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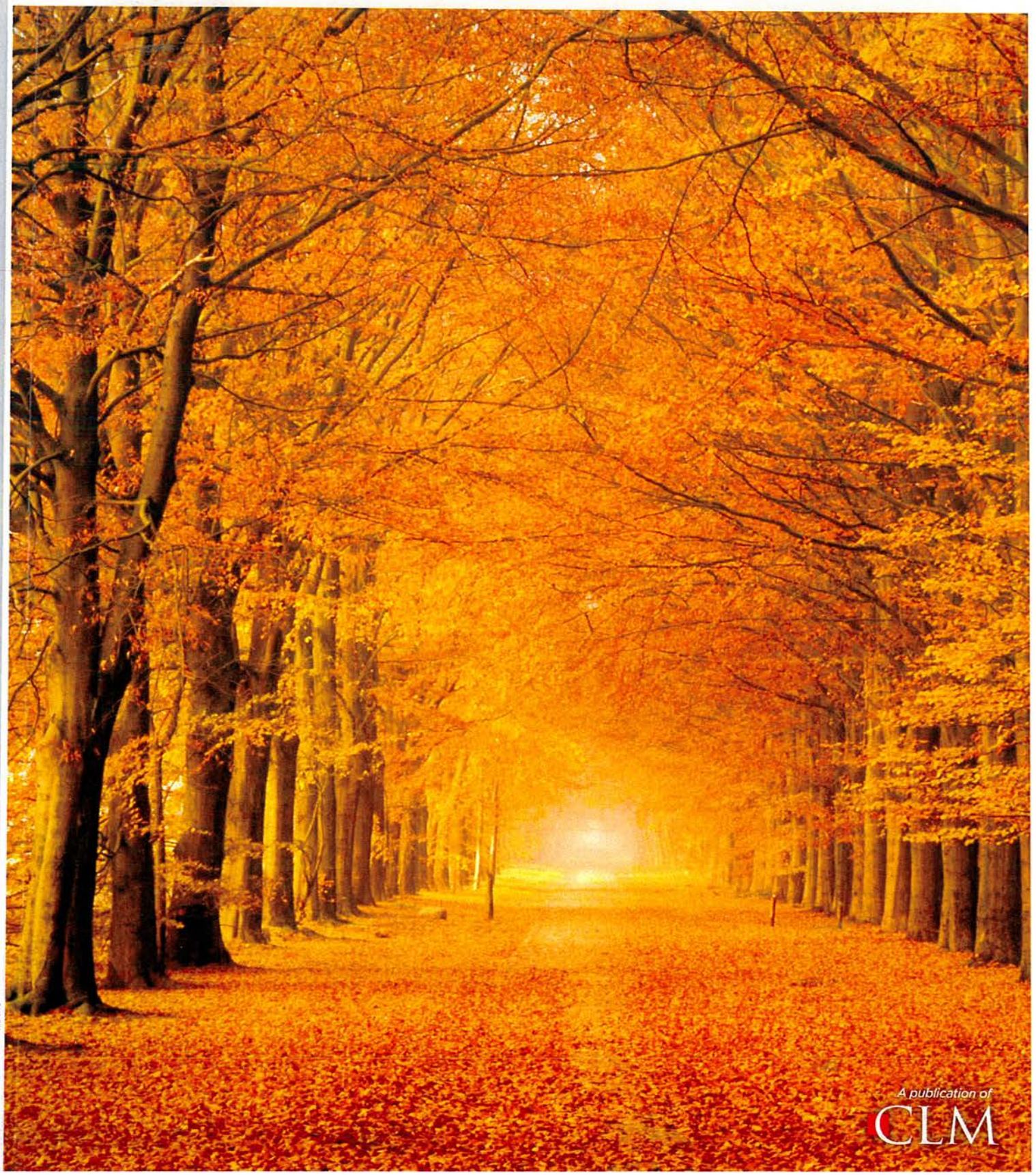

