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**BOSTOCK, BACKLASH, AND BEYOND THE PALE: RELIGIOUS RETRENCHMENT
AND THE FUTURE OF LGBTQ ANTIDISCRIMINATION ADVOCACY IN THE WAKE
OF TITLE VII PROTECTION**

KYLER J. PALMER*

The Supreme Court's landmark decision in Bostock v. Clayton County is an influential ruling affecting future LGBTQ rights projects. However, the Court's ability to produce social and political change through legally formalistic decisions related to highly contentious social issues is routinely undercut by public backlash. In the context of LGBTQ legal advocacy, the Court's ruling is exacerbated by social and political backlash when the Court ignores the lived experiences of LGBTQ litigants.

Despite the recent history of pro-LGBTQ Supreme Court decisions, sexual minorities are still constrained to the margins of society and viewed as inferior—if considered at all. This Article analyzes strong evidence showing that, although courts have eliminated symbolic manifestations of oppression through antidiscrimination law, these actions cannot be seen as a permanent pronouncement of society's commitment to ending subordination of sexual minorities. This is especially true when the Court fails to clarify the intersection of religious liberty and federal antidiscrimination law, like in Bostock.

The Bostock Court neglected the lived experiences of LGBTQ employees; this Article suggests that Bostock served as a catalyst to a period of religious retrenchment of LGBTQ rights. This Article sets forth and applies a three-prong theoretical framework to nullify the threats of religious retrenchment on substantive equality.

INTRODUCTION

Historically, “just like you” is the great American lie. The overwhelming, even giddy, diversity of America precludes such simple analogies. “Just like” is often a false argument . . . [that leads] to far more misunderstanding and anger than agreement and clarity.

– Michael Bronski¹

The best approach for the lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) civil rights campaign has been hotly contested among activists, legal advocates, and scholars.² Early LGBTQ rights groups of the homophile movement advanced assimilationist goals of acceptance into, rather than dismantling of, preestablished societal institutions. They did not question how those societal institutions fostered institutional inequality and marginalization of multidimensional minorities.³ Other early organizations, like the East Coast Homophile Organization (ECHO), criticized the apologetic stance

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¹ MICHAEL BRONSKI, *A QUEER HISTORY OF THE UNITED STATES* 241 (2011).

² For inclusivity, the use of “Q” in LGBTQ is to recognize those in our community who seek not to be affiliated with, or forced into being identified as, Lesbian, Gay, Bisexual or Transgender. Moreover, the use of LGBT throughout this Article does not ignore those who are queer or questioning. Rather, these references are consistent with the use of the abbreviation in the cited work. All errors of reference are the Author’s.

³ Multidimensionality is a theoretical model that rejects LGBTQ essentialism by uncovering intragroup subordination of multi-minority individuals within a minority class. See generally Darren Lenard Hutchinson, *Discrimination and Inequality Emerging Issues “Gay Rights” for “Gay Whites?”: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000) (discussing multidimensionality in LGBTQ advocacy); Kyle Velte, *From the Mattachine Society to Megan Rapinoe: Tracing and Telegraphing the Conformist/Visionary Divide in the LGBT-Rights Movement*, 54 U. RICH. L. REV. 799, 802-04 (2020) (discussing advocacy strategies and tactics of early LGBTQ rights groups); MARTIN DUBERMAN, *STONEWALL: THE DEFINITIVE STORY OF THE LGBTQ RIGHTS UPRISING THAT CHANGED AMERICA* 93 (Penguin Random House LLC, 2d. ed. 2019).

of the homophile movement and took a more radical approach.⁴ These groups were “led by a coalition of people whose goals encompassed a radically different future not only for gay rights, but for a complete overhaul of accepted cultural norms governing sexuality, gender, family, and community.”⁵

Some scholars categorize the two strands of advocacy as “gay advocacy” and “queer advocacy,” while others refer to them as conformist and visionary.⁶ Regardless of the nomenclature, the principal LGBTQ equality agenda has remained unchanged since the movement’s inception: commitment to institutional change of heteronormative establishments that continue to deprive LGBTQ persons of vital basic human rights.⁷ The substantive goals, however, of the mainstream LGBTQ moment vary.⁸

The modern LGBTQ movement has followed an assimilationist pattern of prioritizing social issues by seeking formal equality through legal and policy reform, while substantive equality can be an aftershock.⁹ Marriage equality, vis-à-vis the Supreme Court’s decision in *Obergefell v. Hodges*, is a prime example of

⁴ Elizabeth J. Baia, *Akin to Madmen: A Queer Critique of the Gay Rights Cases*, 104 VA. L. REV. 1021, 1026 (2018). See also Velte *supra* note 3, at 808.

⁵ DUBERMAN, *supra* note 3, at xxiii.

⁶ Baia categorizes the strands of advocacy in the former, while Velte categorizes them in the latter. See Baia, *supra* note 4, at 1028; Velte, *supra* note 3, at 799.

⁷ URVASHI VAID, IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS, AND THE ASSUMPTIONS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POLITICS 195 (2012); DUBERMAN, *supra* note 3, at xxiii.

⁸ Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1678 (2014).

⁹ *Id.*

the modern marginalization of substantive equality at the expense of formal equal rights.¹⁰ Within hours, the aspirations of substantive equality resulting from *Obergefell* were undercut by homophobic and transphobic actions disguised as an exercise of religious freedom.¹¹

This modern trend of assimilationism juxtaposed with the visionary aspirations of other activists results in one extremely troubling question: what exactly is the LGBTQ movement's aim? Dean Spade recounts this question in the context of the marriage equality debate, predating *Obergefell*.¹² Spade asks whether legal inclusion in societal institutions, like marriage, is an essential marker of equal citizenship, making sexual orientation irrelevant, or whether it dismantles such systems while enforcing colonial, gender, and racial control.¹³ The marriage debate is indicative of broad tension within the LGBTQ movement.

¹⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding under the Due Process Clause of the Fourteenth Amendment, same-sex couples have a fundamental right to marry, and all state laws excluding same-sex couples from civil marriage were invalid); *See also*, CORVINO ET AL., DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 2–3 (2017) (noting that after the Supreme Court rendered its decision in *Obergefell*, “conflicts arose when those with religious objections to same-sex marriages were asked to recognize, facilitate, or otherwise lend support to them. . . . Although such conflicts were not directly a function of *Obergefell* . . . they quickly became a new frontier in the ongoing ‘culture wars.’”).

¹¹ *See Miller v. Davis*, 267 F. Supp. 3d 961 (E.D. Ky. 2017) (noting that Kim Davis attempted to use personal religious objections to undercut *Obergefell*'s promise of marriage equality by explicitly refusing to recognize the legal force of Supreme Court jurisprudence). *See also* JOHN CORVINO ET AL., *supra* note 10, at 21 (noting that after the Supreme Court legalized same-sex marriage, Davis stopped issuing marriage licenses and refused to allow deputy clerks to do so).

¹² *See* Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 85 (2013).

¹³ Spade notes this tension is visible in other LGBTQ issues aside from the marriage debate. Those include gay and lesbian military service and the passage of hate crimes legislation that enforces penalties for crimes motivated by sexual orientation or gender identity bias. *Id.* at 83–85.

It begs the question of what it means to advocate for the well-being of sexual minorities.¹⁴ When religious freedom and religious liberty are added to the discussion, the tension thickens.

The tension articulated by Spade is most evident in the judicial victories that advance LGBTQ rights. Concurrently, there is ongoing debate over the Supreme Court's ability to produce positive social and political change through legally formalistic decisions.¹⁵ This general debate is predicated on two competing scholarly contentions. On one hand, many scholars claim public backlash against controversial holdings can undermine the rights the Court is seeking to protect.¹⁶ On the other hand, scholars claim that the possibility of backlash should not impede judicial decision-making, but rather, should play a vital role in advancing constitutional social policy.¹⁷ Jeffrey Schmitt notes this debate largely focuses on the history of the Court's decisions on slavery, desegregation of public schools, and abortion.¹⁸ He argues that "courts should issue limited and incremental rulings when attempting to produce social change on divisive issues."¹⁹

¹⁴ *Id.* at 85.

¹⁵ Jeffery M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of Prigg v. Pennsylvania*, 123 PENN ST. L. REV. 103, 104 (2018).

¹⁶ *Id.* at 104, n. 1.

¹⁷ *Id.* at 104-105, n. 2.

¹⁸ *Id.* at 104-05.

¹⁹ Using *Prigg v. Pennsylvania* as a test case, Schmitt notes that "broad constitutional rulings on important social issues . . . can increase the likelihood that Congress will enact the type of divisive legislation that triggers backlash." *Id.* at 105-06.

As highlighted throughout this Article, incremental steps towards formal equality are vital to achieving substantive equality for the LGBTQ community. However, incremental victories should not fuel the complacent belief that society has ended the subordination of sexual and gender minorities.²⁰ This is especially true when a courtroom victory leads to violence against the LGBTQ community—both in the form of physical violence and violence from elected officials whose political agenda includes stripping away the rights the community achieved.

From the decriminalization of homosexual intercourse to the right to state-recognized same-sex marriage, the LGBTQ movement has made soaring incremental victories in the fight for formal equal rights.²¹ However, these victories are plagued by broken promises made by officials elected to the “gay” vote, the deep suffering of the AIDS epidemic, and painstaking losses in state and

²⁰ Calling for a return to the radical spirit the modern gay liberation movement is rooted in, Duberman notes that “[a] return to that radical spirit—and uncompromising, direct action—has the potential to do more for queer communities than the more incrementalist approach that the mainstream movement eventually embraced.” DUBERMAN, *supra* note 3, at xxiii.

²¹ See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015). See also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1837 (2020) (Kavanaugh, J., dissenting) (noting “Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result.”).

federal courts.²² Post-World War II lesbian and gay strategy has fluctuated between periods of mobilization and demobilization as well as between sexualization and desexualization.²³ Although the differing tactics and strategies employed by the movement over the past seventy years have generated the modern intracommunity debate, judicial decision-making is a power possessed by the dominant heteronormative majority.

This Article contributes to both the intracommunity and general debate among constitutional scholars by tracing the social and political impact of *Bostock v. Clayton County* on future LGBTQ rights movements.²⁴ By critically analyzing *Bostock* and examining LGBTQ rights activism following the ruling, this Article provides strong evidence that legal victories are not a permanent pronouncement of society's commitment to ending the subordination of sexual and gender

²² The AIDS outbreak stigmatized gay and lesbian communities by labeling homosexuality as unnatural and pathological. This eventually led to Congress passing the Helms Amendment in 1987 which “made it illegal to use federal funding to subsidize prevention projects suspected of encouraging same-sex relations.” GUILLAUME MARCHE, *SEXUALITY, SUBJECTIVITY, AND LGBTQ MILITANCY IN THE UNITED STATES* 38–43 (2019). Bill Clinton became the first presidential election frontrunner to explicitly court LGBTQ voters during his 1992 presidential campaign by promised to remove barriers to gay and lesbians in joining the Armed Forces. The resulting “Don’t Ask, Don’t Tell” policy is largely seen as a clear political failure for LGBTQ rights. *Id.* at 44–48.

²³ As Marche notes, the fluctuations of the parallel pendulums of mobilization and demobilization and sexualization and desexualization in the movement’s history occurs in three cycles. The first is the homophile movement, the second is the gay liberation movement, and the third is the modern LGBTQ movement. *Id.* at 25–56.

²⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

minorities.²⁵ This Article further argues that the backlash stemming from the public reception of *Bostock* was inevitable, primarily because of extreme tension between the Religious Right and LGBTQ advocates.²⁶ Although *Bostock* is a victory for LGBTQ individuals, the Court failed to address whether an employer's sincerely held religious beliefs or other religious exemptions can shield employers from complying with Title VII's mandates—ultimately preserving the discriminatory status quo.²⁷ Thus, *Bostock* is yet another Supreme Court decision of queer sacrifice to religious freedom.²⁸ In the name of textualism, the decision serves as an institutional commitment and major catalyst to *religious retrenchment*—a novel term coined by this Article—for the LGBTQ community and a threat to the success of future LGBTQ rights projects.

Religious retrenchment is a social and political consequence of the court system's neglect in considering the lived experiences of minority individuals and balking at opportunities to set bright-line standards governing the intersection of

²⁵ Kimberlé Williams Crenshaw made a similar argument in the civil rights context. Crenshaw noted that “the civil rights constituency cannot afford to view antidiscrimination doctrine as a permanent pronouncement of society’s commitment to ending racial subordination.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988).

²⁶ Used consistently throughout this Article, Religious Right serves as a double entendre. The suggestive phrase alludes to right of the free exercise of religion guaranteed by the First Amendment and the coalition of right-of-aisle conservative Protestants and Catholics that employ legal strategies to justify noncompliance with antidiscrimination law. See *Religious Right*, ASS’N OF RELIGIOUS DATA ARCHIVES, https://www.thearda.com/timeline/movements/movement_17.asp.

²⁷ See Jeremiah A. Ho, *Queering Bostock*, 29 AM. U. J. GENDER SOC. POL’Y & L. 283, 288–89 (2021); Xavier D. Lightfoot & Devon D. Williams, *For Employers: Understanding the Supreme Court’s Title VII Ruling*, THE NAT’L L. REV. (Aug. 12, 2020).

²⁸ Ho, *supra* note 27. See generally Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249 (2020).

religious freedom and antidiscrimination. The emergence of religious retrenchment is the product of a shift in the Religious Right's strategy to undermine the protections guaranteed by public antidiscrimination laws. The Religious Right's strategy is rooted in claims that accommodating LGBTQ minorities' rights violates their First Amendment right to freely exercise their individual religious beliefs.²⁹ The institutional shift among right-wing conservative organizations now focuses on religious theocracy rather than religious pluralism.³⁰ In praxis, the justification for discriminating against LGBTQ individuals is premised on minority individuals' conduct rather than their identities.³¹ This theory, accepted by the Supreme Court in *Masterpiece*

²⁹ Explaining the relationship between religious liberty and LGBTQ rights, Koppelman notes: Each side's position has become more unyielding. Many of the most sophisticated scholars are as rigid as the politicians and partisan commentators. The dominant view, on both sides, is that this disagreement concerns a matter of deep principle. Religious liberty and nondiscrimination are each understood as moral absolutes. Compromise is perceived as an existential threat. Both sides feel victimized. Gay rights advocates fear that exempting even a few religious dissenters would unleash a devastating wave of discrimination. Conservative Christians fear that the law will treat them like racists and drive them to the margins of American society.

ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 1 (2021).

