THE FULL PROMISE OF LIBERTY: A PLACE FOR IDENTITY RHETORIC IN POST-*BOSTOCK* JURISPRUDENCE

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I. INTRODUCTION

[W]e demand that sex speak the truth . . . and we demand that it tell us our truth, or rather, the deeply buried truth of that truth about ourselves which we think we possess in our immediate consciousness.[1]

In the first volume of *The History of Sexuality*, French philosopher Michel Foucault wrote of a "discursive explosion" of the 18th and 19th centuries that changed the way society discussed and interacted with aberrate sexualities, particularly with regard to homosexuality.[2] He called this the *perverse implantation*: the moment at which "the nineteenth-century homosexual became a personage: a past, a case history and childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology."[3] In other words, homosexuality as a concept came to be recognized not just as a physical act or set of actions—it became inextricably tied to identity. Discourse was

1. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 69 (Robert Hurley trans., 1978).
2. *Id.* at 38.
3. *Id.* at 43.

not merely interested in what people did, but what they *were*. The "perversion" was both constitutive and reflective of identity, and not merely of conduct.

According to Foucault, this discursive explosion was the result of a series of operations and historical events that served not to exclude newfound perversions, but rather to make them intensely and unalterably present. The body became a "mode of specification of individuals," a way to speak about and understand what was once taboo and unspoken.[4] This newfound focus was a "machinery of power" that "did not aim to suppress [sexuality], but rather give it an analytical, visible, and permanent reality."[5] Make no mistake, these deviant sexualities were condemned all the same, but for the first time, the individuals who possessed them were present and "listened to."[6] As Foucault explained, "[i]t was time for all these figures, scarcely noticed in the past, to step forward and speak, to make the difficult confession of what they were."[7] Sexuality gained power from discourse, and vice versa; the two "seek out, overlap, and reinforce one another."[8]

In this Note, I argue that the *Obergefell v. Hodges*[9] opinion, which legalized gay marriage in the U.S., opened the door for a new way to analyze cases in the LGBTQ+ sphere: a *non-perverse* perverse implantation through which sexuality could be recognized as constitutive of identity, and not merely of conduct. That is, following 2015, there was an opportunity for identity to be used by LGBTQ+ advocates as a source of rights beyond *Obergefell*'s reach, i.e., beyond the marriage context. Perhaps it could be used to achieve the "full promise of liberty" that Justice Kennedy alluded to in the opinion, a liberty under which the law protects people, not conduct.[10] Stated differently, with *Obergefell* came the opportunity for expansive progress through what I refer to as "identity rhetoric" or "identity arguments." These arguments describe a relationship between identity and action that is reflexive in nature: what one does is reflective of *who* they are, and who they are is constitutive of what one *does*.

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4. *Id.* at 47.

5. *Id.* at 44.

6. *Id.* at 39.

7. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 39.

8. *Id.* at 48.

9. Obergefell v. Hodges, 576 U.S. 644 (2015).

10. *Id.* at 667.

Thus, the modern implantation would not be "perverse" in the pejorative sense, but in a positive sense: it would reflect a change in the way sexuality is present in discourse, in dialogue, and hopefully, in the law. Indeed, in the years following *Obergefell*, proponents of LGBTQ+ rights began to make a linguistic shift from discussing these rights from an *associational* standpoint (i.e., rights to privacy, intimacy, and to identi*fication* with a particular group) to a standpoint that recognizes identi*ty* as the basis for fundamental rights. In other words, the legal fight for LGBTQ+ rights began to shift rhetorical focus from a right grounded in specific institutional contexts (a right to belong in the workplace, in the bedroom, at the altar, despite one's sexual orientation) to a right grounded in something that transcends those contexts (a right to belong in and of itself).

By the time the three Title VII[11] cases[12] of the 2019 term were argued in October of that year, over thirty-six scholars, practitioners, and organizations had submitted *amicus* briefs to the Supreme Court that contained—and indeed, in many cases, centered on—identity as the basis for finding in favor of the Employees. On one hand, these briefs demonstrate an effort to translate rights from one context (constitutional law) to another (statutory interpretation), but more importantly, they demonstrate the linguistic power of identity rhetoric: how a strategy which shifts the Court's focus from conduct to individual can be the substantive foundation for rights in a vast array of contexts: in marriage, in the workplace, and beyond. In other words, an opinion that recognized a legal right based on identity would avoid the myriad issues that have come as a result of the law's current approach[13] to gay rights (and, in turn,

11. 42 U.S.C. § 2000e-2.

12. *See* Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *rev'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599 (2019); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *aff'd sub nom.* Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

13. Historically, legal battles over sex and gender issues have existed in a number of jurisprudential contexts, including Equal Protection (where sexual orientation is not a protected class, and therefore does not get the heightened scrutiny afforded to other suspect classes), Due Process (where, as discussed *infra*, substantive rights are limited to specific institutional settings and narrow social contexts), and statutory interpretation (where the law is defined by and confined to the words drafted by Congress). This fractured approach results in inconsistency among courts and confusion among those who wish to understand—and ultimately, test—the limits of that approach.

avoid the need for further litigation of the same issues in the future).

However, whatever potential for progress *Obergefell* may have ushered in, *Bostock* may have turned on its head. The decision, announced in June of 2020, was almost completely devoid of identity language, instead espousing a textualist approach to the question of precisely what "because of . . . sex" encapsulates.[14] For a majority of the Court, that phrase includes discrimination because of sexual orientation and gender identity, though not for the reasons many had anticipated.

In Part II, I discuss the *Obergefell* opinion and its aftermath, including critics' response to Justice Kennedy's lyrical language as well as the implications that flowed from his emphasis on marriage, family, and the home as the basis for the decision. I explain how, despite the opinion's laser-like focus on marriage, it also presented the opportunity for identity-based arguments in future contexts and cases. In Part III, I examine the identity arguments contained within the *Bostock* briefs to the Supreme Court, focusing on how these arguments placed identity at the forefront of the debate. Specifically, I discuss two forms of identity arguments, both of which flow directly from the language of the *Obergefell* opinion: first, the right to *define* one's identity (that is, the right to live one's life according to their "deeply felt"[15] sense of self) and second, the right to *express* that identity (through individual choice). In Part IV, I discuss the *Bostock* opinion itself and Justice Gorsuch's textualist approach to finding in favor of the Employees—and consequently, the striking absence of nearly any identity language at all. Finally, I consider whether, following that approach, there still exists any place for identity arguments in a post-*Bostock* jurisprudence.

II.
SEX, MARRIAGE, AND DIGNITY: *OBERGEFELL*'S FUNDAMENTAL RIGHTS

People will be surprised at the eagerness with which we went about pretending to rouse from its slumber a sexuality which everything—our discourses, our customs, our institutions, our regulations, our knowl-

14. 42 U.S.C. § 2000e-2; Bostock, 140 S. Ct. 1731 (2020).

15. Brief of Amici Curiae interACT: Advocates for Intersex Youth, et al. in Support of Employees at 28, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter InterACT Brief].

edges—was busy producing in the light of day and broadcasting to noisy accompaniment.[16]

The Supreme Court's landmark opinion in *Obergefell v. Hodges* (2015) begins with these words: "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[17] Indeed, the line is only a mere taste of the kind of lyrical language that is to come throughout Justice Kennedy's majority opinion: one that resonates more as a celebration of love, family, and marriage than it does a legal opinion. Refusing to draw from either the Due Process or Equal Protection Clauses alone as the basis for his holding,[18] Kennedy explained that the two are "connected in a profound way," and that the "interrelation of the two principles furthers our understanding of what freedom is and must become."[19] He spoke of how "choices about marriage shape an individual's destiny" and how "through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[20] Marriage, he said, is the "keystone of our social order."[21]

For many, Justice Kennedy's verbiage was celebrated across the country as a victory for what he called "highest ideals of love, fidelity, devotion, sacrifice, and family."[22] His words became widely and instantly available to the public,[23] they were read as wedding vows,[24] and in one article, they even earned him the title of "the nation's

16. FOUCAULT, *supra* note 1, at 158.

17. Obergefell, 576 U.S. at 651-52 (holding that, as a matter of constitutional law, the right to marry is a fundamental right of which same-sex couples may not be deprived).

18. Historically, these two clauses have been the basis for sex and gender issues. *See* n.13, *supra.*

19. *See* Obergefell, 576 U.S. at 672.

20. *Id.* at 666.

