

COMMENTS

Redefining Sex: A Textualist Approach to Incorporating Sexual Orientation and Gender Identity into the Constitutional Definition of Sex

Zachary Phillips*

The 2020 Supreme Court decision in Bostock v. Clayton County, Georgia, was a landmark victory for LGBTQ+ individuals, holding that Title VII's prohibition on sex discrimination included discrimination on the basis of sexual orientation and gender identity as well. Justice Neil Gorsuch, writing for the majority, came to this conclusion from simply reading the language of the statute—by looking at the strict language and plain meaning of the text, it could be inferred that “sex” according to Title VII inherently included sexual orientation and gender identity, and therefore discrimination on those bases constituted sex discrimination under Title VII. This new meaning of “sex,” though, created two distinct definitions of the word: one that included sexual orientation and one that did not. In this Comment, I argue that, in applying the same textualist reasoning that Justice Gorsuch applied in Bostock, sexual orientation and gender identity can also be inferred into the meaning of “sex” according to the U.S. Constitution. Expanding the constitutional definition of “sex” to incorporate sexual orientation and gender identity would change the way LGBTQ+ rights are analyzed under the equal protection doctrine. This reworking of “sex” under the Fourteenth Amendment then would lead classifications based on sexual orientation and gender identity to be analyzed as sex classifications, which are typically reviewed under the heightened scrutiny standard. In today’s climate, a reevaluation of sexual orientation and gender identity as extensions of “sex” is necessary. Their inclusion in the discussion of sex-based discrimination for Title VII claims must trigger a similar discussion for sex-based classifications challengeable under the Fourteenth Amendment. Doing so gives substantive strength to fundamental rights of citizens, and it empowers LGBTQ+ plaintiffs to have greater chances of success in court by forcing the courts to examine their discrimination claims under a more stringent standard of review.

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I. INTRODUCTION	
A. <i>The Evolution of “Sex” Since 1964</i>	

In June 2020, the United States Supreme Court¹ delivered an opinion that immediately became lauded as a landmark victory for the LGBTQ+ community.² *Bostock v. Clayton County, Georgia*³ was a consolidation of three employment discrimination cases with LGBTQ+ plaintiffs, all of whom alleged discrimination on the basis of their sex under Title VII of

1. For purposes of consistency and clarity, in this Comment I sometimes refer to the U.S. Supreme Court as “the Court.” When I mention any other courts, I address them either by their full name or by the diminutive “court.”

2. Throughout this Comment, I occasionally refer to members of the LGBTQ+ community as “queer.” Queerness as a concept is fairly abstract, and I acknowledge the fact that some individuals who identify as LGBTQ+ in some manner may not also identify as queer. “Queer” tends to refer to the “identities and practices that do not conform to hetero-patriarchal notions of gender and sexuality . . .” Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 416 n.2 (2012).

It may also be used as a catch-all phrase to include many people, for example, who do not identify exclusively as straight and/or those who possess gender-expansive identities. See *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN https://www.hrc.org/resources/glossary-of-terms?utm_source=GS&utm_medium=AD&utm_campaign=BPI-HRC-Grant&utm_content=454854043833&utm_term=lgbt&gclid=CjwKCAiAp8iMBhAqEiwAJb94zw_WavyYXotS5LcaEE2MqR8uuvZ4S9Rk8IzjGwMnqrF9RDSDOCfvxoC4vUQAvD_BwE (last visited Feb.13, 2023).

For purposes of this Comment, I use “queer” as a catch-all phrase, such that my discussion encapsulates the vast spectrum of identities within the LGBTQ+ community.

3. 140 S. Ct. 1731 (2020).

the Civil Rights Act of 1964.⁴ The Court concluded that discrimination on the basis of sexual orientation or gender identity was discrimination on the basis of that individual's sex, which Title VII prohibited.⁵ In other words, an employer violates Title VII when they intentionally fire an employee based at least in part on that person's sex.⁶

The Court's decision in *Bostock* marked a significant moment in the complicated evolution of Title VII jurisprudence and what constitutes a protected class. When Congress enacted the Civil Rights Act, "sex" was interpreted very narrowly to mean the biological distinction between males and females.⁷ Without further legislative clarification, though, courts adhered to normative judgments when defining "sex."⁸ Under this traditional lens, "discrimination" referred to the division of people into two groups defined by a particular protected trait, such as race.⁹ Discrimination on the basis of sex, then, existed when an action separated men and women into distinct groups, categorized by biological sex.¹⁰ Employers were largely successful in shutting down sex-based Title VII claims because the definition of "sex" was so narrowly construed that oftentimes it was difficult for complainants to establish a clear line that divided men and women on the basis of biological sex.

The emergence of the women's movement in the decades following the ratification of the Civil Rights Act compelled courts to consider the language of Title VII more seriously. Over time, employers' arguments defending sex discrimination became less convincing to judges. Despite the "traditional" definition of "sex" still in play, courts began to enforce sex-based Title VII claims. However, by definition, "sex" did not extend to gays, lesbians, or transgender people.¹¹ Towards the end of the twentieth century, courts continued to maintain that "sex" was, could be,

4. *Id.* at 1737-38 (2020); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

5. *Bostock*, 140 S. Ct. at 1754.

6. *Id.* at 1741 ("If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.").

7. *See, e.g.,* *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (asserting that "Congress had only the traditional notions of 'sex' in mind" when it enacted Title VII) (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977) (finding that Congress has not shown intent to expand the definition of "sex," and as such the court would not expand Title VII's application without a congressional mandate)).

8. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1309 (2012) (hereinafter Franklin, "Traditional Concept").

9. *Id.* (analogizing the concept of "discrimination" with Jim Crow-era laws, such as separate water fountains for White and Black people).

10. *Id.*

11. *Id.* at 1310.

and should be narrowly construed such that it remained within the traditional, normative notions of sex roles.¹² As such, individuals claiming sexual orientation or gender identity constituted forms of sex-based discrimination under Title VII failed in court because those identities existed outside any traditional notion of sex.¹³

Sexual orientation and gender identity face similar barriers to success on sex-based discrimination claims under the Equal Protection Clause of the Fourteenth Amendment. Sex classifications under the U.S. Constitution uphold the traditional construction of sex as the biological binary of male and female. This anticlassificationist argument holds that the government may not classify people on the basis of a forbidden category—such as race—either “overtly or surreptitiously on the basis of a forbidden category”¹⁴ Equal protection tradition through an anticlassificationist lens embraces the pursuit of equality on an individual level.¹⁵ A related perspective, the antisubordinationist lens, commits to combating discrimination that enforces the social stratification of historically oppressed groups.¹⁶ Anticlassificationism at its core, with its emphasis on individual equality, explains why traditional equal protection constitutional jurisprudence has led courts to uphold facially neutral laws that have a disparate impact on marginalized groups.¹⁷

The Supreme Court has noted that is unconstitutional when there exists disparate treatment of two groups based on a protected trait.¹⁸ In

12. *Id.* at 1316.

13. *See, e.g.,* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that Title VII protections do not apply to “transsexuals”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (noting that bills had been introduced to amend Title VII to prohibit discrimination against “sexual preference,” but none were adopted).

14. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (clarifying that “[w]e add the word ‘surreptitiously’ because a law that does not explicitly classify by race may nevertheless be motivated by an invidious purpose to differentiate on the basis of race, and most people think that this also counts as a violation of the anticlassification or antidifferentiation principle.”)

15. *See id.*

16. *Id.* at 9 Owen Fiss famously wrote on this principle, also calling it the “group-disadvantaging principle.” It posited that laws may not “aggravate[]” or “perpetuate[]” “the subordinate position of a specially disadvantaged group.” Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976).

17. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 (2004); *see, e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that a facially neutral statute which had a racially disproportionate impact did not violate equal protection if it was not motivated by invidious racial discrimination).

18. 411 U.S. 677, 688, 690-91 (1973).

Frontiero v. Richardson, the Court connected sex discrimination to racial subordination based on similarities of their “historical character,” noting that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”¹⁹ Since *Frontiero*, the Court has approached sex discrimination under a constitutional lens as less rigid than racial classifications, sculpting the standard into a highly deferential one that can be justified on the basis of “natural and inherent” differences between men and women.²⁰ Under this standard of review, laws that distinguish people on the basis of sex will be upheld “so long as they are substantially related to an important government purpose.”²¹

Sex is now a suspect classification for constitutional purposes, which typically gets reviewed under a heightened or intermediate level of scrutiny. But, in light of *Bostock*, “sex” under Title VII diverges from the Constitution’s meaning of “sex.” Under the Fourteenth Amendment, sexual orientation and gender identity are not classifications that merit heightened scrutiny, and courts have declined to expand “sex” to include those groups.²² As such, claims brought forth by queer plaintiffs are examined under a rational basis test, a highly deferential standard which applies to classifications not affecting suspect or quasi-suspect classes, or a fundamental right.²³ Historically, LGBTQ+ equal protection claims have been struck down by courts under the reasoning that state actors have

19. *Id.* at 688; see *Reed v. Reed*, 404 U.S. 71, 75 (1971) (establishing that sex-based statutory classifications are “subject to scrutiny under the Equal Protection Clause”).

20. Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 173 (2011).

21. *Id.*; see, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to [the] achievement of those objectives.”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (quoting *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975) (sex-based discrimination is analyzed under intermediate scrutiny regardless of legislative justifications)).

22. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 571 (9th Cir. 1990) (“We . . . hold that the district court erred in applying heightened scrutiny to the regulations at issue and that the proper standard [for homosexuality] is rational basis review.”); *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986) (ruling that homosexual conduct is not a fundamental right protected by substantive due process and that the proper standard of review is rational basis), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Equal. Found. v. City of Cincinnati*, 54 F.3d 261, 268 (6th Cir. 1995) (“[A]s a matter of law, gays, lesbians, and bisexuals cannot constitute either a ‘suspect class’ or a ‘quasi-suspect class,’ and, accordingly, the district court’s application of the intermediate heightened scrutiny standard to the constitutional analysis . . . was erroneous.”).

23. Caroline Marschlok, et al., *Equal Protection*, 18 GEO. J. GENDER & L. 537, 546 (2017).

a legitimate interest in instituting a discriminatory policy.²⁴ This has not only restrained LGBTQ+ plaintiffs from achieving equal protection rights under the Constitution, but it also has maintained the status quo of traditional notions of sex in this type of analysis. The anticlassificationist view of “sex” under constitutional jurisprudence, therefore, ignores sexual orientation and gender identity as branches of sex-based discrimination.

B. Roadmap of This Comment

In this Comment, I aim to achieve two primary goals. First, I explain that, in light of the *Bostock* ruling, there now exist two distinct definitions of “sex” as outlined by the Supreme Court—statutory and constitutional. While the Court moved to include sexual orientation and gender identity as inherent forms of sex-based discrimination for Title VII claims, they are not considered forms of sex-based discrimination under the Fourteenth Amendment. Because of this, my second goal is to further the argument that the definition of “sex” according to the Constitution must similarly be expanded to include sexual orientation and gender identity. In *Bostock*, the Court looked at the strict language of the statute to conclude that discrimination on the basis of sexual orientation or gender identity were clear forms of sex discrimination.²⁵ Here, I argue that it is

24. This is in part because the Court has failed to explicitly rely on the Equal Protection Clause for analyze LGBTQ+ rights issues, instead relying on the Due Process Clause. As the Court said in *Lawrence*,

[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

539 U.S. at 575.

Moreover, a state’s interest in regulating homosexual persons finds itself rooted in the need to regulate their homosexual conduct as opposed to their identity as homosexuals. Professor Pamela Karlan argued that homosexuality walks a fine line between conduct and status, which makes it difficult to apply conventional constitutional doctrine. She continued,

A state cannot make it a crime to “be gay” since the Eighth Amendment prohibits states from criminalizing a particular status in the absence of “any antisocial behavior.” So a state that wants to express its disapproval of gay people must instead craft a law that makes it a crime to engage in behaviors connected in some way with being gay.

Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1457 (2004).

25. The majority stated:

“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally

possible for courts to use the same textualist reasoning when applied to sex-based constitutional questions. By expanding the definition of “sex” to include sexual orientation and gender identity, legislative classifications that discriminate on those bases would become constitutionally suspect and hence subject to a heightened level of scrutiny, just like a standard sex classification. Graduating to a stricter standard of review allows LGBTQ+ plaintiffs to more persuasively challenge a legislative classification targeted against them, and forces states to have a more compelling interest to justify discriminatory laws.

Part II dives deeper into Title VII jurisprudence and the evolution of its definition of “sex.” In so doing, I aim to illuminate the roadmap that led the Court to its ruling in *Bostock*. I then contrast that prelude with the second section of this Part, which explains the journey of sex-based classifications under the Fourteenth Amendment. There, I define the standards of review that the Supreme Court uses during constitutional analysis: strict scrutiny, the rational basis test, and the amorphous middle category, intermediate or heightened scrutiny. This will illustrate the intricacies of suspect classifications as well as the difficulties certain groups face throughout these types of analyses.

From this foundational framework, I situate sexual orientation and gender identity specifically into the context of constitutional analysis in Part III. Here, I demonstrate the ways in which LGBTQ+ plaintiffs have either been barred from bringing sex-based equal protection claims on the basis of their sexual orientation or simply unsuccessful in winning in those cases. In this Part, I lay out the argument that an expansion of “sex” under the Fourteenth Amendment is not only desired by the LGBTQ+ community but also necessary given the Court’s recent decision.

In Part IV, I examine the differences between sex stereotyping and gender stereotyping, and the fundamental misunderstanding courts have historically had when analyzing Title VII sex discrimination claims. While the courts have interpreted these situations as being examples of sex discrimination, more often than not, the plaintiffs in those cases were actually victims of gender discrimination for failure to conform to traditional gender stereotypes and norms, rather than the discriminatory employment action being based in their biological sex. With this in mind, I argue that the courts have always viewed gender identity as a relevant consideration to sex discrimination cases, even if they have

discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms—and that should be the end of the analysis.” *Bostock*, 140 S. Ct. at 1743.

misunderstood the difference between sex and gender. The majority in *Bostock* understood the difference, though, simply by looking at the strict language of Title VII's sex provision—that sexual orientation and gender identity could be inferred as branches of sex discrimination. Because of this, I argue that *Bostock*'s textualist interpretation of the definition of “sex” under Title VII can and should be transferred to the definition of “sex” as it pertains to the Equal Protection Clause of the Fourteenth Amendment. By doing so, sexual orientation and gender identity claims will become part of the suspect sex classification that merits heightened scrutiny in the courts for constitutional analysis.

This discussion cannot conclude without mention of the Supreme Court's recent 2021-22 term, which ended in a hurricane of originalist opinions that wiped out settled precedent, deregulated federal power, and butchered substantive due process rights. In light of this, Part V addresses the Court's term through an examination of abortion and pregnancy classifications, the evisceration of due process, and what the Court's recent decisions mean for the rights of LGBTQ+ people. The Court's aggressively originalist approach to interpreting the Constitution gives pause to the feasibility of sexual orientation and gender identity gaining inclusion into the constitutional definition of sex. Nevertheless, I argue in this Part that it is still possible, given the Court's prior analysis of “fundamental” rights. If the Court means to effectively nullify the substantive enforceability of the Due Process Clause, which would leave it as a mere procedural mechanism, then the substantive incorporation of rights must then rely on the Equal Protection Clause to be enforced against the states. By awarding the Equal Protection Clause the strength of substantive due process, then the fundamental rights of LGBTQ+ people and must be reevaluated through a lens of sex-based classifications, which must merit heightened scrutiny by the courts.

II. TITLE VII AND EQUAL PROTECTION JURISPRUDENCE

A. *Expanding “Sex” Under Title VII*

The most recent analysis of sexual orientation and gender identity as forms of sex-based discrimination appeared in the 2020 U.S. Supreme Court decision of *Bostock v. Clayton County, Georgia*. The case was consolidated from three separate employment discrimination suits, where plaintiffs were dismissed from their jobs soon after disclosing to their employer that they were homosexual or transgender. In none of these cases did it appear that the employers terminated their respective

employees for any reason other than on the grounds of the employees' sexual orientation or gender identity.

The first plaintiff, Gerald Bostock, worked as a child welfare advocate for Clayton County. The county won numerous national awards for the work that office performed while under Bostock's leadership.²⁶ After more than ten years with the county, Bostock joined a gay recreational softball league and, shortly thereafter, influential members of the community began making disparaging remarks about his sexuality.²⁷ His employer soon thereafter fired him for conduct "unbecoming" of a county employee.²⁸

The second plaintiff, Donald Zarda, was a skydiving instructor in New York who was fired after mentioning to a female patron that he was gay.²⁹ He alleged that he was fired from his company, Altitude Express, for "fail[ing] to conform to male sex stereotypes by referring to his sexual orientation."³⁰ Zarda regularly did tandem dives with patrons, where they would be strapped together by the hips and shoulders. He sometimes informed female clients that he was gay to alleviate any concerns she might have about diving tandem with an unfamiliar man.³¹ After informing a female client of his sexual orientation and completing a dive with her, she later alleged that Zarda made inappropriate advances toward her and "disclosed his sexual orientation to excuse his behavior."³² This incident, which Zarda denied entirely, was reported to his supervisors and he was fired.

The third plaintiff, Aimee Stephens, worked at a funeral home in Michigan.³³ When she first began working there, she presented as a male.³⁴ Over time, she became depressed and sought treatment for her depression. She was diagnosed with gender dysphoria³⁵ and her doctors recommended she begin a transition to live her life as a woman. After six years with the funeral home, she wrote to her supervisor to inform him that she planned to "live and work full-time as a woman" when she

26. *Id.* at 1737.

27. *Id.* at 1737-38.

28. *Id.* at 1738.

29. *Bostock*, 140 S. Ct. at 1738.

30. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018).

31. *Id.* at 108.

32. *Id.*

33. *Bostock*, 140 S. Ct. at 1738.

34. *Id.*

35. The Human Rights Campaign defines gender dysphoria as "[c]linically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify." See Human Rights Campaign, *supra* note 2.

returned from an upcoming vacation. The funeral home fired her before she left, telling her ‘this is not going to work out.’”³⁶

The courts of appeals rendered different rulings in these three suits. In Gerald Bostock’s case, the Eleventh Circuit rejected his claim that the county discriminated against him on the basis of his sexual orientation and failure to conform to gender stereotypes.³⁷ That court dismissed his suit as a matter of law, holding that employers were not barred from firing employees for being gay.³⁸ The Second Circuit, on the other hand, concluded that Donald Zarda was entitled to bring his Title VII claim for discrimination on the basis of sexual orientation, noting that there was “sufficient evidence” for such a claim to survive summary judgment.³⁹ Aimee Stephens was similarly successful on appeal when the Sixth Circuit ruled that Title VII barred her employer from firing her for being transgender, and that the funeral home had engaged in an unlawful form of sex discrimination.⁴⁰ Noting the inconsistent circuit court rulings, Bostock appealed. The Supreme Court granted certiorari and consolidated the cases for review.

The Court affirmed the decisions of the Second and Sixth Circuits, concluding that sex-based discrimination under Title VII included discrimination based on sexual orientation and gender identity.⁴¹ Justice Neil Gorsuch, writing for the majority, stated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁴² The Court provided some analogies to illustrate this notion:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, *the employer discriminates against him for traits or actions it tolerates in his female colleague . . .* Or take an employer who fires a transgender person who was identified as a male at birth, but

36. *Bostock*, 140 S. Ct. 1731. During the course of these proceedings, Aimee Stephens passed away; the executors of her estate were substituted as plaintiffs.

37. *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964, 964 (11th Cir. 2018).

38. *Id.* at 964-65. The court cited a previous ruling, still binding in that circuit, that Title VII does not prohibit employment dismissal for homosexuality. *See Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

39. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018). During the course of these proceedings, Zarda passed away, and his executor continued with the suit.

40. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

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

42. *Id.* at 1741.

who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, *the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.*⁴³

The Court explained that if an employer intentionally singled out an employee at least in part on the basis of their sex, the employee's sex is therefore a but-for cause of the action and plays "an unmistakable and impermissible role in the discharge decision."⁴⁴ If an LGBTQ+ identity were separable from sex, then it would be possible to treat them differently; however, the Court noted that trying to describe the words "homosexual" or "transgender" without using gendered words (such as "man," "woman," "sex," or any other synonym) is impossible.⁴⁵ By discriminating against a homosexual for being attracted to a person of their same sex, or by discriminating against a transgender person for their expressed gender identity, an employer cannot avoid discriminatory conduct if the employee's sex is a but-for cause of that conduct.⁴⁶

Bostock redefined "sex" as it applied to Title VII in that it established protections for LGBTQ+ plaintiffs whose discrimination claims had historically been denied by the courts. Specifically, the Court did so simply by looking at the language of Title VII. In 1964, "sex" commonly referred to the status of male or female as determined by reproductive biology. Particularly, the "traditional" concept of sex discrimination enabled employers to argue that an employment practice only violates Title VII when it clearly divides employees along the lines of biological sex.⁴⁷ It also fueled pushback from those opposed to outlawing sex discrimination because such a prohibition would "disrupt the socially beneficial regulation of men's and women's sex and family roles."⁴⁸ For years, courts analyzed Title VII claims under this rigid standard. In so doing, Title VII jurisprudence systematically excluded LGBTQ+ plaintiffs filing suit against employers for discrimination on the basis of their gender identity or sexual orientation.

For example, in *Ulane v. Eastern Airlines, Inc.*, a transgender woman was fired by her employer, an airline, after she returned to work following a gender reassignment surgery and ceased to work or identify

43. *Id.* (emphasis added).

44. *Id.* at 1741-42.

45. *Id.* at 1746.

46. *Id.*

47. Franklin, *supra* note 8 at 1315.

48. *Id.*

as a man.⁴⁹ The issue before the U.S. Court of Appeals for the Seventh Circuit was to “determine what Congress intended when it decided to outlaw discrimination based on sex.”⁵⁰ In that case, the court acknowledged that, since Congress did not intend to include gays and lesbians under the definition of “sex” in Title VII, the same exclusion also applied to transgender people.⁵¹ While the court agreed that an employer was not permitted to discriminate against a woman because she is a woman—or against a man because he is a man—the court asserted that discrimination is not prohibited against someone who has a “sexual identity disorder,” or someone born as one biological sex but “believes” themselves to be the other.⁵² *Ulane*, consequently, cemented a foundational barrier that precluded transgender people from bringing Title VII claims.