³⁰ Delaney Hiebert, *Patchwork Protections in Kansas: The Rise of Religious Exemption Laws Demands State-Level LGBTQ+ Antidiscrimination Protections*, 30 KAN. J.L. & PUB. POL'Y 128, 136 (2020). See also *id.* at 136, n. 59; Derek H. Davis, *Introduction: Religious Pluralism as the Essential Foundation of America's Quest for Unity and Order*, THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES (2011), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780195326246.001.0001/oxfordhb-9780195326246-e-0> [<https://perma.cc/Y5YN-FS3B>] (discussing the difference between religious pluralism and religious theocracy).

³¹ Hiebert, *supra* note 30, at 137. See also Kyle Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36(1) LAW & INEQ. 67, 80 (2018).

Cakeshop, shields religious organizations from respecting the hard-fought rights of minority groups like the LGBTQ community.³² In the context of LGBTQ rights activism, acceptance of this theory legitimizes the false status-conduct dichotomy that has largely been discredited by today's more accepting societal perception of LGBTQ individuals.³³

Countering religious retrenchment may seem challenging, given the weight of religious freedom in the law.³⁴ However, it is possible by applying a three-prong theoretical framework. First, minorities must view incremental legal victories with extreme skepticism, regardless of how broad the new legal protections may be. Skepticism of legal victories serves as a foundation to craft remedial measures and to prevent future discriminatory efforts. Second, minorities must understand and celebrate formal judicial victories for what they are and not for their potential because potential may be hampered by the resulting backlash. Third, minority individuals must remain cognizant of their societal marginalization. Even momentary lapses in awareness invite future forms of oppression that might have otherwise been preempted. Therefore, until the fight for LGBTQ rights is no longer met with social, political, or legal objections, minorities must recognize that a dominant, heteronormative, masculine majority

³² Hiebert, *supra* note 30, at 136.

³³ *Id.* See also Velte, *supra* note 31, at 81.

³⁴ See U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

is constantly working against them to divest and negate any legal or social progress the minority community has made.

This Article proceeds in five Parts. Part I analyzes the Supreme Court's decision in *Bostock* to reveal how it preserves the heteronormative status quo. The analysis begins with a historical account of state and federal LGBTQ employment discrimination protections predating 2020. Then, this Part analyzes the facts and arguments before the Supreme Court. Finally, Part I provides an in-depth critique of the Court's majority opinion.

Part II focuses on religious objections to *Bostock* and uncovers the social and political trends emerging from the decision. This Part analyzes *Bostock*'s influence on LGBTQ antidiscrimination protection by delineating states' legislative responses to the Court's holding. Finally, Part II reveals how federal administrative action and change in executive leadership has impacted the future of LGBTQ protections.

Part III assesses antidiscrimination legal advocacy in the wake of *Bostock*. This Part calls to attention particularly worrisome judicial trends for the future of LGBTQ advocacy. One trend of utmost importance is the conservative emphasis on religious exemptions and religious freedom.

Part IV applies critical race, feminist, and queer legal theory to make the case for a substantively equal society for all marginalized individuals—not just members of the LGBTQ community. By adopting the theoretical framework of

foundational critical legal scholars, Part IV returns to the LGBTQ movement's grassroots goals and argues for a redirect of the modern LGBTQ rights movement.³⁵ Finally, Part V concludes by recounting the lessons learned from *Bostock* and provides guidance for the LGBTQ rights movement when spearheading the next project.

* * *

In considering the role of sexual orientation and gender identity in the American legal system, this Article's analysis is rooted in three equally important claims. First, there is not a constitutionally enshrined, justifiable right to discriminate against any individual in society. This encompasses all forms of discrimination, including discrimination based on the enumerated classifications like race, color, religion, sex and national origin. The First Amendment's promise of free exercise of religion is an illegitimate defense to freely exercising discriminatory and stereotypical beliefs. Religious liberty and LGBTQ equality are two equally important yet distinct values that are *not* mutually exclusive.

Second, substantive equality is a fundamentally simple concept that should be universally embraced. However, achieving substantive equality is complicated by polarized political fearmongering. Formal equality and substantive equality

³⁵ I use the term "redirect" in its literal sense. Any time a member of the LGBTQ community is not included, their lived experiences not considered, or their voices not heard, the movement is going the wrong direction. This Article uncovers several instances where modern LGBTQ organizations have utilized strategies and tactics that perpetuate marginalization within the community. Accordingly, a redirect of the movement is proper.

should not be partisan issues or talking points. Rather, it is imperative that the commitment to a discrimination-free society is shared by all, regardless of political affiliation.³⁶

Third, queer consciousness is vital when making incremental steps towards formal and substantive equality. It is far too easy for LGBTQ advocates to play into the hands of the heteronormative majority by becoming complacent with easily undone judicial or legislative victories. Through a constant critique of legislative and judicial advancements as well as a cognizance of their marginalized role in society, LGBTQ individuals should forge a united commitment to reform discourse as a collective identity.

I. THE SUPREME COURT'S DECISION IN *BOSTOCK*

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.

— Jeremiah Ho³⁷

³⁶ Koppelman noted that “[t]he gay rights/religious liberty issue is not a question for the courts. It is an appropriate occasion for legislative negotiation.” KOPPELMAN, *supra* note 29, at 5. Compromise, either by way of the court system or through the legislative process, is the main reason for religious retrenchment of modern LGBTQ rights. Compare KOPPELMAN, *supra* note 29, at 12, with STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 71 (2021).

³⁷ Ho, *supra* note 27, at 370.

The Supreme Court's decision in *Bostock* came at a time of patchwork local and state protection against workplace discrimination for LGBTQ individuals.³⁸ At the same time, the general public inaccurately believed LGBTQ individuals were federally protected from workplace discrimination.³⁹

Bostock is the fifth landmark case in a chain of LGBTQ rights victories dating back to the Court's 1996 decision in *Romer v. Evans*.⁴⁰ The majority opinions in each of the four landmark decisions predating *Bostock* were written by the conservative-appointed Justice Kennedy.⁴¹ It is not surprising that the majority decision in *Bostock* was also written by a conservative-appointed justice, Justice Gorsuch.⁴² Justice Gorsuch's textualist interpretation of sex discrimination under

³⁸ As noted by Corvino, "Religion is a protected category at the federal level, whereas sexual orientation [and gender identity] is not—indeed, fewer than half the states include it at the state level." CORVINO ET AL., *supra* note 10, at 75. Further, Koppelman notes "Twenty-one states and the District of Columbia have statutes prohibiting discrimination on the basis of sexual orientation. Such laws were first enacted in 1977. There have been no new ones since 2008. Three states—Arkansas, North Carolina, and Tennessee—prohibit local municipalities from protecting LGBT people from discrimination." KOPPELMAN, *supra* note 29, at 45. See also *infra* notes 45–47 and accompanying text.

³⁹ See *infra* notes 45–47 and accompanying text. See also Brief for the National LGBT Bar Association, et. al. as Amici Curiae Supporting the Employees, p. 12; *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107); PEW RESEARCH CENTER, *Attitudes on Same-Sex Marriage* (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

⁴⁰ In chronological order from oldest to newest, the five landmark cases are *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 664 (2015); and *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). See also Tara Law, 9 *Landmark Supreme Court Cases That Shaped LGBTQ Rights in America*, TIME (Oct. 9, 2019), <https://time.com/5694518/lgbtq-supreme-court-cases/> (an overview of the cases predating *Bostock* and their impact on LGBTQ rights in America).

⁴¹ See generally *supra* note 40.

⁴² Robert Barnes, *Neil Gorsuch? The surprise behind the Supreme Court's surprising LGBTQ decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html.

Title IV is consistent with prior LGBTQ legal victories and serves as another example of the Court's failure to consider the lived experiences of queer minorities. It also stands as a commitment to the heteronormative values enshrined in the expanding LGBTQ rights legal doctrine.⁴³

To establish context for *Bostock*, Part I-A provides a brief historical account of LGBTQ employment discrimination protection dating back to the early 1950s. Part I-B then sets the stage for the Court's decision in *Bostock* and provides a short description of the procedural history, each of the employees' stories, and the legal issues raised by each of the consolidated cases on appeal. Next, Part I-C analyzes the facts and arguments presented before the Supreme Court in *Bostock*. Finally, Part I-D critiques the Supreme Court's holding in *Bostock* by revealing the mouseholes in the LGBTQ community's legal victory in *Bostock*. Part I-D serves as the first theoretical step towards combatting religious retrenchment of LGBTQ rights.

A. *History of LGBTQ Employment Discrimination Protection*

When *Bostock* was decided, only a minority of states enumerated sexual orientation and gender identity as protected characteristics in their non-discrimination statutes.⁴⁴ Despite more than 3.5 million lesbian, gay, or bisexual

⁴³ Ho, *supra* note 27, at 288.

⁴⁴ Brief for the Scholars who Study the LGB Population as Amici Curiae Supporting the Employees at 22, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-162).

workers and 600,000 transgender workers living in states without state-level recourse or protection against workplace discrimination, a 2013 study by the Small Business Majority found that 81 percent of small business owners mistakenly believed it was illegal under federal law to fire an employee because they are gay or lesbian.⁴⁵ In sum, in 2020, nearly half of the estimated 8.1 million LGBTQ workers over 16 years of age lived in states without statutory protections against employment discrimination based on sexual orientation or gender identity.⁴⁶

The current lack of comprehensive workplace protections for LGBTQ individuals at both the state and federal levels result from a long and troubling history. During what is commonly referred to as the lavender scare, in 1953, President Dwight D. Eisenhower signed Executive Order 10,450 and banned

⁴⁵ See *id.*; Brief for the Scholars who Study the Transgender Population as Amici Curiae Supporting Respondent Aimee Stephens at 29; *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (Apr. 22, 2019), *rev'd sub nom.*; *Bostock v. Clayton Cty.*, 103 S. Ct. 1731 (2020) (No. 18-107); MOVEMENT ADVANCEMENT PROJECT, A BROKEN BARGAIN: DISCRIMINATION, FEWER BENEFITS AND MORE TAXES FOR LGBT WORKERS ii (June 2013), <https://www.lgbtmap.org/file/a-broken-bargain-condensed-version.pdf>. (Survey results from 508 small business owners found that “More than eight out of 10 small business owners mistakenly believe that it is illegal under federal law to fire or refuse to hire someone simply because they are gay or lesbian.” Additionally, “More than six in 10 believe that an employer should not be able to ‘fire or refuse to hire someone who is gay or transgender if working with a gay or transgender employee conflicts with the employer’s religious beliefs.’”).

⁴⁶ Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the US Not Protected by State Non-Discrimination Statutes*, UCLA WILLIAMS INSTITUTE (April 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

homosexuals from working in any federal government agency.⁴⁷ With his signature, President Eisenhower declared war on homosexual federal employees.

The rationale behind President Eisenhower's Executive Order was twofold. First, the Executive Order was motivated by false societal perceptions of homosexuals; at the time of its enactment, nationwide campaigns discussing homosexuality equated homosexuals with child molesters and the mentally ill.⁴⁸ Like the Executive Order, these attacks were written in "coded language that never mentioned 'fairy,' 'pansy,' or 'homosexual,' [and] were primarily aimed at homosexual men."⁴⁹ As a result, "sexual psychopath laws," which allowed courts to incarcerate suspected homosexuals and place them in mental institutions, were passed in states including Illinois in 1938, California and Michigan in 1939,

⁴⁷ The lavender scare was a societal moral panic following World War II based on the belief that gay men and lesbians were communist sympathizers and a national security risk. *See* Exec. Order No 10,450, 3 C.F.R. 936 (1949-1953).

⁴⁸ *Id.* at § 8(a)(1)(iii) (allowing for national security risk investigations of federal government employees to gather information relating to "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion."); BRONSKI, *supra* note 1, at 124–25.

⁴⁹ BRONSKI, *supra* note 1, at 124.

Minnesota in 1945, and Ohio in 1947.⁵⁰ In sum, “[t]he more public homosexuals became about their sexuality, the more they were believed to threaten society,” mainly because of the perceived threat they posed to children.⁵¹ The second motivating factor behind the Executive Order was the ungrounded fear that foreign agents would use federal employees’ homosexual status as blackmail to induce the employees into revealing confidential government information.⁵² As a result of Eisenhower’s Order, it is estimated that several thousand gay men and lesbians were terminated from federal employment.⁵³

Throughout the 1940s and 1950s, anti-gay policies ratifying the right to discriminate against LGBTQ employees grew in popularity in state legislatures. In response, early LGBTQ rights activists like Frank Kameny, co-founder of the Washington D.C. branch of the Mattachine Society, fought extensively to

⁵⁰ See 725 ILL. COMP. STAT. 205/0.01 et. seq. (1938); CAL. WELF. & INST. CODE §§ 5500-5516 (Deering 1939); MICH. COMP. LAWS SERV. § 780.503 (Lexis 1939) (repealed 1968); MINN. STAT. §§ 526.09-526.11 (1945) (repealed 1994); OHIO REV. CODE ANN. §2947.25 (Lexis 1947) (repealed 1978); Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 547 (1950) (Describing sexual psychopath laws as being “based on a belief that persons who commit serious sex crimes have no control over their sexual impulses and will repeat their crimes again and again regardless of punishment or other experiences.”); See also BRONSKI, *supra* note 1, at 124 (noting that once these laws were passed: Over the next decade, more waves of “sex panics” spread across the county and similar laws were passed. These laws differed in detail from state to state, but usually allowed the courts to incarcerate suspected “sexual psychopaths” for undetermined periods of time in mental institutions. These laws were broadly written, and the definition of “sexual psychopath” always remained vague so that it could be applied as indiscriminately as possible).

⁵¹ BRONSKI, *supra* note 1, at 125.

⁵² Josh Howard, *April 25, 1953: For LGBT Americans, a Day That Lives in Infamy*, HUFFINGTON POST (Apr. 27, 2012) https://www.huffpost.com/entry/april-27-1953-lavender-scare_b_1459335.

⁵³ DAVID DESCHAMPS & BENNETT SINGER, LGBTQ STATS: LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER PEOPLE BY THE NUMBERS 151–52 (2017).

challenge the legality of employment discrimination against homosexuals.⁵⁴ After being fired as a federal employee because of his sexuality, Kameny sent a letter to President John F. Kennedy urging the Supreme Court to decide the constitutionality of federal employment discrimination policies.⁵⁵ In his letter to President Kennedy, Kameny enclosed a self-composed petition for writ of certiorari that the Supreme Court denied in March 1961.⁵⁶ Although Kameny was the first to take a case challenging employment discrimination based on sexual orientation to the Supreme Court, the Court never heard his appeal.

Despite setbacks from the Supreme Court and relatively little assistance from President Kennedy, Kameny and other gay rights activists turned to both public demonstrations and the legislature to seek statutory protection from employment

⁵⁴ Brooke Sopelsa, *#Pride50: Frank Kameny – Father of the Gay rights movement*, NBC NEWS (June 3, 2019), <https://www.nbcnews.com/feature/nbc-out/pride50-frank-kameny-father-gay-rights-movement-n1005216>.