21. *Id.* at 669.

22. *Id.* at 674.

23. *See* Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1026-27 (2016) (explaining how, within hours of the *Obergefell* decision, every website among the top ten news websites as of January 2015 covered the decision and excerpted language from the majority opinion).

24. *See, e.g.*, Jane Gordon Julien, *A Playwright and a Songwriter, Finding the Right Words*, N.Y. TIMES (Sept. 14, 2018), https://www.nytimes.com/2018/09/14/fashion/weddings/a-playwright-and-a-songwriter-finding-the-right-words.html [https://perma.cc/P6M7-XAAT].

most important judicial champion of gay rights."[25] The holding was called "the long-awaited affirmation of the basic humanity of gay Americans."[26] Professor Erwin Chemerinsky wrote: "June 26, 2015 thus will be remembered, like dates such as May 17, 1954, when the Court decided *Brown v. Board of Education*, as the Court taking a historic step forward in advancing liberty and equality."[27] As for the language, the majority opinion's poetic proclamations on love and marriage were "gorgeous, heartfelt, and a little mystifying."[28]

However, not all shared the same enthusiasm for Justice Kennedy's lyrical prose. In a blistering dissent, Justice Scalia retorted that, "[i]f, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began with 'The Constitution promises liberty to all within its reach . . . .' I would hide my head in a bag."[29] Justice Thomas sharply noted that "the Constitution contains no 'dignity' Clause."[30] Chief Justice Roberts, too, was unsupportive: "*Just who do we think we are?*"[31]

For many scholars and proponents of LGBTQ+ rights, however, the problem with Kennedy's language was not its lyricism, but rather his laser-like focus on marriage, family, and the home as the

25. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html [https://perma.cc/9FSV-ZT5B].

26. Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as A Suspect Class*, 25 TUL. J. L. & SEXUALITY 1, 3 (2016) ("The profound and intimate power of *Obergefell* should be respected not only because the decision was a strong move toward relieving gay Americans and their families from the material costs, insecurity, and stigma of second class citizenship, but because *Obergefell* advances principles of liberty, equality, and personal autonomy for all Americans.").

27. Erwin Chemerinsky, *Symposium: A Landmark Victory for Civil Rights*, SCOTUSBLOG (June 27, 2015, 8:56 AM), https://www.scotusblog.com/2015/06/symposium-a-landmark-victory-for-civil-rights/ [https://perma.cc/5UTS-7QHA]. *See also* Judith Schaeffer, *Symposium: The Constitution Has Everything to Do With It*, SCOTUSBLOG (June 26, 2015, 4:29 PM), https://www.scotusblog.com/2015/06/symposium-the-constitution-has-everything-to-do-with-it/ [https://perma.cc/W5CL-5QAG] ("Chief Justice Roberts's dissent notwithstanding, *Obergefell v. Hodges* will be a great legacy of the Roberts Court, just not of John Roberts himself. And the Constitution will have had everything to do with it.").

28. Mark Joseph Stern, *Supreme Court 2015: Decoding Anthony Kennedy's Gay Marriage Decision*, SLATE (June 26, 2015, 11:18 AM), https://slate.com/news-and-politics/2015/06/supreme-court-2015-decoding-anthony-kennedys-gay-marriage-decision.html [https://perma.cc/ZW3Y-KN9X].

29. Obergefell v. Hodges, 576 U.S. 644 at 720 n.22 (Scalia, J., dissenting).

30. *Id.* at 735 (Thomas, J., dissenting).

31. *Id.* at 687 (Roberts, C.J., dissenting) (emphasis added).

basis for the decision, as opposed to the established doctrine under the Equal Protection Clause.[32] Legal rights depend on clear definitions—not romantic musings. There was thus worry that future courts interpreting the *Obergefell* opinion would place undue emphasis on the importance of the marriage right at the expense of non-married individuals.[33] In other words, because the contours and limits of the constitutional "liberty interest" at stake would be dispositive in future interpretations, a right that was strictly limited to the marriage context would provide no hope for expansion into new contexts beyond the altar.

Further, not only was there an absence of clear Constitutional categorization with respect to which rights, exactly, were being protected—the source of those rights was also unclear. The majority opinion pointedly proclaimed that "[r]ights come not from ancient sources alone," but that they "rise . . . from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[34] While this proclamation reflected an increasingly popular concept of a living Constitution,[35] it troubled those who were looking for a roadmap for LGBTQ+ rights beyond *Obergefell*. Critics cautioned that the kinds of "broad abstractions"[36] drawn in the opinion would do more harm than good, particularly as future courts would try to grapple with the application of whatever the opinion actually *meant*. As Professor Christopher Green put it, "it's hard to find much to criticize as unsound about his method, because it's hard to see much method at all."[37]

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32. *See* Gregg Strauss, *What's Wrong with* Obergefell, 40 CARDOZO L. REV. 631, 642-43 (2018) ("[S]cholars have argued *Obergefell* created unnecessary moral controversy by using due process rather than equal protection law.").

33. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1208 (2016) (arguing that "even as *Obergefell* expands the right to marry, it may also diminish constitutional protection for life outside of marriage.").

34. *See* Obergefell, 576 U.S. at 671-72.

35. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (arguing against originalism and explaining that the common-law approach of American jurisprudence allows the principles which are drawn from the Constitution to adapt and grow based on changed needs, views, and understanding in American society).

36. *See* Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity,'* THE ATLANTIC (Apr. 29, 2015), http://www.theatlantic.com/politics /archive/2015/04/the-dangerous-doctrine-of-dignity/391796 [https://perma.cc/6LWU-MLL9].

37. Chris Green, *Symposium: "Oh, Well, We Know Better.,"* SCOTUSBLOG (June 26, 2015, 4:27 PM), https://www.scotusblog.com/2015/06/symposium-oh-well-we-know-better/ [https://perma.cc/A9SX-FZQL].

Critics knew that issues would arise for gay persons looking for rights *outside* of this context—that is, rights not grounded in that "enduring bond."[38] As Melissa Murray explained, "in a world where all couples have access to the most 'profound commitment,' there is no obligation to acknowledge or respect relationship statuses that are 'somehow less[ ]' than marriage."[39] Once marriage equality was attained, where could we go from there? What relationships—romantic or otherwise—would meet that high bar set by *Obergefell*? If marriage really was "keystone of our social order," it seemed that many would fall far below that bar.[40]

Notably, the difficulties of translating *Obergefell*'s success to other areas arose not only because it would be difficult to raise other rights to the same importance as marriage, but also because it highlighted the associational aspect of the so-called fundamental rights at the expense of the individuals for whom those rights were won.[41] As Keith Cunningham-Parmeter explains, the "benign imagery" of marriage, family, and the home allowed the Court to "emphasize the primacy of marriage without delving into more complicated issues of gender, sex, and sexuality."[42] In other words, the Court could easily defend the goodness of marriage, a nonthreatening and virtuous heterosexual institution, without having to defend homosexual individuals as a class.

However, as Cunningham-Parmeter further explains, this was not necessarily the Court's own doing, but was actually the result of conscious decision-making and strategy by advocates fighting for gay rights in the years leading up to *Obergefell*:

> [M]ovement lawyers won in court by presenting a "just like you" image of homosexuality to judges that focused on gay couples' long-term commitment, professional careers, and children. These "safe," undifferentiated images intentionally downplayed issues of sexuality, gender, and diversity within the gay community while placing the importance of marriage above other interests.[43]

Indeed, this "like-straight" concept of dignity was a prominent rhetorical strategy in many of the gay rights cases leading up to

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38. *See* Obergefell, 576 U.S. at 666.

39. Murray, *supra* note 33, at 1244.

40. *See* Obergefell, 576 U.S. at 669.

41. Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 Florida L. Rev. 1099 (2015).

42. *Id.* at 1103.

43. *Id.* at 1102 (internal citations omitted).

