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Same-Sex Sex and Immutable Traits: Why *Obergefell v. Hodges* Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII

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Same-Sex Sex and Immutable Traits: Why *Obergefell v. Hodges* Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII

Matthew W. Green Jr.*

The plaintiffs also state that, by treating their marriages as if they did not exist, the state . . . encourages private citizens to deny their marriages and exposes them to discrimination in their daily lives.¹

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¹ *Tanco v. Haslam*, 7 F. Supp. 3d 759, 766 (M.D. Tenn. 2014), *overruled by* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *and* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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I. INTRODUCTION

Valeria Tanco and Sophie Jesty sued the state of Tennessee for failing to recognize their marriage lawfully performed and recognized in another state.² Tennessee’s nonrecognition rendered the couple ineligible for state government benefits available to opposite-sex married couples.³ As the quote above explains, however, the harm that flowed from Tennessee’s actions extended beyond denial of state benefits. By refusing to recognize their marriage, Tennessee also encouraged non-governmental entities and other individuals to discriminate against them as well.⁴ In other words, the government’s actions had a greater effect on its gay citizens than denying them government benefits, because their spouses were of the same sex. It encouraged private discrimination against these couples as well.

Civil rights activist Frank Kameny described a similar connection between public and private-sector discrimination when explaining the effects of the federal government’s once blanket policy that declared homosexuality and government employment to be incompatible.⁵ According to Kameny, the policies reached far beyond the denial of federal government employment to gays.⁶ They set the tone for employment policies and practices throughout all of American business.⁷ After all, “if the federal government could exclude gays, and did, then private employers not only could but should. And they did.”⁸

² *Tanco*, 7 F. Supp. 3d at 763–64.

³ *See id.* at 764.

⁴ *See id.* at 770 (explaining that the state’s refusal to recognize the marriage, “invites public and private discrimination and stigmatization”).

⁵ Franklin E. Kameny, *Government v. Gays: Two Sad Stories with Two Happy Endings. Civil Service Employment and Security Clearances*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 214 (John D’Emilio, William B. Turner et al. eds., 2000).

⁶ *See id.* at 214–15.

⁷ *See id.*

⁸ *Id.* at 215.

In *Obergefell v. Hodges*⁹ gay and lesbian couples, like Valeria and Sophie, prevailed in the battle for marriage equality. The *Obergefell* Court struck down anti-gay marriage bans and mandated marriage equality in all fifty states.¹⁰ But how far, if at all, does the substantive reach of *Obergefell* extend beyond marriage? Commentators have offered varying perspectives.¹¹ Kyle Velte argues, for instance, that the true value of *Obergefell* is its expressive promise. According to Professor Velte, *Obergefell's* true import is its transformative potential grounded in the message the opinion sends to society about how lesbian, gay, bisexual, and transgender (“LGBT”) people should be respected and valued.¹² That expressive message can be harnessed to influence the political arena resulting in wide-reaching legal protections for LGBT individuals.¹³ *Obergefell's* promise is not its “legal holding,” but its normative statement.¹⁴

While *Obergefell* does not directly address gay civil rights in employment discrimination—the subject matter of this article—it is too soon to dismiss its substantive reach in that area or others. Currently, no federal statute protects LGBT persons from employment discrimination. With explicit protection lacking, gay individuals have attempted to fill the gap by relying on the proscription against sex discrimination contained in Title VII of the Civil Rights Act of 1964 (“Title VII”).¹⁵ This article argues that *Obergefell* may advance the rights of gay men and lesbians in the employment context.¹⁶ Its explicit identification of same-sex sexual intimacy as a fundamental right and

⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁰ See *id.* at 2598–99 (holding that marriage is a fundamental right under the Due Process Clause of the U.S. Constitution’s 14th Amendment and is available to both same and opposite-sex couples).

¹¹ See e.g., Donald H.J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367, 367 (2016) (explaining that *Obergefell* provides no direct legal authority to claims for protection from discrimination in employment or access to other forms of accommodation); Tobias Barrington Wolff, *The Three Voices of Obergefell*, 38 L.A. LAW. 28, 28 (2015) (“It is too soon to know how much has changed following” *Obergefell*, “but it is apparent that it is a new day.”); Kyle Velte, *Obergefell's Expressive Promise*, 6 HOUS. L. REV. 157, 157–58 (2015) http://www.houstonlawreview.org/wp-content/uploads/2015/11/1relte_final.pdf (noting the narrowness of *Obergefell*); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147 (2014) [hereinafter *A New Birth of Freedom?*] (“While *Obergefell's* most immediate effect was to legalize same-sex marriage across the land, its long-term impact could extend far beyond this context.”).