⁵⁵ Letter from Franklin E. Kameny to President John F. Kennedy, JFK PRESIDENTIAL LIBRARY (Aug. 10, 1961), <https://www.jfklibrary.org/asset-viewer/archives/JFKWHC/NF/1418/JFKWHC/NF-1418-002>. In this letter Kameny wrote:

The homosexual in the United States today is in much the same position as was the Negro about 1925. The difference is that the Negro, in his dealings with his government, and his fight for his proper rights, liberties and freedoms, has met, at worst, merely indifference to him and his problems, and, at best, active assistance; the homosexual has met only active hostility from his government. The homosexuals in this country are increasingly less willing to tolerate the abuse, repression, and discrimination directed at them, both officially and unofficially, and they are beginning to stand up for their rights and freedoms as citizens no longer deserving than other citizens of those rights and freedoms. They are no longer willing to accept their present status as second-class citizens and as second-class human beings; they are neither.

Id.

⁵⁶ *Id.* See also *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960), *cert. denied* 365 U.S. 843 (1961).

discrimination for sexual minorities.⁵⁷ Following the passage of the Civil Rights Act of 1964, public protests demanding the right to federal employment and workplace discrimination protection became commonplace among homophile-era activist groups like the Mattachine Society and the Daughters of Bilitis.⁵⁸ Additionally, the Mattachine Society of New York's employment division conducted surveys of New York businesses to document the reality of employment discrimination against LGBTQ people. The Society also picketed outside government buildings with messages including "Sexual Preference is Irrelevant to Federal Employment" and "Fair Employment for Gays."⁵⁹ In response to activist demands, Wisconsin and Massachusetts enacted legislation that prohibited discrimination based on sexual orientation in both public and private state employment.⁶⁰ California provided similar employment rights

⁵⁷ DUBERMAN, *supra* note 3, at 136–38 (recounting the story of Craig Rodwell, a Stonewall era activist who got to know Kameny through his involvement with ECHO, Duberman noted, "[t]he [ECHO] decided that to protest the exclusion of homosexuals from federal employment and the armed services, it would picket in front of the Pentagon, the Civil Service Commission, the State Department, and—to culminate the series—the White House. . . . [N]o gay protest had ever been seen in the nation's capital, and precious few anywhere else . . .").

⁵⁸ Jason Baumann et al., *The Long History of LGBTQ Employment Rights Activism*, N.Y. PUBLIC LIBRARY (June 18, 2020), <https://www.nypl.org/blog/2020/06/18/supreme-court-ruling-lgbtq-employment-rights>.

⁵⁹ See *March on Albany 1971: List of Demands*, GOOGLE ARTS & CULTURE, <https://artsandculture.google.com/exhibit/march-on-albany-the-new-york-gay-and-lesbian-community-center/FwKyc6rL3sUqJg?hl=en>.

⁶⁰ JOHN C. GONSIORAK & JAMES D. WEINRICH, HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 89 (1991).

protection only to openly gay persons.⁶¹ However, since most employment law is state idiosyncratic, the success of the activist demonstrations on the nationwide front was limited.⁶² Thus, two troubling realities remained: (1) for most LGBTQ persons working in the United States, employment protection was virtually nonexistent; and (2) legal attempts to include sexual orientation within the protected “gender” or “sex” classification of Title VII failed, eliminating the hopes of federal law protection.⁶³

Through a change in legal strategy, traction for public employment protection for LGBTQ employees grew throughout the late 1960s. Rather than raising Title

⁶¹ *Id.* at 89–90. *See also* CAL. LABOR CODE §1101-1102 (Lexis 1937); *Gay Law Student's Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (Cal. 1979). Through combined statutory authority of the California Labor Code and the California Supreme Court's decision in *Gay Law Student's Ass'n*, employment protection in California was afforded to openly gay employees. In *Gay Law Student's Ass'n*, the California Supreme Court held:

[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, [is] recognized as a political activity . . . [and] the subject of the rights of homosexuals incites heated political debate today[.] [T]he “gay liberation movement” encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.

Gay Law Student's Ass'n, 24 Cal. 3d. at 488.

Of notable importance, the employment protection afforded to homosexuals from the combined statutory authority and the holding in *Gay Law Student's Ass'n* ironically denied employment protection to closeted gays and lesbians.

⁶² GONSIORREK & WEINRICH, *supra* note 60, at 89.

⁶³ *Id.* at 89. *See, e.g., De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (affirming the district court's dismissal of employment discrimination claims based on sexual orientation for failure to state a claim based on a textual statutory interpretation of Title VII of the protected “sex” classification); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (holding an employer who refused to hire a prospective male employee because he was “effeminate” did not amount to sex discrimination under Title VII); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (holding a transgender employee who was fired because of her gender identity lacked subject matter jurisdiction to allege a claim under Title VII because “transsexualism was not encompassed within the definition of ‘sex’ as it appears in [Title VII].”).

VII claims for wrongful termination based on sexual orientation, discharged federal employees began to assert their due process rights.⁶⁴ Gay, or allegedly gay, federal employees—like Clifton Norton, a budget analyst for NASA—successfully challenged their federal employment dismissal on these grounds.⁶⁵ In *Norton v. Macy*, the D.C. Circuit found that Norton’s termination, which was based on his off-duty homosexual activity, lacked the necessary nexus between his sexual orientation and his job performance.⁶⁶ In response to cases like *Norton*, in 1980, the Director of the Office of Personnel Management—under the Carter Administration—advised federal agencies that under the Federal Employment Protection Act, “applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such as religious, community, or social affiliations, or sexual orientation.”⁶⁷ However, these victories were limited to federal employees; protecting LGBTQ employees in private employment remained difficult.

⁶⁴ GONSIORREK & WEINRICH, *supra* note 60, at 90.

⁶⁵ *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

⁶⁶ Norton was dismissed for “immoral conduct” and for possessing personality traits that allegedly rendered him “unsuitable for further Government employment.” Norton, however, had veteran preference because his job was established under the Veterans’ Preference Act and his dismissal could only be sustained for “such cause as will promote the efficiency of the service.” Since the Civil Service Commission failed to prove to the satisfaction of the court that homosexual activity was sufficient cause to deem an employee inefficient, the court found Norton was wrongfully terminated. *Id.*

⁶⁷ OPM, *Memorandum on “Policy Statement on Discrimination on the Basis of Conduct Which Does Not Adversely Affect the Performance of Employees or Applicants for Employment,”* (May 12, 1980). See also 5 U.S.C. § 2302(b)(10).

An important development in employment discrimination protection for federal LGBTQ employees came in the Equal Employment Opportunity Commission (EEOC)'s 2015 administrative decision in *Baldwin v. Foxx*.⁶⁸ Following an investigation finding that the Federal Aviation Administration denied David Baldwin permanent employment because he was gay, the EEOC held that employment discrimination based on sexual orientation was covered by Title VII.⁶⁹ Although this was a victory for LGBTQ employment rights, *Baldwin* was an agency interpretation of federal law. Its impact and scope were therefore only subject to *Skidmore* deference and not binding on federal courts.⁷⁰ As a result, district courts were split in applying the EEOC's interpretation of Title VII, with some choosing to follow contrary court decisions.⁷¹ In sum, *Baldwin* served as nothing more than persuasive authority in favor of the morally correct outcome.

B. *Factual and Procedural Background of Bostock*

⁶⁸ *Baldwin v. Foxx*, 2015 EEO PUB LEXIS 1905 (E.E.O.C July 15, 2015).

⁶⁹ Among Baldwin's allegations were negative comments made by his supervisor about his sexual orientation, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on several occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner. *Id.* at 4–5.

⁷⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (Holding the weight of agency "judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control.").

⁷¹ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (giving rise to the eventual challenge in the Supreme Court, the district court chose not to defer to the EEOC's decision and followed binding precedent in the Eleventh Circuit to rule in favor of the employer).

Although progress had been made in advancing the legal argument that Title VII should be interpreted to protect LGBTQ employees from employment discrimination, the LGBTQ legal community feared the Supreme Court would strip this progress away when it granted certiorari to the consolidated cases in *Bostock v. Clayton County*.⁷² This was mainly because of the unpredictable fifth vote necessary to find in favor of the employees.⁷³ It was presumed the four Democratic appointees—Justices Ginsburg, Sotomayor, Breyer, and Kagan—would side with the employees, and Justices Thomas and Alito would vote against.⁷⁴ However, the remaining three Justices—Chief Justice John Roberts and Justices Kavanaugh and Gorsuch—all remained question marks.⁷⁵

In addition to an examination of Justice Gorsuch’s 33-page majority opinion, a full understanding of *Bostock* requires examining the procedural history and factual narratives of each of the three employees’ Title VII claims. Justice Gorsuch summarized the lived experiences and complex litigation history of Gerald Bostock, Donald Zarda, Aimee Stephens, and the millions of other LGBTQ employees in four short paragraphs.⁷⁶ In a single sentence, Justice

⁷² Arthur Leonard, *U.S. Supreme Court Holds that Title VII of the Civil Rights Act of 1964 Bans Anti-LGBT Employment Discrimination in Landmark 6-3 Ruling*, 2 LGBT LAW NOTES (July 2020).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ LGBTQ rights activists had strongly opposed the confirmation of both Justice Gorsuch and Justice Kavanaugh because of their anti-gay rights track records. Equally unpredictable, Chief Justice Roberts had dissented in both *Windsor* and *Obergefell* and did not have the best pro-LGBTQ rights voting record. *Id.*

⁷⁶ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737–38 (2020).

Gorsuch minimized the lived experiences of the claimants by noting that “few facts are needed to appreciate the legal question [the court] face[d].”⁷⁷ Justice Gorsuch then proceeded with nearly 30 pages of textual statutory interpretation of Title VII. He showed zero empathy for the embarrassment, humiliation, and financial hardship an employee experiences when terminated from employment because of their sexual orientation or gender identity.⁷⁸

i. Procedural History

The merits of Gerald Bostock’s Title VII claim had not been decided prior to the Supreme Court’s review because the district court dismissed his case during the pleading stage of litigation.⁷⁹ A three-judge panel of the Eleventh Circuit affirmed the district court’s dismissal on the grounds that “the law does not prohibit employers from firing employees for being gay so his suit could be dismissed as a matter of law.”⁸⁰ This holding was premised on 39-year-old precedent from the Fifth Circuit that held, “discharge for homosexuality is not prohibited by Title VII.”⁸¹ Although indisputably worthy of a rehearing *en banc*, the Eleventh Circuit voted 9–2 not to rehear his case.⁸²

⁷⁷ *Id.* at 1737.

⁷⁸ *See generally id.* at 1737–54.

⁷⁹ *Id.* at 1738.

⁸⁰ *Id.*

⁸¹ *See Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Bostock v. Clayton Cnty.*, 723 Fed. Appx. 964 (11th Cir. 2018), *Bostock v. Clayton Cnty.*, 894 F.3d 1335, 1337 (11th Cir. 2018) (Rosenbaum, J., dissenting).

⁸² *Bostock v. Clayton Cnty.*, 894 F.3d 1135 (11th Cir. 2018).

Donald Zarda's Title VII claim came to a similar conclusion. In Zarda's case, the New York District Court "found a triable issue of fact as to whether Zarda faced discrimination because of his sexual orientation in violation of New York law" and allowed for his state law discrimination claim to proceed to trial.⁸² However, like in *Bostock* at the appellate level, the New York District Court dismissed Zarda's Title VII claim at the pleading stage. After the trial jury found in favor of the employer on the state law claim, Zarda filed his first appeal to the Second Circuit. In his appeal, Zarda asked the court to hold that under Title VII, "sex" encompasses discrimination based on "sexual orientation."⁸³ However, the Second Circuit affirmed the district court's finding of summary judgement, relying on Second Circuit precedent from 2000 that precluded the Court from overturning a previous decision unless the court was sitting *en banc*.⁸⁴ Once the Second Circuit convened *en banc*, it overturned the ruling on Zarda's first appeal and concluded that sexual orientation discrimination does violate Title VII.⁸⁵

Aimee Stephens' case has a more complex procedural history. After four years of litigation, the Sixth Circuit held that Stephens' employer violated Title VII when they fired Stephens, a transgender woman, for failing to conform to sex

⁸² See *Zarda v. Altitude Express*, 855 F.3d 76, 80 (2d. Cir. 2017); N.Y. EXEC. LAW § 296(1)(a) (defining discrimination on the basis of sexual orientation as an "unlawful discriminatory practice . . .").

⁸³ *Zarda*, 855 F.3d at 81–82.

⁸⁴ *Id.* at 79.

⁸⁵ *Zarda v. Altitude Express*, 883 F.3d 100 (2d. Cir. 2018).

stereotypes.⁸⁶ A particularly noteworthy outcome of Stephens' case was that the Sixth Circuit found that her employer was not shielded from the mandates of Title VII by a religious exemption.⁸⁷

ii. Lived Experiences of the LGBTQ Employees

To understand the commitment to heteronormativity by all three levels of the court system illustrated in *Bostock*, it is necessary to examine the factual narratives behind Bostock's, Zarda's, and Stephens' Title VII claims. The following three sections are dedicated to understanding the social struggles that were the catalyst for *Bostock*.

1. Gerald Bostock's Title VII Claim

After over ten years of service as a Child Welfare Services Coordinator for the Juvenile Court of Clayton County, Gerald Bostock was terminated for "conduct unbecoming of a county employee."⁸⁸ During his tenure as a Clayton County employee, he "received good performance evaluations and the program he managed received accolades."⁸⁹ In 2013, a few months after Bostock became an active participant in a gay recreational softball league, the county conducted an internal audit of the Court Appointed Special Advocate funds Bostock managed.⁹⁰

⁸⁶ *EEOC v. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018); *Bostock*, 140 S. Ct. at 1738.

⁸⁷ *Harris Funeral Homes*, 884 F.3d at 581–600 (disposing the employer's religious exemption defenses to Title VII liability).

⁸⁸ *Bostock v. Clayton Cnty.*, 2016 U.S. Dist. LEXIS 192898, at *3–4 (N.D. Ga. Nov. 3, 2016).

⁸⁹ *Id.* at *3 (Mr. Bostock was recognized by the national CASA for Clayton County's CASA expansion and he served on its Standards and Policy Committee for approximately one year around 2011).

⁹⁰ *Id.* at *4.