Obergefell.[44] Boiled down, the argument was this: gay people want the same things straight people do, therefore Equal Protection mandates that they be entitled to seek those same things which were already granted to straight couples. In the beginning years of the fight for rights in the sex and gender context, this was an effective strategy because it focused on the extension of equality in already acceptable contexts: those resistant to change were more likely to be receptive to arguments made on familiar terms, under familiar and relatable institutional norms. However, while this "assimilationist strategy"[45] allowed for important victories in and beyond the courtroom, it also set a precedent that the rights at issue were fundamental only in the *associational* sense, and only because society and courts characterized them as such. In other words, under this view, *Obergefell* did not dredge up new rights; it simply extended those already existing for heterosexual couples to gay couples.[46] As the majority opinion proclaimed, "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[47] By highlighting marriage at the expense of sex, *Obergefell* communicated that the right to marry should be granted to gay couples not because of their sexuality, but in spite of it.[48]

Again, because the normative power of this strategy comes from the "presumptive goodness"[49] of heterosexual institutions, the removal of those institutions from the debate poses problems for individuals arguing for equal rights in other contexts.[50] Without

44. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy for [marriage, procreation, and family] purposes, just as heterosexual persons do.").

45. *See* Susan Frelich Appleton, Obergefell's *Liberties: All in the Family*, 77 OHIO STATE L.J. 919, 924 (2016) (explaining that gay rights advocacy pursued an "assimilationist strategy" by "relying on narratives to highlight the similarities between the human qualities inherent in childrearing in stable marriage relationships and the comparable human qualities . . . inherent in stable homosexual relationships") (internal citations omitted).

46. *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1630 (2004) ("[T]he Court vindicates sexual liberty by recognizing heterosexuals' sexual rights and advances 'equality of treatment' by extending that liberty to lesbians and gay men. Rights that are made to the king's measure are fit for a queen.").

47. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

48. *See* Cunningham-Parmeter, *supra* note 41, at 1117.

49. *Id.*

50. *See* Kerry Abrams, *The Rights of Marriage:* Obergefell, Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 556 (2018) (explaining that Justice Kennedy's opinion, "taken alone, appears to put unmarried people and

marriage or family in the mix, arguments for expansive protections are difficult to tether to any one source of doctrine or opinion. Indeed, following 2015, opponents of such expansions were able to considerably narrow the reach of *Obergefell*'s holdings on dignity, equality, and intimacy.[51]

Unless, however, there was another way out. Perhaps *Obergefell*'s weaknesses could prove to be some of its greatest strengths? The stark absence of a formal equality approach, the deliberate quieting of traditional Equal Protection or Due Process scrutiny, allowed for other rhetorical possibilities to rise from between the lines. Justice Kennedy's refusal to pinpoint the precise source from which fundamental rights should flow permitted readers of the opinion to draw from some of the broader abstractions contained in the opinion in order to formulate a new strategy. Namely, a strategy devised from the concepts of liberty and identity.

Obergefell's theory of dignity was not solely bound up in the home, but also in the concept of identity. Dictum declared that the Constitution protects "personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."[52] Indeed, the majority made clear that these "choices" were not choices at all: the opinion referred to the "immutable"[53] nature of sexual orientation and referenced the damaging effects of repressing the desire to make "truthful declaration[s] . . . of what [ ] in their hearts had to remain unspoken."[54] When Justice Kennedy embraced gay persons' "dignity in their own distinct identity," he spoke to a concept that carried rhetorical power beyond the marriage context—indeed, beyond the confines of any particular context at all.[55]

This idea, that there might exist a freedom to openly express *who you are*, carries a powerful force throughout the majority opinion, right from the very first line: that all people have a constitutionally protected right to "[d]efine and express their identity."[56] Kennedy is able to reach the conclusion that same sex couples are entitled to equal marriage protections from a number of premises,

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their children in jeopardy"). *See also* Murray, *supra* note 33, at 1257 ("If *Obergefell* stands for the proposition that 'love wins,' who loses?").

51. *See, e.g.*, Ramirez v. State, 557 S.W.3d 717, 720 (Tex. App. 2018) (declining to read *Obergefell* as determining that "intimacy, particularly sexual intimacy, between consenting adults is a fundamental right").

52. *See* Obergefell, 576 U.S. at 645.

53. *Id.* at 661.

54. *Id.* at 660.

55. *Id.*

56. *Id.* at 651-52.

including that choices regarding marriage are "inherent in the concept of individual autonomy" and that they "shape an individual's destiny."[57]

Sweeping statements like this, so seemingly untethered to legal doctrine, were the source of much controversy surrounding the opinion. But *Obergefell* was not a standalone manifesto on dignity and autonomy; its predecessors had been paving the way for some time. *Lawrence v. Texas* spoke of the "manifold possibilities" of liberty.[58] *Planned Parenthood of. Se. Pa. v. Casey* described the "[r]ight to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[59] *U.S. v. Windsor* not only discussed marriage—it "rhapsodized about it."[60] But *Obergefell* was perhaps the first case in which identity—as opposed to dignity, intimacy, and autonomy—was given the possibility of being treated as a source of freedom in its own right.

Thus, in the years following *Obergefell*, many advocates saw this as an opportunity to translate that freedom to new contexts.[61] Indeed, it was critical that they do so—if marriage was the sole fundamental right springing from the opinion, the "unique fulfillment to those who find meaning in the secular realm,"[62] there was nowhere else to go from there. *Obergefell* was a momentous victory for the gay rights community, but perhaps it could have meaningful reach beyond the altar. In other words, while *Obergefell* seemed, at least facially, to offer little hope for expectant plaintiffs outside of the marriage-rights context, the opinion's unwavering devotion to an amorphous concept of "liberty" opened the door for others to define not only what that liberty entailed, but from where that liberty came. After all, if rights can and do rise from "better informed

57. *Id.* at 665.

58. *See* Lawrence, 539 U.S. at 558 (holding unconstitutional a Texas statute that criminalized certain intimate homosexual sexual conduct).

59. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851, 877 (1992) (affirming women's right to choose an abortion before fetal viability and imposing an "undue burden" test on state regulation of that right).

60. Kyle Duncan, *Symposium: Overruling* Windsor, SCOTUSBLOG (June 27, 2015, 2:38 PM), https://www.scotusblog.com/2015/06/symposium-overruling-windsor/ [https://perma.cc/8T6E-BYNH] (citing United States v. Windsor, 570 U.S. 744 (2013) (holding that the section of the federal Defense of Marriage Act defining "marriage" and "spouse" to be limited to heterosexual couples violated equal protection and due process principles and concluding that the federal statute served no legitimate constitutional purpose).

61. *See, e.g.*, David B. Cruz, *Transgender Rights After* Obergefell, 84 UMKC L. REV. 693, 696 (2016).

62. *See* Obergefell, 576 U.S. at 656-57.

understanding[s],"[63] and not just ancient texts, there could be hope in expanding the reach of *Obergefell*'s liberty to other contexts.

Justice Kennedy's opinion had acknowledged that, despite the victories gay people had earned in recent years, there was still much more work to be done. He explained that, "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." [64] Following 2015, the question would be this: was *Obergefell* simply a ticket good for one day, or could it be a path towards fulfilling that promise?

III.
BOSTOCK, TITLE VII, AND THE POWER OF IDENTITY RHETORIC

There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses.[65]

In the wake of uncertainty following *Obergefell* regarding just how far its "liberty" principles could reach, there existed a need for advocates of LGBTQ+ rights to draw a connection between the claims that liberty gave rise to in the marriage context and what claims it gave rise to beyond that context. Specifically, the question of whether these principles could have any reach or relevance at all in the employment context had been left markedly unanswered.

In 2019, the Supreme Court heard three cases consolidated under Title VII of the Civil Rights Act of 1964, under which it is unlawful for an employer to fail or refuse to hire, fire, discriminate against, limit, segregate, or classify an employee in an adverse way "because of such individual's "race, color, religion, sex, or national origin."[66] The petitioner in *Bostock v. Clayton County*[67] and the respondents in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*[68] and *Zarda v. Altitude Express*[69] (collectively, the "Employees") were individuals who were fired be-

63. *Id.* at 671.

64. *Id.* at 667.

65. FOUCAULT, *supra* note 1, at 27.

66. 42 U.S.C. § 2000e-2 (hereinafter "Title VII" or the "Act").

67. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *rev'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

68. Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 560 (6th Cir. 2018), *aff'd sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599, 1599 (2019).

cause of their LGBTQ+ status. The question before the Court was not whether the definition of the word "sex" itself explicitly included gender identity or sexual orientation, but whether discrimination on the basis of either constitutes *de facto* discrimination "because of . . . sex."[70]

In the over thirty-six *amicus curiae* briefs submitted to the Court in the months leading up to oral argument, the concept of identity was an indispensable part of advocates' rhetorical strategy. Identity was present in the briefs in two main forms: first, in what I call "inherent identity" arguments, which stressed LGBTQ+ identity as a "deeply felt"[71] sense of self and drew connections to other immutable characteristics protected by Title VII. Second, in what I call "expressive identity" arguments, which sought to recharacterize idiosyncratic choices regarding how one presents themselves to the world (through, e.g., clothing choice, voice modulation, *etc.*) as reflections of that deeply felt identity.

