2021

Queering Bostock

Jeremiah A. Ho

SAINT LOUIS UNIVERSITY SCHOOL OF LAW
Legal Studies Research Paper Series

No. 2021-34

Queering Bostock

Jeremiah A. Ho
Saint Louis University – School of Law

American University Journal of Gender, Social Policy & the Law, Vol. 29, No. 3, 2021

QUEERING *BOSTOCK*

JEREMIAH A. HO*

---

* Associate Professor of Law. University of Massachusetts School of Law. I would like to thank Emma Wood, Jessica Almeida, Robert Ball, Jr., Mercedes Martinez, and Levi Eckman for their research assistance. Also, much thanks to the University of Massachusetts School of Law for funding this research. Lastly, I would like to express my extensive gratitude to the editorial staff of the *American University Journal of Gender, Social Policy & the Law*. I would personally like to thank Executive Editors, Benjamin Schroff and Mary Marston, and the rest of the editorial team who worked on the article: Sandy Arce, Cassandre Gaspard, Clemence Kim, Carly Malamud, Madeline Creps, and Adriana Morquecho.

I. INTRODUCTION

Regarding queer identities,[1] the enduring misconceptions about sexual and gender identities underscore precisely why queer lived experiences are critically salient for understanding and remedying instances of discrimination.[2] Without substantively acknowledging the lived experiences of discrimination, one danger is that the dominant establishment more easily retains the posture of redressing discrimination as a means for preserving a discriminatory status quo. For instance, where anti-subordination approaches might better detect and address the inequalities of a marginalized group's lived experiences than anti-classification approaches,[3] scholars have noted that the establishment's choice to maintain anti-classification approaches allows the status quo to reify its dominant values—especially when such formal equality treatments replicate structural hierarchies favoring the status quo.[4] Likewise, when comparing different equality

---

1. For inclusivity and for this work's critical lens, I prefer to use terms such as "queer identities," "queer minorities," and "LGBTQ identities," rather than terms, such as "gay" or "lesbian." Where possible, I do observe the distinctions between "queer" and "LGBTQ" as well. Although "queer" is historically pejorative, its reclamation in recent decades also invests the term with much subversive power. Also, I use "homosexuality" and its derivatives solely in historical context or to underscore their limitations. Where appropriate and respectful to do so, I replace the term "homosexuality" with "queerness." All errors of reference are my own.

2. *See generally* Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 868, 931 (2000) [hereinafter Levit, *A Different Kind of Sameness*]. Levit posits that because "popular construction of lesbian, gay, bisexual, and transgendered individuals as deviant has fostered novel forms of homophobia," such construction "necessitates increasing visibility, combating untrue media representations, and replacing the dominant cultural images with more accurate portrayals of the lived experiences of lesbians, gays, bisexuals, and transsexuals." *Id.* at 868, 931 (footnote omitted).

3. *See e.g.*, Ronald Turner, *On Neutral and Preferred Principles of Constitutional Law*, 74 U. PITT. L. REV. 433, 481 (2013) (preferring an approach to anti-discrimination based within "recognition of an antisubordination or nonsubordination principle grounded in the reality that racial segregation, as a matter of history and practice and lived experiences, has an asymmetrical legal and social meaning for blacks and whites and does not symmetrically burden those on different sides of the color line") (footnotes omitted).

4. Anti-classification approaches reflected in disparate treatment solutions demonstrates this observation. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 21 (2003) (aligning disparate treatment doctrine with anti-classificationist approaches). Linda Hamilton Krieger has noted that in the Title VII realm, disparate treatment jurisprudence ignores the lived experience as "current disparate treatment jurisprudence does not recognize that categorization based on race, sex, or national origin may distort

approaches used to conceptualize and redress discrimination against queer minorities, Russell Robinson and David Frost urge that "[j]udges should make decisions with a full understanding of LGBT people's lives, not just the slivers that lawyers sometimes choose to serve up to them."[5] Relying on a singular perspective that does not fully contextualize LGBTQ experiences could be "problematic if presented alone, because isolating one [perspective] or the other fails to represent the whole of sexual minorities' lived experiences."[6] Specifically, when sameness arguments are used to justify legal advancements, Robinson and Frost allude to some significant distinctions amongst LGBTQ experiences that are often obscured: "As LGBT people, we may have the same basic desires and life goals as heterosexuals and yet face unique forms of stress as we seek to achieve those goals. These barriers extend far beyond the availability of a marriage license, and courts should know that."[7] In this way, they observe that limited reflections of the LGBTQ experience in recent marriage cases contributed to "the judicial struggle to enforce equal protection while minimally disrupting the status quo and extricating the courts from extended structural reform."[8]

Without doubt, the Supreme Court's 2020 decision in *Bostock v. Clayton County, Georgia*[9] illustrates this conundrum. As expected, much fanfare has trailed the Court's decision to finally settle whether Title VII's sex discrimination protections also shield individuals from sexual orientation and gender identity employment discrimination.[10] Because employment

---

perception, memory, and recall for decision-relevant events such that, at the moment of decision, an employer may be entirely unaware of the effect of an employee's group membership on the decisionmaking process." Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1167 (1995). In race, reliance on disparate treatment can lead to preserving the dominant status quo. David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033, 1090 (2019) (using *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), to illustrate how "disparate treatment law has been shaped to contribute to maintaining [racial] hierarchy").

5. Russell K. Robinson & David M. Frost, *"Playing It Safe" with Empirical Evidence: Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality*, 112 NW. U. L. REV. 1565, 1581 (2018) (footnote omitted) [hereinafter Robinson & Frost, "*Playing it Safe"*].

6. *Id.* (footnote omitted).

7. *Id.* (footnote omitted).

8. *Id.* at 1602-03.

9. 140 S. Ct. 1731 (2020).

10. *E.g.*, Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html.

discrimination protections have been long-sought by LGBTQ movements, the decision is enormously significant and resolves the absurdity left after *Obergefell v. Hodges*[11]—that sexual minorities could, colloquially-speaking, "be married on a Sunday, and fired on a Monday."[12] Appropriately then, *Bostock* exists as an important companion decision alongside other major pro-LGBTQ Supreme Court decisions since *Romer v. Evans*.[13]

Referencing that canon, however, we see something is amiss in *Bostock*. Unlike *Obergefell* and other prior pro-LGBTQ decisions, Justice Neil Gorsuch's textualist opinion neglects the lived experiences of discrimination instrumental for developing anti-stereotyping approaches that substantively address anti-queerness and discrimination. By comparison, in the marriage equality cases *U.S. v. Windsor*[14] and *Obergefell*, Justice Anthony Kennedy relied on the lived experiences of same-sex couples to develop and animate his animus-dignity anti-stereotyping framework.[15] This anti-stereotyping framework then demonstrated that legal recognition of same-sex marriages would not threaten the established institution of marriage—as traditional stereotypes had envisioned—but rather such exclusion inflicted intense societal stigma upon queer identities.[16] Further, beyond that canon of pro-

---

11. 576 U.S. 644 (2015).

12. *See e.g.*, Noam Scheiber, *L.G.B.T.Q. Rights Ruling Pushes Workplace Dynamic Already in Motion*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/business/economy/lgbtq-supreme-court-workforce.html.

13. 517 U.S. 620 (1996).

14. 570 U.S. 744 (2013).

15. Recent scholarly works have discussed how both same-sex marriage cases establish anti-stereotyping frameworks. *See e.g.*, Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 872-881 (2014) (discussing how cases after Windsor interpreted the decision's as expounding a "broad anti-stereotyping reasoning") [hereinafter Franklin, *Marrying Liberty and Equality*]; Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1137-1140 (2017) (discussing Obergefell's "equal dignity command" as an anti-stereotyping approach). In *Windsor*, Justice Kennedy specifically relies on the effects of DOMA on married same-sex couples and their families in order to find that disproportionate harms caused by DOMA stems from animus that tarnishes the dignity of married same-sex couples. *See Windsor*, 570 U.S. at 771-75. Meanwhile, in *Obergefell*, Justice Kennedy excerpts the lives of the litigating same-sex couples, such as James Obergefell and John Arthur, to help demonstrate the dignitary harms state marriage bans disproportionately inflict. *Obergefell*, 576 U.S. at 658.

16. *Id.* at 670. Justice Kennedy notes the states have "contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order," and that "[t]here is no difference between same- and opposite-sex couples with respect to this principle." *Id.* Yet, "by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the states have linked to marriage. This harm results in more than just material burdens.

LGBTQ cases, in the decades since *Price Waterhouse v. Hopkins*,[17] Title VII jurisprudence also promoted anti-stereotyping theories helpful for queer minorities—jurisprudence that *Bostock* could have also relied on and clarified.[18] Thus, when Justice Gorsuch writes in *Bostock* that "[f]ew facts are needed to appreciate the legal question we face," his remark is not necessarily one of inclusion, but of delicate erasure.[19]

Lived experiences matter in redressing discrimination against queer identities. Anti-stereotyping principles have affected, and ought to continually effect, doctrine in discrimination cases premised on non-heteronormative identities—on aspects of queerness.[20] Contemporary discrimination involves complex facets that ought to be explored and understood in context. As this Article will explore, within queer lived experiences, the dominant society has historically authored much of the categorical significances of sexualities and depended on that authorship to marginalize queer identities.[21] Especially when conceptions of sexuality and gender identities have been previously mischaracterized in favor of heteronormative gender roles,[22] and where the culture of marginalization for

---

Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives." *Id.* Moreover, Justice Kennedy's observation that "[f]ar from seeking to devalue marriage, [same-sex couples] seek it for themselves because of their respect . . . for its privileges and responsibilities" and that "their immutable nature dictates that same-sex marriage is their only real path" strikes as ways to ameliorate status quo assumptions that same-sex couples would threaten traditional marriage. *Id.* at 658.

17. 490 U.S. 228 (1989).

18. *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 714 (2010) ("[S]exual minorities have made some progress toward protection against employment discrimination by using the *Price Waterhouse* stereotyping doctrine to advance their cause.").

19. *Bostock*, 140 S. Ct. at 1737.

20. *See e.g.*, Franklin, *Marrying Liberty and Equality*, *supra* note 15, at 827 ("The anti-stereotyping doctrine courts have recently developed in gay rights cases is directly responsive to the history of discrimination gays and lesbians have experienced in the American legal system. Historically, anti-gay stereotypes had a powerful prescriptive component.").

21. *See e.g.*, Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 316, 319-20 (2009) (describing how during prior segments of the LGBTQ movement, "[c]ourts and politicians . . . rel[ied] on traditional psychiatry and religion to identify gays as a group and emphasized the perverse, homosexual identity of these organizations and consequently, "[g]ays themselves internalized many of these claims.").

22. For instance, Russell Robinson and David Frost note that "[c]ontemporary homophobia turns on a bifurcated conception of sex between men and the public

many LGBTQ individuals have involved forms of social or cultural invisibility,[23] lived experiences of queerness are paramount for detecting discrimination, and also correcting it. *Bostock*'s failure to highlight the biases and indignities experienced by queer minorities in employment discrimination is not a forgivable oversight collateral to the decision's sweeping textualist interpretation of Title VII sex discrimination; this neglect was the price queer minorities had to pay for Title VII protection. Ultimately, Justice Gorsuch's lack of regard in *Bostock* for queer lived experiences tacitly privileges heteronormative values, rather than respects queer identities enough to address the underlying gendered stereotyping concerns that animate anti-queer bias. Instead, it underscores the status quo's own interest convergence in *Bostock* and limits the decision's transformative potential.

Moving past this Part I Introduction, Part II will recount the historical misconceptions concerning sexualities, which the heteronormative status quo has engendered into anti-queer stereotyping bias, and have, in turn, marginalized queer identities in society and law. Part III will then illustrate the doctrinal anti-stereotyping tactics developed in canonical Supreme Court gender and sexual orientation discrimination cases that have responded to such biases to advance equality. Part IV will contrast that observation with a critical reading of *Bostock* that reveals how textualism accomplishes LGBTQ protections in its immediacy, but eventually preserves heteronormativity. And finally, before the Article's close, Part IV will also prescribe why and how future cases can attenuate that preservation by reviving anti-stereotyping considerations that highlight queer lived experiences of discrimination. What queering *Bostock* reveals is how inevitably *un-queer* the decision is at all. *Bostock* is a victory for LGBTQ

---

identities associated with men who engage in that sexual behavior, including gay, bisexual, and queer" and that "public aversion to sex between men rests on a cramped understanding of gender." Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 218, 275 (2018) [hereinafter Robinson & Frost, *Afterlife of Homophobia*]. In addition, they articulate that for transgender people, "a central tactic deployed by anti-LGBTQ forces is reimagining transgender women as 'biological males' who, as men, are constructed as a threat to cisgender women." This "misgendering" accordingly "stereotypes cisgender women as fragile and uniquely in need of governmental protection from transgender women, and it also reinforces the stereotype that male sex necessarily entails sexual violence." *Id.* at 220-21 (footnotes omitted).

23. *See e.g.*, William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 819 (1997) ("Fear of social and familial ostracism kept most homosexuals in the closet. The law sealed that closet shut for most gays and lesbians, while at the same time, outing others in state-sponsored witchhunts.").

individuals, but it is also a decision with serious doctrinal limitations that unavoidably preserves a discriminatory status quo.

II. CONCEPTUALIZATIONS OF ANTI-QUEER STEREOTYPES

A. Modern Historical Origins

By historians' accounts, contemporary conceptions of non-heteronormative sexual and gender identities take their roots in the nineteenth century.[24] John D'Emilio recounts that "[d]uring the second half of the nineteenth century, the momentous shift to industrial capitalism provided the condition for a homosexual and lesbian identity to emerge."[25] This history began with the categorization of same-sex sexual behaviors that gradually became merged into an identity—behaviors that, prior to the nineteenth century, infringed upon communal norms or morality and transgressed a certain teleology that prioritized "the sanctioned bonding of husband and wife."[26] But prior to the nineteenth century, same-sex intimacy, though often criminalized, was not yet associated with an identity: "Though criminal records, church sermons, and other evidence reveal homoerotic activity among the residents of the colonies, nothing indicate[d] that men or women thought of themselves as 'homosexual.'"[27] Others also similarly have noted that "[i]n previous centuries, sexual activity between people of the same gender had been deemed a matter of taste or moral weakness, depending on the time and place."[28] Though such behavior was punishable, "there was no sense of homosexuals as a class of people with whom society needed to concern itself."[29] In part, as D'Emilio surmises, this reality was

---

24. *See e.g.*, Jonathan Ned Katz, *The Invention of Heterosexuality*, RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 49 (Paula S. Rothenberg & Christina Hsu Accomando eds., 11th ed., 2020) [hereinafter Katz, *The Invention of Heterosexuality*].

25. John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970* 11 (2d ed. 1998) [hereinafter D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES].

26. *Id.* at 10.

27. *Id.* ("Even trials of persistent offenders document daily lives that revolved around a heterosexual family role.").

28. Michael Nava & Robert Dawidoff, *Created Equal: Why Gay Rights Matter to America* 40 (1994).

29. *Id.* Both Nava and Dawidoff's observations and D'Emilio's account contest the idea other scholars have proposed which asserts that a version of the gay identity pre-dates the modern industrialization era. For instance, John Boswell's study of religious and social regard for same-sex attraction in medieval Europe was framed as a study of "gay people," a group that, as he recognized, has "constituted a substantial minority in

due to the virtually-unspoken notion that "'[h]eterosexuality' remained undefined, since it was literally, the only way of life."[30]

The shift toward industrialized capitalism cultivated the conditions for society to be less dependent on procreation for sustaining a communal economy previously based on agriculture, and consequently less reliant on the values that would promote such behavior.[31] Individuals migrated to large urban centers and embraced new ways of living and work that encouraged "a social context in which an autonomous personal life could develop."[32] Out of a burgeoning capitalist society and a transformative modernity, the conflation between behavior and identity began to take hold through collective self-identification surrounding common same-sex erotic interests distinguishable from mainstream interests: "In America's cities from the 1870s through the 1930s, there emerged a class of people who recognized their erotic interest in members of their own sex, interpreted this interest as a significant characteristic that distinguished them from the majority, and sought others like themselves."[33] Such self-actualized group membership included individuals across lines of genders, occupations, race, national origins, and class, and inhabited different geographic spaces that emerged specifically for such group life to flourish.[34] By the early twentieth century, the conflation between non-heteronormative sexual behavior and identity manifested into a distinctive group category so that in the early decades "a subculture of gay men and lesbians was evolving in American cities that would help to create a collective consciousness among its participants and strengthen their sense of identification with a group."[35]

---

every age." John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* 5 (1980) (footnote omitted). For the purposes of this article, the focus is on contemporary conceptions of non-heteronormative identities that have affected the way we regulate queer identities presently. Thus, I do not intend to resolve or debate the differences between these authors that pertain outside contemporary conceptualizations.

30. D'EMILIO SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 25, at 10.

31. *See id.* at 10-11.

32. *Id.* at 11.

33. *Id.*

34. *Id.* at 11-12 ("The group included letter carriers and business executives, department store clerks and professors, factory operatives, civil service employees, ministers, engineers, students, cooks, domestics, hoboes, and the idle rich. Both men and women, black and whites, immigrants and the native-born people these accounts. Some were or had been married; others were single. Many lived in relative isolation, while quite a few had formed lasting partnerships and acquired a circle of lesbian or homosexual friends.").

35. *Id.* at 12 ("By 1915, one observer of male homosexual life was already referring

In tandem with capitalism and industrialization, historical accounts have also traced the classification of non-heteronormative sexual identities — including one famously offered by Michel Foucault—to the medicalization of sexuality during the latter part of the nineteenth century.[36] According to Jonathan Ned Katz, the medical profession's ascendancy during the nineteenth century also contributed to normative perspectives on human sexuality: "Medical men, in the name of science, defined a new ideal of male-female relationships that included, in women as well as men, an essential, necessary, normal eroticism."[37] Such "normal eroticism" would standardize and consequently distinguish itself from types of deviant and unacceptable states of sexual being.[38] In fact, as D'Emilio also puts it, "[d]octors

---

to it as 'a community distinctly organized.'") (quoting Jonathan Ned Katz, *Gay American History* 52 (1992)).

36. *See e.g.* Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* 43 (1978) ("We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized—Westphal's famous article of 1870 on the 'contrary sexual sensations' can stand as its date of birth—less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.")

37. Katz, *The Invention of Heterosexuality*, *supra* note 24, at 50. Recently, in a posthumous work, the late queer literary scholar, Sam See has daringly queered the supremacy of this normal eroticism assumption through a re-examination of Charles Darwin's work. Specifically, See notes that Darwin's observations of nature and natural selection have been misunderstood and surprisingly encompass queer readings of nature: "[Q]ueer features surprisingly undergrid some of the most far-reaching claims that Darwin makes about biological life." Sam See, *Charles Darwin, Queer Theorist* in QUEER NATURES, QUEER MYTHOLOGIES 25 (Christopher Looby & Michael North eds., 2020). In this way, See asserts that "[t]he most precise—yet still tentative ('appears')—origin of not only the human species but the 'whole vertebrate kingdom' is thus a queer body that defies naturalized definitions of sex." *Id.* From here, See reads Darwin as "posit[ing] in other words, that humans comprise a queer species whose ostensibly nonadaptational traits exemplify rather than are exempt from the species' rule." *Id.* Likely, See's critical implication here is that essentialized readings of sexuality, biology, and nature are also constructions.

38. Katz, *The Invention of Heterosexuality*, *supra* note 24, at 50. As Katz describes, "[b]y the 1880s, the rise of doctors as a professional group fostered the rise of a new medical model of Normal Love, replete with sexuality. The new Normal Woman and Man were endowed with a healthy libido." *Id.* The categorization of what type of sexuality or eroticism was normal—an opposite-sex version—was promulgated as "a new sexual ethic as if it were a morally neutral, medication description of health." *Id.* Furthermore, this normal state of sexual being had its counterparts in deviancy: "The creation of the new Normal Sexual had its counterpart in the invention of the late

developed theories about homosexuality, describing it as a condition, something that was inherent in a person, a part of his or her 'nature,'" and eventually such interpretations of same-sex attraction became so prevalent that it became a feature for self-identification.[39] Once these conflations took better hold in the mainstream in the early twentieth century, decisions by the dominant status quo to privilege those who exhibited "normal eroticism" became easier to manipulate.[40] Such privileging led to heterosupremacy: "The idea of heterosexuality as the master sex from which all others deviated was (like the idea of the master race) deeply authoritarian. The doctor's normalization of a sex that was hetero proclaimed a new heterosexual separatism—an erotic apartheid that forcefully segregated the sex normal from the sex perverts."[41] In this vein, once same-sex attraction became consistently indicative of a non-heteronormative identity—a so-called "homosexual" identity—and was deemed to threaten normalized heterosexuality, the idea of homosexuality as an identity helped privilege certain groups of people over others, as a kind of "sexual hegemony."[42] This privileging paralleled how the dominant status quo similarly oppressed other marginal groups, such as those based on race and gender lines.[43] From

---

Victorian Sexual Pervert. The attention paid the sexual abnormal created a need to name the sexual normal, the better to distinguish the average him and her from the deviant it." *Id.*

39. John D'Emilio, *Capitalism and Gay Identity in The Lesbian and Gay Studies Reader* 471 (Henry Abelove, Michèle Aina Barale, & David M. Halperin eds., 1993) [hereinafter D'Emilio, *Capitalism and Gay Identity*].

40. Katz, *The Invention of Heterosexuality*, *supra* note 24, at 50-51 (tracing the first appearances of the term "homosexual" and observing that the categories of "heterosexual" and "homosexual" arose "from the narrow world of medicine to become a commonly accepted notion in the early twentieth century").

41. *Id.* at 52.

42. *See* Christopher Chitty, *Sexual Hegemony: Statecraft, Sodomy, and Capital in the Rise of the World System* 25 (Max Fox ed., 2020). According to Chitty, "[a] relationship of sexual hegemony exists wherever sexual norm as benefiting a dominant social group shape the sexual conduct and self-understandings of other groups, whether or not they also stand to benefit from such morns or whether or not they can achieve them." *Id.*

43. Serena Mayeri, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1057 (2001). Serena Mayeri's study extensively draws the similarities between racial and gender oppression identified by social scientists who noted "that both women and Negroes occupied a 'caste-like' status, exhibiting tendencies toward self-hatred, an internalization of the inferiority attributed to them by the dominant society" as a result of dominant status quo's "similar[ly] ascribed attributes including intellectual inferiority, emotional volatility, and lack of sexual self-control; confinement to low social status and mythologized "contentment"; strategies of accommodation such as a deferential manner, pretension of

making distinctions based on sexual identities, the heteronormative status quo rationalized conferring degrees of legal protections to those who would not disturb its dominant values.[44] Often the rationale for denying protections to non-heteronormative identities arose by imbuing these sexual identities with hyper-menacing notions of deviance, degeneracy, or pathology.[45]

Indeed, the establishment "marked gay people as inferior—less moral, less respectable, and less healthy than their fellows."[46] Just within medicine, the pathological characterization of non-heteronormative sexual identities was a complex debate framed by the mainstream medical community's *fin-de-siècle* sexology, which stoked in the status quo a panic that paralleled existing status quo fears of relinquishing racial purity from African-Americans and immigrants.[47] Various medical theories of pathology, many

---

ignorance, and methods of 'outwitting' the dominant group; and finally, educational, economic, professional, and social discriminations that resulted in lower occupational attainments." *Id.* (footnotes omitted). Likewise, Craig Konnoth observes that this analogy to racial and gender oppression is precisely how the sexual minorities later followed the paths of racial and gender minority groups in advocating for advancements and protections. Konnoth, *supra* note 21, at 341.

44. As historian Craig Rimmerman intimates, the assimilationist strategies of the early gay and lesbian activist group, the Mattachine Society, reflected the awareness of these distinctions. Craig A. Rimmerman, *From Identity to Politics: The Gay and Lesbian Movements in the United States* 22 (2002). The group's "strategy was to present themselves as reasonable, well-adjusted people, hoping that these heterosexual arbiters of public opinion would rethink their assumptions regarding homosexuality . . . . The activists hoped to de-emphasize sex, since the act of sex itself was the source of so much anger and fear directed at homosexuals." *Id.*

45. *E.g.*, Robinson & Frost, *Afterlife of Homophobia*, *supra* note 22, at 234-35. Robinson and Frost quote an astute example from a CBS television documentary from the mid-1960s that found "gay and bisexual men are incapable of maintaining enduring, healthy relationships because they are less sexually responsible, more sex-focused, and indiscriminate in selecting sex partners, as compared to straight people; because of their sexuality, gay and bisexual men are inherent vectors of disease." *Id.* (quoting CBS, *The Homosexuals* (CBS television broadcast Mar. 7, 1967), https://www.youtube.com/watch?v=zWNEdoXo0Yg).