During the auditing period, several “disparaging comments” were made about Bostock’s “sexual orientation, identity[,] and participation in the softball league.”⁹¹ Shortly after the audit was initiated, Bostock was terminated, prompting him to file a complaint with the EEOC.⁹² In his filing, he noted his belief “that [he had] been discriminated against because of sex in violation of Title VII.”⁹³ Bostock alleged that the audit was initiated “as a pretext for discrimination based on his sexual orientation and failure to conform to a gender stereotype.”⁹⁴

Three years after his termination, Bostock filed his initial complaint in the Northern District of Georgia *pro se*, pleading only discrimination based on sexual orientation.⁹⁵ After securing counsel, his complaint was amended twice, with each amendment only alleging one count of discrimination based on sexual orientation and omitting reference to discrimination based on gender stereotyping.⁹⁶

At the pre-trial stage of litigation, the district court granted a motion to dismiss in favor of the employer and concluded that Bostock failed to state a

⁹¹ *Id.* See also Def’s Answer to Sec. Am. Compl. at 8, *Bostock v. Clayton Cnty.*, 2016 U.S. Dist. LEXIS 192898 (N.D. Ga. Nov. 3, 2016). The County alleges that the audit into the County’s CASA funds was initiated as a response to an email from a former county employee that claimed Mr. Bostock was “misusing program funds” and “urg[ed] that an investigation be conducted into [Mr. Bostock’s] misconduct.” *Id.*

⁹² *Bostock v. Clayton Cnty.*, 2016 U.S. Dist. LEXIS 192898, at *4 (N.D. Ga. November 3, 2016).

⁹³ *Id.* at *5.

⁹⁴ *Id.* at *4.

⁹⁵ *Id.* at *5.

⁹⁶ *Id.* at *5, *14–18.

claim under Title VII.⁹⁷ Guided by the legislative history of the Civil Rights Act of 1964, findings of Congressional intent from two Fifth Circuit decisions from the 1970s, and agency rulings from the 1970s, the court held that discrimination claims based on sexual orientation are not subject to the protections afforded by Title VII.⁹⁸ Ironically, the court also cited the EEOC's 2015 decision in *Baldwin* but only noted "its inconsistency with the EEOC's earlier pronouncement [that there was 'no support in either the language of the legislative history or the statute for the proposition that in enacting Title VII Congress intended to include a person's sexual practices within the meaning of the term sex].'"⁹⁹ Turning to the gender stereotyping claim, which was one of the County's affirmative defenses, the court found that Bostock failed to "avoid dismissal of [his] case by bootstrapping a conclusory gender stereotyping allegation to his sexual orientation discrimination claim" and failed to allege sufficient facts to show he was discriminated against for failing to conform to gender norms.¹⁰⁰ The court also found that Bostock failed to exhaust administrative remedies regarding any gender stereotyping claims because the claim was not raised in any of the filings with the EEOC.¹⁰¹

⁹⁷ *Bostock v. Clayton Cnty.*, 2016 U.S. Dist. LEXIS 192898, at *1 (N.D. Ga. Nov. 3, 2016).

⁹⁸ *Id.* at *6–13 (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Willington v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975); EEOC Dec. No. 76-75 (Dec. 4, 1975)).

⁹⁹ *Id.* at *7–9, *12–13.

¹⁰⁰ *Id.* at *16–17.

¹⁰¹ *Id.* at *18–20.

In sum, the Georgia federal district court ignored the substantial harm that Bostock and other gay men endure because of termination from employment based on sexual orientation. By dismissing his Title VII claim on procedural grounds and precluding other LGBTQ litigants from relying on *Baldwin* when bringing suits in Georgia federal court, the court granted employers a right to discriminate against gay employees without fear of violating Title VII.

2. *Donald Zarda's Title VII Claim*

Donald Zarda was a highly experienced licensed tandem and accelerating freefall instructor who worked seasonally for Altitude Express in the summers of 2001, 2009 and 2010.¹⁰² Throughout his distinguished career as an instructor, which began in 1995, Zarda participated in over 3500 skydiving jumps.¹⁰³ For safety, novice divers must jump while strapped “hip-to-hip and shoulder-to-shoulder” with an instructor.¹⁰⁴ These divers routinely sign safety waivers consenting to physical contact with the instructor.¹⁰⁵ To make light of the intimate situation, instructors often joke about the close physical proximity between themselves and the client throughout the course of the jump.¹⁰⁶ At

¹⁰² Sec. Am. Comp. at 3, *Zarda v. Altitude Express, Inc.*, Mar. 28, 2014, (No. 10-cv-04334-JFB), 2014 WL 12884507.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 3 (noting examples of when a man is strapped to another man instructors would say something like: “I bet you didn’t know you were going to be strapped so close to a man;” or, “That’s the straps you’re feeling,” in reference to the bulge protruding from the equipment; or, “Does your girlfriend know you’re gay?” when a straight man was strapped to another straight man when the client’s girlfriend was present).

Altitude Express, these jokes, usually sexual in nature, were a form of openly tolerated banter. For Zarda, many of these jokes were about his sexual orientation.¹⁰⁷ On several occasions while tightly strapped to women, Zarda attempted to break the ice by saying something along the lines of, “You don’t have to worry about us being so close because I’m gay.”¹⁰⁸ Statements like these were unproblematic until a homophobic female client complained in July 2010.¹⁰⁹ As a result of this complaint, on July 18, 2010, Zarda was suspended from employment with Altitude Express. Specifically, his employer claimed Zarda had discussed “personal escapades” outside of the office with the client.¹¹⁰ A single comment about his sexual orientation resulted in Zarda’s termination.¹¹¹

As noted in the procedural history above, Zarda’s Title VII claim never made it past the pleading stage.¹¹² Unfortunately, his fight took a heartbreaking turn in 2014 when he died in an accident that occurred while BASE jumping, a more extreme form of skydiving.¹¹³ Although Zarda could not observe the Supreme

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5–6.

¹¹⁰ *Id.* at 7.

¹¹¹ *Id.*

¹¹² See *supra* notes 83–86 and accompanying text.

¹¹³ Melissa Zarda, *My Brother Was Fired After Revealing He Was Gay. Now I’m Continuing His Fight at the Supreme Court*, TIME (July 1, 2019), <https://time.com/5617310/zarda-supreme-court-lgbtq/>.

Court oral arguments or learn the outcome of his fight, his sister, Melissa, and partner, Bill, kept his case moving forward.¹¹⁴

3. *Aimee Stephens's Title VII Claim*

Aimee Stephens was born biologically male and worked for R.G. & G.R. Harris Funeral Homes, Inc. for roughly six years before informing her employer of her intention to have sex reassignment surgery and work full-time as a woman.¹¹⁵ When Stephens applied to work at the funeral home in 2007, she presented as a man and used her then-legal name.¹¹⁶ As part of the funeral home's discriminatory, sex-specific employee dress code, Stephens was required to wear a suit and tie when she lived as a public-facing male.¹¹⁷ When Stephens notified her employer of her intent to transition, she stated she was going on a vacation and would return "as [her] true self, Aimee Australia Stephens, in appropriate business attire."¹¹⁸ She was fired just before she intended to leave for vacation.¹¹⁹ The employer's stated reason for her termination was blatant

¹¹⁴ Melissa Zarda noted:

For too many LGBTQ people, the promise of civil rights for all is not an everyday reality. I hope that when people hear Don's story they are moved to speak up, urging the court not to roll back the rights of so many people who are just trying to do their jobs. If we are to ever achieve real equality and justice, we must continue to fight for the civil rights on behalf of Don and on behalf of LGBTQ people everywhere.

Id.

¹¹⁵ *EEOC v. Harris Funeral Homes*, 884 F.3d 560, 566–68 (6th Cir. 2018).

¹¹⁶ *Id.* at 567.

¹¹⁷ *Id.* at 568.

¹¹⁸ *Id.* at 569.

¹¹⁹ *Id.*

transphobia; the employer testified he “sincerely believe[d] that the Bible teaches that a person’s sex is an immutable God-given gift,” and that he fired Stephens because “[Stephens] was no longer going to represent himself as a man [and] wanted to dress as a woman.”¹²⁰

After being wrongfully terminated because of her gender identity and turning down a severance agreement from her employer if she “agreed not to say anything or do anything,” Stephens filed a sex-discrimination charge with the EEOC.¹²¹ The EEOC found there was reasonable cause to believe that Stephens had been wrongfully discharged in violation of Title VII.¹²² After the funeral home and the EEOC were unable to resolve the dispute through an informal conciliation process, the EEOC filed a complaint against the funeral home in September 2014.¹²³ The EEOC zealously advocated for Stephens’ claim to be covered under Title VII for three years; however, this stopped when the Trump Administration took office and the Solicitor General intervened.¹²⁴ The Solicitor General effectively “changed sides” and argued that the employer should prevail.¹²⁵ Expressing concerns in the changing policy priorities within the U.S.

¹²⁰ *Id.* At trial, the Employer purposefully mis-gendered Ms. Stephens and refused to use Ms. Stephens’s preferred pronouns when referring to her.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Leonard, *supra* note 72, at 3.

¹²⁵ *Id.*

Government, Stephens moved to intervene and represent herself personally; the Sixth Circuit granted this motion in March 2017.¹²⁶

The Sixth Circuit ultimately found in favor of Stephens and held that her employer violated Title VII's antidiscrimination mandates.¹²⁷ Additionally, the Sixth Circuit found that neither the ministerial exception to Title VII nor the Religious Freedom Restoration Act (RFRA) served as adequate defenses to preclude enforcement of Title VII.¹²⁸ These findings are important when considering the tension between religious liberty and federal antidiscrimination mandates.

C. Facts and Arguments Before the Supreme Court

Throughout the numerous court filings for the three cases in *Bostock*, two main strands of argumentation emerged. The first was comprised of various anti-stereotyping theories advanced by the LGBTQ employees to persuade the Supreme Court to follow its plurality opinion in *Price Waterhouse v. Hopkins*.¹²⁹ The other, of course, was the line of argumentation the majority adopted: textualism.¹³⁰

¹²⁶ *Harris Funeral Home*, 884 F.3d at 570.

¹²⁷ *Id.*

¹²⁸ *See id.* at 581. As explained by the Sixth Circuit, RFRA prohibits the government from enforcing a religiously neutral law against an individual if the law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest.

¹²⁹ *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Ho, *supra* note 27, at 304–15.

¹³⁰ *See* Brief of William N. Eskridge Jr. and Andrew M. Koppelman as *Amici Curie* Supporting Emp. at 4–5, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17–1618, 17–1623, & 18–107).

Had the Court adopted the anti-stereotyping strand of argumentation, the lived experiences of the LGBTQ employees would have inevitably guided the Court's decision-making. This is largely because the Court in *Price Waterhouse* concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination.¹³¹ According to Zachary Kramer, "*Price Waterhouse* was indeed a watershed moment in the arc of sex discrimination law."¹³² Noted by Jeremiah Ho, the Supreme Court's gender stereotyping theory in *Price Waterhouse* revealed the hardship, public humiliation, and embarrassment discriminated employees endured. The theory accomplished this by disaggregating sex and behavior to direct attention to the reality of working in a hostile work environment.¹³³

¹³¹ In *Price Waterhouse*, an accounting firm hesitated to promote a woman candidate, Anne Hopkins, to partnership status because of stereotypical perceptions relating to her gender. The Court noted:

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 mgr to an authoritative, formidable, but much more appealing lady ptr candidate." But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Price Waterhouse, 490 U.S. at 250–52.

¹³² Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 925–26 (2014).

¹³³ Ho, *supra* note 27, at 310.

Applying the anti-stereotyping theory to the context of discrimination based on sexual orientation or gender identity stems from concepts of heteronormativity.

As Justice Alito, dissenting in *Bostock*, noted:

The argument goes like this. Title VII prohibits discrimination based on stereotypes about the way men and women should behave; the belief that a person should be attracted only to persons of the opposite sex and the belief that a person should identify with his or her biological sex are examples of such stereotypes; therefore, discrimination on either of these grounds is unlawful.¹³⁴

Therefore, for the anti-stereotyping theory to prove a claim of sex discrimination based on sexual orientation or gender identity, the Court must consider the lived experiences of the employees alleging discrimination.

The other argument relied on textualism. As discussed throughout this Article, employing textualism as a matter of statutory interpretation runs counter to anti-stereotyping theory and ignores the reality of discrimination. Although both strands of argumentation might have led to the same result, a textualist interpretation of Title VII's mandates inadvertently allowed the Court to erase the social struggles of the LGBTQ employees from the opinion and severely limited the scope of the Court's opinion on future cases.

Note that in Stephens' case, Harris Funeral Homes unsuccessfully raised a defense to Title VII based on religious beliefs at the intermediate appellate level. As Justice Gorsuch noted towards the end of the *Bostock* majority opinion, "[i]n

¹³⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1765 (2020) (Alito, J., dissenting).

its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us.”¹³⁵

Therefore, instead of resolving the extreme tension between religious liberty and antidiscrimination legal doctrine, the Court reserved the “question for future cases.”¹³⁶

D. *Critiquing the Bostock Court*

Justice Gorsuch exhibits a sworn allegiance to the principles of textualism.¹³⁷ When presented with the challenge of interpreting ambiguous words or phrases in statutes, textualists task themselves with determining the ordinary public meaning of the text at the time of its adoption.¹³⁸ In Justice Gorsuch’s analysis, criticized as a “literalistic approach” by Justice Kavanaugh in dissent, he insisted that Title VII is written in starkly broad terms and has always protected discrimination based on sexual orientation and gender identity.¹³⁹ Justice Gorsuch’s textualist

¹³⁵ *Id.* at 1754.

¹³⁶ *Id.*

¹³⁷ Leonard, *supra* note 72, at 3.

¹³⁸ *Bostock*, 140 S. Ct. at 1738.

¹³⁹ Compare *id.* at 1743 (Justice Gorsuch noting that “[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms” (emphasis added)), with *id.* at 1824–25 (Kavanaugh, J., dissenting) (Justice Kavanaugh criticized the majority when he noted that “[u]nder [a] literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII’s prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach.”).

interpretation of Title VII, however, represents a breeding ground of uncertainty for future Title VII claims and leaves lower courts with relatively little guidance.

This Part asserts three main ways the Court restricted *Bostock*'s application in future Title VII challenges and other cases related to LGBTQ rights. Generally, the Court's textualist interpretation of Title VII is nothing more than a failed attempt to resolve the ambiguity codified in the text itself. The Court had an opportunity to provide guidance on how this interpretation of Title VII could influence interpretations of analogous federal antidiscrimination provisions, including the Fair Housing Act (FHA), Title IX of the Education Amendments of 1972 (Title IX), Section 1577 of the Affordable Care Act (ACA), and the more than 100 other federal statutes that prohibit sex discrimination noted by Justice Alito in dissent.¹⁴⁰ Instead, as will be addressed in Part I-D-1, Justice Gorsuch constrained *Bostock*'s application to the interpretation of Title VII. Secondly, subject to analysis in Part I-D-2, the Court pivoted from the historical canon of pro-LGBTQ holdings and failed to recount the circumstances giving rise to each LGBTQ plaintiff's cause of action. Part I-D-3 sets forth the main claim of this Article—the Court fueled religious retrenchment of LGBTQ rights by leaving the tension between religious liberty and federal antidiscrimination protection untouched.