Perhaps these arguments proliferated because of *Obergefell*'s amorphous conceptualization of "liberty," perhaps in spite of it. Nevertheless, the *Bostock* briefs demonstrate the rhetorical power of using identity as a basis for legal rights: the idea that, when issues of identity are involved, the law protects individuals, not actions. For rights advocates, identity could be the necessary link that bridged the gap between behavior and the individual, action and actor. In that way, discourse was on the brink of a Foucauldian implantation, but it was unclear whether the Court's opinion would adopt this language, as it had done in *Obergefell*, or move completely away. In the end, it was the latter—an opinion almost completely devoid of identity language, instead employing the textual approach that was largely ignored by many *amici* for the Employees. However, before turning to the opinion itself, I first discuss the presence and power of identity arguments in the *Bostock* briefs.

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69. Zarda v. Altitude Express, Inc., 883 F.3d 100, 100 (2d Cir. 2018), *aff'd sub nom.* Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

70. Title VII. Interestingly, "sex" was added only two days before the Act's passage in the House of Representatives by an amendment offered by Rep. Howard Smith, who opposed the civil rights law, in order to "prevent discrimination against another minority group, the women. . . ." *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9(2) LAW & INEQ. 163, 163 (1991). Thus, it was almost certain that the definition of "sex," at least as originally contemplated by the enacting Congress, would not include sexual orientation or gender identity.

71. *See* InterACT Brief, *supra* note 15, at 7.

A. Inherent Identity Arguments

Under the first categorization, proponents of LGBTQ+ rights sought to show that sexual orientation and gender identity are immutable, intrinsic to individuality, part of one's "deeply felt identity and lived experience."[72] The rhetorical strengths of this argument are facially apparent. It focuses on the inseparable tie between one's understanding of their own identity and their ability to achieve a full and happy life. Words such as "immutable," "inherent," and "fundamental" appear throughout the briefs with powerful force, stressing that the issue is not about whether gay and transgender persons should have a statutorily protected right to expression or choice,[73] but about these persons' lived reality. Under this argument, identity is the direct source of the right—the right to *be*, in and of itself, is protected under Title VII's mandate.

InterACT, a nonprofit organization which advocates for intersex youth, explained in its *amicus* brief that "attempting to reduce sex to a function of genitalia, gonads, or chromosomes—while excluding one's deeply felt identity and lived experience from the calculus—is a fool's errand."[74] It refuted the Employers' contention that identity is "fluid" or malleable, explaining that "evidence shows that gender identity is a deep-seated, persistent trait that is fundamental to a person's sense of self and is evidenced by how they live their lives every day."[75] Likewise, the American Bar Association ("ABA") argued that "sexual orientation and transgender status form part of the immutable essence of an individual's being," and that "[d]iscrimination on that basis is destructive both of the individual and to society, especially one built upon the ideal of equal protection under the laws."[76] Inherent identity arguments thus shift the narrative focus from the Employers' disagreement with their employees' behavior to the plaintiff's identities themselves: for example, it is because of Gerald Bostock's status as a gay man that his employer fired him, not because of his participation in a gay recreational softball league. The target of the discrimination is identity, and because identity is an unalterable feature of the

72. InterACT Brief, *supra* note 15, at 7.

73. *But see* Part III(B), *infra* (arguing that the right to expression is fundamentally a right to identity as well).

74. InterACT Brief, *supra* note 15, at 7.

75. InterACT Brief, *supra* note 15, at 28–29.

76. Brief for the American Bar Association as Amicus Curiae in Support of the Employees at 26, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter ABA Bostock Brief].

human experience, the discrimination should be impermissible under Title VII.

Interestingly, this focus on "identity" and the "immutable" self was a stark departure from the ABA's past strategy. In 2015, the ABA's brief for *DeBoer v. Snyder*—the 2015 companion case to *Obergefell*—did not once mention the words "immutable" *or* "identity," despite gay rights being equally at stake.[77] It spoke of "families' health and well-being"[78] and the general effects of being denied the public and private benefits that come with marriage[79] (e.g., tax exemptions), but did not make any explicit—or, for that matter, implicit—identity arguments. This shift in rhetorical strategy demonstrates the ABA's attempt to deemphasize the factual elements that made *Bostock* markedly different from other gay rights cases (that is, a lack of marriage or family issues, per *Obergefell*) and from other Title VII cases (e.g., *Price Waterhouse v. Hopkins*,[80] which concerned explicit discrimination on the basis of gendered stereotypes). Thus, when one removes these factual disparities, the elements that remain are the "broad remedial purposes" for which Title VII was enacted: to prevent "discrimination based on the interaction of a protected aspect of an employee's identity."[81]

The inherent identity argument was particularly prevalent in the context of transgender rights. Many *amici* devoted the entirety of their briefs to explaining why transgender people do not—indeed, cannot—simply choose to be transgender. For example, the American Medical Association explained that transgender individuals have a "deeply felt, inherent sense" of their gender that does not conform to the gender they were assigned at birth, stressing that "[e]very person has a gender identity, which cannot be altered voluntarily or necessarily ascertained immediately after birth."[82] The primacy of identity as a grounding theme served to emphasize exactly what was at stake in these cases: rights which depend not on

77. *See* Brief of Amicus Curiae American Bar Association in Support of Petitioners, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-571) [hereinafter ABA DeBoer Brief].

78. ABA DeBoer Brief, *supra* note 77, at 19.

79. ABA DeBoer Brief, *supra* note 77, at 11–25.

80. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that discrimination for failing to conform to a gender stereotype constitutes discrimination because of sex under Title VII).

81. ABA DeBoer Brief, *supra* note 77, at 10.

82. Brief of the American Medical Association et al. as Amici Curiae in Support of the Employees at 14, 19, Bostock v. Clayton Cnty.,140 S. Ct. 1731 (2020) (No. 17-1618).

choice, association, or even on statutory text, but rights which flow inherently from the very fact of being human.

The inherency argument also allows connections to be drawn to the other protected categories of Title VII: namely, race. Both are immutable, inherent, fundamental to a person's lived experience. Indeed, a recurrent motif throughout many *amicus* briefs is the appearance of race analogies, not only in connection with early Title VII cases, but also landmark Substantive Due Process cases such as *Loving v. Virginia*.[83] For example, the ABA cited to *Loving* four times in its *Bostock* brief to show that, just as "equal application" of a law cannot justify discrimination based on race, so too can it not justify discrimination based on sexual orientation or transgender status.[84] The brief of LGBTQ+ Members of the Legal Profession and Law Students offered several analogies to race, attempting to broaden the Court's focus from the issue at hand—gay and transgender rights—to consider *all* of the protected categories of Title VII. It asked: "[c]an there be any doubt" about these cases?[85] If not, why should *this* case be any different?

American media outlets also invoked the development of civil rights for persuasive force. One argued that, just as Title VII has come to protect expansive categories of race, so too have "the definitions of gender and sexuality . . . evolved past a binary meaning."[86] Another explained:

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83. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that Virginia miscegenation statutes violated both the Equal Protection and Due Process Clauses, and that marriage restrictions based on race are unconstitutional). *See*, *e.g.*, Brief of Amici Curiae Muslim Bar Association of New York et al. in Support of the Employees at 12, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) (invoking *Loving* to show that, while it may be true that the enacting Congress in 1964 did not contemplate LGBTQ+ persons as protected by Title VII, neither did it contemplate that interracial couples could be protected when it inserted the word "race").

84. *See* ABA Bostock Brief, *supra* note 76, at 9, 11, 20, 21. Interestingly, the ABA cited *Loving* only once in its brief for DeBoer, despite the fact that *Loving* and *DeBoer* had an arguably clearer connection than *Loving* and *Bostock*: the freedom to marry.

85. Brief of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Members of the Legal Profession and Law Students as Amici Curiae in Support of the Employees at 4, 10, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) ("This behavior and identity policing based on sex would not be permitted if it were based on any other protected characteristic under Title VII, and should not be permitted when based on sex either.").