An important clarification from *Ulane* must be made: the court did not dismiss the plaintiff’s claims on the grounds that she was transgender. Rather, her Title VII claim failed on the premise that, had she brought her claim on the basis of being discriminated against because she was a woman, her claim would have been actionable under Title VII; however, since she brought the claim under discrimination as transgender, the claim categorically was not actionable under Title VII.⁵³

The notion that only sex, but not gender identity, was actionable under Title VII was based in courts’ unwavering adherence to the

49. 742 F.2d 1081, 1082-83 (7th Cir. 1984).

50. *Id.* at 1084; *see also* U.S. Dep’t of Lab. v. Forsyth Energy, Inc., 666 F.2d 1104, 1107 (7th Cir. 1981). The Seventh Circuit in *Ulane* noted that Congress had racial discrimination in mind when it passed the Civil Rights Act. Under this notion, sex discrimination was not heavily considered. Instead, the lack of legislation supporting a sex amendment likely indicated that Congress did not intend for “sex” to be anything beyond the traditional meaning of the word. *Ulane v. Eastern Airlines, Inc.* 742 F.2d 1081, 1085 (1984).

51. *Ulane*, 742 F.2d at 1086 (“If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline . . . to judicially expand the definition of sex . . . beyond its common and traditional interpretation.”).

52. *Id.* at 1085 (“[A] prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.”).

53. The court stated:

If Eastern had considered *Ulane* to be female and had discriminated against her because she was female . . . , then the argument might be made that Title VII applied It is clear from the evidence that if Eastern did discriminate against *Ulane*, it was not because she is female, but because *Ulane* is a transsexual

Id. at 1087; *see also* *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (explaining that “. . . transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII[,]” but a claim of discrimination based on a transgender identity is not actionable).

traditional boundaries of “sex” and sex discrimination. Throughout the late twentieth century, the prevailing interpretation of “sex” rested on normative values and views of stereotypical gender norms—and, specifically pertaining to Title VII, men’s and women’s roles in the workplace.⁵⁴ Five years after *Ulane* was decided, the Supreme Court was faced with a similar sex stereotyping lawsuit. In *Price Waterhouse v. Hopkins*, the Court held that discriminating against a female employee for failing to conform to traditional sex stereotypes violated Title VII.⁵⁵ Ann Hopkins was considered for a partnership at her firm and was the only woman out of eighty-eight nominated candidates for the position. Despite her success in negotiating government contracts, demonstrating professional integrity, and displaying outstanding performance with the firm, she was denied the partnership because current (male) partners believed her to be aggressive, abrasive, and unladylike.⁵⁶ She sued under Title VII. On appeal, the Supreme Court concluded that the partners’ conduct violated Title VII because their refusal to name Hopkins a partner solely on the basis of her failure to conform to stereotypically female characteristics was a form of sex-based discrimination.⁵⁷

Her argument was largely successful because of an argument that historically had given employers an exception to Title VII when faced with sex-based discrimination claims brought by employees: a bona fide occupational qualification (BFOQ). Title VII statute provides in relevant part that it is not an unlawful employment practice for employers to discriminate against current or prospective employees on the basis of sex so long as sex is a bona fide occupational qualification “reasonably necessary to the normal operation of that particular business or

54. Indeed, when arguments were being made about adding sex into the provisions of Title VII, advocates for the addition argued that Title VII’s sex provision would prohibit labor legislation designed to “protect” women. See, e.g., Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 238-39 (1965) (asserting that society’s legitimate interest in protecting women’s maternal and familial functions did not run afoul of Title VII if those related laws genuinely served to further that interest, but did run afoul if it restricted the conduct of women in favor of men); *Goesaert v. Cleary*, 335 U.S. 464, 468 (1948) (Rutledge, J., dissenting) (“This inevitable result of the classification belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as barmaids.”).

55. 490 U.S. 228, 250-51 (1989).

56. *Id.* at 231-35. (Partners praised Hopkins’ character and accomplishments, noting that she was “extremely competent, intelligent,” and decisive.); *Id.* at 234. (However, they gave her harsh negative reviews as well, saying that she lacked interpersonal skills, was “overcompensated for being a woman,” and needed to take “a course at charm school.”) *Id.* at 235.

57. *Id.* at 251-52.

enterprise[.]”⁵⁸ In other words, to assert a BFOQ defense, an employer must establish that members of the group against which they discriminate could not perform that particular job.⁵⁹ In *Price Waterhouse*, though, the Court found that the BFOQ defense could not stand because there was insufficient evidence to support the claim that the partners would still have not named Hopkins partner had she been male.⁶⁰ The firm’s reliance on a sex stereotype and a generalized notion of the way in which females *should* behave showed that Hopkins’ gender was the central factor in the partners’ employment action, and gender was not a BFOQ for that specific position.

As the jurisprudence surrounding sex-based Title VII claims expanded, courts began evolving the ways in sex discrimination could be interpreted. The concept of “sex-plus” discrimination refers to, for example, instances where an employer has one hiring policy for men and a different policy for women, and such distinction is based on some fundamental right (such as the right to marry or have children).⁶¹ While the language of Title VII does not strictly prohibit employers from selectively hiring members of a particular minority group, the goal of “sex-plus” discrimination is to effectively close any loopholes employers might seek out when engaging in discriminatory and selective hiring practices.⁶² The vagueness of Title VII historically enabled employers to

58. 42 U.S.C. § 2000e-2(e)(1).

59. BFOQ exemptions are very narrowly construed. Title VII does not provide a BFOQ exception for race-based claims. Race is not a factor that can inhibit an individual’s ability to perform a certain job. However, there are still some instances where BFOQ exceptions can apply to sex. For example, it would not be an unlawful employment practice for a men’s clothing designer to publish an advertisement for male models only, where female models would not be considered. This is founded in the fact that men’s and women’s clothing are designed and fitted differently and, if the men’s clothing designer made items that were not intended for female wear, then it would not make sense for a female to model them.

Another exception is religion. Churches can legally reject individuals who are not of the same denomination of said church. Catholics, for instance, understandably would hire only Catholics at that church, and not Lutherans or Mormons, because they have divergent values and beliefs.

There is no BFOQ exception under Title VII that applies to race.

60. *Price Waterhouse*, 490 U.S. at 245-47.

61. Wendi Barish, *Sex-Plus Discrimination: A Discussion of Fisher v. Vassar College*, 13 HOFSTRA LAB. L. J. 239, 240 (1995); see, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that an employer could not deny employment to women with pre-school aged children without also denying employment to men who have pre-school aged children); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 271 (N.D. Iowa, 1980) (holding that employers could not deny employment to unmarried mothers without also denying employment to unmarried fathers).

62. Barish, *supra* note 62 at 240 n.5 (“If taken literally, Title VII does not prohibit an employer from hiring only married women or black men or Asians under the age of forty. As long as the employer hires some women, some blacks, and some Asians, the employer is technically

exclude certain subgroups of protected classes (e.g., sex or race) by justifying discriminatory employment actions on a “neutral” characteristic (e.g., marital status or parenthood) rather than the employee’s salient trait of race or sex.⁶³ If employers could point to a facially neutral characteristic to exclude subgroups of individuals from employment, then there was technically no sex discrimination.⁶⁴ As such, the theory of “sex-plus” discrimination prevents employers from circumventing Title VII’s restrictions simply by grounding their employment decisions in an “unprotected” characteristic.⁶⁵ In stretching the language of Title VII’s sex provision to such limits, courts effectively expanded the definition of “sex” such that, by the time *Bostock* came to the Supreme Court, a natural next interpretation of Title VII was to include sexual orientation and gender identity.

B. “Sex” as Defined Under the Equal Protection Clause

This section explores the Supreme Court’s perpetual struggle to define and apply concepts of equal treatment—and their requirements—as they relate to the U.S. Constitution. Ironically, although the most well-known portion of the Declaration of Independence asserted that “all men are created equal,” there actually was not a provision in the original 1789 Constitution that guaranteed equality. It was not until nearly three-quarters of a century later—after the end of the Civil War—that an equality provision was added to the Constitution. The Fourteenth Amendment was ratified with the goal to protect the rights of African Americans, recently freed from slavery, from discrimination by southern state governments.⁶⁶ Despite efforts to nullify the effectiveness of the Reconstruction Amendments,⁶⁷ Black Americans ultimately earned the

complying with Title VII. However, . . . [in doing that,] an employer is not complying with the true intent of Title VII.”).

63. STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, *THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY* 5-57 (1990).

64. *Id.*

65. Barish, *supra* note 62 at 242-43.

66. GEOFFREY STONE, ET AL., *CONSTITUTIONAL LAW* 465-66 (Wolters Kluwer 8th ed.).

67. Immediately following the end of the Civil War, Congress laid the foundation for enacting three constitutional amendments, which would both award certain rights to newly freed Black Americans, but also give substantive power to Congress itself. *See id.* at 475. Nevertheless, as Stone et al. discussed,

The formal eradication of slavery was insufficient to change the real status of southern blacks. The bonds of slavery were quickly replaced by “Black Codes” in many southern states, which prohibited African Americans from exercising basic civil rights like owning property, pursuing ordinary occupations, or giving testimony in court and which created punishments for ill-defined crimes such as vagrancy or breaking an employment

right to freedom,⁶⁸ the right to vote,⁶⁹ and, as I discuss below, the alleged guarantee to equal protection.

The Fourteenth Amendment states in part that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷⁰ Its general terms and vague language, while consistent with the remainder of the Constitution, has proven burdensome for courts to understand and interpret the scope, power, and meaning of the Fourteenth Amendment’s equal protection provision. To establish a claim on equal protection grounds, a plaintiff must prove “purposeful discrimination directed at an identifiable or suspect class.”⁷¹ Such a claim will not stand if a plaintiff cannot establish that a government actor treated different classes in different ways. Stated differently, similarly situated people—or people within the same class—must receive different treatment by the government.⁷² The real question revolves around whether a challenged classification—or a legislative division that treats similarly situated people differently based on a certain characteristic—is permissible under the circumstances.

Sex discrimination claims are analyzed based on whether a certain government action creates disparate treatment between men and women.⁷³ Different treatment of individuals on the basis of their sex establishes a “suspect classification” that merits scrutinized review by the

contract that threatened to return large numbers of freedmen to conditions virtually identical to slavery.

Id.

68. See U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude throughout the States, except as punishment when convicted of a crime).

69. See U.S. CONST. amend. XV (affording the right to vote to citizens regardless of “race, color, or previous condition of servitude”).

70. U.S. CONST. amend. XIV, § 1.

71. *Marschilok et al.*, *supra* note 23 at 538. (“Classes are defined by an individual’s characteristics”—e.g., sex or race—and those classes determine the level of protection.); *Id.* at 538-39.

72. *Id.* at 540; see *Johnson v. City of Joliet*, No. 04 C 6426, 2007 WL 495258, at *3 (N.D. Ill. Feb. 13, 2007) (holding that, to establish an equal protection claim, “a plaintiff must allege that a state actor discriminated against [them] based on [their] membership in a protected class (e.g., race or gender) . . .”).