¹⁴⁰ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1791–1822 (2020) (Alito, J., dissenting).

i. Failed Attempt to Resolve Ambiguity Created More Ambiguity

The underlying legal holding of *Bostock* is relatively clear—discrimination based on sexual orientation or gender identity is an impermissible form of sex discrimination under Title VII.¹⁴¹ In forming this conclusion, the Court reasoned employers should be found to have discriminated based on sex if they penalize an employee for “traits or actions [they] would not have questioned in members of a different sex.”¹⁴² Furthermore, the Court concluded that based on the “express terms” of Title VII, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹⁴³

Although the *Bostock* Court resolved the ambiguity surrounding whether an employer violates Title VII if they fire an employee based on their sexual orientation or gender identity, the Court did not address other related legal challenges under Title VII, including those involving sex-segregated bathrooms, locker rooms, and dress codes.¹⁴⁴ Specifically, the Court side-stepped these

¹⁴¹ *Bostock*, 140 S. Ct. at 1743.

¹⁴² *Id.* at 1737.

¹⁴³ *Id.* at 1741. See also Julie Wilensky, et. al., *Bostock’s Impact: Recent Policy and Litigation Developments*, PLI CHRONICLE: INSIGHTS AND PERSPECTIVES FOR THE LEGAL COMMUNITY (Mar. 2021), [https://plus.pli.edu/Details/Details?fq=id:\(322823-ATL9\)](https://plus.pli.edu/Details/Details?fq=id:(322823-ATL9)).

¹⁴⁴ See Lightfoot & Williams, *supra* note 27.

challenges by stating that none of them were before the Court.¹⁴⁵ As a result, these related challenges are left to the lower courts to decide.

Given that Title VII only applies to employers with at least 15 employees, state and local government employees, and federal employees, there are still large gaps in employment protection for LGBTQ employees.¹⁴⁶ Furthermore, Title VII's mandates do not apply to the uniformed military, religious organizations with policies on ministerial employees, or state employment laws with sex discrimination protections that do not expressly address sexual orientation or gender identity.¹⁴⁷ Therefore, a substantial portion of America's workforce—those employed by small businesses or classified as non-employee contractors—have no direct gain from *Bostock*. Once again, lower courts are tasked with applying *Bostock* to legal questions raised by these unprotected employees.¹⁴⁸

One additional form of unresolved ambiguity comes at the end of Justice Alito's dissent in *Bostock*.¹⁴⁹ Since the Court decided *Bostock* as a question of

¹⁴⁵ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (noting that “[u]nder Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.”).

¹⁴⁶ 42 U.S.C. § 2000e (defining employer and the scope of Title VII's antidiscrimination mandates). See also Leonard, *supra* note 72, at 5–6.

¹⁴⁷ *Id.*

¹⁴⁸ Recently, a North Carolina District judge issued a rare win for a gay substitute drama teacher who was fired by a Catholic High School after posting his wedding announcement to Facebook. See generally *Billard v. Charlotte Catholic High Sch.*, 2021 U.S. Dist. LEXIS 167418, at 33 (W.D. N.C. Sept. 3, 2021) (attempting to resolve the religious exemption ambiguity left open in *Bostock*, the court narrowly interpreted the religious exemptions of Title VII and found that “religious entities are only allowed to be shielded from liability when they can show (1) the purpose of the employment decision is religious discrimination, and (2) that sex is not a but-for cause in the decision”).

¹⁴⁹ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting).

statutory interpretation rather than on constitutional grounds, the standard of judicial review for the next equal protection challenge raised by LGBTQ plaintiffs is left unsettled.¹⁵⁰ To date, the Supreme Court has not addressed the equal protection status of LGBTQ people raising sexual orientation or gender identity discrimination claims.¹⁵¹ Although some federal courts have found these claims to involve quasi-suspect classifications subject to a heightened standard of review, it remains unclear how the Supreme Court will apply *Bostock* to constitutional claims.¹⁵²

For the reasons above, the *Bostock* opinion serves as nothing more than a failed attempt to resolve ambiguity by creating more ambiguity.¹⁵³

ii. Gone are the (Perfect) Plaintiffs?

A large volume of legal scholarship criticizes the historic legal strategy of maintaining normalcy while attempting to evoke Supreme Court decisions that

¹⁵⁰ Leonard, *supra* note 73, at 6.

¹⁵¹ *Id.*

¹⁵² *Bostock*, 140 S. Ct. at 1783. Justice Alito noted that “[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court’s decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.”

¹⁵³ Ironically, Justice Gorsuch noted how clear the answer to the question posed in *Bostock* was, stating:

Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. *The answer is clear.* 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. *Id.* at 1737. (emphasis added).

transmit massive social and legal change.¹⁵⁴ In the context of LGBTQ advocacy, this strategy has historically led to rather emotional majority opinions finding in favor of the LGBTQ litigants based on concepts of human dignity and equality.¹⁵⁵ Emphasizing normalcy among the LGBTQ movement becomes apparent when examining litigation tactics proffered in briefing, oral argument, and the selective choice of the named plaintiffs in prior LGBTQ rights landmark decisions.¹⁵⁶ Cynthia Godsoe asserted that, by framing the plaintiffs in *Windsor* and *Obergefell* as “normal” rather than radical, the Court based its decisions in these two landmark cases on homosexual status rather than conduct.¹⁵⁷ Furthermore, the plaintiffs in *Windsor* and *Obergefell* erased the existence of radical outlaws within the community by assimilating to norms understood by the Justices.¹⁵⁸ By

¹⁵⁴ Before proceeding further in this Part I-D-2, it is important to give credit to the inspiration behind this Part’s title. Godsoe’s article on the *Obergefell* plaintiffs was one of the first pieces of LGBTQ legal scholarship I was introduced to in law school. In this piece, Godsoe noted four qualities amongst the *Obergefell* plaintiffs that “make them generically appealing, especially to a predominantly straight audience: they are all-American; they seem to be asexual; many have children; and they all are (purportedly) non-political.” Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 1356 (2015). Of particular importance, Godsoe asserted, rather unequivocally, that “[t]he public face of same-sex marriage, as represented by the *Obergefell* plaintiffs, does not accurately represent the realities of either gay (LGB) or straight households. It thus reflects a missed opportunity to celebrate the diversity—racial, economic, cultural, and lifestyle—of all families.” *Id.* at 140; See generally Velte, *supra* note 3 (comparing the history of LGBT rights movements to modern LGBT legal rights advocacy); Ho, *supra* note 28 (critiquing the Supreme Court’s 2018 anti-LGBTQ holding); Neo Khuu, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184 (2017) (applying interest-convergence theory to critique the Supreme Court’s decision on same-sex marriage); Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 1356 (2015).

¹⁵⁵ Leonard, *supra* note 72, at 3 (noting a “big difference” between Justice Kennedy’s “sometimes quite emotional” four earlier landmark pro-LGBTQ opinions referenced in the text accompanying *supra* note 40, and Justice Gorsuch’s majority opinion in *Bostock*.)

¹⁵⁶ Godsoe, *supra* note 155, at 137.

¹⁵⁷ *Id.* at 138–40.

¹⁵⁸ *Id.*

contrast, Justice Gorsuch’s consideration of “[f]ew facts . . . to appreciate the legal question [of *Bostock*]” erased the lived experiences of the LGBTQ employees, whether normal or radical, without considering the misconceptions and social stereotypes of the LGBTQ community.¹⁵⁹ In *Bostock*, not only was the over-arching concept of “perfect plaintiffs” written out of the opinion, but the individual plaintiffs themselves, and their individual stories, were deemed immaterial.

Surprisingly, Justices Alito and Kavanaugh wrote more in their dissenting opinions about the progress of LGBTQ rights activism than Justice Gorsuch did in the majority.¹⁶⁰ Also unexpected was Justice Kavanaugh concluding his dissent by acknowledging the LGBTQ rights victory. Justice Kavanaugh commended the “extraordinary vision, tenacity, and grit” of gay and lesbian Americans as they have “battl[ed] often steep odds in the legislative and judicial arenas, not to mention their daily lives.”¹⁶¹ However, despite these favorable words, Justice Kavanaugh’s dissent largely ignored transgender people and the work of transgender rights advocates.¹⁶² This is noteworthy considering Stephens, a transgender female, was one of the employees directly impacting the majority’s ruling.

¹⁵⁹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

¹⁶⁰ Leonard, *supra* note 72, at 5.

¹⁶¹ *Bostock*, 140 S. Ct. at 1837.

¹⁶² Leonard, *supra* note 72, at 5.

A complete understanding of the hardships faced by the LGBTQ community as a result of systemic oppression is a prerequisite to any transformative potential change stemming from a pro-LGBTQ rights judicial decision. In a dominant society that has historically authored the legal protection of marginalized individuals, recognizing the lived experiences of LGBTQ individuals is paramount not only to recognizing discrimination, but also to correcting it.¹⁶³ For legal change to be memorialized in social equality and overcome social marginalization, social invisibility, and cultural invisibility, it is necessary to recognize the lived experiences of LGBTQ individuals. Since the *Bostock* Court failed to do so, the potential impact of the opinion has been severely limited.

¹⁶³ Ho, *supra* note 27, at 288. (noting that “the lack of regard in *Bostock* for queer lived experiences tacitly privileges heteronormative values.”) Furthermore, alluding to Derrick Bell’s interest convergence theory, Ho noted:

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 ultimately had to pay for Title VII protection.

Id. at 228.

See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing civil rights victories for subordinate groups only occur when the interests of the oppressed converge with the interest of the majority, namely the interests of whites. Further, racism is an integral, permanent, and indestructible component of American democracy and racial justice measures are adopted only when they are in the better interest of the dominant majority as a vehicle for maintaining racial supremacy.); Ho, *supra* note 27, at 355–64 (analyzing the converging interests of privileging heteronormative values, enabling future precedent, and diversifying corporate America with employment discrimination protection in *Bostock*.); Marc Spindelman, *Bostock’s Paradox: Textualism, Legal, Justice, and the Constitution*, 69 BUFF. L. REV. 553, 601–05 (applying interest convergence theory to *Bostock* to show the indications of Title VII’s sex discrimination rule emerges from an extra-textual principle of legal justice. This comes with pro-gay and pro-trans content implying a stance on what formal equality under the law means for LGBT persons.).

iii. *Tension with Religious Exemptions Left Virtually Untouched*

Bostock opened the door for an expansive interpretation of numerous anti-discrimination statutes.¹⁶⁴ However, this expansion is neither guaranteed nor immediate.¹⁶⁵ Moreover, Justice Gorsuch severely narrowed *Bostock*'s application by alluding to instances where the RFRA, "operat[ing] as a kind of super statute," might "displac[e] the normal operation of other federal laws [and] . . . supersede Title VII's commands in appropriate cases."¹⁶⁶ Therefore, the question of whether religious freedom is a defense to Title VII's mandates and what constitutes an "appropriate case" is left unanswered.¹⁶⁷

In his dissent, Justice Alito provided a non-exhaustive list of contentious social issues located at the intersection of religious liberty and LGBTQ rights, including access to bathrooms and locker rooms pertaining to women's sports, employment by religious organizations, housing, healthcare, freedom of speech, and constitutional claims.¹⁶⁸ Each of these areas could have been resolved if the majority opted to provide clearer guidance as to *Bostock*'s implications.

¹⁶⁴ Hiebert, *supra* note 30, at 146.

¹⁶⁵ *Id.*

¹⁶⁶ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

¹⁶⁷ Further narrowing the broad-sweeping application of *Bostock*, Justice Gorsuch noted that "worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage." *Id.* In attempt to settle the fears and circumvent the backlash from the Religious Right, he noted that "Congress included an express statutory exception for religious organizations [in Title VII]" and that the "Court has also recognized that the First Amendment can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers.'" *Id.*

¹⁶⁸ *Bostock*, 140 S. Ct. at 1778–83. (Alito, J., dissenting).

However, in championing textualism as the optimal form of statutory interpretation, the majority clearly did “not want to think about the consequences of its decision, [and the Court] . . . will not be able to avoid those issues for long.”¹⁶⁹ Justice Alito thus predicted that “[t]he entire Federal judiciary will be mired for years in disputes about the reach of the Court’s reasoning.”¹⁷⁰

By failing to provide even the slightest guidance, aside from saying RFRA has the power to act as a “super statute” to supersede codified antidiscrimination protection and that Title VII has an already established religious exemption for those who qualify, the Court’s irresponsible reasoning invites religious retrenchment of LGBTQ rights. As expected, the opinion was immediately controversial among conservative religious organizations, mainly because there was no clarity as to how it might interfere with free exercise of religion and speech.¹⁷¹ This undoubtedly influenced the agency response from the Trump Administration and fueled the state legislatures’ full-fledged war on the LGBTQ community in 2021.

II. *BOSTOCK*’S INFLUENCE ON LGBTQ ANTIDISCRIMINATION PROTECTIONS

Just like we shouldn’t have a country where LGBTQ+ people are celebrated only during Pride month, we shouldn’t have a country where we are protected from discrimination only in some circumstances. While the Supreme Court has put the religious exemption issue on hold, we need to continue to tell policymakers—

¹⁶⁹ *Id.* at 1783.

¹⁷⁰ *Id.*

¹⁷¹ Leonard, *supra* note 72, at 7.

as well as our friends and neighbors—that discrimination hurts and that opening the door to legalized discrimination in the name of the religion will cause harm.

— James Esseks¹⁷²

Bostock is, without a doubt, a landmark Supreme Court decision and a highly influential LGBTQ legal victory. However, because the Court punted on addressing key issues at the intersection of religious liberty and antidiscrimination legal doctrine, the decision was immediately controversial in the eyes of certain conservative and religious groups.¹⁷³ Initially, *Bostock*'s influence appears to be broad sweeping.¹⁷⁴ However, as discussed in Part I-D, *Bostock*'s promise is a false sense of security for the LGBTQ community and has fueled religious retrenchment of LGBTQ rights.

¹⁷² James Esseks, *At End of SCOTUS Term, Where Are We on LGBTQ+ Rights?*, ACLU (July 12, 2021), <https://www.aclu.org/news/lgbtq-rights/at-end-of-scotus-term-where-are-we-on-lgbtq-rights/>.

¹⁷³ Leonard, *supra* note 72, at 7. See also Religious Freedom Institute, *RFI: The Supreme Court Changes the Meaning of "Sex," Imposes an Intolerant Moral Orthodoxy, and Weakens American Unity*, RELIGIOUS FREEDOM INSTITUTE (June 19, 2020), <https://www.religiousfreedominstitute.org/news/rfi-the-supreme-court-changes-the-meaning-of-sex-imposes-an-intolerant-moral-orthodoxy-and-weakens-american-unity?rq=bostock>. Justice Alito noted in dissent:

Briefs filed by a wide range of religious groups—Christian, Jewish, and Muslim—express deep concern that the position now adopted by the Court “will trigger open conflict with faith-based employment practices of numerous churches, synagogues, mosques, and other religious institutions.” They argue that “religious organizations need employees who actually live the faith,” and that compelling a religious organization to employ individuals whose conduct flouts the tenants of the organization’s faith forces the group to communicate an objectionable message.