46. *Id.*

47. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 25, at 15 ("In Germany and Britain, for instance, a minority of doctors argued that individuals should not be punished for a biological inheritance over which they had no control, and the congenital perspective thus served as the intellectual underpinning for vigorous homosexual reform movements. In the United States, on the other hand, doctors emphasized the tainted nature of the inheritance. Homosexual impulses, the argument ran, generally remained inactive until they were inexplicably triggered in people who had been leading otherwise heterosexual lives. Its unexpected manifestation made homosexuality an especially dread disease."); *see also id.* at 16 ("Perhaps because Americans of Anglo-Saxon stock at the turn of the century feared racial 'contamination'

disbursed and entrenched in psychiatry, misinterpreted the inclination of same-sex eroticism and non-heteronormative behaviors, thus furthering stereotyped sexual minorities in anti-heteronormative sentiment: "[H]omosexuality became associated with 'mannishness' in women and effeminacy in men as descriptions of both physical appearance and personality. The medical profession contributed to a popular stereotype of gay men and women as generally exhibiting the characteristics of the opposite sex."[48] The medical community also perpetuated notions of "curing" the disease of homosexuality, another mischaracterization, upon the mainstream's imagination: "Medical guides aimed at a lay audience expounded on the phenomenon of same-sex orientation and the possibilities of curing it."[49]

Ultimately, these mainstream misperceptions and judgments of sexual minorities constrained their visibility from public discussion in media; in distribution of knowledge; and in art, literature, and popular films.[50] D'Emilio refers to this phenomenon as a "conspiracy of silence."[51] Active visibility of their lived experiences meant grave risk:

> Exposure promised punishment and ostracism. It hovered about gay life as an ever-present danger, always reminding homosexual men and women of the need for secrecy and careful management of information about their sexual preferences. Coupled with the restrictions that social custom and law placed on public discussion of homosexuality, fear of discovery kept the gay world invisible. It also erected barriers against self-awareness and made it difficult for women and men to find entry into the homosexual subculture.[52]

Such coordinated societal conspiracy—or sanitization—exemplifies another way the status quo's definitions and interpretations of non-heteronormative sexual identities served as means to policing its own norms and values.[53] To their detriment, it also further reduced sexual minorities' abilities to

---

by immigrants and blacks, homosexuality stimulated worries about evolutionary degeneracy." (citing studies)).

48. *Id.* at 17 (citing generally to Richard von Krafft-Ebing, *Psychopathia Sexualis* (Frank S. Klaf ed. & trans., 12th ed. 1965); Havelock Ellis, *Studies in the Psychology of Sex* (1936); Helene Deutsch, *The Psychology of Women* (1945)).

49. *Id.*

50. *Id.* at 19.

51. *Id.*

52. *Id.* at 13.

53. *See* CHITTY, *supra* note 42, at 25. ("Sexual norms also functioned in more oblique ways to impose a moral order upon public spaces and domestic arrangements, setting up sanitary geographies in which some bodies mattered and some don't.").

articulate their own lived experiences to the rest of society.[54]

B. Anti-Queer Stereotyping Effects in Law

Within the law, D'Emilio observes that "[t]he severity with which legislatures and magistrates viewed homosexual behavior, moreover, buttressed the enforcement of a wide range of other penal code provisions against homosexuals and lesbians."[55] Moving from the nineteenth to the twentieth century, the mainstream medical characterization of pathology influenced legal characterizations, prompting legislatures to refer to psychiatrists when promulgating "sexual psychopath laws that officially recognized homosexuality as a socially threatening disease."[56] Such laws became one of the various ways to justify disqualifying sexual minorities from legal recognition—for instance, in immigration cases.[57] But the hatred and stigmatization were not merely in statutes and enforcement. One incidental account of a court proceeding in 1951 by a New York City magistrate "described how the court attendant's 'normally stentorian voice drop[ped] to a whisper' when reading a homosexual-related complaint, while judges commonly directed gratuitous, abusive language at defendants."[58] Evidently, "[c]ourt proceedings seemed designed to instill feelings of shame and obliterate self-esteem."[59] Just as society was unsympathetic to queer minorities, aspects of law practice were also unsympathetic.

Moreover, courts' historical reliance on stereotyping has also prominently justified disqualifying queer individuals from substantive legal protections.[60] Status quo connotations that attached to non-heteronormative identities,

---

54. In part, D'Emilio points to this invisibility in the first half of the twentieth century: "Prudence dictated that they remain unobtrusive and leave behind as little incriminating evidence as possible." D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 25, at 20. The idea of visibility—of "coming out"— "was a lonely, difficult, and sometimes excruciatingly painful experience." *Id.* at 13.

55. *Id.* at 14-15.

56. *Id.*

57. *E.g.*, 387 U.S. 118 (1967) (upholding petitioner's deportation because "at the time of his entry he had continuously been afflicted with homosexuality for over six years" and therefore violated the Immigration and Nationality Act of 1952's exclusion of homosexuals under its definition of "psychopathic personality").

58. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 25, at 15 (footnote omitted).

59. *Id.* at 14-15.

60. For instance, Clifford Rosky illustrates the use of false and perennial stereotypes depicting gay fathers as sexual child abusers in family court cases with substantial effect. *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 286-94 (2009).

based in part on behaviors considered deviant from heteronormative ones, were employed to essentialize such identities, differentiate them from dominant mainstream sexual identities, and exclude them from legal protection.[61] The status quo's disregard for queer lived experiences have been complicit in such stereotyping.

A century after the conflation of identity and non-heteronormative sexual behavior, the Supreme Court's 1986 decision, *Bowers v. Hardwick*,[62] illustrates the product of such stereotyping. The *Bowers* Court's focus on respondent Michael Hardwick's identity as a "practicing homosexual" significantly invigorated Justice Bryon White's rationale against constitutionally protecting Hardwick for engaging in an act of consensual same-sex intimacy that triggered Georgia's sodomy statute.[63] The case illustrates how identity was punished in addition to conduct that threatened mainstream norms. *Bowers* involved Hardwick's violation of a sodomy statute that did not specifically define and forbid such acts based on the perpetrator's sexual identity; indeed, the statute was identity-neutral.[64] In fact, an early footnote in Justice White's opinion described an opposite sex couple—"John and Mary Doe"—who had joined Hardwick to challenge the suit, but were dismissed for lack of standing as they had only "alleged that they wished to engage in sexual activity proscribed by [the Georgia statute] in the privacy of their home"; they had not actually been caught and prosecuted for engaging in such activity.[65] Justice White did not raise the applicability of Georgia law on opposite-sex couples that would presumably,

---

61. *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1350-51 (2000) (detailing how anti-discrimination ordinances passed by state and local governments that prohibited sexual orientation discrimination were often repealed by referenda as a result of anti-gay campaigns that attacked queer identities with arguments based on family values, the safety of children, and threats to public health).

62. 478 U.S. 186 (1986).

63. *Id.* at 188. In a sentence that seems to emphasize Hardwick's own self-identification, Justice White writes: "[Hardwick] asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution." *Id.*; *see also* Levit, *A Different Kind of Sameness*, *supra* note 2, at 895 ("This was the definitional logic of the Court in *Bowers v. Hardwick*, when it upheld Georgia's right to criminalize sodomy, implicitly assuming either that sodomy was exclusively a homosexual practice or that homosexual sodomy was exclusively criminalized.") (footnote omitted).

64. The Georgia statute only provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga Code Ann. §16-6-2(a) (1984).

65. *Bowers*, 478 U.S. at 188.

but not absolutely, underscore their heterosexual identities.[66] Instead, he proceeded to frame and examine the conduct at issue as "consensual homosexual sodomy," differentiating sexual activity based on sexual identities, rather than addressing Hardwick's act without reference to sexuality, as the statute proscribed.[67] There was a deliberate reason for casting notice on Hardwick's sexual identity; stereotypical connotations about Hardwick's sexual identity would help the Court differentiate his conduct more easily from other types of conduct that might be constitutionally protected.[68] Henceforth, when the Court formally discussed the issue of the case, it was clear sexual identity, perhaps more than conduct, was central to the majority's interpretation of the case: "The issue presented is whether the federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time."[69] Seemingly motivated to marginalize Hardwick because of his sexual identity, the Court reinterpreted the issue as whether non-heteronormative identities, such as Hardwick's, could engage in intimate activities without the enforcement of long-standing and vastly-promulgated status quo values.[70] The Court's *ad hominin* fallacy obscured the real issue at hand: how Georgia's sodomy law interfered with Hardwick's lived experience. In fact, the Court ignored it.

By characterizing Hardwick's conduct as a homosexual version of sodomy, Justice White carved distance between Hardwick's case and prior Supreme Court decisions that had guaranteed constitutional privacy interests

---

66. *See id.* ("We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.").

67. *Id.* ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy.")

68. *See* Levit, *A Different Kind of Sameness*, *supra* note 2, at 895 ("The *Bowers* Court refused to draw on the line of procreation and privacy cases because it found '[n]o connection between family . . . and homosexual activity.' Homosexual identity and homosexual relationships were reduced to 'acts of . . . sodomy,' devoid of love or intimacy (let alone affection, fidelity, or commitment).") (quoting *Bowers*, 478 U.S. at 191, 192). We see a similar marshalling of facts later in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018), where the Justices were able to articulate their positions based on how they characterized the cake at issue. For instance, Justice Gorsuch in his concurrence referred to the cake at issue as "a cake celebrating a same-sex wedding." *Id.* at 1735 (Gorsuch, J., dissenting). However, Justice Ginsburg in her dissent referred to the cake as merely "a wedding cake." *Id.* at 1749 (Ginsburg, J., dissenting).

69. 478 U.S. at 190.

70. *Id.*

in an individual's private decisions regarding sex. Those cases involved sexual activities that existed in a heteronormative world, which would presumably involve stereotypically heterosexual decisions regarding "child rearing and education," "family relationships," "procreation," "contraception," and "abortion."[71] Accordingly, under that logic, the Court "[thought] it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated[.]"[72] Justice White relied on the tradition of criminalizing sodomy to overshadow the lived experiences of persecution: "Proscriptions against [homosexuals to engage in acts of consensual sodomy] have ancient roots."[73] He cited the history of sodomy laws to deem any claim for a fundamental right to homosexual sodomy "at best, facetious."[74] Consequently, the *Bowers* Court assigned heteronormative moral value-judgments upon the lived experiences of sexual minorities, rather than deeply exploring lived experiences to illuminate the inherent discrimination and marginalization that sodomy statutes had on queer identities.[75]

In recent decades, scholars have pointed out that sexual identities embody pluralism—one that often destabilizes the characterizations set up by the dominant mainstream regarding non-heteronormative sexual and gender identities and is influenced by the lived experiences of LGBTQ individuals.[76] *Bowers* is an example of traditional notions of who receives

71. *Id.* (citing cases).

72. *Id.* at 190-91.

73. *Id.* at 192.

74. 478 U.S. at 192-94; *see also id.* at 196-97 (Burger, J., concurring).

75. *Id.* at 196 ("Even if the conduct at issue here is not a fundamental right, respondent asserts that there might be a rational basis for the law and there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalided under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some States should be invalidated on this basis.").

76. *See e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011) (noting that "the political visibility of gays, lesbians, and bisexuals has grown dramatically over recent decades" and, in part, attributes visibility to "the affirmation of alternative sexualities") (referencing Rogers Brubaker, *The Return of Assimilation? Changing Perspectives on Immigration and Its Sequels in France, Germany, and the*

protection based on status quo categorizing of group membership through sexual identity differentiation. Other cases had also denied recognition based on the same definitional grounds that LGBTQ individuals were summarily not a protected group—for instance, *Baker v. Nelson*.[77] Here, *Bowers* accomplished this denial by singling out homosexuals within an identity-neutral statute under Georgia law and disenfranchising them over their sexual activities, while remaining silent about the law's application to heterosexuals and their sexual activities. But because the *Bowers* Court relied on assumptions of status quo stereotypes without even articulating them in the opinion, it illustrates the power of stereotypes for obscuring the lived experiences of queer individuals. As Anthony Michael Kreis notes, *Bowers*' resistance to regarding consensual same-sex intimacy positively might have involved generalized anxieties that challenged heteronormative gender roles, particular roles that are underscored in traditional opposite-sex marriages:

> The danger in recognizing that sexual intimacy between two men or two women might serve a similar purpose as a marriage exposed two problems for the supremacy of masculinity—it challenged marital-related sex stereotypes and tapped into the fears that cropped up nearly a century prior that sex and gender roles were not innate and fixed.[78]

Moral judgments placed on non-heteronormative sexual activities in *Bowers* exaggerated differences as a means for categorizing, marginalizing, and eventually discriminating against LGBTQ individuals. Hardwick's conduct was aberrant because the majority refused to recognize symbolic similarities to heteronormative procreative sex acts in ways that allowed prior constitutional precedents to protect those acts.[79] What differentiated Hardwick's sex was his sexual identity as a "practicing homosexual."[80] Infused with the connotations of his sexual identity, his conduct appeared destabilizing to the heteronormative status quo, which prompted the Court's reproach from a traditional and "presumed" moral vantage point.[81]

United States, 24 ETHNIC & RACIAL STUD. 531 (2001)).

77. *See* Baker v. Nelson, 409 U.S. 810 (1972) (dismissing a male same-sex couple's appeal against state marriage exclusion "for want of a substantial federal question").

78. Anthony Michael Kreis, *Policing the Painted and Powdered*, 41 CARDOZO L. REV. 399, 450-51 (2019) [hereinafter Kreis, *Policing the Painted and Powdered*] (citing Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 308 (1995)).

79. *See Bowers*, 478 U.S. at 190-192.

80. *Id.* at 188.

81. *Id.* at 196-97. *See also* Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in A Pluralist Polity*, 58 MD. L. REV. 150, 182-83 (1999) (observing that *Bowers* "essentializes gay men's and lesbians' social identity

Therefore, these proxy stereotypes weaponized heteronormative assumptions and roles in *Bowers* that Justice White then linked together with prescriptive status quo judgments to provide the logic for permitting exclusion.[82] These stereotypes also distorted Hardwick's lived experiences and kept the majority from examining relevant constitutional privacy interests when a state law interferes with an individual's intimate choices regarding their sexual conduct—from the kind of lived experiences recognition that the *Bowers* dissents and the Eleventh Circuit had made in reviewing the same case.[83]

Although some evident self-authorship did occur with the rise of queer sexualities, both historical accounts and *Bowers* illustrate anti-queer stereotypes crafted by the establishment endured to substitute meaningful recognition of lived experiences to perniciously reinforce a heteronormative status quo. Toward the end of the twentieth century, stereotypes that identified queer individuals based on non-heteronormative behavior were weaponized to keep such individuals from inclusion within mainstream society. That differentiation appears in *Bowers* as one memorable example in law of the Court's dependency on entrenched anti-queer stereotypes. However, with the post-Second World War rise in queer politics and activism, particularly "in the decades since the birth of the mass gay and lesbian rights movements following the Stonewall Riots, queer activism began to challenging the prevailing stereotypes."[84] Queer visibility had emerged during this time especially in part due to the AIDS crisis, but also as a result of the overall civil rights movement.[85] Once marriage became a vigorously pursued issue, sameness arguments were being articulated to

---

into one aspect of the human personality, the manner in which homosexuals physically express sexual love" and consequently "chose a construction of gay and lesbian social identity that marginalizes the humanity of a minority group").

82. *See* Anton Marino, *Transgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of the Transgender Identity*, 21 AM. U. J. GENDER SOC. POL'Y & L. 865, 876-77 (2013) (noting that "Michael Hardwick's sexual orientation—a facet of his innate identity—was distorted into nothing more than capriciously wicked conduct," which underscores how the Bowers Court "rendered its judgment on the basis of archaic socio-cultural, sex-normative stereotypes of the roles of the male and female sex") (footnote omitted)).

83. *See generally Bowers*, 478 U.S. at 199-214 (Blackmun, J., dissenting); *id.* at 214-220 (Stephens, J., dissenting); 760 F.2d 1202 (1985).

84. Michael Nava & Robert Dawidoff, *Created Equal: Why Gay Rights Matter to America*, 29 (1994).

85. Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 129 (2006).

confront such stereotypes.[86] As we will see in Part III, such changes accomplished advancements but also complicated the evolving ways that the heteronormative status quo tried to continue marginalizing queer minorities.

III. ANTI-STEREOTYPING STRATEGIES

More strikingly than before, stereotypes animate contemporary discrimination cases. As Zachary Kramer observes, "[m]odern discrimination is not like the discrimination of the 1960s and 1970s. Back then, discrimination targeted outsider groups. The goal of civil rights law was to achieve formal equality of the sexes, the races, and so on."[87] But "new discrimination," as Kramer continues, "targets people who do not or cannot conform to the whims of society," and unlike previous types of discrimination, it "defies easy categorization."[88] Stereotypes inform such targeting, burrowing latently into the assumptions and implicit biases we carry.[89] In racial discrimination cases, William Carter notes that "[t]he old

---

86. Carlos A. Ball, *Introduction: The Past and the Future*, AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 3 (2016) [hereinafter BALL, AFTER MARRIAGE EQUALITY] (mentioning that the marriage equality efforts "allowed the movement to humanize the discrimination faced by LGBT individuals"); *see also* Craig A. Rimmerman, *The Lesbian and Gay Movements: Assimilation or Liberation?* 146 (2008) (referring to marriage equality movement tactics as "looking to sameness and de-emphasizing . . . differences").

87. Zachary Kramer, *Outsiders: Why Difference is the Future of Civil Rights* 19 (2019) [hereinafter KRAMER, OUTSIDERS].

88. Kramer, *supra* note 87, at 19, 26.

89. *See e.g.*, Kramer, *supra* note 87 at 21-23 (exemplifying *Jesperson v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006), as a case where stereotypes unconsciously informed the decision to fire Darlene Jespersen for her refusal to adhere to her employer's gendered make-up code, while the court was looking for overt group subordination and found none); *see also* Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2185 (2018) ("Although we have made 'considerable progress in reducing overt expressions of prejudice since the Civil Rights Movement of the 1960s,' this does not necessarily mean Americans are becoming less discriminatory; more likely, discrimination is becoming harder to detect. Indeed, 'there is abundant social-psychological evidence that biases against women and minorities persist in a more covert and non-conscious form'- what researchers often term 'modern discrimination,' 'aversive discrimination,' 'covert discrimination,' or 'implicit bias.'") (footnotes omitted); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1180 (2008) ("I use the term "modern discrimination" to refer to the contemporary phenomenon in which overt evidence of discrimination is decreasing, yet implicit bias appears to continue to be widespread."); Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55, 59-60 (2017) (discussing the concept of bias and its relationship to stereotypes in the context of gender

racism of state-sponsored segregation and avowedly bigoted private action has thankfully diminished. However, it has largely been supplanted by the 'new racism' of systemic inequality, unconscious bias, and more subtle forms of racial exclusion."[90] These subtler forms of discrimination are pernicious because they are harder to perceive and uncover: "In an era when it is generally seen as socially unacceptable to give voice to racist sentiments or to engage in explicitly discriminatory practices, the individuals most obviously motivated to oppose such practices—racial minorities—will often be unaware of them."[91] Invariably, the subtler forms of today's discrimination incite their own characteristic insidiousness; and structurally internalized stereotypes—such as those referenced by *Bowers*—are part of that characteristic: "Stereotypes lock people in place. They constrain authenticity. They thwart change."[92]

In response, anti-stereotyping principles emerged in this landscape of new discrimination by proscribing stereotype-informed discrimination.[93] Anti-stereotyping principles can help courts proceed beyond the limits of formal equality to demonstrate how certain stereotypes have historically subordinated a minority group to which a claimant belongs.[94] Such approaches used toward furthering racial justice by civil rights movements stem largely from earlier social science work on stereotyping. Cary Franklin notes that works of social scientists from the early-to-mid twentieth century shed light on how racial stereotypes serve to justify racism by the dominant white establishment.[95] Consequently, "the concept of stereotyping would

---

discrimination).

90. William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1857-58 (2012) (footnotes omitted).

91. *Id*. at 1858 (footnotes omitted).

92. Kramer, *supra* note 87, at 30.

93. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 54-55 (2010) (For instance, in gender discrimination cases, Julie Suk describes how "the antistereotyping norm is at the center of the new 'family responsibilities discrimination,' which is being heralded as the 'next generation of employment discrimination cases.'") (quoting Joan C. Williams, Practicing Law Inst., *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PLI/Lit 333 (2007)).

94. Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J. L. & GENDER 83, 85-86 (2019) (In Orit Gan's study of anti-stereotyping in gender discrimination, Gan notes how the theory exists "in contradistinction to formalistic, sex-blind, formal equality theory" and "is a critique of social institutions and practices that compel conformity with traditional gender roles.")

95. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 107 (2010) [hereinafter Franklin, *The Anti-*

soon become a major theme in American civil rights discourse."[96] For instance, civil rights movements utilized such studies to combat how Jim Crow policies allowed "the state to act in ways that reflected and reinforced stereotyped judgments about the relative capacities and proper social roles of black people."[97] Anti-stereotyping arguments were then used to constitutionally target such state action motivated by racial stereotypes.[98] Doctrines that incorporated anti-stereotyping principles have been used in modern discrimination cases to better combat the discriminatory results of bias and help elucidate the lived experiences of marginalized identities—especially queer identities.[99] Despite certain limitations, uncovering stereotypes that animate laws and practices is useful for illustrating how biased motives emerge to discriminate against perceived outsiders to the status quo.

A. Gender Discrimination

In gender discrimination cases, anti-stereotyping has helped articulate discrimination beyond overt acts of group subordination and how stereotypes reinforced norms of heteropatriarchy.[100] Anti-stereotyping's eventual crossover into the women's rights movement of the mid-to-late twentieth century was not surprising because of some striking similarities between racism and anti-feminism shown by both movements.[101] According to Pauli

---

Stereotyping Principle].

96. *Id*.

97. *Id*.

98. *Id*.

99. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 827 (2014) ("The anti-stereotyping doctrine courts have recently developed in gay rights cases is directly responsive to the history of discrimination gays and lesbians have experienced in the American legal system.").

100. *See* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law As a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1448 (1999) [hereinafter Case, "*The Very Stereotype"*]; David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876-81 (1995); Franklin, *The Anti-Stereotyping Principle*, *supra* note 95 at 122.

101. Franklin, *The Anti-Stereotyping Principle*, *supra* note 95 at 108-09, 119 (Franklin observes that "the Court's conception of discrimination had been forged primarily in the context of race. Over time, the Court had come to understand that the Jim Crow regime had marked racial minorities with a badge of inferiority and deprived them of the equal protection of the laws."); *see e.g.*, Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1095-96 (2009) (noting that earlier sex discrimination cases at the Supreme Court, such as Reed v. Reed, 404 U.S. 71 (1971), and others, "demonstrated that in important

Murray and Mary Eastwood, both groups were subject to the same reasons motivating their separate experiences of subordination—that their presence in society respectively threatened the dominant status quo.[102] And as a result, both groups endured stereotypical treatment and biases from their oppressors—even though, as Franklin notes, the stereotypical treatment in the case of women was characterized differently than the treatment toward racial minorities, mostly in the form of paternalism that sought to subordinate women allegedly for their own benefit.[103] Here, in some ways, stereotypes more often oppressed women in response to how they might threaten heteronormative gender hierarchies, compared to racial stereotypes that were used more overtly to exclude racial minorities from the white status quo.[104]

---

respects, sex was like race: familiar justifications for excluding women rested on stereotypes that denied individuals the opportunity to compete and relegated women to secondary status in American society") (citing cases).

102. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 235 (1965) (citing Dr. Ashley Montagu's finding that "the same underlying motives [are] at work in antifeminism as in racism, 'namely, fear, jealousy, feelings of insecurity, fear of economic competition, guilt feelings and the like") (quoting Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 184 (4th ed. 1964)).