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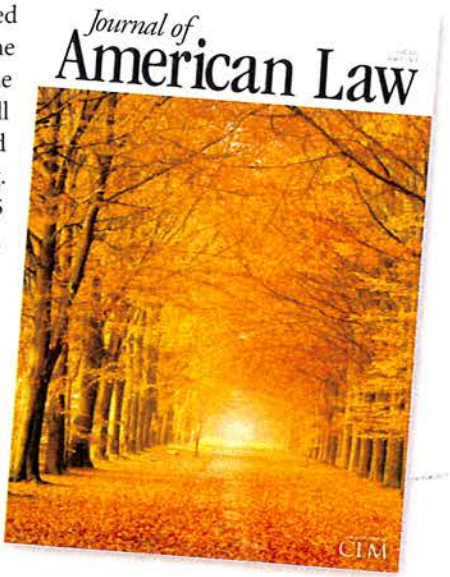

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Sexual Orientation, Gender Identity, Gender Stereotyping, and Other Legal Minefields Following the United States Supreme Court's Defense of Marriage Act Decision in *United States v. Windsor*

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Introduction

The United States Supreme Court's landmark decision in *U.S. v. Windsor*[1] not only affected the federal laws that give rights and obligations to married couples, but also gave weapons to those fighting for rights based on sexual orientation and gender identity. However, whether that weapon is a sword or a shield is still to be determined, as the issues work their way through various legislatures and courts, as well as the court of public opinion.

United States v. Windsor — Culmination and Catalyst

In *U.S. v. Windsor,* the Supreme Court of the United States partially struck down the Defense of Marriage Act ("DOMA"),[2] which prohibited federal recognition of state-sanctioned, same-sex marriages. *Windsor* is properly viewed as both a culmination of the pro-LGBT political movement, and a catalyst for further change.

In *Windsor*, two women married in a lawful ceremony in Canada and returned to their home in New York City.[3] Upon the death of her spouse, Edith Windsor was forced to pay more than $360,000 in federal estate taxes. Ms. Windsor sought to claim the estate tax exemption for surviving spouses. DOMA, however, prevented her from doing so as the definition of "spouse" under the federal statute excluded same-sex partners. Addressing the constitutionality of DOMA, the Supreme Court struck down Section 3 of DOMA and found that "DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment."[4] To that end, the Court reasoned that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."[5] Thus, the Court held:

> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage

1 *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

2 Defense of Marriage Act (DOMA), Pub.L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7; 28 U.S.C. § 1738C). DOMA was signed into law by President Bill Clinton.

3 *Id.* at 2682.

4 *Id.* at 2680.

5 *Id.* at syllabus.

> laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[6]

There are more than 10,000 federal laws that give rights and obligations to spouses and married couples. As a result of the *Windsor* decision, a same-sex marriage that is legal under state law will be recognized to the same extent as an opposite sex marriage for federal law purposes. In other words, the *Windsor* case has a direct impact on the 17 states where same sex marriage is legally recognized: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, as well as the District of Columbia.[7]

However, the issue of the constitutionality of Section 2 of DOMA, which gives states the authority to refuse to recognize same-sex marriages performed under the laws of other states other states, was not before the Court in *Windsor*. Thus, the *Windsor* Court did not strike down Section 2 of DOMA. In other words, Windsor did not rule that there is a constitutional right for same-sex couples to marry in the U.S. Therefore, as the law currently exists, if state law does not allow same-sex couples to marry, the state law controls. In fact, the majority — 33 states — not only refuse to recognize same-sex marriage, but affirmatively ban it.[8]

In the employment context, *Windsor* has two major implications, one for employee benefits and the other for protected classes.

Employee Benefits

The *Windsor* decision affects employee benefits that employers provide, including retirement contributions and 401(k) plans; health and welfare plans; and FMLA leave.