Bostock, 140 S. Ct. at 1780 (Alito, J., dissenting).

¹⁷⁴ *Bostock*, 140 S. Ct. at 1791–1822 (Alito, J., dissenting).

To help understand *Bostock*'s influence on LGBTQ antidiscrimination protections more generally, Part II-A maps the anti-LGBTQ trends emerging from the 2021 state legislative session and highlights the emergence of an unprecedented number of anti-LGBTQ measures enacted into law by states. Part II-B reviews the Trump Administration's efforts to undermine the spirit of *Bostock* and create a license to discriminate across the country. This Part demonstrates how the Court's failure to address key antidiscrimination legal issues in *Bostock* influenced Trump Administration agencies' efforts to legitimize discrimination against the LGBTQ community under the guise of religious liberty. Finally, Part II-C traces the Biden Administration's responsive efforts to curtail the negative impacts of its predecessor's actions.

More generally, this Part serves as a theoretical application of *Bostock*'s outcome to the first and second prongs of abolishing religious retrenchment. It charts a path to combat religious retrenchment by highlighting the importance of viewing legal victories with extreme skepticism while simultaneously celebrating such victories for what they are instead of for their potential.

A. Trends Emerging from State Legislatures

Following *Bostock*, state legislatures' primary focus was not on stripping LGBTQ individuals of their rights, but rather on actively responding to offset the

hardships imposed by the COVID-19 pandemic.¹⁷⁵ While much of the nation's attention was focused on COVID relief efforts, anti-LGBTQ organizations coordinated a nationwide push to score political points with their conservative base by curtailing the LGBTQ community's rights.¹⁷⁶ In some states, like South Dakota, anti-LGBTQ lawmakers used the COVID-19 pandemic as leverage to pass legislation allowing churches to continue operating while simultaneously including vague language that legitimizes discrimination against LGBTQ individuals.¹⁷⁷ More than 280 anti-LGBTQ bills were introduced in state legislatures in 2021 and, as of October 2021, twenty-five have been signed into law.¹⁷⁸ The unprecedented war on the LGBTQ community by anti-equality state lawmakers made 2021 the worst year for anti-LGBTQ legislation in recent history, surpassing the previous record of fifteen bills enacted into law following

¹⁷⁵ *COVID-19 Policy Tracker*, MULTISTATE (2021), <https://www.multistate.us/issues/covid-19-policy-tracker>.

¹⁷⁶ Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUMAN RIGHTS CAMPAIGN (May 7, 2021), <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law>.

¹⁷⁷ South Dakota's Senate Bill 124 included RFRA-like language that gave South Dakota businesses wide latitude to discriminate against LGBTQ people. Kate Sosin reported RFRA-like state laws "were once used to protect minority religions and Indigenous people," but they are now "used to discriminate against LGBTQ+ people and people trying to access reproductive health care." Kate Sosin, *At Least 36 Anti-LGBTQ+ Religious Freedom Measures Have Been Filed This Year, Many Tucked in COVID Church Bills*, 19TH NEWS (Feb. 19, 2021), <https://19thnews.org/2021/02/36-anti-lgbtq-religious-freedom-measures-are-in-covid-church-bills/>.

¹⁷⁸ Wyatt Ronan, *Human Rights Campaign Slams Texas Governor Greg Abbott For Signing Discriminatory Anti-Transgender Sports Ban into Law*, HUMAN RIGHTS CAMPAIGN (Oct. 25, 2021), <https://www.hrc.org/press-releases/breaking-human-rights-campaign-slams-texas-governor-greg-abbott-for-signing-discriminatory-anti-transgender-sports-ban-into-law>.

the *Obergefell* decision in 2015.¹⁷⁹ In response to the 2021 state legislative session, Human Rights Campaign President, Alphonso David, noted:

Bills that have become law so far this year range from making it a felony to provide transgender youth with lifesaving health care to banning transgender girls from participating in sports to erasing LGBTQ people from school curriculum to granting broad licenses to discriminate against LGBTQ people. This crisis cannot be ignored and necessitates concrete action from all those with the ability to speak out. These bills are not only harmful and discriminatory, but also represent a failure in our democracy and the commitment elected officials make to protect and serve their constituents.¹⁸⁰

To reiterate one of the claims advanced by this Article, substantive equality for all individuals in society can *only* be achieved through a shared commitment by all to endorse a discrimination-free society. However, such a shared commitment remains partisan—each of the twenty-five bills enacted in 2021 were by conservative-controlled state legislatures.¹⁸¹ The key takeaway here is that anti-LGBTQ organizations have deepened their connections with conservative lawmakers to further stigmatize and discriminate against LGBTQ people across the country.

¹⁷⁹ *Id.*

¹⁸⁰ Ronan, *supra* note 177.

¹⁸¹ Alabama, Arkansas, Mississippi, Montana, North Dakota, South Dakota, Tennessee, Texas, and West Virginia are all republican state government trifectas. State government trifectas are state governments where a single political party holds three positions in government—namely the governorship, a majority in the state senate, and a majority in the state house. *State Government Trifectas*, BALLOTPEdia, https://ballotpedia.org/State_government_trifectas (last visited July 18, 2021). See also Ronan, *supra* note 177; Ronan, *supra* note 179.

Given that the previous record was set the same year as *Obergefell*, it is reasonable to conclude that the trends emerging from state legislatures a year after *Bostock* are a direct social and political backlash against the Supreme Court's ruling in favor of LGBTQ rights.

B. *The Trump Administration*

To counteract *Bostock* just days before the decision was announced, the Trump Administration finalized an agency rule that directly undermined the nondiscrimination protections within Section 1557 of the Affordable Care Act (ACA).¹⁸² The Department of Health and Human Services (HHS) reversed an Obama Administration rule and withdrew discrimination protection for transgender people under the Act.¹⁸³ This new rule erased existing ACA antidiscrimination protection based on gender identity and dramatically expanded

¹⁸² See generally Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) (stating, this final rule eliminates certain provisions of the 2016 Rule that exceeded the scope of the authority delegated by Congress in Section 1557. The 2016 Rule's definition of discrimination "on the basis of sex" encompassed discrimination on the basis of gender identity. . . [T]hese are essentially legislative changes that the Department lacked the authority to make. This final rule omits the vacated language concerning gender identity and termination of pregnancy. . . The Department also believes that various policy considerations support this action. The 2016 Rule's provisions on sex discrimination imposed new requirements for care related to gender identity and termination of pregnancy that Congress has never required, and prevented covered entities from drawing reasonable and/or medically indicated distinctions on the basis of sex). See also *Connecting the Dots: Reviewing the Trump Administration Efforts to Create a License to Discriminate Across the Country*, ACLU 1 (Feb. 2021), https://www.aclu.org/sites/default/files/field_document/aclu_connecting-the-dots_fact_sheet_2021-4.pdf. (reviewing the roll back of nondiscrimination protections in the ACA); Leonard, *supra* note 72, at 6.

¹⁸³ ACLU, *supra* note 184.

religious exemptions by widening the scope of entities exempt from the nondiscrimination provisions.¹⁸⁴ This was just one of several steps the administration took to undermine important civil rights protections.¹⁸⁵

Similar to the change made to the ACA agency rule, the Department of Justice (DOJ) filed a brief before the Supreme Court in *Fulton v. City of Philadelphia* in support of a Catholic child welfare agency (Catholic Social Services, or CSS) that provided foster care services.¹⁸⁶ Philadelphia refused to renew the agency's foster care contract and stopped referring children in need of foster care to CSS because CSS refused to evaluate and certify married same-sex couples as prospective foster care parents.¹⁸⁷ By siding with CSS, the Trump Administration, by way of the DOJ, made it clear that it believed government contractors can discriminate against same-sex couples under the guise of religious liberty.¹⁸⁸ This position was further supported in December 2020 when the Department of Labor (DOL) issued a final rule that permitted federal contractors to cite religious and moral beliefs as justifications for discriminating against employees who do not follow the

¹⁸⁴ *Id.* at 1.

¹⁸⁵ *Id.*

¹⁸⁶ See Brief for the United States as *Amici Curiae* Supporting Petitioners, *Fulton v. City of Philadelphia* 141 S. Ct. 1868 (2021) (No. 19-123) (arguing the City of Philadelphia unconstitutionally discriminated against a Catholic child welfare agency that contracted with the city to provide foster care and had the right to discriminate against same-sex couples).

¹⁸⁷ Arthur S. Leonard, *Supreme Court Unanimously Rules that Philadelphia Violated the Free Exercise Rights of Catholic Social Services by Conditioning Foster Care Contract on Providing Services to Married Same-Sex Couples*, 1 LGBT LAW NOTES (July 2021).

¹⁸⁸ ACLU, *supra* note 184, at 3.

employer's faith, even if the discrimination was also based on sex, sexual orientation, or gender identity.¹⁸⁹

Expanding religious exemptions to federal antidiscrimination mandates was at the forefront of the Trump Administration's response to *Bostock*. For example, in the context of Title IX, the Department of Education (ED) issued a final rule that forced public colleges and universities to exempt religious student clubs from complying with nondiscrimination provisions that apply to all other student organizations in September 2020.¹⁹⁰ Additionally, in January 2021, HHS issued another final rule that gutted HHS nondiscrimination protections for sexual orientation and gender identity.¹⁹¹

As evidenced above, the Trump Administration's actions were largely used to circumvent antidiscrimination law and the Court's holding in *Bostock*. The main vehicle used to accomplish this was through broadening the scope of federal religious exemptions to give religious institutions more discretion to discriminate.

¹⁸⁹ See generally Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 9, 2020). This rule is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors. See also ACLU, *supra* note 184, at 4.

¹⁹⁰ See generally Direct Grant Programs, State-Administered Formula Grant Programs, Non-Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 Fed. Reg. 59,916 (Sept. 23, 2020). See also ACLU, *supra* note 184, at 4.

¹⁹¹ See generally Health and Human Services Grants Regulation, 86 Fed. Reg. 2,257 (Jan. 12, 2021). See also ACLU, *supra* note 184, at 2.

C. *The Biden Administration*

On his Inauguration Day, President Biden issued Executive Order 13,988, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”¹⁹² This was the first step in the Biden Administration’s commitment to eviscerate the institutional discrimination implemented by its predecessor. However, this action, among other policies the Biden Administration has implemented, does not resolve the friction between religious liberty and antidiscrimination mandates. Notably, Executive Order 13,988 urges federal agencies to interpret statutes forbidding sex-based discrimination as covering claims of discrimination based on sexual orientation or gender identity, “so long as the laws do not contain sufficient indications to the contrary.”¹⁹³ By modifying the Executive Order’s terms with the phrase “so long as the laws do not contain sufficient indication to the contrary,” the Executive Order becomes ineffective in combatting religious retrenchment.

Optimistically speaking, this initial order highlights an important central theme embedded throughout the LGBTQ community. That is:

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of

¹⁹² Exec. Order 13,988, 86 Fed. Reg. 7023 (Jan. 21, 2021).

¹⁹³ *Id.*

workplace discrimination, homelessness, and violence, including fatal violence.¹⁹⁴

Above all else, the Biden Administration has recognized—explicitly and in writing—that the marginalization of LGBTQ individuals is intersectional, if not multidimensional. This is highly important when advancing the idea that LGBTQ individuals should remain mindful of their marginalized role in society to create reform discourse that lessens the cost of preserving a heteronormative status quo.

III. ASSESSING ANTIDISCRIMINATION LEGAL ADVOCACY IN LIGHT OF *BOSTOCK*

As LGBT People, we have the same basic desires and life goals as heterosexuals and yet we face unique forms of stress as we seek to achieve those goals. . . . Judges should make decisions with a full understanding of LGBT people's lives, not just the slivers that lawyers sometimes choose to serve them.

— Russell Robinson & David Frost¹⁹⁵

As discussed in Part I-A, LGBTQ rights advocates sought statutory protection from employment discrimination prior to *Bostock*. Therefore, it is not surprising that much fanfare trailed the Court's decision, resolving the absurd colloquial reality left after *Obergefell* that LGBTQ people can “be married on a Sunday and

¹⁹⁴ *Id.*

¹⁹⁵ 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).

fired on a Monday.”¹⁹⁶ However, *Bostock*’s narrow application and inherent ambiguity left lower courts responsible for resolving many related issues.

In assessing antidiscrimination legal advocacy and considering *Bostock*, this Part maps the judicial trends which have emerged from both the lower courts and the Supreme Court’s 2020 term. Specifically, Part III-A calls to attention key judicial trends of the lower courts that are particularly worrisome to the future of LGBTQ rights advocacy. One important trend is the conservative emphasis on religious carveouts to antidiscrimination mandates. Similarly, Part II-B highlights two key judicial trends emerging from the Supreme Court’s action on three cases directly affecting LGBTQ rights during the 2020 term.

Analysis of these judicial trends, as a general overview, is important to help better inform LGBTQ legal advocates about the courts and the culture that surrounds them. Comparing the legal culture to the struggles faced by the LGBTQ community can guide reform efforts in a way that minimizes the costs of legitimizing the dominant order.

¹⁹⁶ See, e.g., Noam Scheiber, *L.G.B.T.Q. Rights Ruling Pushes Workplace Dynamic Already in Motion*, N.T. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/business/economy/lgbtq-supreme-court-workforce.html>; Ho, *supra* note 27, at 286.

A. Trends Emerging from Lower Courts

With very little guidance pertaining to federal antidiscrimination law protections outside the realm of Title VII, lower courts were left to determine *Bostock*'s impact on related legal questions. An early sign that *Bostock* would be followed by state courts with similar anti-discrimination protections to Title VII came exactly a week after the *Bostock* opinion was released. In *Angelina Nance v. Lima Auto Mall, Inc.*, an Ohio state appeals court stated, "Since the Ohio Supreme Court has held that federal case law is 'generally applicable to cases involving alleged violations of R.C. Chapter 4112,' the type of claim that Angelina raises herein could potentially have a basis in law under *Bostock*."¹⁹⁷ Some other state courts have not followed suit.¹⁹⁸

At the federal level, some courts, such as the Eighth Circuit in *Horton v. Midwest Geriatric Management, LLC*, have used *Bostock* to hold that earlier Title VII cases that are inconsistent with *Bostock* are no longer good law.¹⁹⁹ Additionally, two other federal appellate courts have affirmed judgments in favor

¹⁹⁷ *Angelina Nance v. Lima Auto Mall, Inc.*, 2020 WL 3412268 at 26 (Ohio Ct. App. June 22, 2020).