86. Carliss Chatman, *Men Get Stereotyped Too. It's Time the Court Acknowledges It*, SLATE (Oct. 7, 2019, 4:38 PM), https://slate.com/news-and-politics/2019/10/title-vii-supreme-court-masculinity-stereotypes.html [https://perma.cc/7NTZ-DT5V].

> If you're tempted by the thought that firing a person for having a same-sex partner doesn't discriminate on the basis of sex because the employer would fire *people of any sex* who have same-sex partners, ask yourself whether a law prohibiting *people of any race* to marry outside their racial groups, or to ride in a railroad car designated for people of a different race, discriminates on the basis of race. (It does.)[87]

Of course, the use of race analogies was met with ample criticism—not only from the opposing side, but also from supporters of LGBTQ+ rights.[88] Some argued that citations to *Loving* and other civil rights cases were wholly inappropriate in the context of sexual orientation, not only because of the inherent differences between what constitutes sex- and race-based discrimination, but also the differences between the lived experiences of black and gay persons. As Professor Russell Robinson explains, it can be deeply harmful to make comparisons between differently situated communities, especially ones that paint the picture of a "postracial" America in which "Blacks are doing 'quite well,'" but gay persons are still struggling to achieve legal equality.[89] This picture is damaging not only on a discoursal level, but also because it risks exhausting or diverting civil rights resources away from traditional constituencies that are far away from achieving parity in society.[90]

Further, apart from the problematic nature of comparing differently situated minority groups, many point to the fact that emphasizing the immutable nature of gay or transgender identities runs the risk of excluding those that fall in between and outside of this argument, namely, bisexual persons and other minority groups

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87. Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch's Textualism*, POLITICO (Oct. 15, 2019), https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850 [https://perma.cc/FQN2-J287].

88. *See, e.g.*, Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 190–91 (2019) (warning against comparing LGBTQ+ struggles to those faced by racial minorities and calling such a comparison "absurd").

89. Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1055 (2014) (citation omitted).

90. *See* JANET E. HALLEY, *"Like Race" Arguments*, *in* WHAT'S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY 40, 58 (Judith Butler et al. eds., 2000) (describing this risk as including both "hard" resources, like jobs or police funding, and "soft" resources, which include a "social/cultural appetite for antidiscrimination").

without the same characteristics.[91] As Janet Halley has explained, "the immutability argument . . . [leaves] bisexuals out in the cold: after all, they can switch."[92] This alienation thus "displace[s]" a core group of persons for whom gay and transgender persons—and their advocates—purport to speak.[93]

Thus, as powerful a strategy as it can be to invoke immutability and inherency as bases for equality claims, it is imperative that they are not the *only* bases on which the claims rest, lest important groups be left out of the conversation, and ultimately, the law. It becomes increasingly important to both emphasize the inherent nature of identity *and* draw attention to the individualistic nature of that identity; that is, the fact that the identity belongs to a person, not just a category. As Ruth Coker wrote, "[c]ategories suggest stasis[,] whereas storytelling reflects our changing life experiences."[94] Professor Robinson, too, has suggested that LGBTQ+ advocates should avoid "like race" arguments that focus on black experiences as necessary for the legal claim and instead provide "detailed, compelling accounts of antigay discrimination, which can stand on their own footing."[95] Indeed, individual storytelling serves as an important component of identity arguments, explored below.

B. Expressive Identity Arguments

Where the first form of identity argument focuses on the right to define one's own identity, the second emphasizes the right to *express* that identity. To be clear, the argument is still an identity argument—the idea here is that the right to expression *is* a right grounded in identity. In other words, the difference between this and the inherent identity argument discussed *supra* is that the former *distinguishes* the right to "be" from the right to choose, whereas the latter argues that the right to choose is inextricably intertwined with the right to be. Expressive identity arguments thus focus

91. *See* Robinson, *supra* note 89, at 1058 (arguing that "installing African American-like oppression as a prerequisite unnecessarily fences out other worthy civil rights claimants, such as people with disabilities").

92. *See* HALLEY, *supra* note 90, at 53.

93. *Id*. *See also* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (exploring the motivations shared by self-identifying homosexuals and heterosexuals to erase bisexuality from contemporary political and legal discourse); RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996) (arguing that "people living the gap are often ostracized by all the communities to which they might belong") [hereinafter COLKER, HYBRID].

94. COLKER, HYBRID, *supra* note 93, at 19.

95. *See* Robinson, *supra* note 89, at 1058.

mainly on how discrimination based on non-conformance to perceived gender norms constitutes discrimination "because of . . . sex" because it holds people to expectations that are antithetical to their own deeply felt personal identities. In other words, to force people to choose between expressing who they are and keeping their jobs is unlawful, not because there is an inherent right to dress or act a certain way, but because those decisions reflect a deeper right to *be*.

The main strength of this rhetorical strategy is that it roots expressive behavior in the idea of sex itself rather than in the concept of idiosyncratic choice. The argument that people should be free from normative judgments about how men and women *should* behave heightens the stakes in a similar way to the types of identity arguments discussed in Part A, by drawing the Court's attention to the human lives bound up and implicated by the law. In this way, expressive behaviors such as clothing choices become *more* than mere decisions about what to wear—they actually constitute outward expressions of identity.

As an initial note, the fight to protect what is perceived as "voluntary" choices has been a part of modern sexuality and gender discourse for quite some time. Indeed, many scholars beyond the legal context have been urging a concept of gender itself that is inextricably tied to conscious decisions about appearance and action. Judith Butler's "performativity" model is perhaps the most influential example of this.[96] Butler, an American gender and literary theorist, famously argued that gender is constituted through series of repetitive acts and known only through communicative behaviors, appearances, and choices.[97] However, because society depends upon a model of gender "essentialism"—i.e., the idea that gender pre-exists and defines the self in a way that is binary and intractable—those who "perform[ ] . . . wrong" are punished, whereas "performing it well provides the reassurance that there is an essentialism of gender identity after all."[98]

It is obvious why, then, some legal scholars have explicitly sought to translate Butler's argument into the Title VII context by

96. *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (2nd ed., 1999). As a caveat, Butler's work on performativity is extremely complex, and I cannot purport to capture its intricacies in just a few sentences. For my purposes, however, I use Butler's theory merely to demonstrate the foundations of a performative gender model and the concept that actions and behaviors are intrinsically intertwined with conceptions of sex and gender.

97. Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATER J. 519, 526 (2009).

98. *Id.* at 528.

advocating for a concept of "sex" which includes its performative aspects.[99] Indeed, the performativity model operates as an important recognition that biological sex is not wholly determinative of gender identity, and in fact, the performative features of gender—including conscious behavioral choices—are at least equally, if not more, imperative in establishing a concept of identity.[100]

Discrimination against LGBTQ+ persons is often rooted in societal expectations of how men and women "should behave" (i.e., that men should behave masculinely and women femininely).[101] As some *Bostock amici* noted, "[e]xpectations like these have long been deemed constitutive of male and female identity, and have undergirded a host of assumptions about the purportedly distinct and complementary roles of men and women in society."[102] Thus, discrimination against LGBTQ+ employees because of their perceived defiance of gender norms constitutes discrimination "because of . . . sex."

The linking of sex and LGBTQ+ identity in this way is an important version of the identity argument because it characterizes behavioral choices as *reflections* of something inherent or immutable. Therefore, discrimination against these behaviors must logically and inevitably be *because of* the underlying immutable trait, which must be unlawful under Title VII. *Amici* Legal Aid explicitly drew out this idea in its brief, explaining that discrimination against those who "fail to act and/or identify with the sex they were assigned at birth—is no different from the discrimination directed against [the plaintiff] in *Hopkins* who, in sex-stereotypical terms, did not act like a woman."[103] Indeed, this sort of gender policing is even more prevalent for transgender Americans, as "[a] person is

99. *See, e.g.*, Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1176–79 (2004) (using Butler's model to argue for a redefinition of race and ethnicity under Title VII to include both biological and "performed" features associated with race). *See also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 872–75 (2002) (advocating for what he calls the "weak performative model," which suggests that statuses can be partially constituted by acts; that is, identity may be constituted both by biological and performative influences).

100. *See* Camille Gear Rich, *supra* note 99, at 1179.

101. *See* Brief of Anti-Discrimination Scholars as Amici Curiae in Support of the Employees at 12, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Anti-Discrimination Scholars Brief].