Wasting no time, in August 2013, the Department of Labor ("DOL") updated its FMLA Fact Sheet to reflect that the definition of "spouse" under the FMLA includes those individuals who have entered into a same-sex marriage:

> Spouse: Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including "common law" marriage and same-sex marriage.[9]

The IRS and other federal agencies followed suit in issuing regulations. On August 29, 2013, the IRS issued Revenue Ruling 2013-17 and Guidance stating:

> [T]he Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile.
>
> Under this rule, individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages.[10]

Interestingly, as illustrated by the DOL and IRS policies above, federal agencies differ on their respective interpretations as to *which* state law applies: some will use the marriage laws of the state of residence to determine whether a couple is married for federal law purposes (as the DOL for FMLA purposes), while others will apply the laws of the state of celebration (as the IRS for tax purposes). This anomaly is triggered by the lack of guidance provided by *Windsor* in this regard. Consequently, in those 33 states that do not recognize gay marriage, a same-sex married couple will be considered married for purposes of some federal laws, and not married for others.[11] However,

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6 *Id.* at 2696.

7 Same Sex Marriage Fast Facts, CNN.com (Dec. 20, 2013), http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html. These have come about in three ways: six have been through court decision (California, Connecticut, Iowa, Massachusetts, New Jersey, and New Mexico); eight have been through state legislature (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, and Vermont); and three have been by popular vote (Maine, Maryland, and Washington).

8 This is by constitutional Amendment and state law (Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin); by constitutional amendment only (Nebraska, Nevada, and Oregon); or by state law only (Indiana, Pennsylvania, West Virginia, and Wyoming). State legislatures have begun to chip away at these bans. For example, in January 2014, Colorado state senator Pat Steadman introduced a bill that would recognize gay-marriage for tax purposes. Brandon Rittiman, *Colorado bill would recognize gay marriage - in taxes only* (Jan. 7, 2014), 9News.com, http://www.9news.com/news/local/article/372121/222/Colo-bill-recognizes-gay-marriage--in-tax-only.

9 U.S. Department of Labor, *Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act* (2013), http://www.dol.gov/whd/regs/compliance/ whdfs28f.pdf.

10 I.R.S. Rev. Rul. 2013-17, http://www.irs.gov/pub/irs-drop/rr-13-17.pdf. However, the IRS policy does not affect employees and their same-sex partners who are not married. For example, several states have civil unions, which grant couples in civil unions all the rights and privileges of married couples. The IRS has stated that it will not consider "domestic partnership, civil union, or other similar formal relationship recognized under state law" as married for purposes of federal tax law. *Id.*

11 To complicate matters further, the same agency may have different definitions. On September 18, 2013, the DOL issued guidance related to the Employee Retirement Income Secu-

same-sex married couples residing in states where same-sex marriage is legal will be considered married for all federal law purposes.

Because same-sex marriage is legal in some states but not in others, multi-state employers may be faced with a situation where they must provide different benefits to same-sex married employees depending upon their state of residence. Some large companies, like Wal-Mart, have decided that rather than have different personnel policies for different states, they will offer benefits packages to same-sex partners and spouses even where they are not required under the law.[12] However, this may be a symbolic public relations gesture rather than a matter of convenience; a poll conducted by the Human Rights Campaign shows that 62 percent of Fortune 500 companies already offer domestic partner benefits.[13]

Interestingly, the *Windsor* opinion did not specify when the decision will go into effect, or if it applies retroactively. If *Windsor* applies retroactively, individuals who were affected negatively by Section 3 of DOMA in the past might have the opportunity to seek tax refunds (at least with respect to years for which the statute of limitations remains open). In that respect, IRS guidance has provided that an employee may, but is not required to, file amended tax returns to recover excess income, Medicare, and/or social security taxes paid by the employee.[14]

Marching Towards a New Protected Class?

The second implication may be a bit more surprising: the *Windsor* decision could broaden employers' exposure to workplace discrimination claims. *Windsor* is by no means the beginning of the pro-LGBT movement. It does, however, represent an important legal precedent and one that other courts are sure to emulate.