103. Franklin, *The Anti-Stereotyping Principle*, *supra* note 95, at 119-20 ("[I]n many instances, sex discrimination assumed a different shape than race discrimination: Women attended gender-integrated public schools, ate in gender-integrated restaurants, and lived in the same houses and neighborhoods as men. The fact that the subordination of women did not always or even primarily take the form of segregation presented sex equality advocates with a related problem-namely, that '[m]en holding elected and appointed offices generally considered themselves good husbands and fathers.' They believed their wives and daughters were well served by the status quo and viewed the law's 'differential treatment of men and women not as malign, but as operating benignly in women's favor.'") (quoting Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1442 (2002)).

104. *See* Franklin, *The Anti-Stereotyping Principle, supra* note 95, at 129. Perhaps this noted difference is why "[i]n the Supreme Court's eyes, however, there remains a key difference between race-based and sex-based laws: white supremacy is a constitutional evil; sex differences are an impermissible basis for limiting individual opportunities but can otherwise be "cause for celebration." Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587, 626 (2011) (quoting U.S. v. Va., 518 U.S. 515, 533 (1996)). However, similarities in the marginalization of both groups also exist, which is why Pauli Murray developed the race-sex analogy. *See generally* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253 (1971). The white status quo also can rely on stereotypes to manipulate integration of outsider racial groups that still results in inter- and intra-group oppression. *See e.g.*, Ellen D. Wu, *The Color of Success: Asian-Americans and the Origins of the Model Minority* 252-255 (2014) (noting how the model minority myth

An approach was needed that would combat the idiosyncratic nature of stereotypes that kept women as second class.[105] As Reva Siegel and Neil Siegel have observed, "[l]aws enforcing the sex roles of the separate spheres tradition did not in fact protect women; they locked women in a social order that denied them the opportunity to define themselves as individuals and subordinated them by making them dependents and second-class participants in core activities of citizenship."[106] Rather than adhering to "the assumption that equal rights for women is tantamount to seeking identical treatment with men," Murray offered a corrective that "[i]f laws classifying persons by sex were prohibited by the Constitution, and if it were made clear that laws recognizing functions, *if performed*, are not based on sex per se, much of the confusion as to the legal status of women would be eliminated."[107]

Prior to her Supreme Court tenure, then-attorney and law professor, Ruth Bader Ginsburg imported Pauli Murray's ideas into her deployment of anti-stereotyping strategies in gender discrimination cases in the 1970s.[108] Her strategy for addressing sex discrimination often took shape in her legal counseling of male plaintiffs who did not fit within stereotypical gender roles in cases that ended up expanding conceptions of gender discrimination

---

allows the mainstream to pin African Americans against Asian-Americans and also can distort the class disparities within umbrella Asian-American groups. Finally, the intersectional identities complicate what dominant stereotypes can do. *See e.g.*, Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 274 (2002) (noting that "while privileged white women while privileged white women struggle against stereotypes that suggest they are vulnerable, asexual, and naturally suited to nurturing, many African American women resist stereotyping as strong, promiscuous, and irresponsible mothers") (footnote omitted)).

105. *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 95, at 120.

106. Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1101 (2009).

107. Murray & Eastwood, *supra* note 102, at 241. Murray and Eastwood further note that

> [m]orever, this may be the only way to give adequate recognition to women who are mothers and homemakers and who do not work outside the home—it recognizes the intrinsic value of child care and homemaking. The assumption that financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world is all too common. Underlying this assumption is the unwillingness to acknowledge any value for child care and homemaking because they have not been ascribed a dollar value.

Id.

108. Franklin, *The Anti-Stereotyping Principle, supra* note 95, at 120.

during that time.[109] Her anti-stereotyping strategy worked to bring about awareness that men and women possessed converging interests to disallow traditional gender assumptions that dominated laws promoting sex differentiation; her logic was that laws premised on stereotypes and gender roles also discriminated against men, and so courts had an incentive to see such legal mechanisms as discriminatory based on sex.[110] Ginsburg was motivated to "direct courts' attention to the particular institutions and social practices that perpetuate inequality in the context of sex."[111] In other words, her strategy for using male perspectives to undermine traditional sex stereotypes was her anti-stereotyping tactic, likely tied to demonstrate to white male judicial panels how the evisceration of traditional gender stereotypes through gender discrimination cases also benefitted the interests of men.[112]

Moritz v. Commissioner,[113] one of Ginsburg's earlier cases, illustrates her use of anti-stereotyping in gender discrimination cases as "a mediating principle that would give 'meaning and context to an ideal embodied in the

---

109. *Id*. ("Anti-stereotyping arguments enabled Ginsburg to foreground the state's enforcement of the male breadwinner-female caregiver model--a set of practices that was not visible in the canonical race discrimination cases but had long entrenched women's secondary status in the American legal system.")

110. *Id*. at 88 ("Ginsburg pressed the claims of male plaintiffs in order to promote a new theory of equal protection founded on an anti-stereotyping principle. This anti-stereotyping theory dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles. It was not simply anti-classificationist: It permitted the state to classify on the basis of sex in instances where doing so served to dissipate sex-role stereotypes. Nor was it strictly anti-subordinationist: Because discrimination against women had traditionally been viewed as a benefit to them, Ginsburg was concerned that an anti-subordination principle would provide courts with too little guidance about which forms of regulation warrant constitutional concern. The anti-stereotyping approach was designed to provide such guidance.").

111. *Id*. at 120.

112. Even until comparatively recently, Luke Boso has observed that "[j]udges have special difficulty analyzing evidence of male sex stereotyping" and they "often appear ill-equipped to handle the task of identifying and naming male norms." Luke A. Boso, Real Men, 37 U. Haw. L. Rev. 107, 127 (2015) (footnote omitted). Boso surmises that this difficulty likely stems from masculinity as the apex and beginning of gender viewpoints—an "innocent" perspective, much like whiteness is an innocent perspective to race that privileges white identities over others: "Judges, after all, are consumers of and participants in American culture, and rarely are any of us forced to critically examine the social ingredients necessary to be a man. Instead, society implicitly accepts masculinity as a fixed and stable concept, and most men express little outward doubt that they live up to its unspoken requirements." *Id.* For discussion of whiteness as racial innocence, see David Simson, Whiteness as Innocence, 96 Denv. L. Rev. 635 (2019).

113. Moritz v. Comm'r of Internal Revenue, 469 F.2d 466 (10th Cir. 1972).

text" of the Equal Protection Clause.'"[114] Charles Moritz, a single, unmarried man who was his aging mother's caregiver, sued when the IRS denied him a caregiver's tax deduction in 1968 because of his sex.[115] The underlying societal assumption about single males and their lack of familial responsibilities interfered with Mortiz's opportunity to deduct his taxes, but also exemplified the federal government's complicity in levying financial penalties for men who did not fall within traditional sex and family role stereotyping.[116] Likely what Ginsburg found appealing about Moritz's situation was that it showed how "[l]aws and customs that steer[ed] men out of the domestic sphere reinforce restrictions on women's participation in the public sphere, and the maintenance of such role divisions perpetuates long-standing inequalities between the sexes."[117] Beyond *Moritz*, various Supreme Court gender discrimination cases that involved Ginsburg's work in the 1970s imported aspects of her anti-stereotyping strategy. Several landmark cases associated with Ginsburg, such as *Reed v. Reed*,[118] *Frontiero v. Richardson*,[119] and *Califano v. Goldfarb*,[120] all had anti-stereotyping strategies that revealed state-enacted sex discrimination through reliance on traditional gender role stereotypes.[121] While not all of them achieved the

---

114. Franklin, *The Anti-Stereotyping Principle, supra* note 107, at 121 (2010) (quoting Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (defining mediating principle)).

115. 469 F.2d at 467-68.

116. *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 95, at 122-23 ("Congress's assumption that bachelors lacked family caregiving responsibilities, and the financial penalty it imposed on those who did shoulder such responsibilities, provided a striking illustration of the way in which the government entrenched traditional roles in the family--using carrots and sticks to steer men and women into the male breadwinner-female caregiver paradigm.").

117. *See* Franklin, *The Anti-Stereotyping Principle*, *supra* note 95, at 125.

118. Reed v. Reed, 404 U.S. 71, 71 (1971).

119. Frontiero v. Richardson, 411 U.S. 677, 677 (1973).

120. Ingraham v. Wright, 430 U.S. 199, 199 (1977).

121. Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J. L. & GENDER 83, 86-87 (2019) ("In Reed v. Reed, Ginsburg challenged an Idaho state probate law that preferred men over women for the role of estate administrator after a family member's death. She argued that the law reinforced the traditional roles of men as economic decision-makers, and women as nurturers, incapable of such complex decision-making . . . . Frontiero v. Richardson, Ginsburg challenged a federal law that provided automatic benefits for military wives but provided the same for military husbands only if they were able to prove financial dependency on their wives. This law, she claimed, was based on stereotypes of women as economically dependent on their husbands, in contrast to men, who the law presumed to be economically independent. Similarly, in Califano v. Goldfarb, Ginsburg challenged a federal law that provided social security

doctrinal aim Ginsburg had envisioned at their outsets, these cases had some substantial impact for furthering gender discrimination theories and allowed Ginsburg to rely on each case's advances as an incremental strategy to win over the Justices on the Court.[122] Eventually, her work would help elevate gender as a quasi-suspect class.[123]

Specifically in Title VII gender discrimination cases, a prominent development for anti-stereotyping theories in sex discrimination cases occurred at the Supreme Court in 1989 with *Price Waterhouse v. Hopkins*.[124] Again, anti-stereotyping principles confronted gender role stereotyping here. Accounting firm, Price Waterhouse, had hesitated to promote a woman candidate, Ann Hopkins, to partnership status because of stereotypical perceptions related to her gender:

> One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.' Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only 'because it's a lady using foul language.' Another supporter explained that Hopkins 'ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.'[125]

According to Justice Brennan, who authored the plurality opinion, the "*coup de grace*" comment recommended that "Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up,

---

survivor benefits for widows without regard to their dependency on their husbands and provided similar benefits for widowers only once the latter could prove their financial dependency on their wives. This law, too, reinforced the notion that men are automatically presumed to be more economically well-off than women, and thus not in need of survivors' benefits.") (footnotes omitted).

122. Scott M. Smiler, *Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success*, 4 CARDOZO WOMEN'S L.J. 541, 544 (1998) ("Justice Ginsburg designed a litigation campaign determined to chip away at past legal precedent and lead the Supreme Court towards accepting a policy favoring gender equality. She attempted to build a body of precedent that clearly established that each individual has a right to equal protection by the government regardless of gender. Similarly, she hoped to present the Court with 'easy' cases—those that factually appeared to be 'clear winners'—which would allow her to establish a favorable foundation of equal protection guidelines.").

123. *See* Maureen B. Cavanaugh, *Towards A New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 428 (1994) ("The pivotal role of then advocate Ginsburg in arguing the cases which resulted in gender being recognized as 'quasi-suspect' should not be underestimated.").

124. Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989).

125. *Id.* at 235 (citations omitted).

have hair styled, and wear jewelry.'"[126] During her time at Price Waterhouse, Hopkins did, indeed, behave aggressively and belligerently toward others in the office.[127] Yet, these criticisms did not attribute her behavior specifically to her personality or her character isolated from her gender; rather these criticisms were framed within perceptions that her actions deviated from stereotypical expectations of her gender.[128] In essence, Hopkins was being judged according to an idealized conflation of behavior and identity, which mirrored dominant gendered notions of how women should behave.[129] This prescriptive stereotyping behavior was often the norm at Price Waterhouse when reviewing prior female candidates for partnerships; they "'were viewed favorably if partners believed they maintained their femini[in]ity while becoming effective professional managers.'"[130] However, prescriptive stereotyping was not the only type of stereotyping behavior rampant at the firm; Justice Brennan also observed ascriptive stereotypical bias occurred in the way "'one partner repeatedly commented that he could not consider any women seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers.'"[131]

In the Court's view, Price Waterhouse's stereotypical review and subsequent hesitancy to promote Hopkins equated to gender discrimination under Title VII: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[132] In two ways, the Court's gender stereotyping rationale illustrated the impact these stereotypical biases interfered with Hopkins' lived experiences at the firm. First, Hopkins' behavior crossed stereotypical gender expectations, and it had cost her. Such stereotypical expectations reveal the gender hierarchy at Price Waterhouse that suggested that men could act in ways that Hopkins, as a woman, may not. Some of the comments derided her way of speaking as

---

126. *Id.* (citation omitted).

127. *Id.* at 234-35.

128. *See* Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 398 (2014) [hereinafter Herz, *Price's Progress*] ("*Price Waterhouse*, by correctly perceiving Ann Hopkins's individual traits but then judging them against an inappropriately gendered baseline, engaged in prescriptive stereotyping.").

129. *See Price Waterhouse*, 490 U.S. at 236.

130. *Id*.

131. *Id.* (quoting Hopkins v. Price Waterhouse, 618 F.Supp. 1109, 1117 (D.C. Cir. 1987).

132. *Id.* at 250.

"masculine" or her general manner as "macho."[133] Secondly, these stereotypical remarks underscored a general code of performance, which segregated men's behavior from women's behavior and dictated what was tolerable from one group was not from the other.[134] As Kramer remarks, the partners' "discriminatory comparison is therefore between the employee and a stereotypical employee, a heuristic rather than a real person."[135] Either way, Hopkins could not behave beyond the signature of the "heuristic."[136] The Court's use of gender stereotyping elucidates the difference. Central to animating the bias in the minds of Price Waterhouse's reviewing partners was the conflation between sex and gender performance—a moral judgment, revealed in the expectations against Hopkins' behavior. The Court's gender stereotyping theory in *Price Waterhouse* disaggregates sex and behavior to direct attention to the reality of Hopkins' experience at the firm—that her failure to conduct herself in a manner stereotypically expected of a woman in a management position was the inappropriate focus of her promotion review, not her actual merits or accomplishments at the firm.[137]

---

133. *Id.* at 235.

134. Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 925 (2014) [hereinafter Kramer, *The New Sex Discrimination*]; *see also* Ronald Turner, *Title VII and the Unenvisaged Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?*, 95 IND. L.J. 227, 244 (2020) ("Price Waterhouse went beyond merely prohibiting discrimination on the basis of an individual's biological sex (male or female). Ann Hopkins was discriminated against not because she was a 'woman per se,' but because she was, in the employer's view, not 'womanly enough.'" (quoting *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018))).

135. Kramer, *The New Sex Discrimination*, *supra* note 134, at 925.

136. *See e.g.*, Herz, *Price's Progress, supra* note 128, at 409 (noting that this effect has been described as a "double bind" by scholars); Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 104 NW. U. L. REV. 1, 26-31 (2010).

137. Kramer, *The New Sex Discrimination*, *supra* note 134, at 925. Kramer and others have noted the disaggregation between sex and gender: "*Price Waterhouse* pushes Title VII beyond the realm of biological sex to capture the performative aspects of an employee's identity. In this regard, the decision echoes the work of feminist scholars who sought to disaggregate sex and gender—the former refers to biological differences between men and women, whereas the latter describes the cultural expressions of masculinity and femininity." *Id.* Kramer references generally Judith Butler in regards to the topic of disaggregation—of how sex and gender are different concepts. *Id.* at 925 n. 176. However, in regards to *Price Waterhouse*, Kramer specifically references Mary Anne C. Case and Katherine Franke's works. *See id.* at 925 nn. 176 & 178 (referencing 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 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 95 (1995)).

Though anti-stereotyping theories existed in sex discrimination cases prior to *Price Waterhouse*, the Court's specific gender stereotyping theory here energized Title VII sex discrimination cases dynamically: "*Price Waterhouse* was indeed a watershed moment in the arc of sex discrimination law."[138] Its approach to discrimination surpassed addressing overt types of categorical distinctions in traditional cases of discrimination because of the disaggregation between biological sex and the concept of performance-related gender identity construction. But the post-decisional trajectory for *Price Waterhouse*'s gender stereotyping theory has not been as innovative; in fact, in treatment by subsequent litigants, Kramer describes the theory as a "mixed blessing."[139] In part, the trajectory might have been stunted by unresolved debates over the theory as either a transformative innovation for sex discrimination or merely a suspect strategy.[140] Also, interpretative nuances amongst legal scholars over how to define *Price Waterhouse*'s gender stereotyping theory has taken place, for instance, between Mary Anne Case's "thin view of sex" or "trait neutrality" approach and Kimberly Yuracko's approach that takes into account historical structural inequalities to applying *Price Waterhouse*.[141]

---

138. Kramer, *The New Sex Discrimination*, *supra* note 134 at 925; *see also* Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 755 (2020) ("This view of sex, that Ms. Hopkins's employer unlawfully punished her for failing to act 'like a woman,' broke new ground in recognizing sex as a socially pluralistic trait.").

139. Kramer, *The New Sex Discrimination*, *supra* note 134 at 925-26.

140. *Id*. at 926.

141. *Compare* Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins, *and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1344 (2014) (arguing that "[t]his thin view of sex, interpreting the words of Title VII to mean that an employee's sex 'must be irrelevant to employment decisions,' underlies the *Hopkins* decision, which therefore stands ready to be mobilized both by those who claim a particular sexual identity and those who do not, as well as by those who have one attributed to them by those who discriminate against them in employment and those who do not.") (quoting Price Waterhouse, 490 U.S. at 240); *with* Kimberly A. Yuracko, *Soul of A Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 761 (2013) ("argu[ing] that the burden-shifting framework--in which conformity demands viewed as highly costly by the court trigger a presumption of protection that the employer then bears the burden of overcoming—provides the most coherent and comprehensive account of the sex stereotyping prohibition at work" because "[t]raditional group hierarchies are to be dismantled, in part, by challenging the norms, stereotypes, and prejudices that justify and legitimize them") (referencing *Price Waterhouse*, 490 U.S. at 251; *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978); *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1977) (noting that "the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on

Shirley Lin summarizes another reason why the Court's gender-stereotyping theory here was revolutionary, but also how it has been cabined in the decades since the decision. How courts define "sex" can curtail the theory's reach: "[S]ex-stereotyping theory and arguments are typically anchored to binary 'biological' sex as a simplistic stand-in for the sex trait."[142] Though Lin observes some deviations here, "[c]urrent articulations of stereotyping theory tend to constrain readings of sex that acknowledge further sexual variation."[143] Furthermore, the disaggregation between sex and gender originally in *Price Waterhouse* has taken on patriarchal status quo nuances: "After *Price Waterhouse*, courts interpreted Title VII to reach both 'sex' as physical differences between only men and women, and 'gender' as cultural attributes self-determined or ascribed by others. Most judges and parties frame statutory 'sex' as a binary 'biological' classification that preserves the practice."[144] As a result, the aggregate of such readings creates the conundrum of the status quo regulating the adjudication of its own stereotypes in these discrimination cases—and unfortunately, getting the frameworks wrong. Cases incorrectly suppose that "sex stereotyping and the binary are necessarily linked and leaves intact normative barriers for those who identify with communities that include intersex, non-binary, agender, and gender-fluid, and renders less deliberative the important dialogic relationships between legal institutions and society, including social justice movements that advocate for politically vulnerable communities."[145] In Lin's view, the cabining of "sex" and "gender" to status quo conventions in developing gender stereotyping theories after *Price Waterhouse* illustrates how "[l]egal theories that do not reflect lived experience reinstate and legitimize dominant views of sex and gender, and allow institutions to persist in expressive harms against minorities."[146] Consequently, much development is still needed.

For queer minorities, Kramer's "mixed blessing" remark about *Price Waterhouse*'s anti-stereotyping theory is quite apt in another way—in circuit splits over the theory's interpretation and application.[147] Some LGBTQ

---

the basis of stereotyped characterizations of the sexes"); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971); *See e.g.*, Herz, *Price's Progress*, *supra* note 128, at 412-16 (referring to Case's approach as "trait neutrality").

142. Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 756 (2020).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See e.g.*, Joseph Altieri et al., *Employment Discrimination Against LGBT*

litigants have relied on *Price Waterhouse* with particular success in Title VII cases,[148] while others have not.[149] Although *Price Waterhouse*'s theory managed to undo the conflation between identity and conduct particularly by disaggregating biological sex and the constructions of gender through performance, some LGBTQ claimants have found *Price Waterhouse* difficult in sexual orientation discrimination cases because of another disaggregation, independent from *Price Waterhouse*: the disaggregation between mainstream conceptualizations of sex and sexual orientation. Prior to *Bostock*, this disaggregation led to regarding sex as a protective trait separately from sexual orientation.[150] In these cases, courts kept LGBTQ workers from using *Price Waterhouse* gender-stereotyping to remedy sexual orientation employment discrimination cases under Title VII by claiming that by doing so, these claimants would "bootstrap" their way into a sex discrimination claim when sexual orientation had not—until perhaps with *Bostock*—been recognized as a Title VII protected category. Of course, this interpretative gesture questions who gets to author the disaggregation between sex and sexual orientation identity categories and recalls Lin's thoughts regarding the status quo's imprimatur over how "sex" and "gender" distinctions in gender-stereotyping cases have been framed. Furthermore, when queer claimants use *Price Waterhouse* in Title VII cases based on

---

Persons, 17 GEO. J. GENDER & L. 247, 254 (2016) (detailing splits among the Second, Third, and Ninth Circuits on applications of *Price Waterhouse* for LGBTQ plaintiffs).

148. *See e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) ("[Defendant-employer] Wise cannot persuasively argue that because Prowel [ex-employee] is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee—regardless of his or her sexual orientation-marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred 'because of sex,' the case is not appropriate for summary judgment. For the reasons we have articulated, Prowel has adduced sufficient evidence to submit this claim to a jury.").

149. *See e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (observing that "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII") (citations omitted) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000).

150. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 304 (1995) (observing that "the doctrinal status quo makes discrimination based on sex or gender unlawful but leaves discrimination based on sexual orientation generally unregulated, even if this discrimination is patent and de jure") (footnote omitted).

sexual orientation discrimination, others have noticed how the theory varies in helping plaintiffs who appear gender-deviant versus those who appear less- or non-gender deviant.[151]

Transgender plaintiffs often have had more success using *Price Waterhouse* than plaintiffs suing under Title VII for sexual orientation discrimination. But Kramer's "mixed blessings" remark applies here as well. Though more successful than plaintiffs suing under sexual orientation discrimination, transgender plaintiffs here had to play by dominant distinctions of "sex" and "gender" to make successful claims that stereotyping resulted in discrimination.[152] Applying gender stereotyping, transgender plaintiffs exchange recovery for having their narratives obscured in court. For instance, as Kramer, Lin and others have pointed out in their readings of *Smith v. City of Salem*,[153] a case where a male-to-female transgender firefighter claimed sex discrimination under Title VII after she was suspended from her job when she started appearing as a woman at work,[154] the use of gender-stereotyping was successful but also restricted the plaintiff's ability to articulate her lived experience.[155] Despite identifying as female at her work, the plaintiff had to assert a male identity in court to access a gender stereotyping theory – basically arguing that she was a man who wanted to assert a female identity.[156] In this fashion, the Sixth Circuit's gender-stereotyping rationale "effectively erases transgenderism as an identity."[157] Lin observes that "[m]ost judges and parties frame statutory 'sex' as a binary 'biological' classification that preserves the practice. Indeed, the theory's origin story of a sex-gender mismatch led many courts to misgender the transgender plaintiffs before them and reify 'birth sex' as

---

151. *See e.g.*, Anthony Michael Kreis, *Dead Hand Vogue*, 54 U. RICH. L. REV. 705, 719 (2020) ("Price Waterhouse sex stereotyping claims were viable for effeminate gay men or masculine lesbians, but Price Waterhouse did not 'bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.'") (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000), overruled by Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018)).

152. *See* Drew Culler, *The Price of Price Waterhouse: How Title VII Reduces the Lives of LGBT Americans to Sex and Gender Stereotypes*, 25 AM. U. J. GENDER SOC. POL'Y & L. 509, 513 (2017) (noting how transgender individuals "may display gender non-conforming behavior that may pass the *Price Waterhouse* standard").

153. 378 F.3d 566 (6th Cir. 2004).

154. *Id.* at 568-69.

155. Kramer, *The New Sex Discrimination*, *supra* note 134, at 916.

156. *Id.*

157. *Id.*

biological sex[.]"[158] Perhaps how the dominant status quo controls the definitional frameworks in anti-stereotyping doctrines is where the development of these theories ought to focus on in the future.