¹² See Velte, *supra* note 11, at 158.

¹³ See *id.*

¹⁴ *Id.*

¹⁵ See 42 U.S.C. § 2000e-2(a) (2012); see also discussion *infra* Part III.A.1–2.

¹⁶ While the focus of this article is on *Obergefell's* potential to affect the rights of gay and lesbian individuals in employment, the decision may well have a positive effect on the rights of transgender individuals as well.

recognition that sexual orientation is both immutable and a “normal expression of human sexuality” has the potential to protect workers from sexual orientation discrimination by significantly influencing the interpretation of Title VII.¹⁷

While authority on the issue is split, an increasing number of courts have held that discrimination against an individual because of sexual orientation constitutes impermissible sex discrimination prohibited by Title VII.¹⁸ The Equal Employment Opportunity Commission (“EEOC”) recently adopted this position as well.¹⁹ It is the better reading of the statute. According to the American Psychological Association (“APA”) and other leading medical and mental health organizations, “[s]exual acts or attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved, relative to each other.”²⁰ Further, individuals express their sexuality by acting (or desiring to act) sexually with individuals of a particular sex.²¹ That definition means that sexual orientation and biological sex are inextricably linked, because it is impossible to conceptualize sexual orientation without also taking into account a person’s sex and the sex of individuals with whom she is or desires to be sexually intimate. Thus, discrimination on the basis of an individual’s sexual orientation necessarily implicates considerations of his or her sex as well.²² While that analysis is straightforward, the issue of whether Title VII outlaws sexual orientation discrimination is unsettled. Despite overwhelming support for that position among commentators,²³ the issue divides the federal courts and to date no federal appellate court has adopted it.²⁴

¹⁷ See *infra* Part V.

¹⁸ See *infra* Part III.B.2.

¹⁹ See *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 16, 2015); see also *infra* Part III.B.2.

²⁰ See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713. Other Amici signing onto this brief include the American Psychiatric Association, the National Association of Social Workers, the American Psychoanalytic Association, and the American Medical Association.

²¹ See *id.* (“[I]t is only by acting with another person—or desiring to act—that individuals express their heterosexuality [or] homosexuality . . . [S]exual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy.”) Moreover, sexual orientation “defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.” *Id.*

²² See *Baldwin*, 2015 WL 4397641 at *5 (“‘Sexual orientation’ as a concept cannot be defined or understood without reference to sex.”).

²³ See e.g., Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 726 (2014); Mary Anne Case, *Legal Protections for the Personal Best of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1337 (2014) [hereinafter *Legal Protections*]; Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14

Obergefell strengthens the argument that sexual orientation discrimination violates Title VII. The Court’s rationale allows the opportunity for employees to rely on authority holding that Title VII forbids employers from discriminating against individuals on the basis of sex when doing so implicates a fundamental right or a characteristic that is immutable.²⁵ Such discrimination might occur, for example, if an employer refuses to hire married women but not married men. The employer in this instance is not discriminating against all women, but only a subset of them—those that exercise their fundamental right under the U.S. Constitution to marry. The same should be true if an employer discriminates against a subset of men or women who exercise their constitutional right to engage in consensual, adult sexual intimacy with the same or opposite sex or are perceived as doing so. *Obergefell* explicitly characterized that right as fundamental.²⁶ It also recognized that leading medical and mental health professional organizations consider sexual orientation to be immutable.²⁷ Thus, an employer violates Title VII if it treats its male employees who, because of their sexual orientation or otherwise, exercise their fundamental right to be intimate with other men differently than it treats its female employees who also exercise their fundamental right to be intimate with men. The employer has discriminated against a subset of men (or women) because of their sex as well as an immutable trait and their respective decisions to exercise a fundamental right.²⁸

Numerous courts have recognized this “sex plus” discrimination under Title VII. Courts adopting this theory have often held that no Title VII protection is warranted if the “plus” factor involves rights that are not constitutionally significant or traits that are easily changeable or mutable.²⁹ These cases often

DUKE J. GENDER L. & POL’Y 205, 205 (2007); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1169 (1991).