As of the drafting of this article, the most recent state to allow same-sex marriage, New Mexico, is a prime example of the post-*Windsor* evolution of same-sex rights. New Mexico was formerly the only state without a law banning or legalizing same-sex marriage. In February 2004, Sandoval County, New Mexico, began to issue same-sex marriage licenses.[15] Almost immediately, the state attorney general nullified those licenses because there was no legal precedent for recognizing same-sex marriages. After years of debate and public protest, lower courts then began to uphold gay marriage under the New Mexico state constitution, and counties again began issuing same-sex marriage licenses. All 33 county clerks then joined the American Civil Liberties Union and the National Center for Lesbian Rights to petition the Supreme Court of New Mexico to issue a determination on the legality of same-sex marriage statewide.[16] On December 19, 2013, the court unanimously held that a statutory scheme that implicitly forbade same-sex marriage violates the equal protections clause of the state constitution.[17] Instead of nullifying same-sex marriage licenses as happened in the past, the current state attorney general is outwardly pleased with the ruling.[18] The transformation of political views on LGBT rights in New Mexico over the past decade is emblematic of the evolution occurring in various courtrooms and statehouses across the country.

Current Status of the Law

Sexual orientation is not presently listed as a protected class (i.e., race, color, religion, sex, and national origin) under Title VII, 42 U.S.C. § 2000e-2(a)(1).[19] As such, Title VII does not on its face protect gender identity or transgender employees from

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rity Act of 1974 (ERISA). The DOL announced that under ERISA, the terms "spouse" and "married" are read to include same-sex couples who were legally married in any state that recognizes such marriages, regardless of the couple's current state of residence. In other words, the DOL's guidance for ERISA and the DOL's guidance for the FMLA differ as to which state law will be considered.

12 Jayne O'Donnell, *Walmart to offer same-sex domestic benefits*, USA TODAY, Aug. 27, 2013, http://www.usatoday.com/story/money/personalfinance/2013/08/27/walmart-same-sex-domestic-partner-benefits/2710675/.

13 *Id.*

14 I.R.S. Rev. Rul. 2013-17, *supra*.

15 Same Sex Marriage Fast Facts, CNN.com, *supra*.

16 Bill Waters, *New Mexico Same Sex Marriage Ruling Gives Rights To Gay, Lesbian* (Dec. 19, 2013), http://www.newsoxy.com/world/new-mexico-same-sex-marriage-150507.html.

17 *Griego v. Oliver*, N.M. No. 34,306, -- P.3d --, 2013 WL 6670704, at *3 (Dec. 19, 2013) ("[B]arring individuals from marrying and depriving them of the rights, protections, and responsibilities of civil marriage solely because of their sexual orientation violates the Equal Protection Clause under Article II, Section 18 of the New Mexico Constitution. We hold that the State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law.")

18 *Waters*, *supra* (quoting the spokesman for state Attorney General Gary King, a Democrat, as stating, "The attorney general is very pleased with the court's ruling and feels that it's something that a great deal of New Mexicans have been waiting for.").

19 *See, e.g.*, *Kiley v. Am. Soc. for Prevention of Cruelty to Animals*, 296 Fed. App'x 107, 109 (2d Cir. 2008) ("The law is well-settled in this circuit and in all others to have reached the question that [the plaintiff] has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation." (quotation omitted)); *Berry v. Bailey*, No. CV411-022, 2011 WL 1102826, at *1 (S.D. Ga. Mar. 2, 2011) ("Case law throughout the circuits consistently holds that Title VII provides no protection for discrimination based on sexual orientation."). It is worth noting, however, that courts have recognized a cause of action based on actual or perceived sexual orientation under Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983, which applies to person acting under color of state or local law. *See Gill v. Devlin*, 867 F. Supp. 2d 849, 857 (N.D. Tex. 2012); *Flaherty v Massapequa Pub. Schools*, 752 F. Supp. 2d 286, 295 (E.D.N.Y. 2010).

discrimination. Additionally, there is not a separate federal statute protecting sexual orientation (as there is for age, disability, and genetic information). It is clear, however, that the Equal Protection Clause of the U.S. Constitution prohibits enactments that would expressly ***preclude*** governmental protection of homosexuals from discrimination. In *Romer v. Evans*[20] the U.S. Supreme Court struck a Colorado constitutional amendment that read:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[21]

