of racial classification violate the equal protection and due process clauses of the Fourteenth Amendment.[346] Scholars have extensively debated the appropriateness of drawing analogies between *Loving* and its treatment of antimiscegenation law and attempts to remove prohibitions on same-sex marriage.[347]

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[342] Hebert, *supra* note 338, at 821.

[343] For example, the Supreme Court applied the standards first adopted in the race context in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) to the sex context in Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[344] *See, e.g.*, Breiner v. Nev. Dep't of Corr., 610 F.3d 1202, 1216 (9th Cir. 2010) (protecting men); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976) (holding that Title VII prohibits discrimination against persons of the racial majority); Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 732 (5th Cir. 1986) (holding that Title VII prohibits discrimination based on American national origin).

[345] 388 U.S. 1 (1967).

[346] *Id.* at 2.

[347] *See generally* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008); Rebecca Schatschneider, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 TEMP. POL. & CIV. RTS. L. REV. 285 (2004); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999 (2002); Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1377–78 (2000); David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991); *see also* Lynn C. Wardle & Lincoln C. Oliphant, *In Praise of* Loving*: Reflections on the "*Loving *Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 170–76 (2007) (listing law

Similarly, courts have also disagreed regarding the applicability of *Loving* to the same-sex marriage context.[348] Although this debate is a lively one, and one worth having, it is beyond the scope of this Article.

*Loving* involved a constitutional argument, and sex and race are not treated identically in the constitutional context.[349] By contrast, the argument made in this Article is based on a statute, Title VII, which treats race and sex identically for the purposes of this discussion. This is therefore an Article examining the proper way to interpret a piece of legislation that up until now has interpreted cases involving race in one way (relationally), while interpreting cases involving sex in a different way (isolationist), despite their identical treatments in the relevant statutory language. As such, *Loving* is not directly relevant to the argument, and the cases rejecting attempts to apply the logic of *Loving* to same-sex marriage are inapposite.

## IV. Additional Implications

This final Part looks beyond the proscriptive implications of the first three Parts of this Article and briefly addresses two broader implications of Title VII protection for discrimination on the basis of sexual orientation based on a relational discrimination claim: 1) whether such a rule would actually benefit its target beneficiary—specifically, gays and lesbians who have traditionally been the subject of sexual orientation-based employment discrimination; and 2) whether such an interpretation is even necessary in light of proposed legislation that would expand federal law to expressly cover sexual orientation discrimination.

### A. *Possible Unintended Consequences of Antidiscrimination Legislation*

Antidiscrimination legislation intended to benefit a particular group may not in fact benefit that group.[350] Therefore, it is worth considering whether a relational discrimination interpretation of Title VII that would apply Title VII's protections to sexual orientation would actually be beneficial to those it intends to benefit. To be clear, this is not a question of whether the interpretation of Title VII addressed in parts I through III is logically

review articles both supporting and opposing analogizing to race in cases seeking same-sex marriage rights).

[348] *Compare* Conaway v. Deane, 932 A.2d 571, 619–20 (Md. 2007) (rejecting *Loving* as an appropriate precedent for the same-sex context), *with* Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003) (embracing *Loving* as a relevant precedent in looking at same-sex marriage under the Massachusetts State Constitution).

[349] For example, constitutional race discrimination receives strict scrutiny, whereas constitutional sex discrimination gets intermediate scrutiny. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

[350] *See generally* Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. Rev. 333 (2008) (explaining that antidiscrimination laws may actually exacerbate biases against a particular group).

valid, but rather whether it makes sense for those seeking to obtain protection based on sexual orientation to make the kind of arguments suggested by this Article.

The literature has recognized that antidiscrimination legislation in the employment sector may not benefit its intended beneficiaries because employers who otherwise would have no problem hiring someone with a particular protected characteristic will be de-incentivized to hire such a person.[351] The employer's fear is that terminating or otherwise changing the employment conditions of an employee who happens to have a protected characteristic—even if such action is taken for non-animus reasons—will make the employer more likely to face a lawsuit than if they had simply hired an employee without a protected characteristic.[352] Furthermore, because of the burden-shifting framework,[353] an employer might fear that even a lawsuit that appears to have a low likelihood of ultimately succeeding might survive a motion to dismiss or even summary judgment, therefore tying up resources in costly and timely litigation. This reasoning is exacerbated by the fact that employees are far less likely to bring litigation for discrimination at the hiring phase.[354] One possible explanation for this decrease in litigation over hiring discrimination involves the realities for an individual to successfully bring and maintain such a Title VII claim for failure to hire. As explained by Ronald Turner:

> Suppose that an individual who happens to be black applies for a job with an employer and that the individual is not hired. In informing the applicant of its decision, the employer does not give any indication that race or color had anything to do with the rejection of the applicant. In the absence of any such indication (which would require the employer to say that the applicant was not hired because she was black, or that the company did not employ blacks in the job sought by the applicant), the applicant will be less likely to suspect that the hiring decision was based on or influenced by her race. Nor will the applicant be in a position to shape a claim of discrimination on the basis of the facts then available to her, for her contact with the employer may have been limited to filing an

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[351] *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1027 (1991) (concluding that "under the current regime in which firing cases vastly outweigh hiring cases, Title VII may generate a net disincentive for employers to hire protected workers.").

[352] *See id. See also* Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987) (explaining that Title VII makes it more costly to employ black workers because "the firm may have to incur the expense of defending a Title VII disparate-treatment suit when a black employee is discharged.").

[353] *See supra* Part I(A).

[354] Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 468 (1995) (noting that the number of cases alleging unlawful discrimination in hiring has dramatically decreased over the years as compared to allegations of unlawful discrimination in layoffs).