73. See *Reed*, at 76-77 (1971) (holding that assigning mandatory preference to one sex over the other is prohibited by the Equal Protection Clause); *Frontiero* 411 U.S. at 682 (holding that classifications based upon sex are inherently suspect and are subject to scrutiny); *but see Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a Florida law that excused women from jury service on the ground that they are considered to be the “center of home and family life” which was incompatible with their participation in civic life).

court.⁷⁴ A classification, according to the Court, ““must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.””⁷⁵ That said, throughout the twentieth century, legislative classifications that distinguished on the basis of sex tended to reinforce traditional, normative views of sex, defining “sex” along the biological male-female binary. This historical understanding of classifications under the Equal Protection Clause sheds light on why sexual orientation and gender identity have been largely unsuccessful on sex-based discrimination claims brought under the Fourteenth Amendment.

When constitutional questions involving a fundamental right are brought before a court, they must be analyzed through a certain level of scrutiny. Depending on which right is at the focus of a government policy or action—in other words, the characteristic that makes the government action suspect—the Supreme Court has laid out a series of “tests,” for lack of a better phrase, which boil down to determining the legitimacy of the means a governmental actor utilizes to achieve a certain goal. The standard of review in these kinds of cases determines the outcome of the case—the less stringent the standard, the more likely the state action in question will be found constitutional.⁷⁶ The remainder of this section explores the three levels of scrutiny defined by the Supreme Court. This builds a foundation for explaining where the Court stands on LGBTQ+ issues.

1. Rational Basis Test

The most deferential standard of review is known as the rational basis test. This standard of review typically has been applied to legislative classifications that do not affect a suspect class (like race) or a fundamental right (like the right to privacy).⁷⁷ To withstand rational basis review, a statute must be “rationally related to a legitimate governmental

74. *Reed*, 404 U.S. at 75. An Idaho statute in that case assigned a preference to men over women in appointing a person as executor to one’s estate. The Court concluded that this disparate treatment on the basis of sex was unconstitutional.

75. *Id.* at 76 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

76. *Marschilok et al.*, *supra* note 23 at 540.

77. *See generally* Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 *GEO. J. L. & PUB. POL’Y* 401 (2016) (arguing that the rational basis test is the ideal standard for lower stakes issues like determining passing test scores or tax rates, whereas higher stakes issues of discrimination, rights, and liberty are better examined under a more exacting level of scrutiny).

purpose.”⁷⁸ In fact, the state’s goal need not even be the actual objective of the legislation, “but rather any conceivable legitimate purpose.”⁷⁹ Because the burden of proof the government must meet is a relatively low threshold, the majority of classifications reviewed under a rational basis lens are upheld.⁸⁰

2. Strict Scrutiny

Of the three standards of review, strict scrutiny is the most rigid. A government action triggers strict scrutiny if it is directed at a suspect class or infringes upon a fundamental right.⁸¹ For an action to survive this standard, the government must prove that its action advances a “compelling governmental interest” that is “narrowly tailored” to that interest.⁸² The Supreme Court has determined that classifications based on race, alienage, and national origin must be examined under strict

78. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985)); *Marschilok et al.*, *supra* note 23 at 543-44, 546; *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (concluding that a rent control ordinance was not “irrational” despite treating landlords differently based on whether they had “hardship tenants” because it served “the legitimate purpose of protecting tenants”); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) (upholding a law that required employers to allow employees to vote without penalty as being sufficiently related “to the legitimate end” of protecting voting rights).

79. *Chemerinsky*, *supra* note 77 at 402; *see, e.g., Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) (“As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.”); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528-29 (1959) (stating that an equal protection challenge to a state law could only succeed if “no state of facts reasonably can be conceived to sustain it.”).

80. *Marschilok et al.*, *supra* note 23 at 547; *see, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (upholding a statute with deference to legislative judgment under rational basis review); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 593-94 (1979) (upholding an ordinance that excluded methadone users from operating public transit vehicles under the reasoning that it did not “circumscribe a class of persons characterized by some unpopular trait or affiliation,” and therefore did not muster constitutional suspicion); *but see U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (striking down a classification that precluded unrelated cohabitants of a home from a food stamp program because the governmental purpose of improving nutrition among low-income households was irrelevant to the classification itself); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (striking down a zoning ordinance which excluded homes for mentally disabled people on the grounds that “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases” for discrimination).

81. *Marschilok et al.*, *supra* note 23 at 541; *see St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 637 (7th Cir. 2007) (determining that strict scrutiny applies if a government action “targets a suspect class or addresses a fundamental right”).

82. *Marschilok et al.*, *supra* note 23 at 541.

scrutiny.⁸³ Because the threshold the government must meet is so high, actions reviewed under strict scrutiny are typically found unconstitutional.

Classifications based on race are widely understood to be the cornerstone of equal protection doctrines, but the Supreme Court has also inconsistently applied strict scrutiny to such race-based classifications.⁸⁴ The Court's evolution towards a more rigid standard of review for racial classifications was both slow and confusing over time; indeed, "strict scrutiny" as a concept was not defined until well into the twentieth century, after the Court had addressed the problem of race numerous times.⁸⁵ Despite the Court's inconsistent application of its own doctrine, the general rule is that, when a suspect group or characteristic is targeted,⁸⁶

83. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (holding that racial classifications must be reviewed under strict scrutiny and that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests"); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (finding that racial classifications are reviewed under strict scrutiny); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (applying strict scrutiny to all race-based actions by state and local governments); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (racial classifications are "constitutionally suspect . . . and subject to the most rigid scrutiny" (citations omitted)); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 399-400 (2016) (Alito, dissenting) (racial classifications are reviewed under strict scrutiny because they "so seldom provide a relevant basis for disparate treatment") (quoting *Fisher v. Univ. of Tex.*, 570 U.S. 297, 133 S. Ct. 2411, at 309-10 (2013)); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (striking down a Virginia anti-miscegenation law which criminalized marriage between a white person and non-white person).

84. *Compare* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (failing to adopt a presumptive ban on race-based classifications) *with* *McLaughlin v. Florida*, 379 U.S. 184 (1964) (both articulating and applying a more rigorous standard of review to race-based classifications); *see* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 254-55 (1991).

85. *Compare* *Loving*, 388 U.S. 1 (1967) (the Court's first time articulating a more rigid standard of review for racial classifications), *with* *Anderson v. Martin*, 375 U.S. 399 (1964) (unanimously striking down a Louisiana law requiring a candidate's race to be disclosed on a ballot using rational basis review), *and* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding a race-specific statute targeting Japanese Americans by applying "rigid scrutiny").

86. *Marschilok et al.*, *supra* note 23 at 541-43. A number of factors are considered to determine whether a classification is suspect. First, a classification is suspect if that group has been historically subject to discrimination. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (noting that historical discrimination against a particular group is relevant in determining if the group is a suspect class); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (the "traditional indicia of suspectness" include "a history of purposeful unequal treatment" against a group). Second, a classification can be suspect if it can be defined by an "immutable characteristic." *E.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *Marschilok et al.*, *supra* note 23 at 542 ("[If a suspect classification meets the relevant criteria for a defining and immutable characteristic,] the governmental classification will be subject to strict scrutiny because these characteristics rarely provide a legitimate basis for disadvantageous legislation or other state action."). Third, a classification is suspect if the group is "discrete and insular" such that it has

and when a fundamental right is at issue,⁸⁷ the classification is reviewed under the most rigid scrutiny, and the state must demonstrate a compelling interest that tightly fits to achieve a certain goal.

3. Intermediate or Heightened Scrutiny

Classifications outside of race typically end up fitting into the deferential rational basis category. However, equal protection jurisprudence evolved uniquely to address gender-based classifications. Towards the end of the nineteenth century and into the twentieth, the Supreme Court tended to apply only minimal scrutiny to gender classifications and tended to uphold statutes that disadvantaged women.⁸⁸ It was not until the early 1970s that the Court, for the first time, invalidated a gender classification under the Equal Protection Clause.⁸⁹ Nevertheless, the Court in *Reed v. Reed* did so by applying the rational basis standard.⁹⁰

Just five years later, the Court addressed a sex-based classification under a new standard. In *Craig v. Boren*, the Court stated that, to withstand a constitutional challenge, “classifications by gender must

been politically and socially disadvantaged. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

87. Fundamental rights are any rights that are found in the language of the Constitution or “implicitly in either ‘the concept of ordered liberty’ or the history and traditions of the American people in order to receive protection.” Marschilok et al., *supra* note 23 at 543 (citing *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986)).

88. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (holding that the right to practice law was not a privilege or immunity of citizenship protected by the Fourteenth Amendment and therefore that right did not extend to women); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (acknowledging that women were “citizens” within the meaning of the Fourteenth Amendment, but that the right to vote was not a privilege afforded to citizenship and therefore women were denied the right to vote), superseded by *constitutional amendment*, U.S. CONST. amend. XIX; *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a statute prohibiting the employment of women in factories for more than ten hours a day, noting that the “inherent difference between the two sexes” justified limitations on a woman’s right to contract); *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a jury selection system that excluded women who did not affirmatively indicate a desire to serve on a jury under rationality review).

89. See *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating an Idaho statute that preferred men to women in appointment as estate administrators as arbitrary and violative of the Fourteenth Amendment).

90. *Id.* at 76 (“The question presented by this case . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective . . .”).

serve important governmental objectives and must be substantially related to achievement of those objectives.”⁹¹

Sex-based classifications were originally viewed similarly to racial classifications,⁹² but the Supreme Court abandoned that argument in favor of one rendering sex classifications as “quasi-suspect,” which established a less rigid standard of review than strict scrutiny. Intermediate scrutiny affirms the notion that the natural differences between sexes create a justifiable basis for certain forms of differential treatment under the Fourteenth Amendment.⁹³ Stated differently, the fact that there are inherent biological and sexual differences between men and women justifies a lower standard of review—the Court presumes that, because of these differences, males and females are not similarly situated such that they are not a suspect classification in the same manner as race.⁹⁴

Intermediate scrutiny has been and still remains an amorphous standard of review, mainly due to the Supreme Court’s failure to define its scope. Moreover, the Court’s consistent adherence to traditional notions of what “sex” means has consequently funneled classifications on the basis of sexual orientation and gender identity through a single channel of constitutional review: rational basis. Because the Court had never considered either of those identities as suspect, it has held that heightened scrutiny is not required for constitutional analysis.⁹⁵ LGBTQ+ plaintiffs bringing discrimination claims under the Equal Protection Clause have failed because the Court consistently has asserted that sexual orientation and gender identity issues burden neither a fundamental right nor target a suspect class; as such, the Court has upheld legislative classifications that create disparities for those identities so long as the classification is rationally related to some legitimate governmental end.⁹⁶ Consequently, the Court’s refusal to review sexual orientation and gender identity discrimination claims under anything but a rational basis underscores one way in which the judiciary has supported state actions in keeping LGBTQ+ issues of equality at bay, and has exemplified the

91. 429 U.S. 190, 197 (1976).

92. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (“[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”).

93. Ezie, *supra* note 20.

94. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 11 (1995).

95. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

96. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

Court's unwillingness to allow equal protection claims to survive under heightened scrutiny, let alone rationality review.