Of course, the doctrinal successes and failures of queer minorities using *Price Waterhouse* to address sexual orientation and gender identity discrimination under Title VII had created circuit splits in federal courts prior to *Bostock*. "Bootstrapping" concerns may have evanesced after *Bostock*, where Justice Gorsuch's textualist majority functionally merges the categories of sex, gender identity, and sexual orientation together.[159] However, anti-stereotyping theories from *Price Waterhouse* and its progeny likely live to address discriminatory behavior premised on gender roles in the modern workplace, and hopefully apply to queer minorities. Given the various interpretative circuit splits over gender-stereotyping as it applies to both sex discrimination and discrimination against queer minorities prior to *Bostock*, it would be efficacious to continue developing this doctrinal area of anti-discrimination.[160]

B. LGBTQ Discrimination

Stereotypes against queer minorities share some overlap with gender stereotypes because anti-queer stereotypes also stem from heteronormativity.[161] However, where gender stereotypes often oppress by

---

158. Lin, *supra* note 142, at 756.

159. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (noting "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex").

160. *See* Jack B. Harrison, *"Because of Sex,"* 51 LOY. L.A. L. REV. 91, 195 (2018) ("Approaching the prohibition against discrimination based on sex contained in Title VII from a stance of gender pluralism that allows an individual's claim of gender identity to emerge organically from his or her lived experience would allow the law to provide broader protection against discrimination based on sex. This broad protection would reject a rigid and unequal binary understanding of gender, and would embrace the myriad ways in which gender identity is experienced, defined, and, ultimately, expressed. Tying together the plurality of gender identity and the manner in which that identity is expressed does not result in a wholesale rejection of current Title VII jurisprudence. In fact, tying these ideas together is consistent with the gender stereotyping jurisprudence that the courts have developed in the context of Title VII following *Price Waterhouse*.") (footnotes omitted).

161. *See e.g.*, Franklin, *Marrying Liberty and Equality*, *supra* note 15, at 827 ("Historically, anti-gay stereotypes had a powerful prescriptive component. Laws and policies that banned same-sex intimacy, barred gays and lesbians from the military, and excluded them from certain jobs all sought to enforce traditional, normative conceptions of sexuality and gender. A central aim of such laws was to channel men and women into a single, normative family form: the heterosexual marital family. Discrimination against

folding gender categories into a patriarchal hierarchy, anti-queer stereotypes aim to exclude queer individuals by drawing attention to how queer identities potentially threaten the heteronormative status quo.[162] Since *Bowers*, anti-stereotyping theories also came together in the Supreme Court's major pro-LGBTQ precedents. Specific to the legal advancements of LGBTQ movements, the Court's recognition of lived experiences has been substantively effective for creating doctrinal justifications that overcome discrimination for queer minorities, where historically membership status based on group traits did not avail any affirmative protections.[163] The eventual development of a distinctive anti-stereotyping theory in the Supreme Court's major pro-LGBTQ cases began a decade within *Bowers*' shadow, with *Romer v. Evans*.[164]

Unlike gender discrimination cases, anti-stereotyping approaches here try to lessen the threat anti-queer stereotypes posed to the heteronormative status quo in order to engender anti-discrimination protections. As we will discover, the anti-stereotyping approaches here highlight the lived experiences of queer minorities to a certain extent. Such approaches, however, also have limitations that beckon further development.

1. Animus in Romer

The earliest major examples of anti-stereotyping in the Court's pro-LGBTQ cases appear in *Romer* and *Lawrence v. Texas*, where concepts about animus and dignity in LGBTQ discrimination were used respectively. With animus, Justice Kennedy placed this concept in his *Romer* majority opinion to justify overturning a publicly-voted amendment to Colorado's state constitution that repealed municipal ordinance protections of individuals based on their sexual orientation.[165] Through the use of animus, Justice Kennedy would show that Amendment 2 created a "license to discriminate"[166] against sexual minorities that was designed and shaped by

---

gays and lesbians was often justified on the ground that this model of the family was superior to all others, and that the law ought to encourage all Americans to assimilate into it.").

162. *Id.* at 851 (noting "traditional anti-gay stereotypes, particularly those that depict gays and lesbians as a threat to children and the family").

163. *Id.* at 827-28.

164. 517 U.S. 620, 624 (1996).

165. *Id.* at 633.

166. *See* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 8 (1997) (describing Amendment 2 as a "license to discriminate against gays [that] was so broadly worded that it seemed to the Court likely to mandate some unconstitutional applications").

proponents within a solution to an alleged "special rights" problem.[167] Under Justice Kennedy's inquiry, not only did "Amendment 2 bar[] homosexuals from securing protection against the injuries that these public-accommodations laws address," it also "nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment."[168]

Amendment 2 proponents' "special rights" rhetoric—or "canard" as some have regarded[169]—was a strategy that relied on stereotypes of sexual minorities derived from not-so-distant struggles of the gay rights movement, such as the AIDS epidemic.[170] Similar special rights rhetoric was used by opponents of the Civil Rights Act of 1964.[171] The special rights rhetoric obscures the lived experiences of persons the rhetoric targets because the rights characterized as "special rights" are actually fundamental rights, which enable individuals for civic and communal participation.[172] In *Romer*,

---

167. For examples or discussions of the special rights rhetoric used for justifying Amendment 2, *see e.g.*, Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & INEQ. 117, 143–44 (2012) [hereinafter Kreis, *Gay Gentrification*] (showing how "[t]he American Center for Law and Justice Family Life Project's amicus brief in *Romer* massaged constructions of White privilege into the special rights argument"); Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation & Constitutional Law* 100-02 (2010). Justice Kennedy found Amendment 2's special rights justification "implausible." *See Romer*, 517 U.S. at 626.

168. 517 U.S. at 629.

169. *See e.g.*, Samuel A. Marcosson, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 137-38 (1995) [hereinafter Marcosson, *"Special Rights" Canard*]

170. *See* Nussbaum, *supra* note 167, at 94 (excerpting Colorado for Family Values' Amendment 2 campaign brochure that mentions how "[g]ays have been unwilling (or unable) to curb their voracious unsafe sex practices in the faces of AIDS").

171. Marcosson, *"Special Rights" Canard*, *supra* note 169, at 153 ("'Special rights' rhetoric is not unique to the anti-gay campaigns of the 1990s. It was a primary element of the opposition to the Civil Rights Act and remains as a fundamental premise of those who are still unconvinced of its merits.") (footnote omitted).

172. Marcosson refers to the congressional debates prior to the Civil Rights Act of 1964 to demonstrate how fundamental rights were obscured by "special rights" rhetoric. *Id.* at 155-56. The "argument [by civil rights champions] against the 'special rights' position was quite clear: the rights not to be denied a job, or a place to sleep at night while on the road, are not 'special rights' at all, but fundamental rights that should be guaranteed by law to all Americans." *Id.*; *see also* NAVA & DAWIDOFF, *supra* note 28, at 70 ("Typically, anti-discrimination laws do no more than prevent gays and lesbians from being fired from their jobs and denied housing or medical care because they are gay. These can be deemed 'special rights' only if a job, food to eat, a place to live, and medical

the stereotypes that threaten the status quo further entrenched the worthiness that the special rights fallacy created by allowing the status quo to falsely rationalize what injustices or inequities would arise in giving seemingly undeserving, immoral minorities, such as homosexuals, any "special rights."[173] These stereotypes provoked such outrage when in fact no special rights were being given, and what was being denied were fundamental rights.[174] Justice Kennedy underscores this view of the rights Amendment 2 was trying to deny in *Romer*:

> We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[175]

To further apply this dissection of the "special rights" rhetoric to LGBTQ individuals in *Romer* and beyond, the denial of basic rights that enable participation in American society eclipses the lived experiences of LGBTQ individuals more so than other minorities because of the historic characteristics of marginalization specific to non-heteronormative

---

attention are unusual demands.").

173. Amendment 2 proponents, Colorado for Family Values, distributed campaign literature that warns "about the danger [the militant gay agenda's] goals represent to you and your children's rights" and describes "the gay lifestyle has nothing in common with the kinds of traits and behaviors America has protected in its civil rights laws" and "it isn't kind of behavior society needs to reward with special class status." *See* Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 194 (1997) (excerpting Colorado for Family Values' campaign literature). Then the proponents used a public group sex scenario involving three men that they claimed was protected by a California anti-discrimination ordinance in order to justify that "special, protected civil rights are reserved for legitimate ethnic minorities who are truly disadvantaged." *Id.* Others have also noted that Amendment 2 proponents also used "gay as privileged" stereotypes, "portray[ing] gays and lesbians as wealthy, well-educated, and politically powerful" as another way to deploy the worthiness argument under special rights. *See e.g.*, Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for A Structural Analysis*, 11 AM. U. J. GENDER SOC. POL'Y & L. 13, 22 (2002). However, the *Romer* Court was later able to see through the proponents' special rights objections. *See* Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 593 (1998) ("The Supreme Court in *Romer* appears to have understood the 'special rights' objection to laws prohibiting discrimination against homosexuals as the reflection of a view that, because of something in their very nature, gay men and lesbians did not deserve protection from discrimination.").

174. *See* NAVA & DAWIDOFF, *supra* note 28, at 68 ("What Amendment 2 really attacked . . . was the Fourteenth Amendment's guarantee of equal protection of the laws.").

175. *Romer*, 517 U.S. at 631.

sexualities—the kind of self-policing and invisibility of LGBTQ identities discussed above. Nancy Levit observes similarly that the "special rights" rhetoric "diverts attention from human conditions" and is one of the devices of intolerance that requires dispelling in order to engender more visibility and "replac[e] the dominant cultural images with more accurate portrayals of the lived experiences of lesbians, gays, bisexuals, and transsexuals."[176]

Doctrinally in *Romer*, Justice Kennedy responded to Amendment 2 and the "special rights" justification by undermining the amendment's wide-ranging breadth. Within an equal protection framework, Justice Kennedy relies on animus to acknowledge the unprotected status of sexual minorities, but also to enshrine protections for them against Amendment 2's spurious deprivation of basic rights. Amendment 2 "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" because "[i]t identifies persons by a single trait and then denies them protections across the board."[177] From there, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[178] Quoting *Department of Agriculture v. Moreno*[179] in part, Justice Kennedy articulated that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected" and that such a "'desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[180] Moreover, Justice Kennedy acknowledged how the animus-driven amendment to Colorado's constitution "inflicts on [sexual minorities] immediate, continuing, and real injuries that outrun and belie any legitimate justifications[.]"[181]

Such observations of LGBTQ discrimination are ones he later imported and extended in *Lawrence*, *Windsor*, and *Obergefell*. Yet, *Romer* existed under the silhouette of *Bowers*.[182] Cary Franklin's comparisons between

---

176. Levit, *A Different Kind of Sameness*, *supra* note 2, at 931.

177. *Romer*, 517 U.S. at 632-33.

178. *Id.* at 632.

179. 413 U.S. 528, 534 (1973).

180. *Romer*, 517 U.S. at 634.

181. *Id.* at 635.

182. *Id.* at 636 (Scalia, J., dissenting). "In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." *Id.* (citing Bowers v. Hardwick, 574 U.S. 186 (1986)). *See also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 913 (2012). Pollvogt

Romer and *United States v. Virginia* ("*VMI*")[183]—both cases within the same Term—indicates "the Court was clearly hesitant in *Romer* to articulate a constitutional principle that would, at least potentially, invalidate vast amounts of legislation currently on the books."[184] The broader articulation of discrimination in *VMI*—a case that also had anti-stereotyping principles[185]—was likely part of the doctrinal acknowledgment that gender statuses receive a higher standard of protection and scrutiny review than sexual orientation.[186] This comparison and realization, of course, narrows *Romer*'s ruling on protections for sexual minorities.[187]

Still, for its anti-stereotyping significance, Justice Kennedy's characterization of "bare desire to harm" animus that motivated Amendment 2's adoption intimates at the blind, stereotypical hatred for sexual minorities that inhibited the requisite rationality needed for Amendment 2 to survive a lower-level scrutiny.[188] Dale Carpenter describes *Romer*'s animus as "a desire to disparage and to injure a person or group of people" and that to reach such desire, "[r]eliance on unsubstantiated fears and stereotypes is evidence of animus."[189] Additionally, further scholarly thought has provided

---

suggests that in *Romer*, "the Court glossed over the real—and most controversial—issue in the case: whether it was legitimate for a state to protect citizens' freedom not to associate with members of unpopular groups, and to use the law to enforce that right." *Id.* Her suggestion seems to imply that this "gloss over" was because of *Bowers* and the unprotected status of sexual minorities:

> [T]he Court was hamstrung in reaching this conclusion because *Bowers* was still good law at the time *Romer* was decided. And *Bowers* clearly supported the proposition that it was permissible to disapprove of homosexual conduct and orientation (as Justice Scalia emphasized in his dissent in *Romer*). Accordingly, the *Romer* majority performed a sleight of hand. It could not directly attack the validity of antigay bias, so it transformed its analysis into a structural critique."

Id.

183. 518 U.S. 515, 558 (1996).

184. Franklin, *Marrying Liberty and Equality*, *supra* note 15, at 861.

185. *Cf. id.* at 861-62 ("The Court in 1996 was not prepared to articulate a similarly robust anti-stereotyping principle in the context of sexual orientation; hence the question-begging, anti-moral-disapproval principle on which it purported to rely.").

186. *Id.* at 861-62.

187. *See id.* at 862 ("Deciding *Romer* as it did enable the Court to invalidate a particularly egregious instance of discrimination against gays and lesbians, but did not commit it to doing so in every case.").

188. *Romer*, 517 U.S. at 634.

189. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 270 (2013).

that "the prohibition on animus-based lawmaking is part of a broader constitutional principle, one that prohibits . . . 'naked preferences'" and that "the Constitution demands that every law serve a public-regarding interest or objective or, at a minimum, that it at least be intended to do so."[190] Cass Sunstein explains how government conduct can be restricted because of naked preferences, "if, for example, the government were barred from relying on disfavored stereotypes of women or members of minority groups, on the ground that reliance on such stereotypes is illegitimate and ought to be excluded from the category of public values."[191] As viewed here by Justice Kennedy, that animus behind Amendment 2 appears as none other than a naked preference: "It is a status-based enactment *divorced from any factual context* from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[192] In this way, though not in any thorough or explicit detail, *Romer* initiated the anti-stereotyping framework in Supreme Court LGBTQ rights cases. The Court's "rejection of Colorado for Family Values' political handiwork was a tentative first step toward the conclusion that equal protection bars state action that reflects or reinforces stereotyped conceptions of gays and lesbians as a threat to one's 'grandkids.'"[193] The start was restrained but notable. Despite constitutional constraints on protecting sexual minorities at the time, the *Romer* Court was, nonetheless, able to provide a limited protection. Animus as the anti-stereotyping concept was the mediator between *Romer*'s constraints and its goals.

2. *Dignity in* Lawrence

In *Lawrence v. Texas*,[194] the Court's next major pro-LGBTQ ruling, the concept of dignity emerged as another anti-stereotyping device. Compared to *Romer* and its animus jurisprudence, *Lawrence*'s dignity-based anti-stereotyping doctrine stimulated a more robust—though not flawless—examination of the lived experiences of LGBTQ individuals in overturning *Bowers*. *Lawrence* involved facts similar to *Bowers*: After entering John Lawrence's apartment in Houston and observing Lawrence and Tyrone Garner engaging in the type of sexual conduct that fell within Texas' sodomy

---

190. Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 198 (2019) (quoting Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984)).

191. Sunstein, *supra* note 190, at 1695-96.

192. *Romer*, 517 U.S. at 635 (emphasis added).

193. Franklin, *Marrying Liberty and Equality*, *supra* note 15, at 862.

194. 539 U.S. 558, 567 (2003).

statute, the county police arrested both men.[195] They were subsequently charged and convicted under the statute.[196] With this revisit of the issue of criminalized sodomy, the same threatening stereotypes about same-sex sexual behavior returned.[197]

Rather than focusing on the motivational component of discriminatory conduct as he did in *Romer*, Justice Kennedy, who wrote this opinion as well, concentrated on the grave injury to sexual minorities under Texas' sodomy statute, which criminalized consensual same-sex intimacy specifically.[198] Part of the labor of *Lawrence* involved debunking why such behavior was even criminalized, which would consequently lead Justice Kennedy to examine the dignitary harms that existing stereotypes regarding same-sex intimate behavior inflicted. But these stereotypes actually represent more than mere hatred toward sexual minorities. As the National Organization for Women's amicus brief supporting Lawrence and Garner pointed out, sodomy laws—including Texas' here—used stereotypes against non-heteronormative sex to reinforce heteronormative gender roles between men and women, while cementing the biased conflation between identity status and conduct in sexual minorities: "Texas's prohibition of same-sex intimacy prescribes a gendered standard of sexual behavior and proscribes deviation therefrom: men must not do what women are expected to do (engage in sexual intimacy with men), and women must not do what men are expected to do (engage in sexual intimacy with women)."[199] Hence, Justice Kennedy's attempts to overturn *Bowers* would become more consequential by using an anti-stereotyping tactic to unveil these sodomy law's underlying subtexts.

---

195. *Id.* at 562-63.

196. *Id.* at 563.

197. Dale Carpenter notes the stereotypical lens in one of the arresting officer's summaries of witnessing Lawrence and Garner's sexual encounter. *See* Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1501 (2004) ("Quinn's account of the men as continuing to have sex for over a minute with deputies watching and shouting, guns aimed at them, and the light turned on, plays into stereotypes of gay men as so sex-obsessed they are literally unable to control themselves. They are animals in their lust. Quinn's complaint that Lawrence and Garner lacked what he calls 'self-dignity' is very telling in this regard. Quinn could have expected that his version of events would be believed, since these stereotypes of gay men as sex-obsessed are widely shared.").

198. *Lawrence*, 539 U.S. at 562 ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.").

199. Brief of NOW Legal Defense & Education Fund as Amicus Curiae Supporting Petitioners at 12-13, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

To subvert the stereotypes that buttressed sodomy laws, *Lawrence* centrally recognized the lived experiences of persons who engaged in consensual same-sex intimacy by rejecting the moral stain the status quo had stereotypically associated with non-heteronormative sex and replacing it with a dignity perspective instead. Moral connotations had allowed the *Bowers* Court to conflate Hardwick's conduct with his identity, impugn his character, and justify his non-protection.[200] Instead, Justice Kennedy focused on elevating any latent constitutional interests in consensual same-sex intimacy—revisiting the privacy and autonomy protections that Justices Blackmun and Stevens had found in their respective *Bowers* dissents.[201] Here, Justice Kennedy connected sexual conduct in *Lawrence* to conduct protected by *Griswold v. Connecticut*,[202] *Eisenstadt v. Baird*,[203] *Roe v. Wade*,[204] and *Carey v. Population Services International*.[205] This connection depended on seeing how all of these cases invoked constitutional privacy and autonomy interests, and that such protections reached beyond protecting merely married adults.[206] Where *Bowers* had stereotypically misjudged consensual same-sex intimacy as immoral, Justice Kennedy recast the conduct just far enough to distance it from heteronormative values weighted toward procreative and reproductive sex choices; instead, he examined why consensual same-sex intimacy shares similarity to conduct protected by reproductive rights cases. For instance, when Justice Kennedy criticizes the *Bowers* Court's distinctions between heteronormative sex and non-heteronormative sex in presenting the issue in *Bowers* as whether there is "a fundamental right upon homosexuals to engage in sodomy," he is raising

---

200. *See Bowers*, 478 U.S. at 192, 196 ("It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.").

201. *Lawrence,* 539 U.S. at 564 ("[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."). *See Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting) ("The case before us implicates both the decisional and the spatial aspects of the right to privacy."); *see also id.* at 218 (Stevens, J., dissenting) ("Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' or, indeed, between unmarried heterosexual adults. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed[.]") (internal citations omitted).

202. 381 U.S. 479, 486 (1965).

203. 405 U.S. 438, 443 (1972).

204. 410 U.S. 113, 154 (1973).

205. 431 U.S. 678, 684-85 (1977).

206. *Lawrence*, 539 U.S. at 564-66.

precise concerns about stereotypical judgment in *Bowers*: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[207] *Bowers*' distinctions had been too quick and too dismissive—perhaps examples of "naked perceptions" that led to profound consequences for sexual minorities that the *Bowers* majority were eager to ignore. After all, state sodomy statutes carried invasive penalties that pried at the sexual choices of LGBTQ individuals and were why Kennedy found that they interfered on the level of *Griswold*, *Eisenstadt*, *Roe*, and *Carey*: "[Sodomy] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[208] As a result, Justice Kennedy's humanizing here led him to justify curbing regulation of same-sex intimacy, allowing consenting adult individuals to "choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[209] Justice Kennedy reached that conclusion after referencing the lived experiences *Bowers* had stereotypically mischaracterized: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[210] This humanized characterization of consensual intimacy applied to sexual conduct between same-sex partners, and contrasted significantly from the heteronormative panic around consensual sex between men.[211] In this fashion, broad references to humanity propelled *Lawrence*'s anti-stereotyping goal and effect.

Complimentary to *Lawrence*'s use of dignity, Justice Kennedy also recounted a complex history of contemporary sexuality that both revealed the heteronormative values behind state regulation of sodomy and the status quo conflation of conduct and identity that constructed the "homosexual identity."[212] As another use of the lived experience to anti-stereotyping effect, Justice Kennedy demonstrated regulation of non-procreative sex acts was used originally to reinforce heteronormative values[213] and the status

---

207. *Id.* at 567.

208. *Id.*

209. *Id.*

210. *Id.*

211. Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, *supra* note 22, at 218.

212. *See Lawrence*, 539 U.S. at 568.

213. *Id.* at 568-69 ("[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This

quo's supremacy over constructing sexual identities.[214] Actual history showed that the moralizing against same-sex intimacy had modern heteronormative roots rather than inherently "ancient" ones that Justice White had claimed in *Bowers*.[215] Citing to factual research, *Lawrence*'s historicism here effectively destabilized the "longstanding" stereotyped beliefs the *Bowers* Court referenced toward sexual minorities, revealing such beliefs as more recent status quo reactions to perceived deviations from its values. But such values, even if they might be embodied by religious beliefs and morality,[216] do not inform the regulation of private consensual sex acts; instead, constitutional values do.[217]

Justice Kennedy's attempt to establish and apply anti-stereotyping principles in *Lawrence* had some blind spots as well. Mostly, the blindness existed in the way *Lawrence* generalized the lived experiences of sexual minorities in ways that equate such experiences as being on par with experiences of the heteronormative status quo. An appeal to resemblance can reach for common humanity but also overstate similarities to a point where that appeal obscures crucial realities or differences.[218] By true accounts, Lawrence and Garner were engaging in a sexual encounter that prompted their arrest and later conviction, but they were not in a relationship

---

does not suggest approval of homosexual conduct.[. . .] It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.").

214. *Id.* at 568. ("The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." (citations omitted)).

215. *Id.* at 570 ("The longstanding criminal prohibition of homosexual sodomy upon which the Bowers decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character."); *see also id.* ("It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.").

216. *Id.* at 571 ("The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.").

217. *Lawrence*, 539 U.S. at 571 ("These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'") (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

218. Robinson & Frost, "*Playing it Safe*," *supra* note 5, at 1581.

with each other.[219] In this way, Justice Kennedy's examination of consensual same-sex intimacy sanitized the idea of men having sex with other men, which helped avoid the stereotype of hypersexuality or promiscuity in gay men,[220] but inaccurately overstated the possibilities of consensual same-sex intimacy as conduct that could express "a personal bond that is more enduring" in Lawrence and Garner's actual pairing.[221] Justice Kennedy was extrapolating at possibilities, not referring to the realities; intimate conduct can be "one element," but it is not an element here.[222]

Additionally, by destabilizing the established stereotypical notion that sexual conduct between queer individuals was deviant, and thus queer individuals themselves were immoral in *Lawrence*, Justice Kennedy seemed to imbue queer minorities with dominant status quo connotations as a way to rescue them from illegitimacy and later to conjure his recognitions of their dignity. Marc Spindelman posits that "[w]ith its examination of the history of sodomy laws, the [*Lawrence*] Court clears away a significant doctrinal obstacle for declaring that homosexuality is just like heterosexuality: the claim, traceable at least to *Bowers v. Hardwick*, that the two should be treated as fundamentally different because historically they were."[223] Coupled with what Spindelman refers to as the "like straight" idea propagated by advocates in *Lawrence*, the Court seemed to have been led by such persuasion to be able to examine the privacy and reproductive rights cases, where the *Bowers* Court had refused.[224] The positive result was Justice Kennedy's

---

219. Richard D. Mohr, *The Shag-A-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 365, 375-76 (2004). In fact, "[t]he person with whom Garner had had an enduring personal bond was the man who on a false accusation of weapons violations sent the police into Lawrence's apartment where Lawrence and Garner were having anal sex and who had earlier been granted a temporary restraining order against Garner based on charges of sexual battery in their enduring personal relationship." (citing Bruce Nichols, *"We Never Chose to be Public Figures": Houston Men Were Surrounded by Secrecy Throughout Appeal,* DALLAS MORNING NEWS, June 27, 2003, at 19A).