²⁴ See Soucek, *supra* note 23, at 722 (explaining how the federal courts “almost universally refuse to derive protection for sexual orientation from the ‘sex’ prong”).

²⁵ See e.g., *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (*en banc*) (holding that “distinctions in employment practices between men and women on the basis of something other than immutable or [constitutionally] protected characteristics do not inhibit employment opportunity” for purposes of Title VII). See also *infra* Part IV.B.

²⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015) (discussing the history of the Court’s treatment of the fundamental right to engage in “same-sex intimacy”).

²⁷ See *id.* at 2596.

²⁸ I do not mean to suggest that everyone who has a same-sex intimate encounter is homosexual or bisexual. Sexual orientation has been described as “a person’s *enduring* physical, romantic, emotional and/or spiritual attraction to another person.” It might well be that an individual identifies as heterosexual but engages in same-sex sexual activity. DIANNE AVERY, ET AL., *EMPLOYMENT DISCRIMINATION LAW* 455 (8th ed. 2010).

²⁹ See, e.g., *Willingham*, 507 F.2d at 1091; *EEOC v. Catastrophe Mgmt. Sols.* 837 F.3d 1156, 1158 (11th Cir. 2016) (rejecting a challenge to an employer’s policy forbidding employees from wearing dreadlocks, and noting “our precedent holds that Title VII prohibits discrimination based on immutable traits, and the . . . complaint does not assert that dreadlocks—though culturally associated

arise in the context of an employer's adoption of gendered appearance and grooming codes.³⁰ Although their rationales differ,³¹ courts have often upheld challenges to workplace policies that, for example, forbid men to wear earrings or long hair but allow women to do either or both.³² To be clear, this article does not make a normative argument that discrimination on the basis of gendered grooming or appearance codes should be permissible. Other scholars have cogently argued that such policies may perpetuate stereotypes and subordinate women.³³ Rather, this article demonstrates that exceptions to Title VII's broad proscription against sex discrimination have been allowed. The grooming code cases are merely one example. The article then seeks to use these existing frameworks to argue that *Obergefell* might be used substantively to advance gay rights beyond marriage in the employment context under Title VII. In short, it argues that regardless of where the line is drawn between sex discrimination that

with race—are an immutable characteristic of black persons”); *Campbell v. Alabama Dep’t of Corr.*, No. 2:13-CV-00106-RDP, 2013 WL 2248086, at *2–3 (N.D. Ala. May 20, 2013) (rejecting a claim that a policy forbidding dreadlock hair style violated Title VII as hairstyle and hair length do not involve immutable traits and fall outside the scope of Title VII); *Austin v. Wal-Mart Stores, Inc.*, 20 F. Supp. 2d 1254, 1254, 1257 n.4 (N.D. Ind. 1998) (rejecting a challenge to employer’s hair length policy requiring men to wear their hair “above the collar,” as discrimination is not based on immutable traits or constitutionally protected activities as exemplified by holding that similar grooming code policies that do not violate Title VII); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (Regarding a challenge to a hairstyle policy, the court said, “Even if the grooming policy imposed different standards for men and women . . . it would not violate Title VII” . . . [and it] “does not constitute prohibited sex discrimination . . . because . . . it does not regulate on the basis of any immutable characteristic of the employees involved”). See generally Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 205–06 (2004) [hereinafter *Trait Discrimination*].

³⁰ See Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1133–34 (2006).

³¹ See Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 Duke L.J. 681, 683–85 (2006) (noting that courts have taken different approaches to the issue of grooming and appearance standards).

³² Compare *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1112–113 (9th Cir. 2006) (rejecting a challenge to an employer dress and grooming code that required female employee to wear make-up, the court held that the code did not impose unequal burdens on either men or women and caused no objective harm to the plaintiff) with *Willingham*, 507 F.2d at 1902 (rejecting a male employee’s challenge to an employer’s hair length policy, because the alleged discrimination did not involve immutable traits or fundamental rights). Professor Fisk explains that while challenges to grooming policies have been rejected because of the immutability and fundamental rights analysis, courts have found discrimination on occasion when the sex plus trait is not immutable. See Fisk, *supra* note 30, at 1133–34 n.47 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