102. Anti-Discrimination Scholars Brief, *supra* note 101, at 3.

103. *See* Brief for the Legal Aid Society as Amicus Curiae in Support of the Employees at 6, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Legal Aid Brief]; Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (plaintiff was an employee at Price Waterhouse who was allegedly denied a

defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[104]

As Keith Cunningham-Parmeter noted, a discrimination theory which focuses on sex (rather than on perceived behaviors) "draws critical attention to the fact that any regulation of sexual activity . . . works to reinforce gender stereotypes about how men and women ought to behave."[105] Prior to the *Bostock* decision, Title VII's "heteronormative underpinnings" were revealed by what Cunningham-Parmeter characterized as an inverse relationship between the representation of gay persons in the marriage decisions[106] and in Title VII: "[w]hile the marriage cases have expanded gay rights without talking about gay sexuality, the employment cases talk about gay sexuality without expanding rights."[107] In other words, the constitutional expansion of gay rights in *Obergefell* and its predecessors was predicated on the goodness of heterosexual institutions (i.e., marriage) without focus on the sexual orientation aspect of the case, leading to the myriad issues explored in Part II, *supra* (namely, the trouble with extending *Obergefell*'s holding to contexts outside of marriage). And yet in parallel, legal developments in the Title VII context were largely unhelpful for the gay rights movement because they prohibited only discrimination against a certain type of homosexuality, which Cunningham-Parmeter refers to as "predatory, aggressive, and compulsive" homosexuality, leading to a narrow, reductive characterization of homosexual discrimination in the workplace that served only to reinforce cultural stereotypes about gay people without actually doing the work to expand legal protection.[108]

Thus, expressive identity arguments attempt to merge, in a way, the holdings of the marriage decisions (and the fundamental

promotion because of her "masculine" and "hard-nosed" personality (internal quotation marks omitted)).

104. Legal Aid Brief, *supra* note 103, at 6 (quoting Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)).

105. Cunningham-Parmeter, *supra* note 41, at 1105.

106. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003). *See also* Kyle Duncan, *Symposium: Overruling* Windsor, SCOTUSBLOG (June 27, 2015, 2:38 PM), https://www.scotusblog.com/2015/06/symposium-overruling-windsor/ [https://perma.cc/8T6E-BYNH] ("*Windsor* did not just mention state authority over marriage in a footnote. *Windsor* rhapsodized about it.").

107. Cunningham-Parmeter, *supra* note 41, at 1117.

108. *Id.* at 1119. Cunningham-Parmeter discusses the limited protections afforded by the holdings in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that Title VII prohibited male-on-male sexual harassment) and *Hopkins*.

rights which flowed from them) with the goals of Title VII, which are to protect against discrimination in the workplace because of a person's identity. These arguments take the precedent set by the Court in both of these areas and draw a logical extension from the right to refuse conformance gender norms and expectations to the right to make conscious choices which are reflective of one's identity. These arguments simultaneously challenge traditional conceptions of what "real" men and women are and argue that the right to live one's life in accordance with his or her deeply felt identity includes the right to defy those conceptions.[109]

Both inherent and expressive identity strategies throughout the *Bostock* briefs placed identity at the forefront of the debate, not only in an effort to raise the stakes of the outcome, but to deliberately divert the possibility of a decision based solely on principles of statutory interpretation. Indeed, many *amici* turned towards an analysis of the textual commands of Title VII as one of the last sections in their arguments.[110] In fact, some *amici* did not discuss the statute, its legislative history, or its legal predecessors at all, instead focusing purely on the detrimental effects of workplace discrimination on LGBTQ+ persons.[111] Others discussed the "impossibility" of a situation in which the employee's sex is *not* taken into account in an employer's discriminatory action, but did not attempt to use traditional methods of statutory interpretation to make that point.[112]

On the other side of the debate, however, this was not the case.

109. *See* Chatman, *supra* note 86.

110. *See, e.g.*, Brief of Amici Curiae Impact Fund et al. in Support of Petitioner in No. 17-1618 and Respondents in Nos. 17-1623 & 18-107 at 23–24, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618). Indeed, it is not until the twenty-second page that InterACT turned towards a construction of "sex" as a matter of statutory interpretation—a mere fraction of its greater argument.

111. *See, e.g.*, Brief of Amici Curiae The Women's and Children's Advocacy Project et al. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Women's and Children's Advocacy Project Brief]; Brief of the Southern Poverty Law Ctr. et al. as Amici Curiae in Support of the Employees, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618); Brief of Amici Curiae Business Orgs. in Support of the Employees, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

112. *See, e.g.*, Brief of GLBTQ Legal Advocates & Defenders et al. as Amici Curiae in Support of the Employees, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

C. The Employers' Argument

Amici for the Employers placed a far greater emphasis on traditional canons of statutory interpretation. They sought to show that this was a straightforward case of ordinary meaning, historical understanding, and legislative intent.[113] For example, *amici* Liberty Counsel, in its brief, provided an excess of interpretative canons it claimed worked in the Employer's favor, including *noscitur a sociis* ("a word is known by the company it keeps"), the canon against surplusage (construe against rendering words "superfluous, void, or insignificant"), and of course, the canon of ordinary meaning (explaining that "the ordinary meaning of 'sex' does not subsume within it "sexual orientation").[114] The American Public Philosophy Institute, too, argued that "it is a well established canon of statutory construction that the meaning of a legal text includes the well established legal meaning of any of its words or phrases."[115] The Public Advocate brief simply listed, in bullet-points, how the Second Circuit *Zarda* opinion violated several canons, including "the supremacy-of-text principle; the ordinary-meaning canon; the fixed-meaning canon; the omitted-case canon; the general-terms canon; and the grammar canon."[116] The list goes on.[117]

It was clear that gay- and transgender-rights advocates worried that, if the Court's decision *were* to rely solely on interpretative methods, the argument would weigh overwhelmingly in favor of the Employers. Indeed, some lower courts had already acknowledged that "it is not even remotely plausible that in 1964 . . . a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also

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113. *See, e.g.*, Brief of Amicus Curiae Liberty Counsel in Support of Clayton Cty., Altitude Express, and Ray Maynard at 21, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Liberty Counsel Brief] (arguing that "except for religion, which has its own historical basis for inclusion in Title VII, the categories presently listed include immutable characteristics over which individuals have no choice and cannot change. To interpret 'sex' to include 'sexual orientation' would ignore the cannon giving items grouped in a list as related in some way.").

114. Liberty Counsel Brief, *supra* note 113, at 17–19.

115. Brief of Amicus Curiae American Pub. Philosophy Inst. in Support of Employers at 6, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

116. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of the Employers at 6, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

117. Other *amicus* briefs discussing canons of interpretation include briefs from, *e.g.*, Members of Congress, Religious Freedom Institute's Islam & Religious Freedom Action Team, Council for Christian Colleges, Foundation for Moral Law, and more.

banned discrimination because of sexual orientation."[118] Thus, a solely textual or originalist inquiry was thought by some to be the nail in the coffin for the Title VII plaintiffs' claims.

Beyond the courthouse walls, it seemed impossible to predict how the Court would rule. On one hand, public opinion seemed to overwhelmingly support a finding in favor of the Employees.[119] On the other, with a conservative-leaning bench, a victory for LGBTQ+ rights seemed unlikely, particularly as transgender issues had only recently begun to make meaningful waves in courts.[120] Some speculated that the Court would make a decision informed by societal attitudes, leaving the precise definition of the term "because of . . . sex" for another day.[121] Others observed that this was a case in which Justices' ideologies were "butting up against the methodological commitments of those same justices."[122] Namely, unpredictability seemed most to stem from uncertainty with regard to how the newest additions to the Court (Gorsuch and Kavanaugh) would rule. Justice Gorsuch, in particular, was speculated to be the key vote in the case: would he remain committed to rigid principles of textualism, or take into consideration the "massive social upheaval" that could result from the decision?[123]

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118. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 114 (internal citation omitted). *See also* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

119. *See, e.g.*, Vanita Gupta and Sharon McGowan, *Symposium: Let's Talk About Sex: Why Title VII Must Cover Sexual Orientation and Gender Identity*, SCOTUSBLOG (Sept. 5, 2019, 3:53 PM), https://www.scotusblog.com/2019/09/symposium-lets-talk-about-sex-why-title-vii-must-cover-sexual-orientation-and-gender-identity/ [https://perma.cc/J8YL-FC2T].