The amendment was passed by voters in response to municipalities in Colorado enacting ordinances that prohibited discrimination against the GLBT community in housing, employment, education, and other public accommodations and welfare services.[22] Still, this does not mean that states must afford ***heightened*** protections based on sexual orientation, and further does nothing to proscribe non-governmental actors from engaging in discrimination based on sexual orientation.[23]

On the state level, at least twenty-one states[24] and the District of Columbia have in fact codified protections against discrimination based on sexual orientation. Similarly, at least sixteen states also prohibit gender identity discrimination.[25] Countless other cities and counties have similar laws, and many companies have voluntarily made the decision to prohibit such discrimination. Despite this trend, the remaining states that do not have express statutes (such as Ohio), have traditionally taken a hardline approach against recognizing employment discrimination based on sexual orientation and gender idenity.[26]

Listening for the Other Shoe to Drop[27]

At present there is no evidence of federal court rulings that expand Title VII to encompass sexual orientation claims. However, signs of change are apparent in other forums, such as administrative agencies like the Equal Employment Opportunity Commission (EEOC) and even in Congress. In November 2013, the U.S. Senate passed the Employment Non-Discrimination Act (ENDA), which would prohibit discrimination in hiring and employment on the basis of sexual orientation and gender identity, for the first time in the legislation's tw0-decate history.[28] However, ENDA stalled in the House of Representatives.

Additionally, in April 2012, even before *Windsor*, the EEOC

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20 *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

21 Colo. Const. Art. 2, § 30b.

22 *Romer*, 517 U.S. at 623–24.

23 Federal courts have held that the Equal Protection Clause prohibits employment discrimination based on sexual orientation. *See Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Gill v. Devlin*, 867 F. Supp. 2d 849, 857 (N.D. Tex. 2012). It should be noted that the U.S. Constitution constrains only governmental activity and does not apply to private actors. *See Robertson v. U.S. ex rel. Watson*, 560 U.S. 272, 277, 130 S.Ct. 2184 (2010) ("The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken … , but the action still must be ***governmental*** action." (emphasis sic) (internal citations omitted)). Federal and state laws, however, can and do restrict private action, including employer discrimination based on sexual orientation.

24 These states vary with respect to the extent and nature of the protections afforded. They include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

25 Human Rights Campaign, *Statewide Employment Laws And Policies* (2013), http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf. In Colorado, the Colorado Civil Rights Division ruled that the school district discriminated against a six-year old transgendered girl right to public accommodations by insisting that she use the boys' or single user restrooms. This was the first such ruling in the country. *See* Stephanie Francis Ward, *At a tender age*, ABA Journal, October 2013, at 44. Similarly, the Massachusetts Department of Education issued "guidance" on gender idenity for schools that followed a 2011 state law prohibiting gender identity discrimination in employment, housing, education, and credit. Id. at 46.

26 *See Inskeep v. W. Res. Transit Auth.*, 7th Dist. No. 12 MA 72, 2013-Ohio-897, ¶23 ("However, until the legislature or the Ohio Supreme Court addresses the issue directly, we continue to follow the position that an allegation of discrimination because of sexual orientation alone is not actionable under R.C. 4112.02(A)."); *Giannini-Baur v. Schwab Ret. Plan Servs.*, 9th Dist. No. 25172, 2010-Ohio-6424, ¶28 ("R.C. 4112.02 does not forbid discrimination on the basis of sexual orientation. As [plaintiff] has cited no authority establishing a clear public policy against discrimination based on sexual orientation, [defendants] were entitled to judgment as a matter of law on this claim.").

27 In his spirited dissent in *Windsor*, Justice Scalia predicts that the decision will soon lead to the invalidation of state laws prohibiting same-sex marriage: "no one should be fooled [by this decision] . . . the majority arms well any challenger to a state law restricting marriage to its traditional definition." *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting). "[I]t's just a matter of listening and waiting for the other shoe [to drop]." *Id.* Although Justice Scalia's refers specifically to the invalidation of state marriage laws, the same rationale would seem to hold true for prohibiting discrimination in other contexts as well.