³³ See e.g., Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 68 (1995) [hereinafter *Disaggregating Gender*] (noting “the claim of numerous legal and cultural commentators that conventionally feminine apparel has often been used as a mark of female subordination”); see also *id.* at 64–69 (arguing that the law devalues that which is feminine by, for example, rejecting claims by effeminate gay men, as well as claims by women, who challenge employer requirements that they exhibit traits perceived as masculine).

is permissible under Title VII and proscribed by it, *Obergefell* places sexual orientation discrimination in the latter category. Understanding *Obergefell* in this light not only signals an end to the discrimination gay individuals like Valeria and Sophie have endured at the hands of the state, but also protects them from the private-sector discrimination that, until recently, state action allowed and encouraged.

This article is set forth in five parts. Part II is largely descriptive and focuses on two aspects of *Obergefell*: (1) the Court's clarification that adult, private, consensual, same-sex sexual intimacy is a fundamental right, protected by the U.S. Constitution's Fourteenth Amendment Due Process Clause and (2) the Court's recognition that leading mental health and medical groups consider sexual orientation to be immutable. Part III examines how courts and the EEOC have treated sexual orientation discrimination under Title VII and contains a normative discussion which argues—consistent with the position of other commentators, some courts, and the EEOC—that sexual orientation discrimination should be recognized as sex discrimination for purposes of Title VII. Part IV explores instances in which courts have permitted employers to discriminate because of sex as a matter of judicial interpretation of Title VII. One such instance involves the “sex plus” theory. Part V argues that under this line of sex plus authority, sexual orientation discrimination is not only sex-discrimination, but consistent with *Obergefell*, it is the type of discrimination that Title VII forbids.

II. SAME-SEX SEX AND IMMUTABLE TRAITS

Obergefell was a significant victory for gay rights. Still, it could have done more to strengthen the argument that existing civil rights statutes that protect individuals on the basis of sex also protect them from sexual orientation discrimination. The Court, for instance, could have held that the marriage bans imposed impermissible sex-based classifications in violation of the Fourteenth Amendment's Equal Protection Clause. Some judges addressing marriage equality employed this analysis.³⁴ Under this theory, the marriage bans might

³⁴ See *Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014) (calling the sex discrimination argument a “potentially persuasive answer to defendants’ theory” in support of the bans); see also *id.* at 479 (Berzon, J., concurring) (opining that bans discriminate on the basis of gender); See *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part). See Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2121 (2014) (explaining that the argument had received “little traction” in the courts). Chief Justice Roberts also posed the question during oral arguments whether the challenged marriage bans constituted sex discrimination. Robert Barnes & Fred Barbash, *Supreme Court Hears Arguments in Historic Gay-Marriage Case*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-will-hear-historic-arguments-in-gay-marriage-cases/2015/04/27/083d9302-ed24-11e4-8666-a1d756d0218e_story.html. Chief Justice Roberts asked, “If Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t . . . and the difference is based upon their different sex. Why isn’t that a straightforward question of

have violated constitutional proscriptions against sex discrimination in two distinct ways—as a matter of formal equality or under sex stereotyping theory. Sex stereotyping theory is discussed later in this article. Suzanne Goldberg has explained the formal equality argument.

[A] law authorizing a man to marry a woman but not to marry a man (and a woman to marry a man but not a woman) is discriminatory per se based on the category of sex. Put another way, a rule that limits marriage to different-sex couples hinges eligibility on the sex of one's partner. According to the formal-equality argument, this kind of sex-based eligibility rule is, by definition, discrimination based on sex.³⁵

Similarly, when an employer treats a male employee who has, or is perceived to have, sex with other men differently from a female employee who also has, or is perceived to have, sex with men, the disparate treatment is because of the employee's sex. Because Title VII protects individuals from discrimination on the basis of sex, litigants could have reasonably relied on a sex-based equal protection analysis to argue that sexual orientation discrimination is tantamount to unlawful sex discrimination under the statute as well. The Court charted a different path.