¹⁹⁸ See generally *Tarrant Cnty. Coll. Dist. v. Sima*, (Tex. App. Mar. 10, 2021).

¹⁹⁹ *Horton v. Midwest Geriatric Management, LLC*, 963 F.3d 844, 847 (8th Cir. 2020). The Eighth Circuit stated:

We stayed Horton's appeal pending the Supreme Court's consideration of the "scope of Title VII's protections for homosexual and transgender persons." In its decision, the Court held that it "defies" Title VII for "an employer to discriminate against employees for being homosexual or transgender," because to do so, it "must intentionally discriminate against individual men and women in part because of sex." In light of this holding, our contrary conclusion in *Williamson* is no longer good law.

of transgender students who brought sex discrimination claims under Title IX.²⁰⁰ The Eleventh Circuit, in ruling on a Title IX claim, noted that “*Bostock* has great importance for [the student’s] Title IX claim” and “[w]ith *Bostock*’s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex.”²⁰¹ Within the same month, the Fourth Circuit affirmed summary judgment in favor of a transgender student who brought an equal protection claim under Title IX after his school board implemented a policy that prohibited transgender students from using the bathrooms that matched their gender identity.²⁰² Both cases illustrate *Bostock*’s potential impact on other federal appellate courts.

B. Trends Emerging from the Supreme Court’s 2020 Term

During the 2020 term—a year after deciding *Bostock*—the Supreme Court ruled on three cases which directly considered LGBTQ rights.²⁰³ As summarized by James Esseks, Director of the ACLU LGBTQ & HIV Project, “[t]he [C]ourt’s ambiguous rulings have induced much head-scratching.”²⁰⁴ Of the three cases the Court acted on, only one—*Fulton v. City of Philadelphia*—was decided on the

²⁰⁰ Wilensky, et. al., *supra* note 144, at 3.

²⁰¹ *Adams v. School Board of St. John’s County*, 968 F.3d 1286 (11th Cir. 2020).

²⁰² *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020).

²⁰³ Esseks, *supra* note 173.

²⁰⁴ *Id.*

merits.²⁰⁵ The other two decisions, *Gloucester County School Board v. Gavin Grimm* and *Arlene's Flowers v. Washington State*, were denied review, leaving the appellate court's rulings in favor of the LGBTQ litigants in place.²⁰⁶

Adopting the two subtitles of Essex's July 2021 Supreme Court recap article, trends which emerged from the Supreme Court's 2020 term identified two concepts which are at risk: (1) respect for transgender people; and (2) nondiscrimination laws.²⁰⁷ Both trends are analyzed independently below.

i. Respect for Transgender People

The Supreme Court's denial of review in *Grimm* has the same historic undertones as when the Supreme Court denied review in October 2014 in five cases where the lower courts ruled that same-sex couples had a right to marry.²⁰⁸ The Court's decision not to hear *Grimm* was the second time in three years where the Supreme Court declined to take up cases over access to bathrooms for transgender students. If the October 2014 trend followed by the landmark decision in *Obergefell* serves as any indication of how the Court feels about transgender people now, it could be a strong indication of respect.

²⁰⁵ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

²⁰⁶ See *Gloucester Cty. School Board v. Gavin Grimm*, 972 F.3d 586 (4th Cir. 2020), *cert. denied* 2021 WL 2637992 (mem) (S. Ct. June 28, 2021); *State v. Arlene's Flowers*, 441 P.3d. 1203 (Wash. 2019), *cert. denied* sub nom. *Arlene's Flowers, Inc. v. Wash., et. al.*, 2021 WL 2742795 (mem) (S. Ct. July 2, 2021).

²⁰⁷ Essex, *supra* note 173.

²⁰⁸ *Id.*

ii. Nondiscrimination Laws at Risk

Deciphering the Supreme Court's trends in the realm of antidiscrimination law is a lot harder than analyzing its decision regarding *Grimm*. The other two cases, *Fulton* and *Arlene's Flowers*, both considered the competing doctrines of religious liberty and antidiscrimination. Reading the cases together, Esseks theorized that "[t]he combination of the [C]ourt ducking the license-to-discriminate issue in *Fulton* and declining to take up the same issue in *Arlene's Flowers* suggests that even this profoundly conservative court isn't ready to undermine the nation's civil rights laws."²⁰⁹ The stalemate on providing adequate direction regarding the intersection between religious freedom and discrimination protection is extremely problematic during the current period of religious retrenchment.

IV. VISIONARY ASPIRATIONS OF SUBSTANTIVE EQUALITY

The legal fight about whether, and in what context, the Constitution gives some people a right to discriminate is one of the most

²⁰⁹ *Id.* The Supreme Court sided with the religious organization in *Fulton* through a narrow decision on a contract technicality. The facts of *Arlene's Flowers*, however, are like those of *Masterpiece Cakeshop*. As noted by Esseks, "in *Arlene's Flowers* the Washington Supreme Court unanimously ruled that a flower shop's religious objection to a same-sex couple getting married didn't give it a right to refuse to sell them flowers for their wedding." Just prior to publication of this Article, the Supreme Court granted certiorari in *303 Creative v. Elenis*. 303 Creative v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, 2022 LEXIS 840 (U.S. Feb. 22, 2022) (No. 21-476). This case arose from a challenge to Colorado's antidiscrimination law by a website designer who claims she should not be forced to design sites for same-sex weddings. In this case, the Court will consider "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."

important legal issues for the LGBTQ community. It has consequences for how every single non-discrimination law and regulation operates, and could allow all of the civil rights laws that our community struggled for decades to establish to be undermined and side-stepped and ultimately rendered close to irrelevant. It could also result in discrimination not just against LGBTQ people, but against religious minorities, people of color, people with disabilities, and all women.

— James Esseks²¹⁰

Situating *Bostock* squarely within the LGBTQ intracommunity conformist-visionary debate is quite challenging, considering the opinion can be read to align with both strands of advocacy. From a conformist perspective, *Bostock*'s interpretation of Title VII serves as mainstream acceptance of easily accessible employment opportunities.²¹¹ Since communities that have historically experienced structural inequality—like the LGBTQ community—experience higher rates of unemployment, the spirit of *Bostock* can easily be read to align more with the conformist strand of the movement.²¹² On the other hand, *Bostock* can be read as a narrow visionary victory. This alternative reading is rooted in the potential of *Bostock*'s impact on other federal antidiscrimination laws and its undercut of historical federal employment discrimination tracing back to the Eisenhower Administration.

²¹⁰ James Esseks, *Supreme Court Again Rejects a License to Discriminate*, ACLU (June 17, 2021), <https://www.aclu.org/news/lgbtq-rights/supreme-court-again-rejects-a-license-to-discriminate/>.

²¹¹ Leonard, *supra* note 72, at 6.

²¹² Sharita Gruberg & Michael Madowitz, *Same-Sex Couples Experience Higher Unemployment Rates Throughout an Economic Recovery*, CENTER FOR AMERICAN PROGRESS (May 5, 2020), <https://www.americanprogress.org/issues/lgbtq-rights/news/2020/05/05/484547/sex-couples-experience-higher-unemployment-rates-throughout-economic-recovery/>.

However, any transformative potential of *Bostock* is limited to cases deciding questions related to antidiscrimination protection under Title VII. As such, this Part generally categorizes and treats *Bostock* as a conformist victory. This is because the *Bostock* Court failed to substantively acknowledge the lived experiences of LGBTQ employees and retained the posture of redressing discrimination to preserve and legitimize a discriminatory status quo.²¹³ Comparing the history of conformist pro-LGBTQ Supreme Court decisions to *Bostock*'s impact further supports categorizing *Bostock* as a conformist decision.

Central to the critique of the conformist strand of LGBTQ legal advocacy is an emphasis on the distinct alignment and assimilationist position within the dominant status quo. Conformist legal advocacy for marriage equality—spearheaded by the *Obergefell* plaintiffs—illustrates how admission into social institutions invites future forms of oppression when visionary strategies and tactics are not employed. The same can be said about *Bostock*. *Bostock* is yet another example of how the modern LGBTQ movement has diverted from its grassroots objectives.

To serve as foundational guidance for a modern LGBTQ movement redirect, this Part applies critical race, feminist, and queer legal theory to help advance the goal of social equality for all marginalized individuals, not just for members of

²¹³ Ho, *supra* note 27, at 284.

the LGBTQ community. Part IV-A expands on the third prong of combatting religious retrenchment of basic civil rights through a critical lens and emphasizes the importance of minority individuals committing to recognizing their marginalized role in society. Building on Part IV-A, Part IV-B applies both Derrick Bell's interest convergence theory and the concept of respectability politics to highlight why assimilationist advocacy strategies are problematic to the success of future LGBTQ rights projects. This Part argues that recognition of formal legal rights for LGBTQ individuals only occurs when it is in the interest of decisionmakers who are committed to preserving a heteronormative status quo. Interest convergence coupled with movement satisfaction and activist complacency results in one extremely troubling reality—mainstream sacrifice of the LGBTQ equality agenda to benefit a dominant majority. Part IV-C explains that forging fortuity through multidimensional coalition building is a theoretical framework that grassroots organizers can, *and should*, adopt to develop visionary advocacy strategies and tactics for the next LGBTQ rights movement. Drawing on the scholarly work of Mari Matsuda, this Part stresses the importance of forming movement coalitions that represent the members of all marginalized communities so others can realize that all forms of subordination are interlocking and mutually reinforcing.

Now, more than ever, the LGBTQ community must not acquiesce to the false sense of security underlying recent pro-LGBTQ Supreme Court decisions.

Rejecting conformist ideas in favor of visionary strategies to combat systemic oppression of all marginalized groups is one of the only ways to prevent the Supreme Court from granting a license to discriminate in the name of religious liberty.

A. Cognitive Adherence to a Marginalized Role in Society

Until the fight for LGBTQ rights is no longer met with social, political, or legal objections, LGBTQ individuals must remain mindful of their marginalized role in society. In doing so, queer minorities should forge a collective identity to reform discourse. A collective commitment to recognizing the subordinate “other” status of LGBTQ people helps reveal that LGBTQ individuals of all classes can share the burdens of social struggle and the benefits of advocacy.²¹⁴ Although this may seem simple, it is a self-conscious ideological struggle.²¹⁵

An adherence to the marginalized position of LGBTQ people among the dominant order is crucial to devising ways to address struggle while minimizing the cost of engaging in inherently legitimizing discourse.²¹⁶ Attaining full civil rights for LGBTQ individuals is important. However, when incremental civil rights victories for the community are met with social and political backlash, the dominant heteronormative hierarchy is inevitably preserved.

²¹⁴ See Crenshaw, *supra* note 25, at 1384, n. 197.

²¹⁵ *Id.* at 1385.

²¹⁶ *Id.* at 1387.

Religious retrenchment because of *Bostock* is possible only through the ambiguity embedded within the *Bostock* opinion. Both the ambiguity of *Bostock* and the religious retrenchment that followed are evidence of the hegemonic force supporting homophobia and transphobia in American society, and it can no longer be ignored. It is important that legal advocates for LGBTQ rights realize the present predicament of the LGBTQ community. This necessitates an understanding of the social and legal spaces occupied by the community.²¹⁷ The next LGBTQ rights project should not be defined by the presence of a dominant, heteronormative order. Instead, it must maintain a distinctly progressive outlook that focuses on the needs of *all* LGBTQ people.²¹⁸ Although ideologically challenging, eliminating the tension between religious liberty and substantive equality for LGBTQ people is only possible through a visionary outlook on LGBTQ rights advancement.

B. *Recognizing Interest Convergence in Legal Victories*

Once LGBTQ individuals commit to a cognitive understanding of their place in society, the dominant majority's converging interest in maintaining a heteronormative society will become more apparent. Legal scholars have no choice but to work from theoretical frameworks until LGBTQ individuals make a cognitive adherence to their marginalized social position. As noted by Ho,

²¹⁷ *Id.*

²¹⁸ *Id.*

applying Derrick Bell's interest convergence theory in the analysis of *Bostock* helps "explain why the decision protects sexual minorities from discrimination, but also fails to address the substantive heteronormative biases that animate such discrimination."²¹⁹

i. Relationship Between Interest Convergence and Respectability Politics

In the context of *Brown v. Board of Education*, Bell reasoned that the Supreme Court's decision to overturn Jim Crow era segregation laws was based on the dominant status quo's interests and the petitioners' converging interests.²²⁰ Regarding racial equality generally, Bell posited that recognizing the legal rights of subordinate racial groups occurs by convincing white decisionmakers that the interests of both groups converge.²²¹ the United States had an incentive to maintain foreign national allies during the Cold War, prompting the Supreme Court to repudiate vehicles of domestic discrimination.²²²

²¹⁹ Ho, *supra* note 27, at 355. See generally Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 164.

²²⁰ See generally Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 164.

²²¹ See generally Ho, *supra* note 28, at 319–24 (applying interest convergence theory to the Supreme Court decision in *Masterpiece Cakeshop* as an example of when interests fail to converge and heteronormative values are preserved by ruling against the LGBTQ litigant); See also Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 164, at 523. Explaining his theory, Bell noted:

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.

Id.

²²² Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 166, at 523.

Accordingly, segregation of public schools was unanimously deemed unconstitutional.²²³

Bell's work has been criticized as simplistic and understood as part of "the first wave of [Critical Race Theory]"—a direct challenge to liberal reformers' ideological assumptions.²²⁴ Scholars like Justin Driver view Bell's interest convergence theory as potentially harmful and argue that it hinders Black advancement by "invit[ing] would-be racial reformers to adopt artificially constrained notions of what constitutes a viable method for seeking change."²²⁵ As a result, Devon Carbado and Daria Roithmayr recently enumerated a non-exhaustive list of "truths" that underwrite Critical Race Theory.²²⁶ Two of these "truths," both relating to Bell's theory, include the idea that "racial change occurs when the interests of white elites converge with the interests of the racially disempowered" and "the success of various policy initiatives often depends on whether the perceived beneficiaries are people of color."²²⁷ Lastly, drawing on

²²³ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

²²⁴ Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO L.J. 1419, 1445 (2016); Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1489 (2011). Butler makes the case that there has been limited progress for African-Americans as a result of the Civil Rights movement. Against this empirical backdrop, Butler uses critical race and feminist legal theory to explain how antidiscrimination law has not yielded the ravishing benefits commonly articulated in the discourse surrounding such reform.

²²⁵ Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 189 (2011).

²²⁶ Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 155 (2014).