220. *See e.g.*, James D. Woods, *The Corporate Closet* 65 (1993) ("Prevailing stereotypes about gay men (that they are hypersexual, promiscuous, indiscriminate) further emphasize the sexual aspects of their lives. The result is a tendency to hypersexualize gay men, to allow their sexuality to eclipse all else about them, even to see sexual motives or intentions where there are none.").

221. *Lawrence*, 539 U.S. at 567.

222. *Id.*

223. Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1621 (2004).

224. *Id.* at 1619-20.

pronouncement that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[225] But from an anti-stereotyping perspective, this reasoning only swapped out one stereotype with another—that "[g]ays are just like heterosexuals," and so "[l]esbians and gay men, being just like heterosexuals, are entitled to all the rights heterosexuals receive, and for the same reasons."[226] Spindelman further posits the "road to the legitimization of gay rights [from *Lawrence*] also entrenches a hierarchized dichotomy of the 'good gay' over the 'bad queer,' where the assimilated good gay becomes the figure of acceptable gay identity in mainstream heterosexual society, and the bad queer is further marginalized."[227] Thus, the side effects from "like straight" or "sameness" arguments in *Lawrence* are pernicious because rather than excluding sexual minorities from the status quo based on immorality, these arguments neutralized morality considerations only to insert sexual minorities beneath a hierarchy dominated not by procreative or non-procreative categories, but privileged by heteronormative status quo values of acceptability and respectability. This likening of queer minorities with heteronormativity confounded *Lawrence*'s conception of dignity with aspects of respectability as well. Despite declaring that "[u]nquestionably, *Lawrence* is an about-face in the Supreme Court's interpretation of the Constitution's application to the lives and practices of gay men and lesbians,"[228] Katherine Franke also finds the decision severely limiting: "The world post-*Lawrence* remains invested in forms of social membership and, indeed, citizenship that are structurally identified with domesticated heterosexual marriage and intimacy."[229]

---

225. *See* Berta E. Hernández-Truyol, *Querying* Lawrence, 65 OHIO ST. L.J. 1151, 1216, 1244-45 (2004) (noting that "[t]hroughout the *Lawrence* opinion, Justice Kennedy compared homosexual sexual conduct to heterosexual sexual conduct, thus promoting the idea that the former is acceptable so long as it is mimetic of the latter" and thus, "gays and lesbians, and their conduct, deserve constitutional protection only insofar as they perform and exist 'just like' heterosexuals").

226. Spindelman, *supra* note 223, at 1619.

227. Stewart L. Chang, *Gay Liberation in the Illiberal State*, 24 WASH. INT'L L.J. 1, 4 (2015).

228. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1401 (2004); *see also* Susan Frelich Appleton, *Contesting Gender in Popular Culture and Family Law: Middlesex and Other Transgender Tales*, 80 IND. L.J. 391, 420-21 (2005) ("[I]n *Lawrence v. Texas*, the United States Supreme Court's critique of the stigma, discrimination, and demeaning effects of sodomy bans shows sensitivity to the experiences of gays and lesbians.")

229. Franke, *supra* note 228, at 1415-16. Franke is quite critical of the normative limits of *Lawrence* because of its domestication of non-heterosexual sexual conduct:

> *Lawrence* offers us no tools to investigate "kinds of intimacy [and sex]

3. Anti-Stereotyping in Windsor *&* Obergefell

With the marriage equality cases, Justice Kennedy furthered the anti-stereotyping concepts from *Romer* and *Lawrence* by deliberately tying them together—first, in *Windsor* and then finally in *Obergefell*. In doing so, Justice Kennedy ultimately evinced how exclusions of same-sex relationships from legal recognition in marriage were motived by the status quo's stereotypical animus against same-sex couples who aspired to marry, and, in turn, the same exclusions impinged on the dignities of these same-sex couples.

Starting with *Windsor*'s examination of the *Defense of Marriage Act*,[230] Justice Kennedy began to fuse animus and dignity concepts to increase their anti-stereotyping potential while mediating toward the equal protections of same-sex couples in state marriages on the federal level, which *DOMA* deprived, and maintaining the boundaries of protected categories from expanding to envelope sexual minorities as suspect or quasi-suspect classes. Stereotypes depicting how same-sex couples disrupted the institution of marriage have plagued LGBTQ movements since same-sex couples started actively questioning their exclusion from marriage.[231] Often, status quo arguments against including same-sex couples have harped on exaggerated differences from opposite-sex relationships that were rooted in a preference for maintaining heteronormative gender roles over recognizing relationships

---

> that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation." In this regard, the opinion's implications are at once modest and quite broad in scope. The legal program that is most easily suggested by *Lawrence* is one undertaken by adult gay couples who seek recognition for their relationships and whose sexuality is not merely backgrounded, but closeted behind the closed doors of the bedroom. This is a project devoted to celebrating our *relationships*; it is not a project of sexual rights or the politics of sexuality. Indeed, against this framing of the "gay agenda," the heterosexual reproductive rights cases start looking pretty darn radical. In this sense, overreliance on *Lawrence* risks domesticating rights, sex, and politics, and charting us down a path of domestic normative sexual citizenship. The political subjects it predetermines are husbands and wives, and the legal projects it maps out do not extend beyond gay marriage.

Id. at 1416 (quoting Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 558 (1998); and referencing Lawrence v. Texas, 539 U.S. 558, 577-87 (2003)).

230. 1 U.S.C. § 7 (1996).

231. For instance, Phyllis Schlafly associated the portent of same-sex marriages to dissolution of women and traditional gender roles in the home. *See* PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 85-90 (1977).

that do not apparently seem to bolster procreation, child-rearing, or Judeo-Christian religious attitudes toward family.[232] Essentially, these stereotypes exposed the heteronormative mainstream's perceived threat and anxiety over same-sex relationships.[233] But *Windsor* also took place after some major societal fluctuations in the visibility and acceptance of queer minorities and relationships. After a raucous period of marriage litigation and politics in the 1990s that involved cases such as *Baehr v. Lewin*[234] and the rise of civil unions and partnerships,[235] several notable states had begun adopting same-sex marriages in the 2000s.[236] Despite setbacks, such as California's Proposition 8, the national debate over same-sex marriages was shifting positively in the 2010s.[237] Justice Kennedy's anti-stereotyping jurisprudence

---

232. For instance, Eskridge contends that same-sex marriage opponents maintained procreative and religious reasonings for exclusions. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 96-99 (1996).

233. In the litigation over California's Proposition 8, the Ninth Circuit in *Perry v. Brown* mentioned the various campaign advertisements from opponents of same-sex marriages:

> Television and print advertisements "focused on . . . the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" and "conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships." These messages were not crafted accidentally. The strategists responsible for the campaign in favor of Proposition 8 later explained their approach: "'[T]here were limits to the degree of tolerance Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society,'" such as what children would be taught in school.

Perry v. Brown, 671 F.3d 1052, 1094 (9th Cir. 2012) (quoting Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 990, 998 (N.D. Cal. 2010)).

234. 852 P.2d 44 (Haw. 1993).

235. *See, e.g.*, Baker v. State, 744 A.2d 864 (Vt. 1999).

236. *See, e.g.*, Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

237. Alongside *Windsor* during the Supreme Court's 2012-2013 Term, the Court also heard Hollingsworth v. Perry, 570 U.S. 693 (2013), in which same-sex couples from California challenged the constitutionality of Proposition 8. 570 U.S. 693, 702 (2013). Proposition 8 was a state ballot initiative that had amended the California state constitution, limiting marriages to only opposite-sex couples. *Id.* at 701. Proposition 8 had been a reaction to a California Supreme Court's 2008 marriage equality decision. *Id.* During the 2012-2013 Term, Gallup polling showed substantial public recognition of the gravity of anti-gay bias. *See* Jeffrey M. Jones, *Most in U.S. Say Gay/Lesbian Bias*

from *Romer* and *Lawrence* was now directly revived on more contingently promising ground; though some have regarded *Windsor*'s parameters as narrower on the marriage issue compared to *Obergefell* two years later, no doubt the conditions for recognizing same-sex relationships had changed.[238]

Doctrinally in *Windsor*, Justice Kennedy refined his prior anti-stereotyping concepts from *Romer* and *Lawrence* here in two related ways. First, he resuscitated and reframed *Lawrence*'s dignity concepts, observing how "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."[239] Instead of exactly importing *Lawrence*'s conception of dignity, Justice Kennedy deviated from it in *Windsor*. Rather than warranting inherent respect for a person's identity and autonomy,[240] dignity in *Windsor* was more about being *dignified*—about obtaining dignity through the respectability that marriage

---

Is a Serious Problem, GALLUP (Dec. 6, 2012), http://www.gallup.com/poll/159113/most-say-gay-lesbian-bias-serious-problem.aspx (relating that sixty-three percent of Americans now believe discrimination against gays and lesbians to be a "very" or "somewhat" serious problem). National surveys also reported growing public support for marriage equality. *See* Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013); *see also Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (Mar. 20, 2013), http://www.peoplepress.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changingdemographics/ (reporting that two-thirds of Americans agree same-sex couples should have the same legal rights as heterosexual couples while 30% disagree).

238. Neil Siegel summarizes the potential narrowness of *Windsor*'s marriage equality issue:

> Reading *Windsor* as a case about extraordinary evidence of congressional animus—extraordinary because of the nature of the evidence (federal overreach) used to infer the presence of animus—limits the Court's reasoning to federal legislation that restricts marriage to opposite-sex couples. So understood, the Court's ruling either has no implications for the constitutionality of state prohibitions on same-sex marriage, or else it implies the validity of such prohibitions. If the state is the relevant constitutional subject, then perhaps it may choose to deny dignity, just as it may choose to confer it. Or perhaps it may act upon an understanding of dignity that is different from the prevailing conception in states that permit same-sex marriage.

Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEG. ANALYSIS 87, 96 (2014).

239. *Windsor*, 570 U.S. at 768.

240. *Lawrence*, 539 U.S. at 567 ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

confers upon same-sex couples.[241] *Windsor* involved Thea Spyer and Edith Windsor's legally recognized same-sex marriage in New York state.[242] After Spyer's 2009 passing, Windsor inherited Spyer's entire estate but was denied $363,053 federally in estate tax exemption money as a surviving spouse because *DOMA* barred federal recognition of same-sex marriages.[243] From a critical perspective, a wealthy, white woman's estate tax issues would gather more empathy among the Justices than the casual sexual encounter of interracial male same-sex partners in *Lawrence*.[244] Indeed, rather than merely imply the "like straight" motivation in *Lawrence*, Justice Kennedy depicted it sharply here as an anti-stereotyping tactic in his handling of Spyer and Windsor's lived experiences. In *Windsor*, the women appeared and behaved like many couples in long-term committed marriages, who travel together, are concerned for each other's health, and expect to inherit each other's estates.[245] Even if others have later observed the identity construction at play as the opinion excerpted only the domestic and sanitized portions of their relationship,[246] these recited factual details were, nonetheless, conspicuously reminiscent of prominent parts of traditional wedding vows—where couples promise each other in marriage "to have and to hold from this day forward, for better, for worse, for richer, for poorer, in sickness and in health."[247] Together, these descriptions depicted such a domestic, conventional "married" life that when we learn of Windsor's hefty inheritance tax problem, that tax forfeiture became the outlier that eventually ignited the discussion about discrimination and led to dignity considerations.[248] And while certain states had begun to dignify same-sex

---

241. *See Windsor*, 570 U.S. at 763 ("It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.").

242. *Id.* at 753.

243. *Id.*

244. After the *Windsor* decision, a *New Yorker* article prominently detailed Windsor's sex life with Spyer and afterward. *See* Ariel Levy, *The Perfect Wife*, NEW YORKER (Sept. 30, 2013), http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife.

245. *Windsor*, 570 U.S. at 753.

246. *See* Robinson & Frost, *The Afterlife of Homophobia*, *supra* note 22, at 224-25; Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521, 523 (2015).

247. *E.g.*, *Traditional Wedding Vows for Your Ceremony*, MARTHA STEWART WEDDINGS, https://www.marthastewart.com/7888175/traditional-wedding-vows (last updated Mar. 25, 2021) (quoting from the Protestant vow).

248. *Windsor*, 570 U.S. at 770 ("The history of DOMA's enactment and its own text

couples with marriage recognition, *DOMA*'s restrictions federally resulted in "injury and indignity [that] is a deprivation of an essential part of the liberty protected by the Fifth Amendment."[249] States had and did confer that dignity through marriage, and *DOMA* took it away on the federal level, leaving behind not just a tax issue for surviving same-sex spouses like Edith Windsor, but indignity as well.

Beyond dignity concepts, *Windsor* also significantly built on prior anti-stereotyping jurisprudence by focusing on animus, which Justice Kennedy ascribed as the source of *DOMA*'s indignity effect. From *Romer*, Justice Kennedy revived his use of *Moreno*'s concept of a "bare congressional desire to harm" and applied it here to *DOMA*:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[250]

Legislative history uncovered such bare desire to harm, showing how the House of Representatives "concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.'"[251] *DOMA*'s purpose perpetuated that stereotype for legally married same-sex couples on the state and federal levels: "[*DOMA*] tells [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage."[252] Such inferiority derives from a status quo preference for opposite-sex relationships, as the context in which heteronormative male-to-female gender roles are best replicated versus same-sex relationships, which ostensibly blurs or complicates those traditional gender roles. Roberta Kaplan, an attorney for Edith Windsor, intimates this motivating perception through the speculative comparisons between same-sex and opposite-sex parenting made by the Bipartisan Legal

---

demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.").

249. *Id.* at 768.

250. *Id.* at 770.

251. *Id.* at 771 (quoting H.R. REP. NO. 104–664, at 16 (1996)).

252. *Id.* at 772.

Advisory Group ("BLAG"), a group that had challenged Windsor's *DOMA* claim.[253] Kaplan recalls how BLAG asserted "that gays and lesbians are not as effective at parenting as straight people; that there is some advantage to children to being raised by a male and female biological parent"; and "that children should have male and female parents who assume traditional gender roles."[254] Justice Kennedy even glibly referenced the title "Defense of Marriage Act" to indicate the act's purpose "was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'"[255]—hinting at the status quo's perceived threat from same-sex couples.[256] Invariably, Justice Kennedy clarified that the legislative animus, in part, harbored on stereotypes that fueled *DOMA*'s exclusion from marriage: that same-sex couples were inferior to opposite-sex couples under the heteronormative hierarchy.

Since *Windsor* framed the issue under equality principles, Justice Kennedy's import of *Romer*'s animus concept was central to preventing *DOMA*'s survival under rationality review: "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 laws, sought to protect in personhood and dignity."[257] The holding illustrated the relationship between animus and dignity in Justice Kennedy's anti-stereotyping approach; *DOMA*'s irrationality was partly demonstrated by the disproportionate dignitary harms the act inflicted upon same-sex couples and their families, all of which originated from a stereotypical animus toward same-sex couples' desires to marry.[258] A major underlying message here was that stereotypical fears and prejudice toward same-sex couples cannot be

253. Roberta Kaplan & Jaren Janghorbani, *Proof vs. Prejudice*, 37 N.Y.U. REV. L. & SOC. CHANGE 143, 144 (2013).

254. *Id.*

255. *Windsor*, 570 U.S. at 771 (quoting H.R. REP. NO. 104–664, at 16 (1996)).

256. *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 190 (2016) [hereinafter Robinson, *Unequal Protection*] ("Justice Kennedy treats DOMA as if its title were the 'Demean Gay Marriage Act,' but the statute, on its face, valorizes traditional marriage. Although the title does not expressly refer to same-sex marriage, it does imply that same-sex marriage represents a threat to traditional marriage.").

257. *Windsor*, 570 U.S. at 775.

258. *Id.* ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.").

legitimized and weaponized to legally exclude them.[259]

The now-intwined animus-dignity jurisprudence in *Windsor* resurfaced two years later in *Obergefell*, where the fundamental right to marry was extended to same-sex couples.[260] This time dignity concepts took center focus as the Court examined *state exclusion* of same-sex marriages, a wider terrain than *Windsor*.[261] Although the case was primarily concerned with how marriage dignifies same-sex couples and that relation to the denial of the fundamental marriage right, *Obergefell* acknowledged that such exclusions among states derived from some kind of animus, noting in several places that the refusal to legally recognize same-sex couples in marriage stemmed from either a "sincere, personal opposition"[262] or "a long history of disapproval of their relationships."[263] Animus was not visibly described as the naked perceptions hatred or bare desire to harm here, but was associated with how it had underscored disapprobation in *Windsor*; it resided in the background of *Obergefell*'s discussions, serving as the reason for Justice Kennedy's empathic vignettes of the litigants' lived experiences and his cautious historicism that requires lived experiences to dispel disapproval and make way for marriage dignification.[264]

In *Obergefell*, some state marriage cases, involving more than a dozen

---

259. Franklin notes that after *Windsor*, "[c]ourts today talk differently about the rights of gays and lesbians under the Fourteenth Amendment than they used to. This 'rhetorical shift' reflects an emerging consensus that, in the context of sexual orientation, '[t]he Constitution cannot countenance "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."'" Franklin, *Marrying Liberty and Equality*, *supra* note 15, at 872-73.

260. 576 U.S. 644 (2015).

261. *See* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 158 (2019) (noting that a "dignity focus" indeed "permeated Justice Kennedy's opinion in *Obergefell*").

262. *Obergefell*, 576 U.S. at 672.

263. *Id.* at 675.

264. *See* Araiza, *supra* note 261, at 158 (discussing animus in *Obergefell* as "arguably percolat[ing] under the surface of Justice Kennedy's 2015 majority opinion"). Also, according to Carlos Ball, *Obergefell* "does not focus on questions of intent or animus; instead, it focuses on the effects that excluding same-sex couples from the opportunity to marry had on sexual minorities and their children." Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 1, 639, 649 (2016). William Araiza interprets Ball's characterization here as a "careful distinction" that "requires a nuanced understanding of how different types of discrimination relate differently to animus." Araiza, *supra* note 261, at 160. Here, "it requires an understanding of how animus relates both to the concept of bigotry and to the dignitary harms Justice Kennedy sought to remedy by rejecting the constitutionality of same-sex marriage bans in *Obergefell*." *Id.* at 160-61. In this way, the concept of animus is backgrounded in *Obergefell*.

same-sex couples, percolated after *Windsor* and were consolidated for the Court's review.[265] This time, the visibility of same-sex couples had begun to permeate mainstream cultural consciousness so that same-sex couples in family-oriented depictions started appearing in popular media.[266] The shift in public attitudes toward same-sex marriage revealed how hostile stereotypes against same-sex relationships seemed to be waning.[267] Still, Justice Kennedy proceeded to develop the anti-stereotyping tactics and jurisprudence he had already cultivated in the prior pro-LGBTQ cases. For instance, *Obergefell* again illuminated the lived experiences of same-sex couples who faced exclusion from state marriage recognition. Using vivid vignettes to demonstrate the indignities of being barred from marriage, Justice Kennedy recounted the personal and poignant struggles of same-sex couples more deeply and profoundly than he had ever done in the prior pro-LGBTQ cases.[268] James Obergefell's fleeting and makeshift out-of-state wedding to John Arthur inside a medical transport plane on a Baltimore airport tarmac was conveyed even more affectingly when Justice Kennedy described how the couple returned to their home state to find that their out-of-state marriage would not be recognized, so that when Arthur passed away, Obergefell could even not be listed as the surviving spouse on Arthur's death certificate.[269] Thus, both men were, as Justice Kennedy mournfully described, to "remain strangers in death."[270] In referencing history, as he had done in *Lawrence*, Justice Kennedy acknowledged the beginnings of marriage as a heteronormative status quo institution—a "lifelong union of a man and woman [that] always has promised nobility and dignity to all persons, without regard to their station in life"[271] But marriage, according to Justice Kennedy, is also an evolving institution, one that can also recognize sexual minorities, whose intimate behaviors were once "condemned as

265. *Obergefell*, 576 U.S. at 653-54.

266. For instance, Chevrolet and Coca-Cola both ran notable ads during this time featuring same-sex couples and their families. *Chevrolet Showcases Gay Families in Olympics Opening Ceremony Ad*, NBC NEWS, https://www.nbcnews.com/storyline/olympic-opening-ceremony/chevrolet-showcases-gay-families-olympics-opening-ceremony-ad-n25011 (last updated Feb. 7, 2014, 5:52 PM).

267. Even during the oral arguments for *Windsor*, Roberta Kaplan answered Justice Scalia's question regarding a "sea change" in attitudes toward LGBTQ individuals with, "I think with respect to the understanding of gay people and their relationships there has been a sea change, Your Honor." Transcript of Oral Argument at 107, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307).

268. *Obergefell*, 576 U.S. at 660-61.

269. *Id.* at 658.

270. *Id.*

271. *Id.* at 656.

immoral by the state" and stereotypically conflated by the status quo with a categorical sense of self so that "many persons did not deem homosexuals to have dignity in their own distinct identity."[272] Like the history of marriage, Justice Kennedy's historical account of sexual minorities displayed an elastic evolution. And both histories can overlap. Once medicalized stereotypes no longer pathologized same-sex eroticism as a disease, but such eroticism was seen as "a normal expression of human sexuality and immutable,"[273] and once same-sex relationships became more visible and recognized, one might have anticipated that Justice Kennedy would have described queer identities as coming into their own in modern American society; yet, the history he eventually describes turns toward more normalizing respects to mirror what *Obergefell* was accomplishing. According to Justice Kennedy, just as "same-sex couples began to lead more open and public lives," they also "establish[ed] families."[274] In other words, they came out of a history of marginalization, *only to specifically enter a world of domesticity*. Queer individuals do create families and have always done so. But Justice Kennedy used the lived experience as an anti-stereotyping device to lift the perceived taint off sexual minorities, and then redirect them to associations with traditional marriage values. The sleight-of-hand gesture was part of a larger transposition to demonstrate that same-sex couples do not threaten the traditional institution of marriage—as mainstream stereotypes might have it. Instead, their desires to marry, coupled with depictions of their conformity to heteronormative values of family and domesticity, showed they would only fortify marriage instead. And Justice Kennedy's historical characterizations here, and the factual references to the litigant's experiences, all played into an argument for dignity.

As with *Windsor*, in *Obergefell*, dignity is something acquired, and once acquired, confers status and privileges. Once Justice Kennedy established that same-sex couples, in contrast to what traditional stereotypes propounded, did value and treat marriage in the same way mainstream opposite-sex couples ideally have, their legal exclusion from marriage's dignifying possibilities amounted to injury.[275] Justice Kennedy's literary anti-stereotyping devices now aligned with a doctrinal anti-stereotyping pairing of animus and dignity concepts, drawing the conclusion that if the status of marriage was denied to an outsider group that functionally

---

272. *Id.* at 660.

273. *Obergefell*, 576 U.S. at 661.

274. *Id.*

275. *Id.* at 665-72 (discussing "four principles and traditions" that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples").

resembled those who presently participated in marriage for no apparent reason than stereotypical prejudice, then the gravity of harm is social stigma and indignity:

> There is no difference between same- and opposite-sex couples with respect to [their relationship commitments]. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.[276]

Essentially, this mechanism, revisited and developed further from *Windsor*, served again as the anti-stereotyping reasoning that drew same-sex couples into the institution of marriage in *Obergefell*. This time, the dignity of same-sex couples justified due process concerns that ultimately allowed anti-stereotyping principles to mediate toward extending them the fundamental right to marry.