120. *See* Masha Gessen, *The Supreme Court Considers L.G.B.T. Rights, But Can't Stop Talking About Bathrooms*, THE NEW YORKER (Oct. 9, 2019), https://www.newyorker.com/news/our-columnists/the-supreme-court-considers-lgbt-rights-but-cant-stop-talking-about-bathrooms[https://perma.cc/56JG-K37N] (stating that the hearings for the Title VII cases "provided a snapshot of the current moment"). *See also* Alexander Chen, *The Supreme Court Doesn't Understand Transgender People*, SLATE (Oct. 18, 2019, 3:11 PM), https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html [https://perma.cc/AS27-XQW8] (citing the Court's "palpable discomfort" with transgender people and likening it to "its discomfort about gay people in 1986").

121. InterACT Brief, *supra* note 15, at 30.

122. Emma Green, *The LGBTQ-Rights Movement Is Changing, and So Is the Supreme Court*, THE ATLANTIC (Oct. 8, 2019), https://www.theatlantic.com/politics/archive/2019/10/supreme-court-lgbtq/599608/ [https://perma.cc/WRF7-3XAN].

123. *See Are We All Textualists Now?*, SCOTUSTALK (Oct. 17, 2019), https://www.scotusblog.com/2019/10/are-we-all-textualists-now-lgbt-cases/ [https://perma.cc/4UAY-N4US].

As it turns out, it was both—and neither.

IV.
THE OPINION: A TEXTUALIST APPROACH TO EQUAL RIGHTS

We're all textualists now.[124]

Bostock was a landmark victory for LGBTQ+ rights, a ruling that declared discrimination on the basis of sexual orientation or gender identity to be unlawful under Title VII. It was a "simple and profound victory,"[125] one that was decidedly "the most consequential in the decades-long history of the American L.G.B.T.Q. movement."[126]

But what came as a surprise to some was that the author of this landmark opinion turned out to be the first Trump-appointed justice to the court, Justice Gorsuch. Perhaps an even greater surprise was that textualism provided the basis for the decision. In the end, all nine justices seemed to agree with Gorsuch that the "written word is the law"[127]—here, the text of Title VII. Only six, however, agreed that it meant what Gorsuch said it meant.

In the initial pages of the opinion, Gorsuch sets the parameters of the Court's approach: first, it must "orient [itself] to the time of the statute's adoption" and assess the statutory terms on their own footing before applying them to the case at hand.[128] From there, the application was straightforward: "sex" at the time of Title VII's enactment meant biological roles determined by birth.[129] The term "because of" legally connotes a "but-for" test: the Court should

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124. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:29 YouTube (Nov. 25, 2015), https://www.youtube.com/watch?v=DPEtszFT0Tg [https://perma.cc/Q8F6-ETD5] ("I think we're all textualists now, in a way that just was not remotely true when Justice Scalia joined the bench.").

125. Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. Times (June 15, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html [https://perma.cc/Q8F6-ETD5].

126. Masha Gessen, *The L.G.B.T.Q.-Rights Movement Wins Its Biggest Supreme Court Victory*, The New Yorker (June 15, 2020), https://www.newyorker.com/news/our-columnists/the-lgbtq-rights-movement-wins-its-biggest-supreme-court-victory [https://perma.cc/6A59-QFAA].

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

128. *Id.* at 1738.

129. *Id.* at 1739.

"change one thing at a time and see if the outcome changes."[130] In each case before the Court, the employee's sex was a but-for cause of the adverse action taken against them: for example, if Gerald Bostock was a woman who had been attracted to men, he would not have been fired.[131] The conclusion: "[s]ex plays a necessary and undisguisable role" in an employer's decision to fire an employee on the basis of sexual orientation or gender identity—"exactly what Title VII forbids."[132]

Some, however, were not so readily convinced. From the dissent, Justice Alito wrote that the "arrogance" of the majority's argument was "breathtaking."[133] He took issue with nearly every aspect of the opinion, including its lengthy discussion of matters which were "beside the point,"[134] its employment of "strange" and "illogical" hypotheticals,[135] and its failure to address the ramifications the opinion would surely have on the freedoms of religion and speech.[136] But Alito's primary contention with the majority opinion was its use of textualism to reach the conclusion that Title VII, by its own terms, protects against discrimination of gay and transgender persons. Specifically, he wrote:

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated––the theory that courts should "update" old statutes so that they better reflect the current values of society.[137]

Gorsuch's use of textualism to reach his decision was met with equal controversy from conservatives beyond the courtroom. One

130. *Id.* (citing University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 350 (2013)).

131. *See id.* at 1741.

132. *Id.* at 1737. It is important to note, however, that the Court made clear that its approach was a direct application of statutory interpretation principles. In other words, its parameters were explicitly limited to the statute at hand—it did not create any other categorical or protection for sexual orientation or gender identity.

133. *See* Bostock, 140 S. Ct. at 1757 (Alito, J., dissenting).

134. *Id.* (referring to the majority's discussion of sole versus primary motivation, individual versus group rights, etc., to which Alito says, "[a]ll that is true, but so what?").

135. *See id.* at 1759–60.

136. *See id.* at 1782–83.

137. *Id.* at 1755–56.

commentator wrote: "[w]here statutory interpretation is concerned, per *Bostock*, a judge should effectively set aside his or her law school education and retreat to the lessons of high school English class."[138] Another wrote that, as a matter of textualism, the conclusion that Title VII protects against discrimination on the basis of sexual orientation or gender identity is "analytically untenable."[139] The majority had declared that, "[a]t bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings."[140] But if it really were as straightforward as Gorsuch claimed it to be, why was his application of it so controversial?

Notably, the opinion was nearly completely devoid of identity language; indeed, its rigid adherence to textualism leaves no room for anything else. Gorsuch goes out of his way to avoid nearly any non-textual analysis, stating at the very beginning of the opinion that the Court would "proceed on the assumption that 'sex' signified what the employers suggest," that is, sex as defined at birth.[141] Thus, in a single line, Gorsuch disregards hundreds of pages of *amicus* briefs which centered on challenging that very notion. The opinion says nothing about equality, individual rights, or the role identity might play in either—it simply states what the statute says and interprets it. Nothing more, nothing less.

The absence of these elements, however, did not go unnoticed, particularly by the dissenting justices. Justice Alito noted that, while the majority chose to rely solely on textualism for the basis of its opinion, "several other arguments figure prominently in the decisions of the lower courts and in briefs submitted by or in support of the employees," particularly the role of sex stereotypes and the use of race analogies, which he briefly addresses "for the sake of completeness."[142] Additionally, while the majority does declare that "homosexuality and transgender status are inextricably bound up with sex,"[143] he notes that it makes this point "more or less in passing."[144] Justice Alito's issue is not only with the majority's brevity on

138. Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word is the Law"*, SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/KGS3-Z9FX].

139. Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 167 (2020).

140. *See* Bostock, 140 S. Ct. at 1743 (majority opinion).

141. *Id.* at 1739.

142. *Id.* at 1763 (Alito, J., dissenting).

143. *Id.* at 1742 (majority opinion).

144. *Id.* at 1760 (Alito, J., dissenting).

this point, but he questions the very existence of the assumption itself: "[i]t is curious to see," he says, "in an opinion that purports to apply the purest and highest form of textualism."[145]

Further, where Gorsuch deliberately avoids discussion of the implications the decision might have in contexts beyond the workplace, both Alito and Kavanaugh note the potential for far-reaching consequences in other areas, namely, the area of constitutional law. Alito cautions that *Bostock* will "exert a gravitational pull in constitutional cases" because it may be used as a ground for elevating homosexual and transgender persons to the heightened scrutiny reserved for sex-based classifications under Equal Protection review.[146] Kavanaugh, too, draws an explicit connection, but focuses on the history of constitutional precedents, explaining that "[a]ll of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination."[147] In other words, if, as the majority claimed, the constitutional prohibition on sex discrimination covered sexual orientation too, the Supreme Court had taken a wildly convoluted route towards the vindication of gay rights in those cases (where the Court could have simply held, as a blanket rule, that sexual orientation discrimination *is* sex discrimination).

And to some extent, that's true. If *Obergefell* had simply declared discrimination on the basis of sexual orientation to be unconstitutional, Gerald Bostock would perhaps never have had to bring his case in the first place. Nor would there still be hundreds of other cases pending in lower courts, fighting to have the judicial system declare acts of discrimination unlawful in contexts which lie beyond the reach of Title VII. Textualism won this battle, but the war is not yet close to over—LGBTQ+ rights advocates must continue to challenge discrimination in its manifold micro-contexts.