²²⁷ *Id.*

the scholarship of Anthony Michael Kreis, “in propelling gay rights and legal protections, the strategy to align interests is not exclusive to race.”²²⁸

The concept of respectability politics is closely aligned with Bell’s theory of interest convergence. Working in tandem, interest convergence and respectability politics allow for marginalized individuals or communities to incorporate into hegemonic power by aligning with mainstream ideas and values to establish social worthiness.²²⁹ By exhibiting the material ethos and characteristics that hegemony values as good, an outsider can obtain social, economic, and political worth, recognition, and respect only attainable by a grant from the dominant power.²³⁰ The ability to act respectably for social gain is not exclusive to the phenomenon of racial negotiations in American society and politics, so it transfers aptly into the context of negotiations between sexual and gender minorities and the mainstream status quo.²³¹ Therefore, since respectability is distinguished from assimilation by way of individual construction of worthiness, for sexual

²²⁸ Ho, *supra* note 28, at 267. See generally Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & EQUITY 117, 137–53 (2013).

²²⁹ Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 421–22 (2012) (distinguishing respectability from assimilation by indirectly indicating that respectability embodies a sense of *worthiness* of recognition); See also Evelyn Brooks Higginbotham, *The Politics of Respectability*, in *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880-1920*, at 185 (1993) (noting that respectability politics can be described as “a performance and project of moving from the position of ‘other,’ to being incorporated into the normal, dominant, and hegemonic.”).

²³⁰ Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS L. REV. (2016).

²³¹ Ho, *supra* note 28, at 263.

minorities evoking assimilationist strategies, respectability becomes the degree to which these strategies are calibrated.²³² As such, once the level of assimilation is calculated by identifying the level of recognition worthiness being sought, marginalized individuals or groups can assess their chances of achieving reform by predicting the convergence of both groups' interests. Such tactics, when carried out with precision, are a viable option for LGBTQ organizations to achieve formal reform.

However, these assimilationist and conformist tactics should be used cautiously. LGBTQ legal reform victories achieved at the expense of marginalizing non-conformists within the community legitimize the anti-gay rhetoric that "Gay Rights" are "Special Rights."²³³ A commonly rejected narrative among Critical Race Theorists is the linear progression model of civil rights reform.²³⁴ Instead, a more accurate model of reform progress is one of reform and retrenchment.²³⁵ Developed by Crenshaw and further articulated by Charles Lawrence, "[w]hen people's movements successfully challenge and disrupt racist

²³² See Joshi, *supra* note 230; Ho, *supra* note 28, at 264.

²³³ Hutchinson, *supra* note 3, at 1372 (explaining that contrary to the societal narrative and anti-gay political rhetoric surrounding the LGBT identity that "Gay Rights are Special Rights" construing lesbians and gays as white, upper-class, and privileged, independent data suggests that LGBT people live in poverty at rates disproportionate to the non-LGBT population. The limited data available founding this conclusion gives rise to findings that LGBT people fare far more poorly than their non-LGBT counterparts on measures including health outcomes, homelessness, employment discrimination, and truancy. LGBT people are also victims of harassment and hate crimes at higher rates than their non-LGBT counterparts).

²³⁴ Devon W. Carbado, *Critical What What?*, 43 CONN L. REV. 1593, 1607 (2011); Butler, *supra* note 225, at 1444.

²³⁵ Butler, *supra* note 225, at 1444. See generally Crenshaw, *supra* note 25.

structures and institutions, and contest the narratives of racial subordination, the plunderers will respond with new law."²³⁶ Thus, a period of LGBTQ reform victory may trigger the newly constituted conservative majority Supreme Court to overturn equality laws and reverse the advances made across decades as a way of maintaining heteronormativity among a dominant majority.²³⁷ Such is the case with *Bostock* and other pro-LGBTQ Supreme Court victories dating back to *Romer*. Antidiscrimination reform, by way of Title VII protection, triggered religious retrenchment of LGBTQ rights protection and worked to maintain heteronormativity among the dominant majority.

To further illustrate the hegemonic power possessed by the dominant majority when making accommodation decisions for LGBTQ persons, a more nuanced analysis of Bell's scholarship is warranted. Bell's interest convergence theory, in concert with his theory on racial sacrifice, forming "two sides of the same coin" of an overarching theory of racial fortuity, helps clarify why accommodation of marginalized groups is sometimes denied even when the interests of the two competing groups converge.²³⁸ Bell defines racial sacrifice as the way "society is always willing to sacrifice the rights of black people in order to protect important

²³⁶ Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 387 (2015). See also Butler, *supra* note 225, at 1444.

²³⁷ RICHIE JACKSON, *GAY LIKE ME: A FATHER WRITES TO HIS SON* (2020) (assertion made in book sleeve inside cover.).

²³⁸ Ho, *supra* note 28, at 319. See also Derrick Bell, "Here Come De Judge": *The Role of Faith in Progressive Decision-Making*, 51 HASTINGS L.J. 1, 8 (1999).

economic and political interests of whites.”²³⁹ Thus, racial sacrifice adopts the inverse logic of interest convergence and anticipates white dominance refusing to wield its authority for change that would help advance the interests of marginalized groups. In articulating the limited effectiveness of interest convergence in enacting social change, Bell notes that “even when interest convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes.”²⁴⁰

ii. Grassroots Divergence as a Consequence

Championing conformist victories, like those of *Windsor*, *Obergefell*, and *Bostock*, results in a problematic mainstream understanding of the foundational LGBTQ movement’s goals. Guillaume Marche noted that the post-1990 LGBTQ community advocated for equal rights by relying on the mobilization of experts rather than the grassroots support base.²⁴¹ The legal victories of this era’s cycle of mobilization are largely rooted in antidiscrimination legal victories at the local and state levels, with marriage equality representing the only clear nationwide demand.²⁴²

²³⁹ Bell, *supra* note 239, at 8. *See also* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFILLED HOPES FOR RACIAL REFORM 69 (2004).

²⁴⁰ BELL, *supra* note 240, at 69.

²⁴¹ MARCHE, *supra* note 22, at 26.

²⁴² *Id.*

A consequence of the nationwide LGBTQ agenda's focus on marriage is the failure to capture the full spirit and energy of the progressive LGBTQ movement. By assimilating into an institution that reinforces heterosexuality, conformist advocates sacrificed the basic premise of the LGBTQ movement. As articulated by Urvashi Vaid, "the core faith of progressivism has always been that prosperity can be more widely shared—through systems that deliver education, health care, jobs, training, housing, and other forms of social support to a wider array of people."²⁴³ Championing marriage equality and limited employment antidiscrimination protection does not align with this fundamental idea of social progress.

Despite mainstream sacrifice of the true nature of the LGBTQ equality agenda, the foundational grassroots goals of the movement have remained constant since beginning the fight for LGBTQ social equality. Today's agenda is rooted in the consensus that the LGBTQ community continues to be deprived of basic human rights.²⁴⁴ The framework of interest convergence and queer sacrifice proves that reform focused on achieving formal equality between gay and straight

²⁴³ VAID, *supra* note 7, at 195.

²⁴⁴ *Id.* at 189–190. Vaid enumerates a non-exhaustive list of basic rights of the LGBT equality agenda. These rights include: workplace equality; military equality; family equality to recognize the myriad ways that LGBT families are denied benefits they have earned and deserved; fair treatment for people with HIV and adequate funding for the demands of this global epidemic; increased attention and resources for LGBT homeless youth, LGBT seniors, African-American gay men who are HIV-positive or at risk, and LGBT health and social service institutions on the front lines; safety and security by organizing to challenge the roots of violence; and the promotion of human rights around the world, starting with the State Department to promote LGBT human rights around the world.

people does not advance the fundamental ideas the movement is built on. As an alternative, the LGBTQ movement should center reform efforts around creating the best possible societal conditions for all people, regardless of social classification.

C. Forging Fortuity Through Multidimensional Coalition Building

As this Article has uncovered, analyzing the strategies and tactics of the modern LGBTQ movement from a critical race, feminist, and queer legal theory perspective affirms the axiom that society, its institutions, and its dominant order contribute to preserve the heteronormative status quo. However, it is worth highlighting that a substantial amount of this analysis is rooted purely in judicial results. Fortunately, undercutting essentialism discourse within the LGBTQ community to directly combat the dilemma of queer fortuity is attainable through a strategy Bell termed as “forged fortuity.”²⁴⁵

Through forged fortuity, Bell advocates for anti-subordination measures that rely less on the judiciary for results and more on “challenging the continuing assumptions of [heterosexual] white dominance” though “tactics, actions, and even [changed] attitudes.”²⁴⁶ Rather than assimilate and conform to the assumptions of white dominance by seeking admission into the institutions they

²⁴⁵ Ho, *supra* note 28, at 328. *See also* BELL, *supra* note 240, at 9.

²⁴⁶ Ho, *supra* note 28, at 328.

control a visionary approach—yielding forged fortuity is essential to the progressive future of the LGBTQ movement.

Successful forged fortuity requires stressing the economic harm resulting from the subordination of other communities that is sustained by the dominant party.²⁴⁷ The argument is that when the cost of subordination is too high for the dominant party, antidiscrimination measures will be achieved without conforming to the institutions that perpetuated oppression. By forging fortuity through multidimensional coalition-building, the LGBTQ community's fundamental grassroots goals of human flourishing can be obtained.

Without redirecting the current trend of the LGBTQ movement, subordination of sexual minorities will continue. Accordingly, forging fortuity through multidimensional coalition building is a theoretical framework that grassroots organizers should adopt to assist in the movement redirect. As with theory, praxis requires multidimensionality—working in coalitions helps us realize that no form of subordination ever stands alone.²⁴⁸ In articulating the importance of working in coalitions, Mari Matsuda finds that coalitions allow others to realize that patterns of oppression do not stand alone and “all forms of subordination are

²⁴⁷ *Id.* at 329.

²⁴⁸ Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DEN. U.L. REV. 1409, 1415 (1998). See also Mari Matsuda, *Beside My Sister, Facing My Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

interlocking and mutually reinforcing.”²⁴⁹ Additionally, Catherine Smith finds that within larger coalitions, “members of subordinated groups go even farther” through sharing their lived experiences to help identify the depth of the group’s marginalization.²⁵⁰ These findings, read together, support the idea that the LGBTQ rights movement should not be tied to unidimensional essentialist formations like sexual identity.²⁵¹ Instead of working in silos to advance single legal issues by emphasizing their singular importance, LGBTQ advocates need to fight for change that transforms the hegemonic ideas of the status quo. The LGBTQ movement, in conjunction with other subordinate groups, should focus on a redistribution of justice through justice-based advocacy.

The early philosophical teachings of Karl Marx and Friedrich Engels can help predict the organizational structure of such a movement. In discussing the proper formation of a social movement to undermine capitalism, neither Marx nor Engels speculated on the detailed organization of movement structure.²⁵² Rather, their focus was on obtaining movement power based on a central idea. Once a movement obtained power, Marx and Engels argued it would be up to the “members of the new society to decide how it was to be organized, in the concrete

²⁴⁹ Matsuda, *supra* note 249, at 1189.

²⁵⁰ Catherine Smith, *Unconscious Bias and “Outsider” Interest Convergence*, 40 CONN L. REV. 1077, 1089 (2008). *See also* Ho, *supra* note 28, at 331.

²⁵¹ Valdes, *supra* note 249.

²⁵² This call for action actually comes from preeminent Marxist educationist Peter McLaren in his 2018 personal correspondence on the role of socialists in the US in the era of Trump. Michael Cole, *Racism and Fascism in the Era of Donald J. Trump and the Alt-Right*, CRITICAL RACE THEORY IN THE ACADEMY 191 (Vernon Lee Farmer & Evelyn Shepherd W. Farmer eds., 2020).

historical circumstances in which they found themselves.”²⁵³ Therefore, when building multidimensional coalitions, the LGBTQ community’s initial focus should be on the central idea that subordination is maintained by the dominant majority. Movement power is established by overcoming the hurdle of finding “common interest that is significant enough to overcome any ideological differences” among the coalition.²⁵⁴

V. CONCLUSION

When racism masquerades as the rule of law, every person is threatened with the immorality of that act. When women are violated brutally, as [they] are being every day in every country from the U.S. to Congo, when [they] are regarded as less important or less equal, men are damaged and harmed as well. And when any gay, lesbian, bisexual, and transgender people are treated as second-class citizens in a society that is not a theocratic state, our very liberty and most-cherished values are endangered.

— Urvashi Vaid²⁵⁵

Ultimately, the problem of LGBTQ inequality rests on a host of social, legal, political, and ideological variables.²⁵⁶ Therefore, it is not a viable solution to combat the continued subordination of the LGBTQ community by challenging these variables independently. Rather, the community should use them in combination to its advantage. Audre Lorde articulates an important idea for

²⁵³ *Id.*

²⁵⁴ Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN’S. L. REV. 253, 279 (2005).

²⁵⁵ VAID, *supra* note 7, at 179.

²⁵⁶ Hutchinson, *supra* note 3, at 1359.

progressive theorists and activists to consider when challenging the institutional foundation preserving the oppression of minority individuals. Lorde's message that "the master's tools will never dismantle the master's house" is an inherently simple, yet highly important, concept to keep in mind while moving forward.²⁵⁷ The tools and variables that LGBTQ advocates are fixated on are fundamentally incapable of upending the institutional status quo that exists.²⁵⁸ Therefore, we, as progressive theorists and activists, must outsmart the majority and beat them at their own game. The colloquialism "if you can't beat them, join them" does not apply when joining them is at the expense of enduring continued oppression in the name of religious freedom. Therefore, we only have one option: We Build. To flourish, we must build a better house—a stronger, more inclusive house.

Moving forward, however, the LGBTQ community must remain mindful of its marginalized role in society. Viewing oneself as a subordinate 'other' upends any argument advancing a constitutionally enshrined right to discriminate. This cognitive commitment also assists in recognizing and dismantling the various layers of marginalization that exist in today's society. Additionally, the LGBTQ community must view incremental judicial victories with skepticism and celebrate them for what they are, not for their potential. By applying this theoretical

²⁵⁷ AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, SISTER OUTSIDER 110, 112 (1984).

²⁵⁸ Reiterating an axiom of critical race and feminist legal theory, the institutional status quo is used to preserve the dominant majority. However, it is important to note that the conformist stand of the LGBTQ movement uses these variables in the same manner as the dominant majority.

framework, the LGBTQ community can emerge from the current period of religious retrenchment.

This house can be built by using critical race and feminist legal theory as tools to redirect the LGBTQ movement in a way that employs multidimensional coalition-building to acknowledge and empower the most marginalized. By returning to the grassroots beliefs of visionary LGBTQ advocates—that human rights are not only basic rights, but essential rights that include racial justice, women’s reproductive freedom, sexual freedom, accessibility, and other basic liberties—our house will be stronger and more inclusive.²⁵⁹ We must, however, be cautious of cracks in our foundation, poured by conformist ideas like marriage equality and limited employment discrimination protections, that foreshadow its collapse.

²⁵⁹ VAID, *supra* note 7, at 189–90.