A study that threads *Bowers* and *Obergefell* on either side of the Court's journey from refusing to decriminalize consensual same-sex intimacy in 1986, to legally recognizing same-sex marriages in 2015, illuminates the rise of an important anti-stereotyping jurisprudence. *Bowers* had perceived and imbued Hardwick's homosexuality with immorality, while both *Windsor* and *Obergefell* found same-sex couples worthy of dignification in marriage. In this journey, anti-stereotyping concepts, such as animus and dignity, arose to shed the influence of queer-phobic stereotypes, uncover the inflictions of discriminatory acts of exclusion, and expose the humanity that queer minorities share with the rest of society. In considering *Windsor*'s holding, Reva Siegel alludes to the profound anti-stereotyping effect of Justice Kennedy's development of animus from *Moreno*: "[*Windsor*] reasoned about the social meaning of disparate treatment in ways that have been unmistakably informed by long-running public debate—and by the experience and standpoint of the excluded."[277] Siegel observes Justice Kennedy's conceptualization of animus and how its two possible meanings—"hostility toward a politically unpopular group" and a legislative

---

276. *Id.* at 670.

277. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 90 (2013).

disapproval—both succumb to interpretations that *DOMA* was unconstitutional because it resulted in disparate treatment, conferring stigma on one group while sustaining dignity in another.[278] In this way, "[t]hese passages of the opinion are, in method, akin to the affirmative action opinions in considering how the citizen experiences law in deciding the law's constitutionality."[279] Yet, Siegel also finds *Windsor* distinctive: "*Windsor* endeavors to give voice to perspectives of the minority, the historically excluded group, in ways the affirmative action opinions do not. The result is an equality opinion unlike any the Court has handed down in quite some time."[280]

But scholars have also noted limits in Justice Kennedy's anti-stereotyping approaches in *Windsor* and *Obergefell*. First, these approaches are used to mediate toward constitutional protections in lieu of traditional formalist strategies, such as finding sexuality worthy of class protection under equality principles.[281] But this result might be because modern discrimination depends more on the regulation of norms rather than exclusion of classes or because, as Kenji Yoshino and others have described, in recent decades "the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments.[282]

Secondly, looking more closely at Justice Kennedy's anti-stereotyping jurisprudence itself, the flaws evident in how the jurisprudence is both re-conceptualized from *Romer* and *Lawrence* and applied in the marriage cases bear serious consideration. In the marriage cases, the anti-stereotyping approach is co-opted by heteronormativity. For instance, as Russell Robinson notes, the concept of animus is not as well articulated in *Windsor* as it could be for clarifying its concept of bias that, in turn, could have illustrated the heteronormative contours of anti-queer bias.[283] Robinson

278. *Id.* at 88-89.

279. *Id.* at 90.

280. *Id.*

281. *See* Steve Sanders, *Dignity and Social Meaning:* Obergefell, Windsor, *and* Lawrence *as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2075 (2019) (observing that in pro-LGBTQ cases including *Windsor* and *Obergefell*, "the concept of dignity was the vehicle the Court used to translate the nation's 'evolving political morality' about the status of gays and lesbians into holdings of constitutional law").

282. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (footnotes omitted).

283. Robinson, *Unequal Protection*, *supra* note 256, at 171-72 (regarding Justice Kennedy's animus conception in pro-LGBTQ cases, including *Windsor*, as "oscillat[ing]

criticizes the same ambiguity that Siegel observed in Justice Kennedy's definition of animus in *Windsor* as conflations that leave the concept muddled and does not "acknowledg[e] the complexity of discrimination."[284] Instead, one is left to "rely heavily on personal intuition."[285] Further, Robinson asserts that "Justice Kennedy should have explained how a preference for heterosexuality inevitably disadvantages homosexuals and bisexuals" and "he could have traced the adoration of traditional marriage to a legal preference for rigid gender roles."[286] Otherwise, such omissions regarding "the gendered nature of marriage may reflect [Justice Kennedy's] own ambivalence about traditional gender roles."[287]

The issue is likely even more complex than mere ambivalence to gender roles if we recall Spindelman's "like straight" observations regarding the notions of conformity raised in *Lawrence*. The ambivalence may be caught up in some hesitancy for showing the differences between same-sex and opposite-sex couples. A discussion on the gendered nature of marriage would seem to complicate the underlying message in *Windsor* that married same-sex couples have no reason to endure indignities created by *DOMA*'s differentiation between them and married opposite-sex couples, when both groups should be treated equally. A revelation on the gendered nature of traditional marriage would have been ideally meaningful, as much bias against sexual minorities derives from the fortification of heteronormative gender roles. But unfortunately, that distinction would not have easily aligned with *Windsor*'s objectives in the area of marriage, which accordingly served to further "straight-jacket" anti-stereotyping potentials in *Windsor* than in *Lawrence*.

Spindelman's "like straight" description, used to illustrate how advocates in *Lawrence* campaigned, also aptly describes how the plaintiff couples litigated in *Obergefell* to facilitate Justice Kennedy's ability to draw resemblances between same-sex couples and opposite-sex couples. In that way, anti-stereotyping approaches in the marriage cases fell short of their potential because part of the approach's mediating role included transposing same-sex couples from a hostile stereotype into a respectable one. Justice Kennedy's conceptualizations of dignity in *Windsor* and *Obergefell*—where evaluations of worthiness to be dignified are considered and used to show

---

between a 'thick' and 'thin' version of animus").

284. *Id.* at 186-89 ("The . . . passage from *Moreno* suggests that a law based on naked hostility violates rational basis review, but a law based on a mix of hostile motives and legitimate state interests presents a different question.").

285. *Id.* at 186.

286. *Id.* at 190.

287. *Id.*

indignity when dignification is denied—plays well into this transposition. We see this particularly in how Justice Kennedy used the lived experiences of *Windsor* and *Obergefell* litigants to draw sameness to the status quo, without regarding how gendered and heteronormative that status quo is. Katherine Franke has remarked that same-sex couples' lawyers in *Obergefell* were careful in articulating sameness arguments.[288] Her comments align with others who have observed that *Obergefell*'s privileging of respectability was the necessary virtue of same-sex couples who wanted to be married.[289] But with the most determined and empirical detail, Cynthia Godsoe has deconstructed the mainstream assimilated characteristics of the *Obergefell* couples for creating the "perfect plaintiffs" to persuade the Court that same-sex couples deserved the right to marry because, contrary to prior stereotypes that characterized same-sex couples as disrupting the status quo's heteronormative practices and values, same-sex couples now in *Obergefell* resembled heightened versions of married opposite-sex couples within the status quo.[290]

These observations do articulate that anti-stereotyping approaches in *Windsor* and *Obergefell* fell short of developing an inclusive normative scope of anti-discrimination for queer minorities. Instead, lived experiences were channeled through anti-stereotyping approaches to help same-sex couples obtain entry into a traditionally heteronormative institution-particularly by downplaying prior stereotypes that the status quo found threatening to marriage, and then imbuing same-sex couples with connotations of respectability. In marriage, queer couples must now contend with status quo values and practices, including heteronormative ones. The implications from this application of Justice Kennedy's anti-stereotyping jurisprudence from the marriage cases was seen soon after *Obergefell* when the Court decided *Masterpiece Cakeshop v. Colorado Civil Rights*

---

288. Katherine Franke, *What Marriage Equality Teaches Us: The Afterlife of Racism and Homophobia*, *in* BALL, AFTER MARRIAGE EQUALITY, THE FUTURE OF LGBT RIGHTS 249 (2016) ("As marriage equality advocates make the plausible case that they share with conservatives the same basic values about marriage, conservatives come around to seeing same-sex couples who wanted to marry as 'just like us,' or enough like us to recognize a shared identity.").

289. Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CAL. L. REV. CIR. 117, 123 (2015) [hereinafter Joshi, *Respectable Dignity*] ("The strategy of depicting same-sex couples as 'worthy' is apparent in the factual accounts of model plaintiffs that are advanced in same-sex marriage litigation to establish couples' stability and heteronormativity.").

290. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. FORUM 136, 145-52 (2015) (articulating categories of mainstream economic and socio-cultural alignment inhabited by the *Obergefell* plaintiffs).

Commission[291] in 2018. A Colorado baker, citing religious beliefs against same-sex marriages, had refused to bake and sell a custom cake that was meant to celebrate the out-of-state wedding of a male same-sex couple, Charlie Craig and David Mullins.[292] Here, respectable appearances mattered over queer lived experiences. Even when Colorado's public accommodations laws rightfully protected the couple from discrimination, the *Masterpiece* Court sided with the baker on religious hostility grounds related to the adjudication of the couple's case against the baker, rather than any hostility related to the actual incident itself.[293] Compared to the *Obergefell* plaintiffs, the *Masterpiece* couple openly flaunted their sexualities, embraced gender nonconforming appearances, belonged to a lower socioeconomic status, and did not rear any children.[294] In this sense, *Masterpiece*'s married couple was "more queer" than the couples in the marriage cases because they did not embody assimilated or respectable characteristics; instead, Craig and Mullins violated gender expectations and family-oriented characteristics.[295] Consequently, they likely threatened the status quo, even as a married couple. Justice Kennedy, who authored *Masterpiece* before retiring, did not apply his anti-stereotyping approach to find the couple any justice here.[296] He did not even accurately depict the couple's lived experiences.[297] Instead, the failed outcome for Craig and Mullins in *Masterpiece* was likely a result of the flaws that others have pointed out regarding Justice Kennedy's conceptualization of animus and dignity, and also the flaws of repeated application of anti-stereotyping approaches in contexts such as marriage, where assimilationist demands are susceptible.

The anti-stereotyping jurisprudence from the pro-LGBTQ cases has remarkably addressed certain types of queer discrimination with recurring success since *Romer*. In some instances, with mixed success, concepts such as animus and dignity have helped litigants to overcome the stereotypes that perpetuate their marginalization by a discriminatory status quo. Inevitably, however, the *Masterpiece* predicament illustrates how the anti-stereotyping jurisprudence originally developed from *Romer* and *Lawrence* has now been

---

291. 138 S. Ct. 1719 (2018).

292. Joint Appendix at 110-11, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (No. 16-111).

293. *Masterpiece*, 138 S. Ct. at 1723-24.

294. *See* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249, 287-97 (2020).

295. *Id.* at 288-89.

296. *Id.* at 297-98.

297. *Id.* at 298-301.

decidedly cabined in the domestic and heteronormative realities of marriage after *Windsor* and *Obergefell*. Like *Price Waterhouse*'s Title VII gender-stereotyping theory jurisprudence, the anti-stereotyping approach developed here in pro-LGBTQ cases are limited by underlying judicial failures for fully recognizing the gendered norms of a heteronormative status quo. Its uses for recognizing and articulating instances of anti-queerness need not be short lived at the Court, however. We wait to curiously ponder when and how these anti-stereotyping approaches may be revived to redress future examples of discrimination against queer individuals.

IV. WHAT QUEERING *BOSTOCK* REVEALS

In the numerous filings for the three consolidated cases in *Bostock v. Clayton County, Georgia*,[298] arguments incorporating anti-stereotyping approaches appeared in various litigant and amici filings.[299] With their respective cases below, each of the three LGBTQ employees—Gerald Bostock, Donald Zarda, and Aimee Stephens—had contested their employment terminations in part on Title VII sex stereotyping theories—hoping to apply *Price Waterhouse* and its progeny to their respective advantages.[300] The results had been mixed.[301] But beyond circuit appeals,

298. 140 S. Ct. 1731 (2020).

299. *See, e.g.*, Brief for Respondents at 11, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1623) (articulating that "[d]iscrimination predicated on a person's sexual orientation involves . . . prohibited sex stereotyping") [hereinafter ZARDA, BRIEF FOR RESPONDENTS]; Brief for Emp't Discrimination Law Scholars as Amici Curiae Supporting the Emp. at 12-28, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (raising applicability of anti-stereotyping theories from *Price Waterhouse*, 490 U.S. 228 (1989)); Brief of the Trevor Project, PFLAG, and Family Equal. as Amici Curiae Supporting the Emp. at 5, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (noting "[a]t its core, discriminations against LGBTQ individuals is rooted in notions of how men and women are supposed to look, act, and carry themselves and who they are supposed to love").

300. *See* Joint Appendix at 142, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter *Bostock*, *Joint Appendix*] (Bostock alleging discrimination "based upon his sexual orientation and his failure to conform to a gender stereotype"); Joint Appendix at 26, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (17-1623) (Zarda claiming that he was fired because he "honestly referred to his sexual orientation and did not conform to the straight male macho stereotype."); Joint Appendix at 15, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107) (Stephens claiming that she was fired in part because she "did not conform to the Defendant Employer's sex-or gender-based preferences, expectations, or stereotypes").

301. *See* Bostock v. Clayton Cnty., 2016 WL 9753356, at *5-7 (N.D. Ga. Nov. 3, 2016) (dismissing Bostock's gender stereotyping claim with prejudice); Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 572 (6th Cir. 2018) (finding that "decision to fire Stephens because Stephens was 'no longer

the litigants revived their separate takes on gender stereotyping ahead of their Supreme Court oral arguments.[302] Consideration of lived experiences in these workplace discrimination cases again seemed conceivable.

Each litigant's experiences displayed varying possibilities of anti-stereotyping: Gerald Bostock, a well-respected Court Appointed Special Advocate ("CASA") in Clayton County, Georgia, had joined a gay recreational sports league in 2013, which made his sexuality a target of open criticism.[303] Clayton County brought an internal audit over Bostock's use of CASA program funds, which, as Bostock claimed, pretextually discriminated against him for being gay.[304] Soon after, the county fired him for "'conduct unbecoming of a county employee.'"[305] What always remained unclear was whether that unbecoming conduct was the alleged misuse of funds or Bostock's openness about his sexuality. Donald Zarda's experience harbored even stronger anti-stereotyping possibilities. In 2010, Zarda was a skydiving instructor at Altitude Express.[306] Because instructors are often strapped physically to their clients during dives, Zarda, who was gay, would disclose his sexuality to female clients to allay any concerns of impropriety.[307] After one skydiving session, a woman client complained that Zarda had touched her inappropriately, and Altitude Express subsequently fired Zarda.[308] Other men at the skydiving operation had joked about being strapped to clients, but Zarda alleged he was terminated because he had referenced his sexuality and failed to fit within a "straight male macho stereotype."[309] Lastly, Aimee Stephens, who had been assigned male at

---

going to represent himself as a man' and 'wanted to dress as a woman,' falls squarely within the ambit of sex-based discrimination that Price Waterhouse and Smith forbid") (citations omitted); Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d Cir. 2018) (finding that "Zarda has alleged that, by 'honestly referr[ing] to his sexual orientation,' he failed to 'conform to the straight male macho stereotype'") (citations omitted).

302. *See* Brief for Petitioner Gerald Bostock at 23-29, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter BOSTOCK, BRIEF FOR PETITIONER] (relying on sex stereotyping theory under *Price Waterhouse*); ZARDA, BRIEF FOR RESPONDENTS, *supra* note 299, at 23-30 (arguing that sexual orientation discrimination is a form of Title VII sex stereotyping); Brief for Respondent Aimee Stephens at 28-38, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107) [hereinafter STEPHENS, BRIEF FOR RESPONDENT] (raising "sex-based stereotypes" issues).

303. BOSTOCK, BRIEF FOR PETITIONER, *supra* note 302, at 5-7.

304. *Id.* at 6-7.

305. *Id.* at 6 (quoting *Bostock*, *Joint Appendix*, *supra* note 300, at 28).

306. ZARDA, BRIEF FOR RESPONDENTS, *supra* note 299, at 3.

307. *Id.* at 3-4.

308. *Id.* at 4, 4 n.2.

309. *Id.* at 3-4.

birth, worked many years as a male employee at R.G. & G.R. Harris Funeral Homes.[310] The funeral home had a strict dress code that stereotyped the way men and women ought to look.[311] In 2013, Stephens announced to her employer that she would be living as a woman because of her gender dysphoria and would undergo sex reassignment surgery.[312] Referring to Stephens as "he" in court documents, the funeral home explained that Stephens was fired because "'*he* was no longer going to represent *himself* as a man.'"[313]

Beyond litigant filings before the Court, various amici also submitted briefs that highlighted perspectives on anti-stereotyping, particularly as ways for the Court to further clarify *Price Waterhouse*.[314] Together, they emphasized one argument strand that had helped some of the *Bostock* litigants successfully articulate discrimination below.[315] The other strand, of course, was textualism, which also garnered amici attention.[316]

A. Lived Experiences Disregarded

Despite the amici focus on anti-stereotyping prior to oral arguments, when *Bostock* was decided, the Court ultimately chose to elevate the textualist approach made viable in the Sixth Circuit's *Zarda* ruling.[317] Textualism helped determine that Title VII protected queer minorities from employment discrimination—thus vindicating each LGBTQ employee's respective discrimination claims here as sex discrimination.[318] *Bostock* is a curious landmark decision because no matter how pro-queer it is in the area of employment discrimination, the decision minimizes queer experiences of

---

310. STEPHENS, BRIEF FOR RESPONDENT, *supra* note 299, at 3-4.

311. *Id.* at 4.

312. *Id.* at 5.

313. *Id.* at 6 (emphasis added)

314. *See, e.g.*, Brief of Scholars Who Study the LGB Population as *Amici Curiae* Supporting the Emp. at 11-14, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618 & 17-1623); Brief for the Legal Aid Society as *Amicus Curiae* in Support of the Emp. at 4-24, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618, 17-1623, & 18-107).

315. *See, e.g.*, *Zarda*, 883 F.3d 100, 132 (2d Cir. 2018).

316. *See, e.g.*, Brief of William N. Eskridge Jr. and Andrew M. Koppelman as *Amici Curiae* Supporting Emp. at 4-5, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618, 17-1623, & 18-107).

317. *See Zarda*, 883 F.3d at 113-19.

318. *Bostock*, 140 S. Ct. at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

discrimination. Compared to Justice Kennedy's major pro-LGBTQ opinions, the lives and experiences of Bostock, Zarda, and Stephens are not focal points for demonstrating aspects of shared humanity that could conjure persuasion for sexual orientation and gender identity protection. Rather, a textualist posture was much more absolute. In fact, according to Justice Gorsuch, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[319] Textualism dominated in *Bostock*.

Accordingly, absent in *Bostock* are the rhetorical devices Justice Kennedy had employed in prior pro-LGBTQ opinions that highlighted lived experiences. Unlike *Windsor* or *Obergefell*'s revelations about the litigant's lives, Justice Gorsuch only narrates the details of Bostock, Zarda, and Stephens' discriminatory experiences just enough to contextualize the consolidated cases as instances of sexual orientation and gender identity discrimination. "Few facts are needed to appreciate the legal question we face," Justice Gorsuch writes conspicuously to start his succinct facts section in *Bostock*.[320] Indeed, Justice Gorsuch narrates the litigant facts sparingly and transactionally. Lived experiences are only essential to establish discriminatory acts and considerations involving sexual orientation or gender identity; textualism would take care of the rest. In that respect, Gerald Bostock's account of being fired for "unbecoming" conduct here lacks any nuanced discussion of what kind of criticisms he received for being openly gay or what was Clayton County's idea of unbecoming conduct—whether such conduct was based on the alleged misuse of funds for which Bostock was investigated or on perceived notions regarding his male sexual identity.[321] Similarly, Justice Gorsuch simplifies Donald Zarda's firing at Altitude Express by withholding the reason why Zarda had revealed his sexual identity to prevent inferences of impropriety between him and a skydiving client.[322] Justice Gorsuch's version leaves out possible interpretations of gender stereotyping here—from enduring presumptions of heterosexuality as a male skydiving instructor with female clients to having standards of hetero-masculinity forced against him because of his known sexuality.[323] Finally, Aimee Stephens' story was told quite dispassionately

---

319. *Id.*

320. *Id.*

321. *See id.* at 1737-38.

322. *See id.* at 1738.

323. *See Bostock*, 140 S. Ct. at 1738 ("Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.").

as well. Nothing in Justice Gorsuch's account mentions Harris Funeral Home's strict gendered dress codes for employees, nor does Justice Gorsuch excerpt the employer's misogyny and stereotypical reactions to Stephens' gender transformation—all of which had appeared in Stephens' brief in opposition.[324]

Also, missing in *Bostock* is the near-customary historicism that appeared often in pro-LGBTQ cases. The collective history of employment discrimination for non-heteronormative queer identities could have established a counter-factual narrative to historically persistent status quo stereotypes about LGBTQ identities. Ironically, Justice Samuel Alito's dissent documents these historical moments of discrimination against LGBTQ employees—but only to validate his point that Title VII had never been read to protect against sexual orientation or gender identity discrimination and that status quo premise ought to continue.[325]

What remains in *Bostock* are vacant specters of the prior pro-LGBTQ cases, not anti-stereotyping's resurrection. Whereas reading *Romer*, *Lawrence*, *Windsor*, and *Obergefell* together, those cases ended up intertextually woven because of common themes, doctrinal developments, or approaches—a collection that has prompted others to refer to them as a "quadrilogy" of gay rights cases.[326] The intertextual conclusion of reading *Bostock* against that quadrilogy is that prior anti-stereotyping rhetorical devices and theories do not matter. Lived experiences contextualize discrimination *in Bostock*, but do not in Justice Gorsuch's rendering centrally *define discrimination protections*; they are only obligatory for showing that an employer discriminated based on an employee's sexual orientation or gender identity. Otherwise, the factual details in Bostock, Zarda, and Stephens' experiences are not worth mentioning.

B. Preserving Stereotypes

As a result of eclipsing the factual and historical iterations of lived experiences, Justice Gorsuch's textualism in *Bostock* functionally precludes the case's doctrinal anti-stereotyping potential. Although textualism helps sexual minorities secure Title VII protection, it does not counterbalance or

---

324. *Compare id.*, *with* Brief for Respondent Aimee Stephens at 4-7, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107).

325. *Bostock*, 140 S. Ct. at 1770-73 (Alito, J., dissenting) (narrating historical instances of exclusion based on sexual orientation and post-1964 history of gender dysphoria diagnoses to demonstrate his interpretation of Title VII's "because of sex" meaning).

326. *See e.g.*, Steve Sanders, *Religious Arguments, Religious Purposes, and the Gay and Lesbian Rights Cases*, 17 FIRST AMEND. L. REV. 237, 246 (2018).

address the still relevant impact of heteronormative gender roles and stereotypes in these consolidated cases, or generally in employment discrimination situations involving queer minorities; the pernicious association between gender stereotypes and anti-queer bias is merely and instrumentally overlooked. In fact, by privileging textualism over examining discrimination based on stereotyping bias, *Bostock* ultimately preserves and privileges complicated heteronormative gender and queer stereotyping issues in workplace discrimination.

1. Because of Sex

Instead of focusing on experiences to demonstrate stereotyping bias that motivate animus affecting the dignity of queer minorities, Justice Gorsuch solely concentrates on protecting sexual minorities based on the reading of the word, "sex," and the operative phrase, "because of," in Title VII's original prohibition against employers from discriminating "because of . . . sex[.]"[327] Textualism exegetically situates "sex" within its 1960s dictionary vernacular—indeed, the specific definition the employers had advocated using.[328] "Sex" here refers to male or female biological status.[329] The employee litigants, meanwhile, had argued to define "sex" as a "term [that] bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation."[330] Comparatively, Bostock, Zarda, and Stephens' broader reading evinces perhaps a "queerer" understanding than the dictionary definition—perhaps one that would encompass gender roles and stereotyping.[331] But working within textualist parameters, Justice Gorsuch adheres to reading "sex" with its biological designations.[332] We cannot ignore that this interpretation also effectuates a status quo line-drawing of protected statuses under mainstream classifications of gender and sexuality that just so happens to be a logical and

---

327. 42 U.S.C. § 2000e-2(a)(1).

328. *Bostock*, 140 S. Ct. at 1739.

329. *Id.* ("Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology.' . . . [W]e proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.")

330. *Id.*

331. *See* Judith Butler, *Critically Queer*, *in* BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 228-29 (1993) (using the term "queer" as a de-stabilizing concept that helps reflect upon "a false unity of women and men").

332. *Bostock*, 140 S. Ct. at 1739.

necessary outcome of textualism here.[333] As a result, "sex" is purely biological, rather than imbued with constructionist possibilities.