III. SEXUAL ORIENTATION AND GENDER IDENTITY AS SUSPECT
CLASSIFICATIONS UNDER THE EQUAL PROTECTION CLAUSE: THE
CASE FOR HEIGHTENED SCRUTINY

As the preceding sections of this Comment have illustrated, sexual orientation and gender identity are now treated under Title VII as protected classes, thanks to the recent finding in *Bostock* that discrimination on those bases is inherently a form of sex discrimination. Yet, when “sex” is applied to equal protection claims under the Fourteenth Amendment, sexual orientation and gender identity remain excluded from the list of suspect classifications. In other words, there now exist two distinct definitions of the word “sex” according to the Constitution and the Civil Rights Act. In this Part, I assert that the Court’s textualist interpretation of Title VII’s sex provision in *Bostock* establishes a basis for incorporating sexual orientation and gender identity into the constitutional definition of “sex” and hence consider them forms of sex discrimination. Using Justice Gorsuch’s strictly textualist reading of the statute, the definition of “sex” under the Equal Protection Clause can also be plainly interpreted to include sexual orientation and gender identity. By redefining “sex” in this way, sexual orientation and gender identity will become suspect classifications for constitutional purposes, and LGBTQ+ plaintiffs who bring forth sex discrimination claims on these grounds will be entitled to heightened scrutiny review.

A. *Sex Stereotyping versus Gender Stereotyping*

A significant barrier for LGBTQ+ plaintiffs bringing sex discrimination claims in court is the omnipresent traditional definition of “sex.” A queer plaintiff’s failure to conform to traditional gender norms or stereotypes assigned to their biological sex typically did not yield much success in court when they brought sex discrimination claims. However, Title VII’s sex provision prohibits employers from discriminating against an employer for failing to comport with traditional sex stereotypes, as the Supreme Court concluded in *Price Waterhouse*.⁹⁷ By forbidding employers from discriminating against a female employee who acts more

97. The Court determined that it was impermissible disparate treatment for Price Waterhouse to advise Ann Hopkins that she should walk, talk, and dress more femininely, wear makeup and jewelry, and style her hair. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

masculinely, a similar protection should exist for men who act or appear more effeminately.⁹⁸

The Court's interpretation of "sex" through this lens, though, focuses less on biological sex and more on gender. In fact, most sex discrimination Title VII jurisprudence is centered around the way a plaintiff was treated by their employer because of a socially constructed, gendered characteristic—not because of their biological sex. Each time, the Court interpreted the treatment of that gendered characteristic as impermissible sex discrimination. As Mary Ann Case argued, it is possible for an employer to engage in *gender* discrimination and still be in violation of Title VII's ban on *sex* discrimination.⁹⁹ This is what Aimee Stephens faced: her transition, which included presenting externally as a woman, led her employer to terminate her employment on the basis that Stephens—an individual born with male reproductive parts—failed to adhere to norms societally followed by biological males.¹⁰⁰ The logic from *Price Waterhouse*, that an employer cannot discriminate against an employee for failing to follow traditional sex stereotypes, has maintained its stature, but the Sixth Circuit's conclusion in Aimee Stephens' case (confirmed by the Supreme Court in *Bostock* two years later) supports the finding that gender stereotyping is inherently tied with the concept of sex stereotyping.

Stereotypes based in traditional gender roles are truly what lie at the center of sex stereotyping cases.¹⁰¹ As the plurality noted in *Price*

98. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 32-33 (1995).

99. This argument relates back to *Price Waterhouse* and Ann Hopkins, whose sex discrimination claim was based in her nonconformity with traditionally feminine traits. In discriminating against her because of these traits, Mary Anne Case argues that it was the concept of gender upon which the male partners of *Price Waterhouse* based their decision. Case states:

What of an employer that neither encourages nor tolerates behavior conventionally gendered feminine in members of either sex, who likes Ann Hopkins just the way she is and wouldn't change a thing about her, but won't promote her more feminine counterparts unless they go to assertiveness training class and wear man-tailored suits to work? If such an employer rewards masculinity equally in either sex and does not assume that women are less capable of manifesting masculine qualities, it is not engaging in sex discrimination narrowly defined, nor in the sort of sex stereotyping the case law has thus far prohibited. What the employer is doing is engaging in gender discrimination—favoring the masculine over the feminine rather than the male over the female.

Id. at 33.

100. See generally, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566-67, 572 (6th Cir. 2018).

101. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (holding that the Library of Congress violated Title VII in rescinding a transgender individual's job offer upon

Waterhouse, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*.”¹⁰² The conflation of gender and sex in these kinds of discrimination cases highlights the Supreme Court’s fundamental misunderstanding between these differences. Specifically, this confusion has resulted in gender discrimination being interpreted as sex discrimination in LGBTQ+ cases because of the existence of stereotypes pertaining to traditional gender roles. One federal court stated that such stereotypes are reinforced in instances where a harasser “may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks . . . ‘real men don’t date men.’”¹⁰³ This relates to both Gerald Bostock’s and Donald Zarda’s experiences, where their employers discriminated against them because they believed their employees, as men, should not date other men. In one regard, these men were discriminated against based on their gender because it is not within the traditional norms of men to be sexually attracted to other men; similarly, they were also discriminated against based on their sex because, if they were women who happened to be in relationships with men, their employers would not have taken action against them. The fundamental concept of sex stereotyping as defined by the courts, then, is closely linked to stereotyping that was really based in gender.

To be sure, the Supreme Court in *Bostock* framed sexual orientation and gender identity discrimination around its inextricable connection to sex. The Court noted that “to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”¹⁰⁴ To the extent that an employee’s sex is at least in part a factor of an adverse employment action, Title VII is triggered. It does not matter whether an employer intends to discriminate on a different basis; the Court recognized that “intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the

learning that the applicant was undergoing a transition, because the Library’s decision was rooted in stereotypes about how men and women should act and appear); *see also* *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (sex stereotyping based on gender non-conforming behavior is impermissible discrimination, regardless of the cause of the behavior); *see also* *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (affirming a ruling that a transgender individual had been discriminated against on the basis of his failure to conform to traditional sex stereotypes).

102. *Price Waterhouse*, 490 U.S. at 250 (emphasis added).

103. *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“The gender stereotype at work here is that ‘real’ men should date women, and not other men.”).

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

employer's ultimate goal of discriminating against homosexual or transgender employees."¹⁰⁵ At bottom, the Court explained that the intentional discrimination against an employee based on their LGBTQ+ identity is inescapably sex discrimination, and this is true regardless of whether the triggering act on the employee's behalf was based on their failure to conform to traditional gender norms (gender discrimination) or based in whether they would have faced the same treatment if they were of the opposite biological sex (sex discrimination).

B. A Textualist Approach to Broadening "Sex" Under the Equal Protection Clause

With the foundation in mind that the Court's approach to sex discrimination has historically been linked to gender discrimination, it can be discerned from Justice Gorsuch's reasoning in *Bostock* that a textualist reading of Title VII's sex provision includes sexual orientation and gender identity as forms of sex discrimination. Granted, the simple definition of "sex" in Title VII is not what gives it weight; it is what the statute says about it.¹⁰⁶ The pivotal phrase is "because of"—meaning a form of causation that is established when a particular result would not have occurred but for the alleged cause.¹⁰⁷ But it is not sufficient for an employer to escape liability by merely citing a different reason for a discriminatory action; "[s]o long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."¹⁰⁸ If this much may be deduced from looking at the language of Title VII as it was written in 1964, the question then migrates toward the meaning of

105. The majority continued:

There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking [sic] To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

Id. (emphasis in original).

106. *Id.* at 1739.

107. *Id.* (The Supreme Court has explained that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' Thus, the requirement that an employer took adverse action because of age [meant] that age was the reason that the employer decided to act, or, in other words, that age was the but-for cause of the employer's adverse decision."); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) (quoting Gross v. FBL Fin. Servs., 557 U.S. 167, 176 (2009) (internal citations and quotations omitted)).

108. *Bostock*, 140 S. Ct. at 1739; see *Nassar*, 570 U.S. at 349-51; see also *Burrage v. United States*, 571 U.S. 204, 211-12 (2014) (explaining but-for causation to be where a harm would not have occurred in the absence—that is, but for—of the defendant's conduct).

“discrimination” at the time of the ratification of the Civil Rights Act. Justice Gorsuch provided that the word “discriminate,” according to Webster’s Dictionary, means to “‘make a difference in treatment or favor (of one as compared with others).’”¹⁰⁹ Discriminating against an individual therefore meant to treat one individual differently—usually worse—than another “similarly situated” individual.¹¹⁰ So, when an employer treats an employee differently than another employee, for example on the basis of their sex, the employer has discriminated against them on the basis of their sex and has thus violated Title VII.¹¹¹

Additionally, a textualist reading of the statute illustrates that phrasing like “sexual orientation” or “gender identity” need not explicitly appear in the text, but rather can be inferred as an offshoot of enumerated phrases like “sex.”¹¹² Previous cases before the Supreme Court have determined that sex discrimination is apparent despite an employer acting on a different primary factor. Take, for example, an employer who refuses to hire a woman with two young children and bases that decision on the fact that she is a mother. Motherhood, per se, is not a protected class under the language of Title VII, but it can be inferred that discriminating against an individual on the basis of motherhood status is a form of sex discrimination.¹¹³ While that employee’s sex may not have been a central factor in the employer’s decision, it nevertheless was rooted in the factor that was the central factor: motherhood. Her sex, then, was a but-for cause of the discriminatory employment action and triggered Title VII.¹¹⁴

In the same vein, sexual orientation and gender identity, like motherhood, may be inferred from Title VII’s sex provision despite not being explicitly enumerated in the language of the statute. This is due to the fact that, while the employee’s LGBTQ+ identity may have been the central determining factor that led to the discriminatory employment action against them, that employee’s sex was a but-for cause for such action. These types of discrimination claims relate to the notion of sex-plus discrimination, where an employer might act on the basis of a “sex-

109. *Bostock*, 140 S. Ct. at 1740; Webster’s New Int’l Dictionary 745 (2d ed. 1954).

110. *Bostock*, 140 S. Ct. at 1740; see *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006) (noting that the term “discriminate against refers to distinctions or differences in treatment that injure protected individuals”).

111. See *Bostock*, 140 S. Ct. at 1740.

112. See *id.* at 1745-46.

113. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (present participle where a company refused to hire women with young children but continued to hire men with young children).

114. *Bostock*, 140 S. Ct. at 1745.

based animus” and targets an individual employee because of a protected characteristic like sex as well as another “plus” factor.¹¹⁵ Therefore, when combining the majority’s reasoning from *Bostock* and the theory of sex-plus discrimination, if an employer discriminates against someone because of their sexual orientation or gender identity, the employer has impermissibly discriminated against them on the basis of the employee’s sex, and that employee’s LGBTQ+ identity is the “plus” factor that also constitutes an impermissible form of sex discrimination.

The sex-plus theory of discrimination provides a solid foundation to raise for sexual orientation and gender identity discrimination claims. Negative stereotypes about LGBTQ+ identities and individuals relate to the traditional gender norms that employers act against, which triggers the sex discrimination ban of Title VII. In understanding sex stereotyping as a rationale for striking down sex-based statutes, it becomes easier to discern sex discrimination and sex-based classifications under the Equal Protection Clause. The Fourteenth Amendment requires scrutiny of specific acts of classifications rather than the classes themselves, which challenges the government’s power to perpetuate social classifications.¹¹⁶ A reframing of sexual orientation and gender identity discrimination claims as a corollary to sex discrimination—like what has been done under Title VII—would grant those classes heightened scrutiny without

115. Marc Chase McAllister, *Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination*, 67 BUFF. L. REV. 1007, 1011 (2019) (“At its core, then, sex-plus discrimination claims ‘are a flavor of gender discrimination claims’ in which an employer discriminates against a particular segment of males or females on the basis of sex (e.g., female) plus another characteristic (e.g., child care [sic] responsibilities).”); see also *Smith v. AVSC Int’l, Inc.*, 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (concluding that the “sex-plus” theory of discrimination “recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic”); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (“ . . . an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities”).