28 Lauren Fox, *Senate Passes ENDA in Bipartisan Vote*, U.S. News and World Report, http://www.usnews.com/news/articles/2013/11/07/senate-passes-enda-in-bipartisan-vote.

issued a decision in *Macy v. Holder*[29] that recognized discrimination based on gender identity, change of sex, and/or transgender status as actionable under Title VII. While not binding on the judiciary, the *Macy v. Holder* decision details the EEOC's mindset on gender identity and transgender rights. Mia Macy, a transgender police woman, applied for a position at the Bureau of Alcohol, Tobacco, Firearms and Explosives Agency (the "Bureau").[30] Ms. Macy presented as a man during the application process and was assured that, pending the completion of the required background check, the position was hers. Soon thereafter, Ms. Macy informed the hiring contractor, Aspen, that she was in the process of transitioning into a female and requested that Aspen inform the Bureau. Five days later, Aspen informed Ms. Macy that the position was no longer available due to federal budget reductions. Upon contacting an EEO counselor, Ms. Macy learned that the position was not in fact cut, but rather had been filled by another individual.[31] As a result, Ms. Macy filed a complaint with the EEOC alleging discrimination on the basis of sex and specifically described her claim as "change in gender (from male to female)."[32] The agency responded that "claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], [and the] claims will be processed according to Department of Justice policy."[33] On appeal, the EEOC held that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."[34] In reaching this holding, the EEOC stated the following:

> That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important.
>
> ....
>
> Title VII prohibits discrimination based on sex whether motivated by hostility by a desire to protect people or a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.
>
> ....
>
> Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on... sex," and such discrimination therefore violates Title VII.[35]

Although it is too soon to tell exactly how classifications of protected individuals will change in light of rulings like *Windsor* and *Macy*, the rigid approach will likely soften. In fact, discrimination based on sex stereotyping or gender identity is already widely recognized as "discrimination because of sex" and therefore covered under Title VII.[36]

The EEOC's recent decision in *Couch v. Department of Energy* underscores its willingness to expand the scope of sex-based discrimination claims.[37] Mr. Couch, a federal employee, filed a discrimination claim based, in part, on having been the target of sex-based epithets. In finding the claim within its jurisdiction, the EEOC concluded that Mr. Couch's claim fell within the scope of gender stereotyping and was protected under Title VII. In this respect, the EEOC held that the "claim of harassment based on [Mr. Couch's] perceived sexual orientation is a claim of discrimination based on the perception that he does not conform to gender stereotypes of masculinity, and therefore states a viable claim under Title VII's sex discrimination prohibition."[38]

This logic used to expand Title VII's protections against sex discrimination to encompass gender standards or roles provides a roadmap that supporters of LGBT rights hope to use to protect against workplace discrimination based on sexual orientation. *Windsor* and cases like it will certainly encourage a trend toward recognizing sexual orientation as a protected class — but it is unclear when that trend will blossom and whether courts will continue to refrain from reversing precedent without legislative enactment.[39] It is likely, however, that because many states have fashioned their discrimination laws to correlate with Title VII — and state courts look to federal interpretation of Title VII when analyzing the state equivalent[40] — it will take

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29 *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

30 *Id.* at *1.
31 *Id.* at *2.

32 *Id.* at *3.

33 *Id.* at *2.

34 *Id.* at *4.

35 *Id.* at *6, 10, 11 (citations omitted).

36 *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (superseded on other grounds).

37 *Couch v. Dep't of Energy*, EEOC Appeal No. 0120131136, 2013 WL 4499198 (Aug. 13, 2013).
38 *Id.* at *8.

39 "In light of the political evolution allowing gays in the military, women in combat, adoption of children, and marriage, the national trend appears to recognize sexual orientation discrimination as a basis for protection. It will likely take some time for the Courts to catch up to the political sentiment, but the trend is to afford sexual orientation the same protections as other traditional classifications." Cheryl Wilke, *Title VII does not prohibit harassment because of sexual orientation, but Title VII does support a claim for failure to conform to gender stereotypes*, Prac. Insights Emp. FL 0125 (updated July 15, 2013) (available on Westlaw.com).