> application or a short interview, she may not have information on the demographics of the employer's work force, and she will not know (although she may suspect) that the employer's stated reasons for not hiring her were not the true reasons. In addition, the applicant may have to continue her search for employment and may not wish to pursue legal action against the employer that rejected her application.[355]

Therefore, the odds of litigation if the employer hires the member of a protected class and subsequently fires them is substantially greater than if the employer fails to hire that same individual, causing a disincentive to hire that individual.

It is unclear whether, as an empirical matter, employers actually make decisions in this way, but assuming that they do, it is worth considering whether a similar unintended consequence of antidiscrimination protection is likely to occur in the context of relational discrimination cases. First, relational discrimination in the race context is less likely to have this unintended impact on its intended beneficiaries because interracial relationships are not generally apparent on an employment application. For example, in the subset of these cases that involve interracial marriages, an employer will likely not know the race of an applicant's spouse during the hiring phase, unless there were occasion for the employer to meet the applicant's spouse prior to making the hiring decision. It is in a very few occupations—such as those involving cocktail parties or other social events as part of the hiring process—that a potential employer would even discover the race of the potential employee's spouse. Given the inability to identify individuals who fall within the protected class at the hiring stage, it is unlikely that an employer, fearing the extra costs associated with hiring members of protected groups, would fail to hire those in an interracial marriage, much less those in any other less obvious form of relationship.

The same *ought* to be true with sexual orientation. Just as with interracial relationships, an employer at the hiring phase will not know the sex of an applicant's significant other, or the individual's sexual orientation. Unlike with interracial relationships, however, some employers may use appearance-based stereotypes to guess or assume an applicant's sexual orientation. An employer who otherwise would not discriminate on the basis of sexual orientation might choose to discriminate in hiring using stereotypes believed by that employer to correlate to sexual orientation in order to avoid future litigation. This could have the strange unintended consequence of harming the hiring prospects not only of lesbians and gay men, but also potentially of heterosexuals who do not conform to gender norms and are therefore wrongly presumed by the employer to be homosexual. Admittedly, concern about this possible unintended consequence is not unique to a relational dis-

[355] *Id.* at 469.

crimination theory of Title VII, but should at least be evaluated when considering whether to extend antidiscrimination protection of any sort to sexual orientation.

### *B. Comparing a Judicial Relational Discrimination Approach with Proposed Sexual Orientation Non-Discrimination Legislation*

For over thirty-five years, Congress has considered a number of proposed pieces of legislation that would make it clear that federal law prohibits discrimination based on sexual orientation, including most recently the Employment Non-Discrimination Act ("ENDA").[356] Whereas the purpose of the discussion in this past Section was to consider whether it makes sense for advocates to pursue the line of reasoning outlined in Parts I through III, the purpose of this Section is to consider whether advocates should pursue attempts to convince courts that their interpretation of Title VII as not covering sexual orientation-based discrimination is erroneous, or whether instead they should focus on lobbying for the passage of ENDA.

At the outset, the obvious benefit of the judicial solution—if, in fact, a court would be willing to adopt the reasoning contained in this Article—is that Title VII is already the law, whereas it is unclear how long it will take for ENDA to pass, if it ever will. Versions of this legislation have been repeatedly introduced in Congress since 1994.[357] More recently, President Obama was viewed as very likely to push this legislation;[358] however, given economic difficulties, it is unclear whether ENDA will remain a priority.[359]

Putting aside the odds of success, there are substantive differences between the judicial and legislative approaches as well. The latest version of ENDA would expand antidiscrimination law to cover adverse employment actions taken against an individual "because of such individual's actual or perceived sexual orientation or gender identity."[360] Therefore, one obvious advantage of the legislative approach is that it would make it entirely unambiguous that federal law protects against employment discrimination based on sexual orientation, whether or not an individual is in a relationship. Although this Article contends that Title VII should also be interpreted to cover sexual orientation regardless of whether an individual is in a relationship,

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[356] Representative Barney Frank introduced the most recent version of an ENDA bill in the House of Representatives on April 6, 2011. H.R. 1397, 112th Cong. (1st Sess. 2011). On April 13, 2011, Senator Jeff Merkley introduced the most recent version of an ENDA bill in the Senate. S. 811, 112th Cong. (1st Sess. 2011). *See also* 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, 8–13 (2009) (describing the history of ENDA).

[357] *See* Weinberg, *supra* note 356, at 9–12.

[358] *See id.* at 12 (noting that Obama's 100-days agenda proclaimed his support for a gender identity inclusive-ENDA).

[359] *Cf. id.* (recognizing the political hurdles in gathering support for the legislation).

[360] H.R. 1397, 112th Cong. § 4(a)(1) (2011).

this area of potential ambiguity in the judicial approach would be eliminated by the clear language of ENDA. The same is true with regard to perceived sexual orientation. Although, as described in Part III, Title VII properly interpreted would cover a perceived sexual orientation in addition to actual sexual orientation, having this made explicit by federal law is preferable. Despite these possible advantages of passing federal legislation to explicitly protect against sexual-orientation based employment discrimination, the relational discrimination approach is still worthy of pursuit by advocates given the uncertainty as to whether ENDA will actually become law.

## Conclusion

Courts have overwhelmingly embraced a relational discrimination interpretation of Title VII in the race and national origin contexts. At the same time, courts have repeated the mantra that Title VII does not apply to sexual orientation so many times that they have stopped considering the basis for their conclusion. This status quo needs to change. Advocates, scholars, and courts that have thus far ignored the issue must confront the implications of relational discrimination interpretations of Title VII on sexual orientation-based discrimination claims. If they do so, they will find that as a matter of statutory interpretation, reason, and policy, Title VII protects against discrimination on the basis of sexual orientation.