116. Janet Halley noted that:

[The Equal Protection Clause] requires courts to scrutinize not classes but acts of classifications—not preexisting, given biological groupings of human persons but governmental determinations that certain persons shall belong and others shall not belong to a special favored or disfavored group. At issue in an equal protection case is not merely the government’s power to redistribute benefits and burdens, but also its power to create and perpetuate social classifications.

Janet E. Halley, *Misreading Sodomy: A Critique of the Classifications of “Homosexuals” in Federal Equal Protection Law*, *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY* 351, 356 (Julia Epstein & Kristina Straub eds., 1991).

interfering with the already-established suspect sex classification under the Fourteenth Amendment.¹¹⁷

The construction of the theory that sexual orientation and gender identity may be seen through the lens of sex discrimination is not new. In recent years, more courts have expanded their definitions of “sex” to include those claims.¹¹⁸ This adopted line of reasoning, while primarily applied to Title VII questions, “is equally applicable to equal protection cases since the question of what encompasses sex discrimination is identical under either framework.”¹¹⁹ The Supreme Court has also previously skirted around this idea for years, using vague and speculative language that does not explicitly give heightened scrutiny to LGBTQ+ equal protection claims, but effectively gives them teeth. For example, some commentators speculate that the Court in *Romer v. Evans* used a standard of review more stringent than a rational basis test.¹²⁰ Under this argument, LGBTQ+ plaintiffs would be granted at least a quasi-suspect classification.¹²¹ Whether the Court applied a standard higher than rational basis, or applied a form of scrutiny that could be deemed rational basis “with bite,”¹²² *Romer* illustrates how the Court has previously applied a slightly higher standard than it normally has if it stuck to the traditional

117. See Raelynn J. Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, 20 GEO. J. GENDER & L. 49, 53 (2018) (noting that viewing sexual orientation discrimination through a lens of sex discrimination “reflects the diverse reality and fluidity of modern gender identities”).

118. See, e.g., *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (applying a social constructionist perspective to a Title VII claim and concluding that sexual orientation discrimination was sex discrimination).

119. Hillhouse, *supra* note 119 at 66; see also *Latta v. Otter*, 771 F.3d 456, 486 (9th Cir. 2014) (Berzon, J., concurring) (“The notion underlying the Supreme Court’s anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: ‘[n]obody should be forced into a predetermined role on account of sex,’ or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one’s gender.”); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).

120. Marschilok et al., *supra* note 23 at 581 (citing Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J. 89, 137-38 (1997) (arguing that *Romer* was a step in the right direction despite the fact that it did not explicitly hold sexual orientation to be a suspect classification)).

121. *Id.* at 581-82.

122. Rational basis “with bite” scrutinizes the rationality between the alleged legislative purpose behind a discriminatory statute and the means chosen to achieve it. *Id.* at 582. This standard was applied in cases even before *Romer*—see, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (invalidating the “unrelated person” classification because it was not rationally related to a stated governmental interest); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (rejecting Texas’s alleged objections for refusing education to alien children); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 433 (concluding that a council’s reasons for rejecting a housing permit for a developmentally disabled person were irrational prejudice against that class of person).

definition of “sex” wherein sexual orientation and gender identity were not suspect classes. A few years later in *Lawrence v. Texas*, Justice O’Connor stated in her concurrence that the Supreme Court used a “more searching form of rational basis review to strike down [laws designed to harm a politically unpopular group] under the Equal Protection Clause.”¹²³ This allusion to a potential fourth tier of scrutiny, wedged between rational basis and intermediate scrutiny, is what drives forward the argument that sexual orientation and gender identity, as suspect classes, should be scrutinized under a standard more rigid than rational basis.

Twelve years later in *Obergefell v. Hodges*, in extending the fundamental right to marry to same-sex couples, the Court again alluded to the possibility of sexual orientation being a suspect class, but did not explicitly affirm or deny it.¹²⁴ Still, references to the immutable nature of sexual orientation imply that it is a suspect class.¹²⁵ With these cases in mind, it appears that the Court has interpreted the Equal Protection Clause and sex-based classifications to extend at least in part to sexual orientation and gender identity. The rational basis with bite standard seems to be the way in which the Court justifies striking down discriminatory laws in favor of LGBTQ+ plaintiffs. Since the Court has already determined that sexual orientation and gender identity are forms of sex discrimination under Title VII, it follows that these two also belong in the same category as sex-based classifications under the Equal Protection Clause. At the very least, considering cases like *Romer*, *Lawrence*, and *Obergefell*, sexual orientation and gender identity as suspect classes merit rational basis with bite. If the Court strives to be consistent in its definition of “sex” for purposes of Title VII and equal protection, however, then those belong in the same classification as sex, which then would merit heightened scrutiny.

123. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

124. Instead, the Court concluded that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” 576 U.S. 644, 675.

125. *Id.* at 675-76 (“... the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”).

IV. POST-ROE: WITHOUT DUE PROCESS, WHERE DOES EQUAL PROTECTION STAND?

Just months after the Supreme Court delivered *Bostock*, liberal justice and lifelong civil rights advocate Ruth Bader Ginsburg passed away. In a frenzy to fill her vacancy before the 2020 presidential election just weeks away, then-Senate Majority Leader Mitch McConnell (R-KY) urged then-President Donald Trump to nominate Ginsburg's replacement. In record-breaking time, Notre Dame law professor Amy Coney Barrett, a devout Catholic and staunch constitutional originalist, was confirmed to the highest bench just one week before election day and only thirty days after initially being nominated by the president.¹²⁶

With Barrett joining Justices Gorsuch and Kavanaugh as three justices appointed by President Trump, the makeup of the Court shifted from a 5-4 conservative majority to a 6-3 conservative supermajority. Perhaps no Supreme Court term in modern American history has endured as much judicial activism—or rather, judicial aggression—as did the recent 2021-22 term. By the end of the term in June 2022, the Court had obliterated precedents, redefined federalism, and jeopardized its own legitimacy in the eyes of the public. Last year, this supermajority stripped away states' rights to regulate firearms,¹²⁷ weakened *Miranda* rights¹²⁸ and federal habeas procedures for criminal defendants,¹²⁹ favored Christian religious expression at the expense of the Establishment Clause of the First Amendment,¹³⁰ stymied the power of federal regulatory

126. Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court>.

127. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (invalidating New York's requirement to obtain an unrestricted license to carry a concealed firearm and holding that states' attempts to regulate firearms violate the Second Amendment).

128. *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) (holding that a violation of *Miranda* rules does not provide a basis for a 42 U.S.C. § 1983 claim).

129. *Brown v. Davenport*, 142 S. Ct. 1510 (2022) (holding that, when a state has ruled on the merits of a state prisoner's claim, a federal court cannot grant habeas relief without applying both the test laid out in *Brecht v. Abrahamson* and the one laid out in the Antiterrorism and Effective Death Penalty Act of 1996); *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (holding that a federal habeas court may not consider evidence beyond the state court's record based on the ineffectiveness of state post-conviction counsel).

130. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (holding that a public school football coach's display of prayer after games was protected under the Free Exercise and Free Speech Clauses of the First Amendment); *Carson v. Makin*, 142 S. Ct. 1987 (2022) (holding that Maine's tuition assistance programs to help parents send their children to private schools if a public school does not exist in their district must also extend to religious private schools); *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022) (holding that Boston's refusal to allow a Christian organization to fly their flag in front of City Hall did not constitute government speech and

agencies to combat COVID-19¹³¹ and climate change,¹³² and further stripped away at the sovereignty of Native nations.¹³³

The decision that received the most attention, however, was *Dobbs v. Jackson Women’s Health Organization*,¹³⁴ which overruled *Roe v. Wade*¹³⁵ and *Planned Parenthood v. Casey*,¹³⁶ the two most fundamental cases that awarded Americans a fundamental right to abortion.¹³⁷ The Court concluded that the Constitution did not award citizens a right to obtain an abortion because it is neither expressly mentioned in the text, nor is it “deeply rooted in [the] Nation’s history and tradition.”¹³⁸ In one fell swoop, the Court dismantled the idea of stare decisis, as well as the rights to privacy and due process. By stripping away the right to abortion, which had been made a fundamental constitutional right for the last half-century, the question is raised of which other rights—similarly founded in privacy and due process—are now vulnerable.

This Part looks back on reproductive cases like *Roe* and *Casey*, to illuminate how the right to privacy came to be what we knew until recently. First, I examine ways in which pregnancy has been interpreted as a form of sex discrimination under Title VII, then contrast it with the struggles pregnant plaintiffs have faced in court on equal protection grounds. As I argue, the inability for plaintiffs to succeed on pregnancy discrimination grounds both reinforces the traditional definition of “sex” and stereotypes based in traditional gender norms and roles for purposes of constitutional analysis. I then take the foundations of pregnancy discrimination and apply them to this Supreme Court’s approach to constitutional tradition, history, and textualism. Although due process

therefore violated the Free Speech Clause of the First Amendment); *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022) (holding that the distinction between on- and off-premises signs in Austin’s sign code is facially content-neutral under the First Amendment).

131. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 142 S. Ct. 661 (2022) (striking down OSHA’s mandate for employers with at least 100 employees to require covered workers to be vaccinated against COVID-19); *but see Biden v. Missouri*, 142 S. Ct. 647 (2022) (allowing the Health and Human Services regulation requiring facilities that participate in Medicare and Medicaid to ensure their employees are vaccinated against COVID-19 to continue).

132. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (holding that a provision of the Clean Air Act did not grant the EPA authority to regulate or set emissions caps).

133. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (holding that the federal government and the state have concurrent jurisdiction to prosecute crimes committed by non-Natives against Natives in “Indian” country).

134. 142 S. Ct. 2228 (2022) (holding that the Constitution does not confer a right to abortion, and that the authority to regulate abortion must be returned to the state).

135. 410 U.S. 113 (1973).

136. 505 U.S. 833 (1992).

137. *Dobbs*, 142 S. Ct. at 2242.

138. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

rights are surely weakened by the *Dobbs* decision, I continue my argument that a parallel textualist approach exists in the realm of equal protection to secure other fundamental rights for women and LGBTQ+ people.

A. *Pregnancy Discrimination, the PDA, and Title VII*

For decades, discrimination on the basis of pregnancy has stably remained a form of sex-based discrimination prohibited by Title VII.¹³⁹ When the Supreme Court in *General Electric Company v. Gilbert*¹⁴⁰ held that the employer's failure to cover pregnancy-related conditions in its disability benefits plan did not violate Title VII,¹⁴¹ Congress swiftly moved to enact the Pregnancy Discrimination Act (PDA),¹⁴² which overturned *Gilbert* and amended Title VII to expressly prohibit employers from discriminating against employees on the basis of pregnancy or its related conditions.¹⁴³ The PDA came at a time when the establishment of Title VII's sex provision had been ambiguously received by women's activist groups. On the one hand, they applauded the protection of equal employment opportunities for women, but on the other hand, they recognized that certain gender-based labor laws designed to protect women (especially pregnant women) while in the workplace would no longer be upheld.¹⁴⁴ Stated differently, throughout the 1960s, Title VII

139. See 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work").

140. 429 U.S. 125 (1976).