40 *See, e.g., Campolieti v. Cleveland*, 184 Ohio App.3d 419, 921 N.E.2d 286, 2009-Ohio-5224, ¶14 (Ohio App. 8th Dist.) ("Because this statutory scheme is similar to federal discrimination law, federal case law interpreting Title VII of the Civil Rights

either affirmative legislative enactment or a change in Title VII jurisprudence before state courts recognize sexual orientation as a protected class.

While federal court cases have yet to expand Title VII to encompass sexual orientation claims as a result of *Windsor*, courts have used *Windsor* to invalidate bans on same sex marriage based upon equal protection grounds. Perhaps the most significant is *Kitchen v. Herbert*.[41] In *Kitchen*, the court held that, despite a constitutional amendment in Utah that forbids same-sex unions, the right to marry is a "fundamental right" and "the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies [an individual] their rights to due process and equal protection under the law."[42]

The state appealed the *Kitchen* decision. However, following the decision in *Kitchen*, same-sex couples in Utah began applying for marriage licenses, and more than 900 were issued. On January 6, 2014, Justice Sonia Sotomayor, who oversees the region, granted the state's request for an emergency order blocking new same-sex marriages, and referring the matter to the full Supreme Court.[43] This put a temporary stop to gay marriages in Utah until the Tenth Circuit ruled on the appeal.[44] On January 8, 2013, Utah Governor Gary Herbert declared that Utah will not recognize the same-sex wedding licenses issued before the Supreme Court's injunction. Consequently, the 900+ same-sex couples, who thought they were legally wed, are not — pending the Tenth Circuit ruling.[45] As of the date of this article, the Tenth Circuit has not ruled. However, this case is likely to end up in the Supreme Court.

Conclusion

So what does a case about gay marriage have to do with Title VII and employment rights? *Windsor* provides a prominent example of a trend that has already resulted in court decisions recognizing a person's sexual preference as protected under the Equal Protection Clause. In light of *Windsor*, courts have ever-fervently espoused favor for protecting the LGBT community from discrimination.[46] As societal norms continue to change, so will the law (though not nearly as fast). It does not take a crystal ball to see that pressures will eventually force a change in statutory language and/or interpretation to preclude employment discrimination based on sexual orientation. Employers are wise to be proactive: avoid making personnel decisions or ignoring harassment based on sexual orientation. Those who fail to do so risk becoming the target of discrimination claims and perhaps the tag name for a future seminal case.

Act of 1964 . . . is generally applicable to cases involving alleged violations of R.C. Chapter 4112." (quotation omitted)); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500 (Tex. 2012).

41 *Kitchen v. Herbert*, -- F. Supp. 3d --, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013).

42 *Id.*

43 Pete Williams & Tracy Connor, *U.S. Supreme Court puts gay marriage in Utah on hold*, http://usnews.nbcnews.com/_news/2014/01/06/22201874-us-supreme-court-puts-gay-marriage-in-utah-on-hold?lite.

44 Both the district court and the Tenth Circuit refused to put a halt to gay marriages while the case was being considered.

45 Rebecca Shabad, *Utah won't recognize same-sex marriages during SCOTUS hold*, http://thehill.com/blogs/blog-briefing-room/news/194792-utah-wont-recognize-same-sex-marriages-during-scotus-hold

46 *See, e.g., Griego*, 2013 WL 6670704, at *17 ("The history we have just recounted demonstrates that the members of the LGBT community do not have sufficient political strength to protect themselves from purposeful discrimination."); *Obergefell v. Wymyslo*, -- F. Supp. 2d --, S.D. Ohio No. 1:13-CV-501, 2013 WL 6726688, at *1 (Dec. 23, 2013) (finding that Ohio must recognize on Ohio death certificates valid same-sex marriages from other states, and noting that "[t]his conclusion flows from the *Windsor* decision of the United States Supreme Court this past summer, which held that the federal government cannot refuse to recognize a valid same-sex marriage").