With "because of," Justice Gorsuch applies a more legally-operative definition by resorting to recent Supreme Court decisions to help decide that "because of" evinces a traditional and "simple" but-for causation standard.[334] Consequently, the functional parameters of Title VII's "because of sex" textualism is expansive.[335] Actionable discrimination occurs even if the act or practice merely involved some remote aspect of biological sex: "So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[336] This expansive reading also clarifies Justice Gorsuch's reluctance to rely on employee litigants' contemporaneous "queerer" meaning of "sex," which would have included gender identity and sexual orientation norms; it would not have made a difference in the result.[337] So again, biological sex controls.

Justice Gorsuch's textualist construction of Title VII's "because of sex" language as prohibiting discrimination "because of a protected characteristic

---

333. The artificiality of what *Bostock* accomplishes emerges more clearly in contrast to Zalesne's observation that "[w]hen courts state that the term 'sex' in Title VII refers to 'gender,' they are generally referring to "an individual's distinguishing biological or anatomical characteristics." *See* Deborah Zalesne, *When Men Harass Men: Is It Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 404 (1998).

334. *Bostock*, 140 S. Ct. at 1739 (referencing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)) ("That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause.").

335. Although *Bostock* would only be one part of a plaintiff's Title VII claim, other elements must still be met. *See* Frith v. Whole Foods Mkt., Inc., No. 20-CV-11358-ADB, 2021 WL 413606 *1, *6 (D. Mass. Feb. 5, 2021) (citing the four elements of prima facie claim under Title VII). *Frith* involved a class action under a Title VII employment discrimination theory based on race in which Whole Foods grocery employees sued the grocery chain for adverse employment actions taken against them when they wore face masks with Black Lives Matter messaging at stores during the Covid-19 pandemic, which was against company policy. *Id.* at *1-3. The plaintiffs did not allege any employment retaliation based on their race but only allege a Title VII race discrimination claim because Whole Foods singled them out for wearing racial messaging on their face masks based on *Bostock*. *Id.* at *6-7. The district court dismissed the plaintiff's suit because it refused to apply *Bostock* so expansively; plaintiffs still needed to allege that Whole Foods have "treated any individual plaintiffs differently if that plaintiffs were of a different race." *Id.* at *7. The *Frith* court holding here suggests some cabining of *Bostock*'s sweeping potential.

336. *Bostock*, 140 S. Ct at 1739 (referencing Burrage v. United States, 571 U.S. 204, 211–212 (2014); *Nassar*, 570 U.S. at 350).

337. Presumably, this result is why Justice Gorsuch had written that "nothing in our approach to these cases turns on the outcome of the parties' debate," over biological sex or otherwise. *Id.*

like sex" necessitates a powerfully "sweeping" standard. His reading seemingly and, without further substantive thought, enshrines situations that derive from prominent characterizations of sexual orientation and gender identity experiences.[338] Henceforth, an individual employee who is fired based on the employer's knowledge that the employee is attracted to individuals of the same sex would have a claim under Title VII because the protected characteristic of "sex" is implicated as a but-for cause.[339] Likewise, an employee who is fired because of a transition from an assigned birth sex could also recover under Title VII.[340] The textualist interpretation functionally, putatively, or implicitly induces protected statuses based on sexual orientation and gender identity. Textualism, thus, accomplishes Title VII sexual orientation and gender identity workplace protections.

Finally, Justice Gorsuch's examination of the phrase "discriminate against" is less patently provocative but does critically restrict Title VII in three ways. First, his textualist approach reads Title VII as covering disparate treatment cases only.[341] Secondly, such discrimination must be intentional.[342] Lastly, "because of sex" discrimination is discrimination against individuals, not categorically against groups.[343] How this reading of "discriminate against" works with Justice Gorsuch's "because of sex" interpretation has significances, as we will see, *infra*.

2. Precluding Anti-Stereotyping Theories

Textualism allows Justice Gorsuch to keep any evaluation of stereotyping bias in gender discrimination—and anti-queer discrimination—unaddressed in *Bostock*. In one passage, he minimizes the relevance of performative gender characteristics that motivate sex discrimination by diverting his rationale toward textualism. In his example of "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine," he focuses not on the gender stereotyping aspects involved, but observes instead that "in *both* cases the employer fires an individual in part because of sex."[344] Accordingly, Title VII liability ensues and "[i]nstead of avoiding Title VII exposure, this

338. *Id.* at 1740.
339. *Id.* at 1741.
340. *Id.* at 1741-42.
341. *Bostock*, 140 S. Ct. at 1740.
342. *Id.*
343. *Id.* at 1740-41.
344. *Id.* at 1741.

employer doubles it."[345] His but-for causation approach detects sex discrimination, but it misses the point that gender expectations might also play a part in controlling norms of femininity and masculinity, as well or perhaps more significantly and directly than biological sex. Wouldn't firing employees for not being feminine or masculine enough illustrate termination based on social constructions of gender at least as well as biological sex?

Although scholars have noted how stereotyping bias invigorate modern discrimination, this disregard for stereotyping bias in sex discrimination repeats elsewhere in Justice Gorsuch's *Bostock* opinion. He continually re-reads discriminatory scenarios based solely on his textualist imprimatur. Even his reference to *Price Waterhouse* seems like a misappropriation of that case for textualist purposes. After recapitulating his but-for causation approach in another sex discrimination scenario where "the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee,"[346] he quotes Ann Hopkin's case. But his brief and generic quotations do not conjure *Price Waterhouse*'s gender stereotyping rationale; they merely reiterate a background observation from the case that "an individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[347] It is curious why he excerpts specifically from *Price Waterhouse*, only to ignore its gender stereotyping rationale and to affirm his posture about the relevancy of sex in employment decisions when other authorities could have sufficed.[348] What seems absolute to Justice Gorsuch is biological sex, not its accompanying social stereotypes. In fact, this primacy toward sex is also the reason why queer minorities are protected under his textualist reading—not any biased notions about their sexual identities. Is this putting the cart before the horse? Under Justice Gorsuch's textualism, sexuality and gender identity are not relevant because, in his words, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[349] He later explains this impossibility to underscore the operations of *Bostock*'s textualism:

> [H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on

345. *Id.*

346. *Bostock*, 140 S. Ct. at 1741.

347. *Bostock*, 140 S. Ct. at 1741(quoting *Price Waterhouse*, 490 U.S. at 239).

348. For instance, the statutory language of Title VII itself relays the intent that gender is not a consideration for employment decisions. *See* 42 U.S.C. §§ 2000e–2(a)(1), (2).

349. *Bostock,* 140 S. Ct. at 1741.

> these grounds requires an employer to intentionally treat individual employees differently because of their sex.[350]

As Supreme Court Justices have been regarded as part of the status quo,[351] it is not difficult to conclude that Justice Gorsuch's observation exemplifies another moment of mainstream conceptualizing of gender and queerness—except, he is not medicalizing sexuality; it is just a but-for cause to him. In *Bostock*, Justice Gorsuch's examples all ignore the stereotyping aspects of employment discrimination. He points out the discriminatory actions but not the underlying heteronormative stereotyping that could be the motivator for such biased conduct. In part, motivation is not the requirement in *Bostock*'s textualism, but rather the employer's intent.[352] But the intent requirement correspondingly means that bias also becomes irrelevant:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.[353]

These textualist attributes leave Justice Gorsuch's approach lacking in the critical dimensions that anti-stereotyping approaches might have raised. Instead, Justice Gorsuch's approach is transactional and restrained. This textualist result is incredibly beneficial to sexual minorities in its effects. However, it also leaves behind some significant questions for sexual orientation and gender identity—one of which is what about the character

---

350. *Id.* at 1742.

351. *See, e.g.*, Godsoe, *supra* note 290, at 140 ([T]he Supreme Court is mainstream in its own way, composed of nine individuals from a very narrow slice of the population.") (emphasis removed) (footnotes omitted) (quoting Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of* Lawrence v. Texas, THE NEW YORKER (Mar. 4, 2012), https://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick).

352. *Bostock*, 140 S. Ct. at 1742.

353. *Id*. at 1741-42.

and nature of modern discrimination and the lived experiences of queer minorities?

Essentially, *Bostock* eliminates bias by eliminating discussions of bias. Textualism conflates—or perhaps associates—sex with sexual orientation, and sex with gender identity, but such relationships appear thin and not deeply substantive, depending only on the causation element that textualism enshrines in the phrase, "because of." Contrary to various scholarly perspectives on Title VII, Justice Gorsuch seems to suggest that Title VII would not even consider anything deeper than what his but-for causation detects in discrimination cases, such as notions of stereotyping bias perhaps, because his reading of "because of sex" accomplishes discrimination while bypassing considerations of bias:

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.[354]

That "something else" could be what Justice Gorsuch lists in the accompanying parenthetical—the employer's considerations of same-sex attraction or gender identification, which would be motivated by bias.[355] Yet, the way he describes the reasons for discrimination is an unsophisticated, mechanical, and perhaps intentionally-naïve mischaracterization of sexual orientation or gender identity discrimination, and discrimination generally. What Justice Gorsuch fails to acknowledge here is the employer's motivated judgment against an individual's same-sex attraction or non-conforming gender identification—the bias that privileges stereotypical heteronormative gender role expectations of how individuals should have opposite-gender relationships, or how individuals should live according to their biologically-assigned sex at birth. When Justice Gorsuch writes that "Title VII doesn't care" about that "something else," there is reason to probe suspiciously at that remark because examinations of heteronormative gendered biases are centrally relevant in modern discrimination cases.[356]

To further obscure the relevance of stereotyping and support his use of textualism, Justice Gorsuch presents several invariably revisionist readings

---

354. *Id.* at 1742.

355. *Id.*

356. Even under a disparate treatment approach to Title VII, gender bias appears as animating model for determining discrimination. *See* Kya Rose Coletta, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 202 (2020).

of three of the Court's more prominent Title VII sex discrimination decisions, *Phillips v. Martin Marietta Corp.*[357] *Los Angeles Dept. of Water and Power v. Manhart*,[358] and *Oncale v. Sundowner Offshore Services, Inc.*[359] All of these cases revealed stereotyping biases, but under his readings, Justice Gorsuch demonstrates how the discriminatory actions respectively support his textualist "because of sex" reading of Title VII. For instance, in *Phillips*, Justice Gorsuch characterizes what happened to Ida Phillips when Martin Marietta Corporation refused to hire her because she had young children as an example of when "an employer discriminates intentionally against an individual only in part because of sex."[360] This reading fundamentally obscures scholarly observations that *Phillips* is "one of the first cases in which the Supreme Court addressed stereotypes in Title VII" and "Martin Marietta's deployment of generalizing ascriptive stereotype, lie at the heart of Phillips's claim."[361]

Similarly, in his reading of *Manhart*, Justice Gorsuch seemed to forget the stereotyping elements of an employment decision to require women employees to submit larger pension contributions than their male counterparts because mortality tables generalized that women outlived men.[362] Instead, he claims here that "the employer [in *Manhart*] violated Title VII because, when its policy worked exactly as planned, it could not 'pass the [but-for] test' asking whether an individual female employee would have been treated the same regardless of her sex."[363] In contrast, the *Manhart* Court itself had opined that "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."[364] And lastly, his reading of *Oncale*, where the male plaintiff Joseph Oncale had been harassed by his male co-workers because of perceived homosexuality,[365] only focused on what was consonant to his textualist but-for causation: "Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a

357. 400 U.S. 542 (1971) (per curiam).

358. 435 U.S. 702 (1978).

359. 523 U.S. 75 (1998).

360. *Bostock*, 140 S. Ct. at 1743.

361. Herz, *supra* note 128, at 405.

362. *Manhart*, 435 U.S. at 704.

363. *Bostock*, 140 S. Ct. at 1743 (referencing *Manhart*, 435 U.S. at 711).

364. *Manhart*, 435 U.S. at 707.

365. *Oncale*, 523 U.S. at 77.

triable Title VII claim existed."[366] Although the *Oncale* Court did find that Title VII protected against same-sex sexual harassment in the workplace as a form "because of sex" discrimination,[367] the Court's finding in favor of Oncale has been arguably interpreted as receptive to *Price Waterhouse*'s sex stereotyping theory.[368] At least one scholarly observation seems to controvert Justice Gorsuch's reading of *Oncale* on the issue of whether or not Oncale would have been similarly harassed had he been a woman: "The Court [found in favor of Oncale] even though . . . *Oncale never alleged that he would have received better treatment if he had been a woman*."[369] Thus, Justice Gorsuch's reading of *Oncale* appears rather colorable.

Invariably, from these observations here, Bostock tacitly privileges a heteronormative status quo. In addressing the employers' bare admission that they had terminated the litigants for their sexuality or for being transgender, Justice Gorsuch never investigates the deeper existing stereotyped reasons underneath the employer's admissions: "Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here."[370] He focuses only on what is "bound up" with sex for his textualist approach to Title VII.[371] Even when he acknowledges that "an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules," he never develops what those "sex-based rules" are—whether they implicate gender norms and stereotypes, which would seem prudent.[372] After all, *Bowers* and *Lawrence* remind us that rules tend to be backed by normative considerations of their authors and enforcers. Instead, Justice Gorsuch only follows up with another long recapitulation of his textualist but-for causation, premised on finding discrimination when the but-for causation is partly "bound up" with the disparate treatment of an individual's sex: "An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women."[373] In one more comparative example, drawn up rhetorically, Justice Gorsuch further demonstrates the cogs of textualism while showing how it displaces aspects of gender stereotyping in

366. *Bostock*, 140 S. Ct. at 1744.

367. *Oncale*, 523 U.S. at 79.

368. *Id.* at 80-81; *see* Herz, *supra* note 128, at 420.

369. Herz, *supra* note 128, at 420 (emphasis added).

370. *Bostock*, 140 S. Ct. at 1744.

371. *Id.* at 1742.

372. *Id.* at 1745.

373. *Id.*

discrimination under Title VII:

> Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire.[374]

As long as treatment of biological sex is involved in the disparity, discrimination based on sexual orientation and gender identity qualifies as "because of sex" under Title VII: "The 'simple [but-for] test' thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So, we need to hold that second trait constant."[375] No need arises for anti-stereotyping theories. While textualism would recognize situations involving gender stereotypes as Title VII sex discrimination, it excludes them in the *substantive analysis*, only seeking a basis involving biological sex as the controlling litmus. In essence, *Bostock*'s textualism leaves sex stereotypes—and their underlying perniciousness toward queer minorities—unexamined. What also remains unexamined and unchallenged, as well consequentially, is the heteronormative status quo.

C. Converging Interests

Justice Gorsuch's neglect of anti-stereotyping potentials seems heavy-handed in *Bostock*. Despite textualism's sweeping effect for enveloping sexual orientation and gender identity statuses within Title VII protection, that protection remains tenuous after *Bostock*—solely linked by Justice Gorsuch's textualist approach, essentially under an operative reading of Title VII. Such protections for queer identities are merely as strong as they are transitively linked to sex under Justice Gorsuch's textualism. However, examining the converging interests in *Bostock* might explain why the decision both protects sexual minorities from discrimination, but also fails to address the substantive heteronormative biases that animate such discrimination.

In analyzing moments of racial progress, such as *Brown v. Board of Education*,[376] critical race theorist Derrick Bell posited in his take on the Court's desegregation ruling that where a subordinated group advances from some prior inequality to achieve progress, such advances arise because the subordinated group's interests have converged with the interests of the status

---

374. *Id.* at 1748.

375. *Bostock*, 140 S. Ct. at 1748-49.

376. 347 U.S. 483 (1954).

quo.[377] Under Bell's interest-convergence thesis, *Brown*'s desegregation holding was not purely a status quo acknowledgment of African-American racial inequities, it also helped the United States' democratic image abroad during the Cold War.[378] Recently, others have imported Bell's theory into critical readings of marriage equality and other LGBTQ advancements.[379] Reading *Bostock* through the interest-convergence lens might clear some of the scholarly curiosity over this decision's pro-queer stance and yet cold, textualist rationale that leaves heteronormative bias against sexual minorities unaddressed.

1. Privileging Heteronormative Values

Employment discrimination protections have been an entrenched interest for sexual minorities.[380] *Bostock*'s textualist approach fulfills that interest by providing federal workplace protections and settling the debate over Title VII's reach into sexual orientation and gender identity protections. Yet, by ignoring lived experiences and anti-stereotyping opportunities to doctrinally address heteronormative gender role stereotyping that substantively connects sexual orientation and gender identity discrimination to sex discrimination, textualism tacitly preserves and condones the persistence of heteronormative values and stereotypes against queer minorities. Unlike Justice Kavanaugh's *Bostock* dissent, where ordinary meaning is used to categorically deny protections to sexual minorities and preserve wholesale the interests of a heteronormative status quo,[381] Justice Gorsuch's majority provides a controlled mechanism for equality that more subtly retains the status quo's posture for deciding the protective boundaries of Title VII sex discrimination, and also over who accordingly deserves protection.

Besides the examples above that show Justice Gorsuch's re-reading of

---

377. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior status of middle and upper class whites.").

378. *Id.* at 524; *see also* Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1722 (2017).

379. *See, e.g.*, Kreis, *Gay Gentrification*, *supra* note 167, at 147-52; Neo Khuu, Obergefell v. Hodges: *Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 214-24 (2017).

380. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1374-75 (2012) (mentioning employment discrimination cases from the 1970s involving sexual minorities).

381. *Bostock*, 140 S. Ct. at 1825-30 (Kavanaugh, J., dissenting).

gender and queer discrimination scenarios, one cannot overlook how the decision simultaneously recognizes an employer's religious convictions when they conflict with Title VII sex discrimination protections. Appearing at the opinion's near conclusion, the Court reveals that, "[w]e are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[382] Religious values, such as those promoted by Judeo-Christian traditions, often bolster heteronormative views—not to mention stereotypes—on gender and sexuality.[383] Thus, when Justice Gorsuch invokes First Amendment religious protections affirmed under *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[384] and the *Religious Freedom Restoration Act of 1993*,[385] *Bostock* effectively completes the tacit preservation of heteronormativity and stereotyping already existing in its textualism. Discriminatory workplace practices animated by anti-LGBTQ stereotyping bias might coincide with "because of sex" discrimination in Title VII and protect sexual minorities within the context of employment. But the underlying animus toward sexual minorities are not subverted, rather the engines that stoke such animus are venerated. This preservation is one example of converging interests in *Bostock*.

---

382. *Id.* at 1754. In a similar stroke just one Term after *Bostock*, the Court unanimously sided with a Catholic-based foster agency's free exercise of religion in *Fulton v. City of Philadelphia*, No. 19-123, 2021 WL 2459253 (U.S. June 17, 2021). In *Fulton*, the city of Philadelphia ceased to refer foster children to Catholic Social Services ("CSS") after observing that CSS would not certify same-sex couples as prospective foster parents. *Id.* at *4. The city's reason was that CSS's refusal to same-sex couples "violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance." *Id.* By finding that CSS's foster services do not fall within the realm of public accommodations, Chief Justice Robert's majority opinion essentially removed from debate the issue that CSS had violated any non-discrimination provisions protecting against sexual orientation discrimination. *Id.* at *8. Though narrow, the *Fulton* ruling privileges religious exercise over the rights of same-sex couples by virtually creating a religious exemption for CSS: "We do not doubt that this interest is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.' On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise." *Id.* at *9 (quoting *Masterpiece Cakeshop*, 138 S.Ct., at 1727). The Court here seems to continue its signaling since *Masterpiece Cakeshop* and *Bostock* that religious liberties preside over queer lived experiences.

383. Gillian R. Chadwick, *Legitimating the Transnational Family*, 42 HARV. J. L. & GENDER 257, 271 (2019) (alluding to the relationship between Christianity and heteronormativity in characterizing queer families as illegitimate).

384. 565 U.S. 171, 188 (2012).

385. 42 U.S.C. § 2000bb.

2. Enabling Future Precedents

Another instance of interest convergence arises with *Bostock*'s influence as a major controlling precedent for future textualist readings of Title VII in challenges that may take place involving other protected categories. *Bostock*'s textualist reading of "because of sex" hardens an already-cementing anti-classification approach to Title VII discrimination.[386] Justice Gorsuch's reading of Title VII as protecting individuals from intentional discrimination promotes Title VII generally as a disparate treatment solution to workplace sex discrimination and underscores Title VII's anti-classification aspects.[387] In the opinion, he explicitly and repeatedly rejects an approach to Title VII based on group discrimination.[388] When everything is interpreted through a but-for causation linked to a monolithic notion of "sex," that reading engenders blindness toward differences in gender and sexualities much like color-blind approaches to race discrimination.[389] Indeed, by reading "because of sex" as "because of a protected characteristic like sex," textualism here affords a broad standard that finds discrimination whenever biological sex is remotely implicated. On the one hand, this approach achieves sexual orientation and gender identity protection. But what if the same textualist approach is applied to other protected categories, particularly "race" under a 1960s dictionary meaning? If "because of race" is read similarly as here in *Bostock*—as "because of a protected characteristic *like race*," then what is the result? Recognizing Title VII discrimination textually as an intentional act against an individual based on stable definitions of race forecloses anti-subordination approaches and other frameworks for addressing racial inequities that approximate disparate

386. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 988–95 (2012) (discussing specifically the Court's shift toward anticlassification in Title VII cases).

387. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279 (2020) (noting Bostock's textualism underscores a disparate treatment holding); *see also* Balkin & Siegel, *supra* note 4, at 21 (noting disparate treatment as anti-classificationist).

388. *See, e.g.*, *Bostock*, 140 S. Ct. at 1740-41 (asserting that Title VII addresses individual, not group, discrimination).

389. *See* Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1139-41 (1996) ("When invoked as a moral imperative, the color-blind vision assumes that race color blindness is race-neutral as a process and embodies a valid and positive racial social vision. I argue that this assumption is not only false, but that race color blindness when applied to the complexities of civil society--to actual decision-making in such areas as contracting, employment, and admissions--is not race-neutral. Instead, it is a disguised form of racial privileging.").

impact solutions recognized in *Griggs v. Duke Power Company*.[390]

Indeed, as some have noted, *Bostock*'s textualism would conflict with affirmative action policies.[391] Such policies could be read as discriminatory if Justice Gorsuch's characterization of "because of sex" discrimination under Title VII is transferred, for instance, into the realm of workplace race discrimination because of how the carve-outs to diversify based on race in affirmative action policies have been characterized as reverse discrimination under disparate treatment theories.[392] Two observations of *Bostock*'s perniciousness derive from considering the decision's future impact as Title VII precedence. First, though *Bostock* is in effect a pro-LGBTQ decision, its textualism may abolish affirmative action policies and, in turn, also more deeply entrench "colorblind" anti-classification approaches to anti-discrimination in the future. And so, the colorblind analogy in *Bostock*'s "we don't see historically-marginalized queer identities, we only see sex" approach would then become fully realized in a "we don't see historically-marginalized racial identities, we only see race" approach. But specifics matter. Secondly, in a broad context, if this precedential effect on future race-based discrimination cases occurs, then *Bostock* facilitates the Court's ability to nitpick which minority category deserves more privileging—in this case, marginalized sexual identities in employment over marginalized racial groups.

3. Diversifying Corporate America

Finally, despite providing Title VII protection for sexual minorities, *Bostock*'s textualist approach also seems propelled by another converging interest: *Bostock* engenders positive optics for America's corporate status quo. American businesses have incentives to promote workplace diversity.[393] The underlying benefits of such investments are not lost upon individual workers who represent various backgrounds in the American workplace; diversity initiatives create employment opportunities that

390. 401 U.S. 424 (1971).

391. Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, THE NEW YORKER (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action.

392. *See, e.g.*, Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. 1, 17-18 (2020) (suggesting Bostock's effect on Supreme Court affirmative action holdings).