141. *Id.* at 136 (concluding that, absent an indication that pregnancy status was a pretext for discriminating against women, excluding pregnancy-related conditions from a disability benefits plan did not amount to sex discrimination).

142. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at, 42 U.S.C. § 2000e(k)).

143. Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 1 (2009).

144. Indeed, many protective labor laws—such as maximum working hours and weightlifting limits—were designed by women's advocates to shield women from potentially dangerous or burdensome job duties and tasks. Many of these "protections," however, tended to be restrictive upon women's career mobility and employment opportunities. *Id.* at 3; see also JUDITH BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* (1978) (explaining that, while progressive labor legislation was well-intentioned and generally beneficial, many laws consequently ended up being more restrictive than protective of women's interests).

banned discrimination on the basis of sex, but protective labor laws, by definition, discriminated on that exact basis.¹⁴⁵

By the 1970s, employers could no longer rely upon traditional gender norms or stereotypes to justify sex-based classifications, and courts tended to do well enforcing sex discrimination claims.¹⁴⁶ In fact, many lower federal courts in the early 1970s concluded that pregnancy discrimination was a branch of sex discrimination and thus violative of Title VII.¹⁴⁷ The Equal Employment Opportunity Commission (EEOC) further underscored such protections for pregnant workers in its own 1972 guidelines: “Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.”¹⁴⁸ Between regulations, guidelines, and court rulings, a general consensus existed in the early 1970s surrounding pregnancy discrimination as a form of a sex classification included under Title VII, as well as the need to protect pregnant employees.

It is important to note, though, that many early pregnancy discrimination cases in federal court were brought under the Equal Protection Clause of the Fourteenth Amendment, due to the fact that Title VII did not cover state or local employers until 1972.¹⁴⁹ As time progressed, the U.S. Supreme Court found a way to skirt around the topic of equal protection and instead rule on pregnancy-related claims on the basis of due process. In *Cleveland Board of Education v. LaFleur*,¹⁵⁰ the Court struck down the school board’s maternity leave policy mandating female teachers to stop working after the fourth or fifth month of their pregnancy.¹⁵¹ The majority reasoned that the arbitrary cut-off dates held

145. Pedriana, *supra* note 143 at 4.

146. Pedriana, *supra* note 143 at 6 (“The law required that women workers be treated as individuals rather than as members of a generalized class subject to outdated cultural sensibilities and practices.”).

147. See, e.g., *Singer v. Mahoning Cnty. Bd. of Mental Retardation*, 379 F. Supp. 986, 989 (N.D. Ohio 1974), *aff’d* 519 F.2d 748 (6th Cir. 1975) (concluding that Title VII is violated when an employer forces a female employee to take a maternity leave of absence despite the female employee being capable of adequately doing her job); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1161-62 (W.D. Pa. 1974), *aff’d* 508 F.2d 239 (3d Cir. 1975) (striking down a company’s disability plan which excluded pregnancy on the grounds that conditions limited to men, like prostate cancer, were not excluded).

148. 37 Fed. Reg. 6837 § 1604.10(b) (Mar. 31, 1972).

149. Pedriana, *supra* note 143 at 6 n.22.

150. 414 U.S. 632 (1974).

151. *Id.* at 642.

“no rational relationship to the valid state interest of preserving continuity of instruction,” especially considering the policy failed to consider the individualized circumstances of each pregnancy—or rather, failed to consider that many teachers would be able to continue working well past the fifth month of pregnancy and still effectively perform their duties.¹⁵² Further, because the policy forced female teachers to both leave work at the fifth month of the pregnancy and not return until her child reached three months of age, it violated her due process rights.¹⁵³

In that same year, though, the Supreme Court in *Geduldig v. Aiello*¹⁵⁴ found that California’s disability insurance fund for private employees with a temporary disability, which excluded pregnancy from the list of sicknesses and disabilities covered under workman’s compensation, could be upheld.¹⁵⁵ While *Geduldig* was neither a Title VII case nor a question of constitutional violation, the Court seemed to assert that pregnancy-based distinctions—at least within the frame of benefit packages—were not sex-based classifications at all, and therefore were constitutionally and statutorily permissible.¹⁵⁶ It is under this notion that, despite being codified in the PDA in 1978, pregnancy landed on shaky footing for purposes of constitutional analysis, given the landscape of related reproductive cases, like *Roe* and *Casey*, which were decided on due process grounds.

B. Reproductive Justice, the Right to Privacy, and Due Process

Whenever a debatably fundamental right arises, the U.S. Supreme Court historically and (in)famously has avoided ruling on said right as a matter of equal protection under the law. Instead, the Court bases its decision upon the Due Process Clause of the Fourteenth Amendment—that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹⁵⁷ In the realm of constitutional law, due process is a central component to the foundation that awards Americans their basic

152. *Id.* at 643–44.

153. The Court explained that the time the female teacher would be forced away from school would likely impose serious financial and occupational burdens on themselves and their families. In imposing these stringent requirements on teachers, without providing administrative alternatives, the policy violates the Due Process Clause of the Fourteenth Amendment because it “employ[s] irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.” *Id.* at 648.

154. 417 U.S. 484 (1974).

155. *Id.* at 494.

156. See Pedriana, *supra* note 143 at 8.

157. U.S. CONST. amend. XIV, § 1.

rights; this is despite the phrase lacking any definition in the text of the Constitution itself. The Due Process Clause only earned a substantive interpretation because the Supreme Court held that the Privileges and Immunities Clause—originally intended to be the driving enforcer of the Fourteenth Amendment—only encapsulated rights of national citizenship.¹⁵⁸ Because the Court did not interpret that clause to substantively protect any rights of citizens, that left the Due Process Clause to step in and expand past its original meaning.¹⁵⁹

The doctrine of substantive due process, in theory, protects certain liberties from governmental intrusion.¹⁶⁰ Those liberties not explicitly mentioned in the Constitution are nevertheless protected under this doctrine, though the degree of protection they receive “depends on the relative importance of the liberty interest involved.”¹⁶¹ If the right in question is deemed “fundamental,” then the Court applies strict scrutiny, which requires a law or government action to be narrowly tailored to serve a compelling governmental interest.¹⁶²

One of the ways the Court has broadly used due process rights as an enforcement of fundamental rights is through the right to privacy, originally established in *Griswold v. Connecticut*.¹⁶³ Even before this landmark decision, an idea of a right to privacy existed both in scholarship¹⁶⁴ and in the law.¹⁶⁵ Nevertheless, *Griswold* solidified this

158. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1872).

159. Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151, 152 (2013); see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 207-08 (2004) (“A judicial assessment of the necessity and propriety of state laws is entirely consistent with the original meaning of the Privileges and Immunities Clause. For this reason, a doctrine of ‘substantive due process’ restores rather than violates the original historical meaning of Section 1 of the Fourteenth Amendment . . .”).

160. *Planned Parenthood v. Casey*, 505 U.S. 833, 846-47 (1992); *Tennessee v. Lane*, 541 U.S. 509, 562 (2004) (Scalia, J., dissenting)

161. Mary Helen Wimberly, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 296 (2007).

162. See discussion *supra* subpart II.B.3.

163. 381 U.S. 479 (1965).

164. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 204-05 (1890) (discussing that the right to privacy at common law is ancillary to property rights, and that courts should recognize and protect citizens’ interest in privacy as a distinct right).

165. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (recognizing the “vital relationship between freedom to associate and privacy in one’s associations”); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (“The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as ‘basic to a free society.’” (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949))).

“beyond statutory and tort law into the realm of constitutional protection.”¹⁶⁶

In that case, a licensed physician and the executive director of Connecticut’s Planned Parenthood League were convicted, as accessories, for violating a state statute prohibiting the use of contraceptives when they “gave information, instruction, and medical advice to *married persons* as to the means of preventing conception.”¹⁶⁷ The Court noted that the guarantees outlined in the Constitution “have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁶⁸ In other words, while a “right to privacy” is not stated in the explicit text of the Constitution, it nevertheless “emanated” from various constitutional guarantees.¹⁶⁹

This idea was reaffirmed less than ten years later in *Roe*. In accordance with its holding in *Griswold*, the Court held that “personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”¹⁷⁰ The majority then continued:

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, *as we feel it is*, or as the District Court determined, in the Ninth Amendment’s reservation to rights of the people, *is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy*. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.¹⁷¹

Not only did the Court recognize that the right to terminate a pregnancy was a fundamental right, as accorded to citizens via the Fourteenth Amendment’s right to privacy, but it also reasoned that the regulation of those kinds of rights—fundamental ones—could only be justified by narrowly tailored, “compelling state interest[s],” which therefore triggers heightened scrutiny.¹⁷²

The threshold that qualified a “compelling” governmental interest, however, became less difficult to pass, as was shown two decades later in

166. Wimberly, *supra* note 161 at 299-300; *Griswold*, 381 U.S. at 484-86.

167. *Griswold*, 381 U.S. at 480. Section 54-196 of the statute provided: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” *Id.*

168. *Id.* at 484.

169. *Id.*

170. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citations omitted).

171. *Id.* at 153 (emphasis added).

172. *Id.* at 155.

Casey. In response to a Pennsylvania law that required, among other things, informed consent and a twenty-four-hour waiting period prior to receiving an abortion,¹⁷³ the Supreme Court concluded that only laws that are unduly burdensome on a fundamental right are unconstitutional.¹⁷⁴ While still affirming *Roe*'s central holding, the Court nevertheless began stripping away the secureness of the fundamental right to privacy, limiting permissible laws to only those that do not pose an "undue burden" on such rights.¹⁷⁵ It is against this backdrop that the right to privacy—and the very doctrine of substantive due process—has, in the last five decades, been bolstered, seemingly only to be completely eviscerated.

C. *The Evisceration of Due Process and its Implications for Equal Protection and LGBTQ+ Plaintiffs*

Dobbs marked the beginning of a horribly dystopian, yet devastatingly predictable, post-*Roe* era in which the reproductive rights of people capable of pregnancy¹⁷⁶ are no longer in danger—they are simply gone. With the new 6-3 conservative supermajority on the Supreme Court bench, the justices have demonstrated their power and willingness to interpret the Constitution and its driving principles at their will.¹⁷⁷ In the months following *Dobbs*, where the rest of substantive due process rights lie has been a question at the forefront of many discussions, and what overturning *Roe* and *Casey* could imply for other rights—namely same-sex intimacy, same-sex marriage, and access to contraceptives—that the Supreme Court guaranteed on similar grounds.

Justice Samuel Alito made clear throughout his opinion that the Constitution does not explicitly make any reference to abortion, and that no constitutional provision (i.e., the Due Process Clause) implicitly

173. *Planned Parenthood v. Casey*, 505 U.S. 833,887 (1992).

174. *Id.* at 874.

175. *Id.* at 877 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

176. While the discourse surrounding abortion and reproductive justice often centers around cisgender women, this Comment recognizes that the battle for reproductive rights is not limited only to this group. Many transgender men and nonbinary individuals, too, are capable of becoming pregnant. Because of this, it is crucial they are included in the discussion.