With a shifting composition of the Supreme Court and an ever-changing sociopolitical climate, it is impossible to say whether *Bostock* signals the rise of an interpretive method under which time-worn texts may be used to further progressive agenda, or whether it is merely the product of societal pressure and changing attitudes. For some, *Bostock* presents the opportunity to reclaim interpretive methods which have been traditionally used to defend the status

145. *Id.* at 1761.

146. *See* Bostock, 140 S. Ct. at 1783.

147. *Id.* at 1833 (Kavanaugh, J., dissenting).

quo.[148] For strict textualists, however, *Bostock* threatens to tear down the safeguards in place that constrain judicial activism and inhibit expansive readings of statutory text.[149] The risk posed by an equality regime which relies solely on textualism then, is the apparent possibility for either outcome to happen.

As Professor Katie Eyer explains, "[b]oth textualism and originalism can be infinitely malleable when only one side of the argument claims the authority to define their contours."[150] This is both the beauty and danger of any interpretive method: its pliability, the flexible nature with which it can be manipulated to conform to either side of an argument. Even ostensibly rigid approaches like textualism or originalism can be molded to an extent to reach conclusions that were unmistakably *not* considered by the writers of the original text—just look at the case in point. The *Bostock* opinion maintains that "[j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."[151] But is that not what all interpretive methods demand? Even a textualist inquiry requires an extent of guesswork about what exactly the words of the statute mean, what the writers intended they mean, and ultimately, what they *should* mean. Regardless, whether the Court will continue to follow this approach is a question that will only be answered with time.

Thus, we find ourselves once again in an uncertain jurisprudential territory we found ourselves in following *Obergefell*, but at the opposite extreme. At least for the time being, the Court seems to have rejected the course set by earlier sexual orientation cases—a course that gradually developed an arsenal of fundamental rights from extra-textual, extra-legal considerations of dignity, autonomy, and identity—to embrace an approach that considers only the

148. *See, e.g.*, Sarah Rice, *Symposium: The Strength of the Written Word Fulfills Title VII's Promise*, SCOTUSBLOG (June 15, 2020, 6:32 PM), https://www.scotusblog.com/2020/06/symposium-the-strength-of-the-written-word-fulfills-title-viis-promise/ [https://perma.cc/5MZ5-EPEP] ("The opinion . . . fulfills the best promises of textualism.").

149. *See* Nelson Lund, *supra* note 139, at 163 ("The unacknowledged theory underlying the result in *Bostock* is that statutory language can simply be declared unambiguous so long as the imputed meaning is not linguistically impossible. This form of textualism thus operates as a super trump card.").

150. Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ [https://perma.cc/39VE-MNPU].

151. *See* Bostock, 140 S. Ct. at 1754 (majority opinion).

words of the text itself. Perhaps, following *Bostock*, discourse will see a shift in the way cases are discussed, argued, and ultimately won. Perhaps rights advocates will once again develop a rhetorical strategy that reflects the shift made to identity arguments following *Obergefell*. Now though, rather than asking what rights might spring from the concept of identity, they should ask what else can be found between the lines of statutory text. If, as Justice Kagan recently remarked, we really are "all textualists now,"[152] then perhaps this is the beginning of a new era, or perhaps *Bostock*, too, was a ticket only good for one day.

V.
CONCLUSION: THE FUTURE OF IDENTITY RHETORIC

> *We tell [sex] its truth by deciphering what it tells us about that truth; it tells us our own by delivering up that part of it that escaped us.*[153]

Was *Obergefell* simultaneously the rise and fall of identity rhetoric? Did it both usher in a rhetorical strategy centered on the primacy of identity and at the same time, demand that jurisprudence step back into more concrete methods of analysis lest it go too far? Undoubtedly, the prevalence of identity arguments in the discourse surrounding the Title VII cases was influenced by the trajectory of fundamental rights cases concerning sex, gender, and sexual orientation leading up to the 2019 decision. Without *Obergefell* and its predecessors, rights advocates could not have cited the Supreme Court of the United States in their proclamation that, "[w]hen an individual or group is excluded from equal protection of laws that preserve basic human rights, they suffer injury to their dignity, autonomy, and humanity."[154]

And yet, while *Obergefell* opened the door to that promise, it ultimately failed to fulfill it by only vaguely reaching at the heart of the issue: identity. At surface level, Justice Kennedy's majority opinion had warned against narrow readings of fundamental rights, proclaiming that "*Loving* did not ask about a 'right to interracial marriage';[155] *Turner*[156] did not ask about a 'right of inmates to

152. Harvard Law School, *supra* note 124.

153. FOUCAULT, *supra* note 1, at 69–70.

154. Women's and Children's Advocacy Project Brief, *supra* note 111, at 5 ("Civil rights laws are designed to promote the unifying and universal values of equal dignity and treatment") (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 291 (1964)).

155. Obergefell v. Hodges, 576 U.S. 644, 2602 (2015).

marry'; and *Zablocki*[157] did not ask about a 'right of fathers with unpaid child support duties to marry," but rather that each case considered the right in its "comprehensive sense, asking if there was a sufficient justification for excluding the relevant class"—i.e., gays and lesbians—from the full protection of the law.[158] Clearly, the opinion hinted that discriminatory treatment of LGBTQ+ persons as a class was unconstitutional, but never explicitly stated so.[159] Thus, by too broadly generalizing about marriage, liberty, and identity, *Obergefell* allowed others to narrow those rights themselves.

In this way, *Obergefell* simultaneously went too far, and not far enough. It went too far beyond the formal equality regime laid down by Supreme Court precedent by employing the type of lyrical language that many viewed to be discrediting to the legal substance of the decision. And yet, it did not go far enough to actually achieve what it seemed to want to achieve: a "full promise" of true equality, a promise that could only be fulfilled by fully bridging the gap between action and actor, between behavior and identity. Did *Bostock* make the same mistake?

Of course, *Bostock* was nonetheless an unequivocal victory for the gay- and trans- rights community, and it was won through an opinion void of any identity language at all. The inquiry, the analysis, and the decision rested solely on just three words: "because of sex." For a majority of the Court, it was enough to say that those words protected discrimination in the workplace against gay and transgender persons—no more, no less. I argue only that, if *Obergefell* had more formally and unambiguously stated that identity was at the heart of its liberty rights, and that person, not conduct, was protected under the law, the *Bostock* opinion may have looked much different.

Thus, the gap between actor and action remains open, at least for now. LGBTQ+ advocates must continue to fight for the very

156. Turner v. Safley, 482 U.S. 78, 81 (1987) (holding that Missouri prison regulations restricting inmates from marrying without prison superintendent permission violated their constitutional right to marry).

157. Zablocki v. Redhail, 434 U.S. 374, 377 (1978) (holding that Wisconsin statutes requiring a court order prior to receiving a marriage license and prohibiting marriage where individuals were delinquent in child support payments violated the constitutional right to marry).

158. *See* Obergefell, 135 S. Ct. at 671.

159. *See generally* Katie Eyer, Brown*, Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L. J. F. 1, 2 (2015) (arguing that *Obergefell* should have institutionalized a "formal equality" regime under which discrimination against a group is presumptively unlawful, and that the resulting "doctrinal uncertainty" would pose real danger to the expansion of gay rights).

specific freedoms that arise in a vast array of societal contexts—beyond the bedroom, beyond marriage, and now, beyond the workplace. Perhaps, then, equality will not be achieved through a Foucauldian discursive explosion, but through *implosion*: through scatterings of specific, narrow, peripheral rights won in individual victories, through standalone cases and decisions that accumulate to form a bigger picture, one which ultimately reveals the kind of unitary equality for which we have been working all along.

Perhaps, too, the door to making expansive, explicit identity-based arguments is closed for now. Yet, identity has always found a way to permeate discourse—whether it does so explicitly and loudly, as it did in *Obergefell*'s declaration of gay persons' right to "define and express their identity,"[160] or whether it does so almost imperceptibly, appearing as fleetingly as *Bostock*'s assumption that "homosexuality and transgender status are inextricably bound up with sex."[161] As Justice Gorsuch observed at the beginning of his opinion: "small gestures can have unexpected consequences."[162] What consequences will follow from here is a question for tomorrow.

160. *See* Obergefell, 576 U.S. at 651-52.
161. Bostock v. Clayton Cnty., 140 S. Ct. 1731,1742 (2020).
162. *Id.* at 1737.