393. Jenn Flynn, *Diversity and Inclusion: A Worthy Business Investment With Strong Returns*, FORBES (Nov. 5, 2019, 8:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2019/11/05/diversity-and-inclusion-a-worthy-business-investment-with-strong-returns/?sh=5978596d2455.

diversify, but also simultaneously impacts corporate branding.[394] Of course, these aggregate effects and benefits of promoting diversity are not lost on corporate America either. In recent decades, workplace ratings of companies have included their acceptance of openly-identified LGBTQ workers, and well-branded corporations have promoted openly-gay managers to the top of their organizational hierarchies.[395] Among the *Bostock* amici, filings from corporate America stressed the value of workplace diversity and, particularly, how corporate America values its LGBTQ employees. For example, in its amicus brief supporting Bostock, Zarda, and Stephens, the "Fortune 200" tobacco giant, Altria Group, Inc., articulated its own efforts toward fostering an inclusive workplace for LGBTQ employees "because creating and maintaining a diverse and inclusive workplace benefits both the company and its employees."[396] In turn, such benefits are so because "[e]mployees are more productive in inclusive workplaces, and the satisfaction of its employees helps drive Altria's success."[397] Of course, externally as well, Altria's efforts have significant branding effects as "investment in diversity and inclusion has led to Altria being repeatedly named by Forbes as one of America's best employers and being rated among the 'Best Places to Work' for 2018 and 2019 by the Human Rights Campaign's Corporate Equality Index."[398] Substantively, Altria also supported gender stereotyping theories for extending Title VII protections to LGBTQ individuals and underscored the harms *to businesses* with continued sexual orientation and gender identity workplace discrimination.[399]

Even more impressively, another amicus brief filed by a group of 206

---

394. Theanne Liu, *Ethnic Studies As Antisubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies*, 11 WASH. U. JURIS. REV. 165, 175 (2018) ("Diversity, equal employment opportunity, and implicit bias trainings, which primarily target individuals in the workplace, exist as a common and widely used remedy and preventative measure to curb and redress claims of racial discrimination in the workplace."); *see also id.* at 177 ("Among businesses and law firms across the United States, diversity is often touted as a central value, often for the actual purposes of engaging broader, multicultural, and diverse markets.").

395. *The World's Most Influential LGBT+ Business Leaders*, CEO TODAY (June 26, 2020), https://www.ceotodaymagazine.com/2020/06/the-worlds-most-influential-lgbt-business-leaders/.

396. Brief for Altria Group, Inc. as Amicus Curiae Supporting the Employees at 1, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

397. *Id.* at 1-2.

398. *Id.* at 2.

399. *Id.* at 4-20, 21 (raising sex stereotyping theories) (noting that "[l]oss of Title VII protections for LGBTQ people would also harm companies' ability to conduct out-reach to and attract such employees.").

major American brand-name businesses, including AT&T, Amazon, Goldman Sachs, Starbucks, and Uber, argued solely on the detriment of workplace discrimination against sexual minorities:

> The U.S. economy is strengthened when all employees are protected from discrimination in the workplace based on sexual orientation or gender identity. The failure to recognize that Title VII protects LGBT workers would hinder the ability of businesses to compete in all corners of the nation, and would harm the U.S. economy as a whole.[400]

Specifically, these business amici remarked on their awareness of the purchasing power of LGBTQ individuals: "A diverse and inclusive workforce likewise furthers businesses' ability to connect with consumers, particularly given that the buying power of diverse groups has increased substantially over the past 30 years. In 2015, the buying power of LGBT people in the United States stood at over $900 billion."[401] Business amici also observed that "[r]ecent studies confirm that companies with LGBT-inclusive workplaces also have better financial outcomes."[402] These filings here are important first-hand acknowledgments of mainstream corporate America's interests in LGBTQ diversity in the workplace.

Extremely pernicious observations arise when critiquing corporate America's interests here. These observations all stem from recognizing the overlap between mainstream corporate America's interests in Title VII's workplace discrimination protections for sexual minorities and the status quo policing of "good" versus "less desirable" queer minorities—the kind of policing that has developed in tandem with the acceptance of marriage equality and societal validation of respectable gay identities. First, as Yurvaj Joshi has observed, "[c]onspicuous consumption has been crucial to the construction of gay men and, to a lesser extent, lesbians as respectable citizen-consumers."[403] Because "today's gay and lesbian identities are constituted less by sexual practice and rather more by consumption," the result "is a complex and symbiotic relationship between 'the gay community' and 'the gay market' and, that being the case, one cannot meaningfully separate the politics of being gay from the business of buying and selling gay."[404] Thus, there is a status quo privileging of *which* sexual minority is the marketable one and *which* is not: "[W]ho is viewed as a gay

---

400. Brief for 206 Businesses as Amici Curiae Supporting the Employees at 8, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

401. *Id.* at 9 (footnotes omitted).

402. *Id.* at 11.

403. Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 431 (2012) [hereinafter Joshi, *Respectable Queerness*].

404. *Id.* at 431-32 (footnotes omitted).

consumer bears on who is imaginable as a gay citizen and, crucially, who is deemed suitable for the sexual citizenship that is attended with marriage."[405] Specifically, "the gay market is not a pre-existing entity, but an active production, one that overwhelmingly gay male (as opposed to LGBT) professionals have worked to produce."[406] Within corporate workplace cultures, "[o]penly LGBT people working in professional-managerial status occupations range from those whose sexual identity constitutes part of their professional expertise ('professional homosexuals') to those whose sexual identity plays little to no part in their professional life ('homosexual professionals')."[407]

Secondly, we ought to recall from Part II, *supra*, that historical accounts have asserted that the development of the capitalist workforce during modern industrialization led to contemporary conceptualizations of non-heteronormative identities.[408] Gay and lesbian identities, as D'Emilio posited in particular, "are a product of history, and have come into existence in a specific historical era" and are "associated with the relations of capitalism."[409] Such identities exist also, in part, in reaction to the privileging of a heteronormative gendered prescription within a capitalist context.[410] These concurrent observations reveal an intricate tension. Although capitalism and industrialization prompted a geographic dispersion of people toward urban centers where individuals, away from traditional pressures, could explore non-heteronormative sexual behaviors, capitalism is also keen to maintain a thriving labor workforce. Queer minorities are caught in the middle of this tension. As D'Emilio notes, "[o]n the one hand, capitalism continually weakens the material foundation of family life, making it possible for individuals to live outside of the family, and for a lesbian and gay male identity to develop. On the other, it needs to push men and women into families, at least long enough to reproduce the next generation of workers."[411] This push for families ought to reverberate significantly with the discussion in Part III, *supra*, of Justice Kennedy's interpretation of gay history, where the growing visibility of same-sex couples also coincided with the forming of families—one of his underlying justifications for extending marriage rights to same-sex couples and one of

405. *Id.* at 432 (footnote omitted).

406. *Id.*

407. *Id.* (footnote omitted).

408. *See* discussion in Part II.A.

409. D'EMILIO, *Capitalism and Gay Identity*, *supra* note 39, at 468.

410. *See* discussion in Part II.A.

411. D'EMILIO, *Capitalism and Gay Identity*, *supra* note 39, at 474.

the performative characteristics of *Obergefell*'s respectable "perfect plaintiffs."[412]

In this way, as D'Emilio further articulates, "[t]he elevation of the family to ideological preeminence guarantees that capitalist society will reproduce not just children, but heterosexism and homophobia."[413] In this paradigm, mainstream corporate America, as the externalization of modern capitalism, has a profound material interest in recognizing its LGBTQ workers but also polices them in the way Joshi has described. As Richard Delgado has observed, Bell's interest convergence theory depicts the negotiation of equality through a materialist perspective: "Interest convergence is a form of materialist analysis which seeks to explain the shifting tides of racial history by reference to underlying conditions such as labor needs, international competition, and the search for profit."[414] Despite the corporate interest and need to include LGBTQ workers, the recognition of LGBTQ workers exists within workplaces where presumably heteronormative gender roles prevail, leaving respectability as the prescription for inclusion and survival.[415]

As "[s]exual norms operate at the level of aspirational fantasy and as a form of social status," this respectability-driven corporate inclusiveness places major stereotyping expectations on LGBTQ individuals.[416] Joshi notes that "[m]ost professional contexts, even those touted as being 'gay friendly,' maintain heteronormative ideas of gender and sexuality, adherence to which remains a precondition of institutional citizenship. LGBT professionals must tread carefully, and refrain from expressing their personal identities in personal and political ways that might be deemed 'unprofessional.'"[417] And so from the rise and dominant exclusion of non-heteronormative identities during the modern industrialization era all the way to the federal employment protections of sexual minorities secured in *Bostock*, a peculiar narrative comes to a full spiral rotation. In its new

412. *See Obergefell*, 576 U.S. at 661 ("In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families."); *see also* discussion in Part III.

413. D'EMILIO, *Capitalism and Gay Identity*, *supra* note 39, at 474.

414. Richard Delgado, *The Shadows and the Fire: Three Puzzles for Civil Rights Scholars*, 6 ALA. C.R. & C.L.L. REV. 21 n.3 (2014).

415. D'Emilio observes that the ideology of the family that is needed to maintain a capitalist labor force—in essence, to "drive[] people into heterosexual families"—in a modern capitalist world that also separates the physical bond of traditional family units altogether generates an "instability" for which non-heteronormative individuals have been targeted as "scapegoats." D'EMILIO, *Capitalism and Gay Identity*, *supra* note 39, at 473.

416. *See* CHITTY, *supra* note 42, at 25.

417. Joshi, *Respectable Queerness*, *supra* note 403, at 432-33.

elevated positioning, the spiral narrative has merely recycled the same sexual hegemony, only in a less overt, but continually pernicious fashion. By leaving heteronormative stereotypes preserved, *Bostock* is complicit. *Bostock* fulfills Title VII protections for sexual minorities, while its textualism allows the heteronormative status quo the opportunity to continue fulfilling its gendered scripts, which includes privileging assimilated sexual minorities over others who might, otherwise, threaten status quo norms.

From an interest-convergence perspective, *Bostock*'s holding reveals how the status quo's interests converge with the protective interest that the *Bostock* litigants sought under Title VII. Importing Bell's thesis into *Bostock* helps explain why the Court might have chosen textualism to protect queer minorities under Title VII, but failed to theorize the real substance of employment discrimination premised on sexual orientation and gender identities.

D. Reviving Anti-Stereotyping

Despite *Bostock*'s disregard for approaching the litigants' lived experiences through an anti-stereotyping lens and how converging interests disclose ulterior motives for its textualist holding, the Court's decision does not, however, foreclose anti-stereotyping resolutions in future discrimination cases. Because *Obergefell*'s anti-stereotyping approach evinces inherent flaws that privilege assimilated gay identities over others, and because *Bostock*'s textualism leaves heteronormative gender stereotypes intact, future pro-LGBTQ decisions must revive and develop anti-stereotyping rationales that appropriately and honestly regard the experiences of queer minorities. Interest convergence will likely reappear to cabin some of that discussion at every instance, but the arc toward fuller equality in various issues has often—especially for LGBTQ movements—been incremental.[418] As *Bostock*'s textualist precedent is being applied to protect individuals who have experienced sexual orientation and gender identity protections, a few considerations exist for ensuring that stereotyping and erasure of lived experiences do not continue in future precedents. *Bostock* is a major development; but if modern discrimination is fueled by discriminatory norms and stereotypes, then the visibility of lived experiences must persist to challenge those norms and stereotypes.[419]

---

418. *See, e.g.*, WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS xiii-xiv (2002).

419. Kramer, *supra* note 134, at 929. Again, Kramer is helpful to remind us that

> modern discrimination has more to do with work-culture norms and the ways in which an employee's behavior violates these norms . . . . Modern discrimination is the product of a complex web of work-culture norms,

Bostock's textualism does not preclude future Title VII decisions from reviving gender stereotyping theories that derive from *Price Waterhouse*. Although any prevailing interpretation of *Price Waterhouse* remains tenuous amongst the circuits, perhaps the bootstrapping considerations that once prevented some federal courts from applying sex stereotyping rationales to sexual minority litigants are now less applicable after *Bostock* functionally conjoins Title VII sex discrimination with either discrimination based on sexual orientation or gender identity. In fact, lower federal precedence has recognized the viability of Title VII gender stereotyping theories in *Bostock*'s aftermath, even in a circuit that previously denied the use of gender stereotyping by gay and lesbian litigants in Title VII cases.[420] Shortly after *Bostock*, a Virginia federal district court within the Fourth Circuit allowed gender stereotyping theories to survive a motion to dismiss challenge from an employer who had relied on the bootstrapping rationale.[421] The Fourth Circuit had previously refused to grant the use of *Price Waterhouse* for sexual orientation claims in Title VII gender stereotyping cases because of "bootstrapping" concerns.[422] But, in the court's perspective, *Bostock* had made the bootstrapping concerns irrelevant because Title VII sex discrimination now includes sexual orientation discrimination cases.[423] Likely, similar rationale that reconciles gender stereotyping in circuits that previously allowed *Price Waterhouse* to be applied to sexual minority litigants in Title VII cases would also find gender stereotyping still viable despite *Bostock*. Hence, where possible, in post-*Bostock* employment cases, both textualism and gender stereotyping theories ought to reside side-by-side.

Additionally, since Title VII precedents exact influence over Title IX discrimination cases,[424] *Bostock*'s application here in the educational context

---

> stereotypes, and unconscious biases, which work together to make discrimination subtle, messy, and more personal than ever before.

Id. (footnotes omitted).

420. Sarco v. 5 Star Fin., LLC, No. 5:19cv86, 2020 WL 5507534, *1, *5 (W.D. Va. Sept. 11, 2020).

421. *Id.* at *3, *5.

422. *See* Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751-52 (4th Cir. 1996).

423. *Sarco*, 2020 WL 5507534, at *5.

424. *See* Pamela Prescott, *"Entitled": Why Victims of Sex Discrimination Should Be Entitled to Seek Relief Under Title VII and Title IX*, 54 CAL. W. L. REV. 267, 276 (2018) ("[C]ourts have consistently used Title VII precedent to properly apply Title IX."). Additionally, relying on *Bostock*, the Department of Education has specifically interpreted that Title IX protects against sexual orientation and gender identity discrimination. *See* U.S. Dept. of Educ., *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender*

is certainly guaranteed. Again, as anti-stereotyping approaches were not foreclosed but only overshadowed by Justice Gorsuch's textualism in *Bostock*, future decisions in Title IX can continue anti-stereotyping theories to complement the textualist approach to sexual orientation and gender identity discrimination. An example from the Eleventh Circuit shortly after the *Bostock* decision is illustrative here. In *Adams by and through Kasper v. School Board of St. Johns County*,[425] Drew Adams, whose birth-assigned sex was female, started transitioning during adolescence after suffering from gender dysphoria and realizing he was transgender.[426] While transitioning, he began using the boy's restroom at his high school, but school officials forbade him from doing so because of the School District's bathroom policy that segregated restroom use based on biological sex.[427] Because Adams had entered the school district in the fourth grade as female, the school officials deemed him biologically female and enforced the bathroom policy, prohibiting him from using the boys' restroom.[428] Further, the School Board later declined to adopt a more inclusive bathroom policy, ultimately differentiating Adams and leaving him "'alienated and humiliated.'"[429] Adams sued and prevailed; the School Board then appealed.[430]

Siding with Adams, the Eleventh Circuit acknowledged the applicability of *Bostock*'s but-for causation in a Title IX action: "*Bostock* explained that if an employer fires a transgender female employee but retains a non-transgender female employee, this differential treatment is discrimination because of sex."[431] But, unlike Justice Gorsuch's hermetic and exclusively textualist decision, the court considered Adams' experiences from the school board's treatment, detailing at great length how Adams "suffered harm" and acknowledged distress and anxiety caused by the stigma that the bathroom

---

Identity (Jun. 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity. The Department of Education's notice of interpretation specifically observes the textual resemblances between Title VII and Title IX, and applies *Bostock*'s protections against discrimination based on sex, sexual orientation, and gender identity to Title IX protections consistently. *See* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, __ Fed. Reg. __ (forthcoming), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf.

425. 968 F.3d 1286 (11th Cir. 2020).

426. *Id.* at 1292.

427. *Id.* at 1293-94.

428. *Id.* at 1294.

429. *Id.* at 1294-95.

430. *Adams*, 968 F.3d at 1295.

431. *Id.* at 1306.

policy inflicted on him.[432] In part, after following *Bostock*'s textualist precedent for the application of its but-for causation, the court anchored its discussion of harm and stigma on prior transgender restroom cases[433] but also on *Obergefell*—analogizing the bathroom policy to marriage bans for their propensity to impose "stigma and injury"[434] and recognizing how the bathroom policy similarly "cause[d] [Adams] psychological and dignitary harm."[435] The *Adams* decision is a post-*Bostock* starting point for reviving existing anti-stereotyping approaches in other LGBTQ discrimination cases and merging them with textualism. Future cases along these lines will be welcomed developments for animus-dignity anti-stereotyping, especially since such jurisprudence would no longer be cabined in the marriage context.

Although *Bostock* preserves heteronormativity, its textualism also accomplishes a bare aggregation of sex, sexual orientation, and gender identity conceptions through its simple but-for causation. Implications for a deeper "queering" of these conceptions intrinsically within *Bostock* might be thin; but doctrinally for the purposes of Title VII at least, sex discrimination appears to functionally envelope sexual orientation and gender identity discrimination, and cosmetically it coincides with various scholarly and judicial considerations that have more "thickly" or profoundly linked these types of concepts together.[436] In a sense, *Bostock* exemplifies how the status

---

432. *Id.* at 1307.

433. *See id.* at 1307-08 (quoting Whitaker *v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-57 (7th Cir. 2017); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam)).

434. *See Adams*, 968 F.3d at 1307 (relying on the same basis for legalizing same-sex marriage that excluding same-sex couples inflicts stigma on same-sex couples); *see also Obergefell*, 576 U.S. at 671.

435. *Id.* at 1310. The court made other anti-stereotyping references under Adams' 14th Amendment Equal Protection argument, referencing stereotyping effects in sex discrimination cases under *Craig v. Boren* and *VMI* cases and drawing such effects on Adams' experiences with the school bathroom policy. *See generally id.* at 1297-1304 (holding that excluding Adams from the boys' restroom violates the Equal Protection Clause of the Fourteenth Amendment because there is no rational basis between privacy in the school district restrooms and excluding non-binary individuals from restrooms).

436. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 235-336 (1994) (arguing that sexual orientation is discrimination against those who violate gender norms); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992) (arguing that sexual orientation is purely sexual in nature and, therefore, is gender-based sexual harassment); I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1187 (1991) (arguing that sexual orientation is essentially a form of sex stereotyping); *see also* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 358 (7th Cir. 2017) (Flaum, J., concurring)

quo has slightly loosened the mainstream distinctions of sex, sexual orientation, and gender identity that it has historically designated upon individuals who engaged in non-heteronormative sexual conduct. Again, as Altria and the numerous business amici articulated in their briefs, the interests of corporate diversity would not seem bothered by this import in federal workplace protections because LGBTQ inclusion engenders significant capital.[437] From this perspective, courts following *Bostock* might capture this conceptual blurring and importing of sexual orientation and gender identity discrimination cases under constitutional sex equality jurisprudence. Although no direct precedence yet exists, this import appears possible since the jurisprudential boundaries between Title VII sex discrimination cases and constitutional sex equality cases are often porous.[438]

For early precedence that imports *Bostock* into constitutional sex discrimination without a statutory anchor, the Court of Appeals of North Carolina recently applied *Bostock* in a case where a woman who terminated a same-sex relationship was denied state domestic violence protections because North Carolina laws protected partners in opposite-sex relationships, rather than same-sex ones.[439] The claimant in *M.E. v. T.J.* based part of her appeal on Fourteenth Amendment equal protection grounds, and the appeals court found through application of anti-stereotyping approaches in *Romer*, *Windsor*, *Lawrence*, and *Obergefell* that the claimant's case warranted intermediate scrutiny.[440] In an additional validation of the sex discrimination finding here, the court applied *Bostock* specifically to demonstrate "that equal protection challenges of a law based upon LGBTQ+ status are also challenges based upon 'sex' or gender and, therefore, require at least 'intermediate scrutiny.'"[441] Without a statutory anchor that would afford a textualist reading, the court here, nonetheless, imported *Bostock*'s associations of sex with sexual orientation and gender identity categories. The court noted *Bostock*'s applicability to Supreme Court equality jurisprudence because "the Supreme Court has held that 'because of' language used to determine a 'discriminatory purpose' when

---

(finding sexual orientation is sex discrimination within the Title VII context, because "[f]undamental to the definition of homosexuality is the sexual attraction to individuals of the 'same sex.' . . . One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless.").

437. Brief for 206 Businesses, *supra* note 400, at 11.

438. Case, *supra* note 100, at 1451 (noting that "constitutional sex discrimination law is in many ways path dependent on Title VII").

439. M.E. v. T.J., 854 S.E.2d 74, 109-11 (N.C. Ct. App. 2020).

440. *Id.* at 107.

441. *Id.* at 115.

required for an Equal Protection Clause challenge 'applies to the "class-based, invidiously discriminatory animus" requirement of' federal statutes."[442] In this way, "the Court's analysis of Title VII in *Bostock* is also relevant to similar requirements imposed by the Fourteenth Amendment in the case."[443] Invariably, the leap from Title VII to Fourteenth Amendment sex discrimination did not take far:

> Though *Bostock* was decided by statutory interpretation of certain language in Title VII, the reasoning in *Bostock* in support of its determination, that "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex*[,]" includes a common, plain language definition of "sex" in the context of discrimination that, absent some exclusionary language, must logically include sexual-orientation and gender identity.[444]

Under this premise, "the definition of 'sex' in *Bostock* should apply equally to any law denying protections or benefits to people based upon sexual orientation or gender identity; disparate treatment based on these 'statuses' is disparate treatment based, at least in part, upon 'sex' or gender."[445] Such import, underscoring the functional reading of *Bostock*'s definition of sex, destabilizes the textualist aspect of Justice Gorsuch's reading of Title VII "because of sex." It also would provide his *Bostock* conflation of sex, sexual orientation, and gender identity categories new doctrinal strengthening in sex equality cases beyond Title VII. Moreover, the court here used anti-stereotyping considerations of what constituted "racial animus" from North Carolina cases to analogize and further supplement the textualist foundations of *Bostock*'s conceptualization of sex, sexual orientation, and gender identity categories.[446] This decision demonstrates an expansive potential that can eventually erode the textualist basis for *Bostock*'s determination that sex discrimination is sexual orientation or gender identity discrimination, and replace it with anti-stereotyping ones—perhaps from LGBTQ cases or sex stereotyping cases—to use the lived experiences of queer discrimination to reach higher protections under constitutional equal protection.

Again, lived experiences must matter in modern discrimination. Despite its protective and expansive holding, *Bostock* preserves a heteronormative and discriminatory status quo. Cases ought not to follow *Bostock*'s un-queerness singly or mechanically, but ought to consider its substantive

---

442. *Id.* at 109.

443. *Id.* at 109-10 (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 272 (1993) (citations omitted)).

444. *Id.* at 110 (quoting *Bostock*, 140 S. Ct. at 1741 (emphasis added)).

445. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741).

446. *Id.*

implications critically, reviving and continuing anti-stereotyping theories as part of the development of anti-discrimination for queer identities. Recognition of queerness warrants that adjustment.

V. CONCLUSION

Donald Zarda and Aimee Stephens did not live to witness the Supreme Court validate their Title VII identities.[447] Of the three *Bostock* litigants, only Gerald Bostock lived to experience the arrival of the Court's ruling.[448] During a pandemic year, where often the lived experiences of the modern workplace migrated to virtual environments out of necessity, Bostock learned of the decision while on a virtual conference call for his current occupation as a mental health counselor.[449] He celebrated by "let[ting] out a big scream" and "hugg[ing] his partner."[450] Likewise, the thought of Title VII employment protections in the Court's holding should certainly give queer individuals much to cheer, knowing the post-*Obergefell* quandary of marriage rights without employment protections no longer endures.

Yet, the Court's tacit disinclination in *Bostock* to substantively examine and address what motivates anti-queer bias while the Court promoted its expansive textualist rationale is quite curious. By proceeding on that curiousness—by queering *Bostock* in a way—we see here that the Court's advancements are driven by status quo convictions, rather than more genuine motivations toward understanding and recognizing queer lived experiences. *Bostock*'s validation is a mixed blessing, and much remains to be addressed beyond the Court's textualism. For a decision about work, no doubt more work ostensibly lies ahead.

---

447. Samantha Schmidt, *Fired after joining a gay softball league, Gerald Bostock wins landmark Supreme Court case*, WASH. POST (June 15, 2020, 5:49 PM), https://www.washingtonpost.com/dc-md-va/2020/06/15/fired-after-joining-gay-softball-league-gerald-bostock-wins-landmark-supreme-court-case/.

448. *Id.*

449. *Id.*

450. *Id.*