177. Justice Elena Kagan commented on the conservative bloc's cavalier approach to textualism in a stern dissent from the 2021-22 term: "Some years ago, I remarked that '[w]e're all textualists now. It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (citations omitted).

protects such a right.¹⁷⁸ The basis for this ruling is the majority's understanding that rights may only be characterized as "fundamental" if it is "deeply rooted in [the] Nation's history and tradition."¹⁷⁹ Because abortion, according to Justice Alito, is not rooted in the tradition of the country—and, in fact, was criminalized in every state at one point in American history¹⁸⁰—it cannot be a constitutionally protected right.¹⁸¹

Included in the assertion that those "fundamental rights" which do not appear in the text of the Constitution are not protected are the rights awarded to members of the LGBTQ+ community in *Lawrence v. Texas* and *Obergefell v. Hodges*. As Justice Clarence Thomas noted in his concurrence, while nothing in the majority opinion should be construed as a threat to certain due process rights unrelated to abortion, nevertheless "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."¹⁸² Although Justice Thomas's call to reevaluate the authority of the Due Process Clause altogether is mere dicta in the greater scheme of the *Dobbs* decision, the chances of such an event occurring—especially with the bench packed as it currently is—is not entirely out of the realm of possibility.

The critical question thus arises: where do rights for LGBTQ+ people stand in light of *Dobbs*? The first half of this Comment discussed how *Bostock* marked a triumph for LGBTQ+ employees, earning protections under Title VII for sex discrimination claims when their employers discriminated against them on the basis of their sexual orientation or gender identity. Nevertheless, the definition of "sex" under the Fourteenth Amendment excludes those groups. My argument proposes a furtherance of Justice Gorsuch's interpretation of "sex" from *Bostock* as a basis for expanding the definition of "sex" under the Equal Protection Clause. But, with due process rights under attack by the current Court, how do rights of equal protection survive?

We first should look to the general construction of the Fourteenth Amendment. In so doing, it is discernable that both the Due Process Clause and the Equal Protection Clause announce a certain conformity to which the state must adhere when it deprives an individual of their rights.

178. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

179. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

180. *Id.* at 2285-300 (listing statutes that criminalized abortion at all stages of pregnancy in all fifty states and the District of Columbia, enacted as early as 1825).

181. *Id.* at 2242-43.

182. *Id.* at 2301 (Thomas, J., concurring).

As Professor William Eskridge stated, “the Due Process Clause demands a reasonable process and basis for state action that hurts my interests, while the Equal Protection Clause demands a reasonable basis for state action that hurts my interests but not yours.”¹⁸³ As of late, the resurgent originalist movement within the Supreme Court suggests that the Due Process Clause should be just that: a procedural mechanism. This is evidenced by the Court’s recent gutting of the doctrine of substantive due process.¹⁸⁴ If the substantive strength of the Due Process Clause gets wiped away, then incorporation of rights¹⁸⁵ ultimately reverts back onto the Privileges and Immunities Clause, which is how incorporation was originally intended to be accomplished under the Fourteenth Amendment.¹⁸⁶ To go a step further, by incorporating both enumerated and unenumerated rights into the notion of due process vis-à-vis the Privileges and Immunities Clause, then the substantive enforcement of those rights are left to be upheld under the doctrine of equal protection. Therefore, the Court’s recent attacks on due process leave open the door for the Equal Protection Clause of the Fourteenth Amendment to enforce fundamental rights against state actions both for purposes of equal protection and of substantive due process under the law.

Returning, then, to the definition of “sex” under the Fourteenth Amendment, following *Bostock*’s approach to include sexual orientation and gender identity as a form of sex discrimination implies that discrimination upon those bases merits heightened scrutiny by courts. As Justice Gorsuch outlined in his opinion, a textualist reading of the definition of “sex” according to Title VII encompasses sexual orientation and gender identity;¹⁸⁷ reframing sex-based discrimination under Title VII thus demands a rereading of sex-based classifications for constitutional purposes. This is true as well under the “sex-plus” lens, where sexual orientation serves as the additional factor that led to a sex-based classification.¹⁸⁸ Expanding the definition of “sex” under the Constitution allows the Court to resolve its self-made issue of keeping LGBTQ+

183. William N. Eskridge, *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1188 (2000).

184. See *supra* notes 127-136 and accompanying text.

185. “Incorporation” here refers to the doctrine by which enumerated or unenumerated rights are incorporated into the idea of due process and enforced against the states. See *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968).

186. Banta, *supra* note 159 at 151-52.

187. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

188. See *Franchina v. City of Providence*, 881 F.3d 32, 52-54 (1st Cir. 2018) (recognizing the legal potential of sex-plus Title VII claims where sexual orientation is the “plus-factor”).

identities as amorphous, undefined, quasi-suspect classes; the inclusion of sexual orientation and gender identity into the definition of “sex” more clearly shapes what a sex-based classification looks like. The Court’s definitive ruling in *Bostock* that sexual orientation and gender identity can easily be inferred as offshoots of “sex” then satisfies the “discrete and insular” condition of a group being discriminated against which triggers “more searching judicial inquiry.”¹⁸⁹ If we accept Justice Gorsuch’s new definition of “sex” under Title VII as true, then its corollary for equal protection analysis under the Constitution must also be true.

The problem that arises from this assertion, however, is that the Court’s new supermajority already has begun to veer away from Justice Gorsuch’s textualist vision and chart course towards Justice Alito’s originalist path. In *Dobbs*, Alito declared that a state’s regulation of abortion is not a sex-based classification that merits heightened scrutiny.¹⁹⁰ He further asserted that “the ‘goal of preventing abortion’ does not constitute ‘invidiously discriminatory animus’ against women.”¹⁹¹ Nevertheless, the Court’s refusal in *Dobbs* to view pregnancy or abortion as sex-based classifications, despite its past rulings consistently indicating the opposite, indicates hardly more than an originalist bench crafting an originalist policy agenda. Under a textualist reading—and even a reading under the sex-plus theory of discrimination—of “pregnancy” and its related conditions, it becomes inextricably bound up with “sex.”¹⁹² A state action cannot create a classification based on pregnancy without inherently causing a divide between of women and other persons capable of pregnancy, and men and other non-birthing persons. While the *Dobbs* Court argues that pregnancy- and abortion-related classifications do not violate individuals’ due process rights, such classifications nevertheless run afoul of individuals’ equal protection rights against disparate treatment under the law.

So too is the case with LGBTQ+ rights that were based in due process and privacy rights. If a procedural mechanism cannot uphold certain rights for LGBTQ+ individuals, then those rights must rely on equal protection grounds. For the right to same-sex intimacy as guaranteed in *Lawrence*, the equivalent sex-based classification is that it

189. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

190. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245 (2022).

191. *Id.* at 2246 (citing *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273-74 (1993)).

192. *See Bostock*, 140 S. Ct. at 1742 (using the same language with homosexuality and transgender status, that they are “inextricably bound up with sex”).

effectively only applies to gay men because they are the primary demographic engaging in anal sexual intercourse.¹⁹³ The Court's narrow approach pigeonholed homosexual sodomy into solely a due process issue, ignoring the fact that it created a sex-based division depending on the sex of the receiving partner.¹⁹⁴ Sodomy laws inherently create a sex-based classification because a male-passive partner engaging in anal intercourse with a male-active partner would be targeted by the law, while a female-passive partner engaging in the same conduct with a male-active partner would not. Beyond the issue of privacy and consensual sexual intimacy, the issues discussed raise serious equal protection questions. The Court understands that these questions exist; it has just historically refused to address it.

Similarly, for the right to marriage as guaranteed in *Obergefell*, the equivalent sex-based classification is that the biological sex of one-half of a romantic couple acts as a but-for factor for disparate treatment (meaning that a classification which creates a division between homosexual and heterosexual couples inherently causes disparate treatment against the homosexual couple because one person is of the same sex as their partner).¹⁹⁵ Stated differently, a law regulating same-sex marriage—even if sex-neutral on its face—implicates equal protection in that a male-female couple attempting to get married would not trigger a violation, but a male-male or female-female couple attempting to do the same would.

Within these due process rights exist inherent sex-based classifications that would otherwise trigger heightened scrutiny, but for

193. The *Lawrence* Court discussed consensual homosexual intimacy as an issue underneath the umbrella of privacy. *Lawrence*, 539 U.S. at 564. While presented with the question of whether Texas' regulation of homosexual sodomy violated the Equal Protection Clause, the Court instead determined that the law should be viewed under the Due Process Clause. *Id.* at 564-65.

194. For example, the Georgia anti-sodomy statute upheld in *Bowers v. Hardwick* was gender-neutral on its face. However, the Court interpreted and analyzed it as only applying to homosexual acts of sodomy. 478 U.S. 190, 216. So, while a man and woman would have been in violation of the Georgia statute by engaging in anal intercourse, the statute was only enforced against men who engaged in anal intercourse with other men.

195. Like in *Lawrence*, the *Obergefell* Court addressed equal marriage through the lens of due process, restating the precedent that the right to marry was "inherent in the concept of individual autonomy." *Lawrence*, 539 U.S. at 564; (2003); *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015). Again, the Court did not extend its analysis to what the equal protection implications of same-sex marriage would be. Instead, the Court followed a sex-neutral approach to understanding the right to marriage, saying that "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 666 (internal citations omitted).

the Court's systematic avoidance of the topic under the Equal Protection Clause. In order to protect the rights of women and LGBTQ+ people—what courts and society have declared as fundamental rights—from an originalist, aggressive Supreme Court, they must be analyzed through a different lens. Justice Gorsuch's textualist interpretation of "sex" enables courts to include sexual orientation and gender identity as inherently part of that definition, which in turn allows LGBTQ+ plaintiffs to bring sex discrimination claims with bite into court. This adaptation also forces courts to reevaluate the way it looks at LGBTQ+ discrimination claims no longer as discrete issues in a queer vacuum, but instead as conventional forms of sex-based discrimination. In so doing, LGBTQ+ plaintiffs will merit heightened scrutiny review and gain greater protections for their fundamental rights.

V. CONCLUSION

This Comment, at its core, examined the evolution of Title VII and equal protection jurisprudence in federal courts. In the time since the Supreme Court announced its decision in *Bostock* to include sexual orientation and gender identity as inherently forms of sex discrimination protected under Title VII, there now exist two distinct definitions of "sex"—a broader, more inclusive statutory definition, and a narrower, traditional understanding of sex under a constitutional definition. For decades, the Court has alluded to the possibility of a higher standard of review for sexual orientation and gender identity, yet each time fails to fully address it. For that matter, the Court's historical aversion to addressing equal protection questions for LGBTQ+ individuals signals its noncommittal stance on guaranteeing fundamental rights for that community.

The Court's recent attacks on fundamental rights—namely the right to abortion in *Dobbs*—indicates the conservative supermajority's willingness to obliterate settled precedent in the name of originalism, but more centrally indicates its *eagerness* to ignore the doctrine of stare decisis under the guise of judicial restraint. The annihilation of substantive due process rights forces the Fourteenth Amendment's Due Process Clause back into the corner for which it was originally created: to be a mere procedural mechanism. Given the direction the Court appears to be heading, any substantive enforcement of due process will fall upon the Equal Protection Clause. As such, a reevaluation of sexual orientation and gender identity as extensions of "sex" is necessary. The inclusion of sexual orientation and gender identity in the discussion of sex-based

discrimination for Title VII claims must trigger a similar discussion for sex-based classifications challengeable under the Fourteenth Amendment. Doing so gives substantive strength to fundamental rights of citizens, and it empowers LGBTQ+ plaintiffs to have greater chances of success in court by forcing the courts to examine their discrimination claims under a more stringent standard of review.