A. *Lawrence*, *Obergefell*, and *Same-Sex Sex*

The Court in *Obergefell* relied principally on substantive due process to strike down the marriage bans challenged in that case, although it also held that the bans violated the Equal Protection Clause.³⁶ While other commentators continue to unpack *Obergefell* at length,³⁷ the discussion here is more modest. Its focus is on two discrete points: (1) the Court's characterization of adult, consensual, private same-sex sexual conduct as a fundamental right protected by the Due Process Clause, an issue that had been heavily debated after the Court's earlier gay-rights decision, *Lawrence v. Texas*,³⁸ and (2) the Court's recognition

sexual discrimination?" *Id.* However, he did not address the issue in his dissent in *Obergefell*. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁵ Goldberg, *supra* note 34, at 2099 (noting that formal equality "focuses on facial discrimination"). Compare Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 417–21 (2010) (explaining that formal equality is based on the notion that "like cases should be treated alike;" men and women are entitled to equal treatment, and discussing the limits of the "sameness" argument) with Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) (proposing an argument similar to the sameness argument).

³⁶ See *A New Birth of Freedom?*, *supra* note 11, at 148.

³⁷ See *id.*; see also Hermann, *supra* note 11; Wolff, *supra* note 11; and Velte, *supra* note 11 (discussing generally *Obergefell* and the decision's implications).

³⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

that leading medical and mental health organizations consider sexual orientation to be an immutable trait.

1. Due Process and Fundamental Rights

Obergefell clarified that adult, consensual, same-sex intimacy is a fundamental right under the Due Process Clause of the U.S. Constitution. That statement is obvious considering *Obergefell's* holding that same-sex couples have a fundamental right to marry. That right would mean little to most couples if they also did not have a right to engage freely in conduct common to the marital relationship. As Professor Harry Wellington has explained, although sex occurs outside of marriage, “the state has undertaken to sponsor one institution [marriage] that has at its core the love-sex relationship. That relationship demands liberty in the practice of the sexual act.”³⁹ Until relatively recently, however, laws that outlawed same-sex sexual conduct were constitutional. Moreover, after the Court held that such laws were unconstitutional, courts and scholars disagreed on whether same-sex sex was a fundamental right.

The Court has set forth different approaches to determining whether an asserted liberty interest under the Due Process Clause is a fundamental right. A detailed discussion of these approaches and the implications of using one or the other is beyond the scope of this article.⁴⁰ Suffice it to say that such a determination matters. The Due Process Clause of the Fourteenth Amendment, in pertinent part, forbids states from depriving “any person of life, liberty, or property, without due process of law.”⁴¹ The Clause on its face appears to speak to the fairness of procedure to which an individual is entitled before being denied the rights set forth in the Clause. The Court, however, has held that the Clause contains a “substantive component that protects certain liberty interests against state deprivation no matter what process is provided.”⁴² Specifically, the Clause protects “fundamental liberties . . . enumerated in the Bill of Rights” as well as other unenumerated rights that pertain to “personal choices central to

³⁹ Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L. J. 221, 292 (1973).

⁴⁰ Other scholars have provided a detailed discussion of a history of the Court’s fundamental rights jurisprudence. See e.g., Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002-2003 CATO SUP. CT. REV. 21 (2003); *A New Birth of Freedom?*, *supra* note 11 (discussing *Obergefell’s* approach to fundamental rights as well as the decision’s potential implications for this area of the law).

⁴¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

⁴² See *id.* at 2616 (Roberts, C.J., dissenting) (citation omitted); see also *Cook v. Gates*, 528 F.3d 42, 49 (1st Cir. 2008) (“It has long been held that, despite their name, the due process clauses of the Fifth and Fourteenth Amendments ‘guarantee[] more than fair process.’” (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”⁴³

Characterizing a right as fundamental under the Due Process clause “to a great extent . . .” makes it “. . . immune from federal or state regulation or proscription.”⁴⁴ Under conventional analysis, if a law burdens a fundamental right (like marriage), the government must prove that it has a compelling interest justifying that burden and that the restriction placed on that right is narrowly tailored to achieve that interest. If a fundamental right is not implicated, the government’s action is generally analyzed using a rational-basis standard, an extremely deferential standard of review.⁴⁵

In *Lawrence v. Texas*, the Court recognized that adult, consensual, same-sex sexual intimacy was a protected liberty right under the Due Process Clause.⁴⁶ The lower courts subsequently debated, however, whether that right was a fundamental right. Scholars also disagreed on how to characterize or analyze the liberty interest *Lawrence* recognized. The next section addresses the controversy and why *Obergefell* should settle it.

2. The Fundamental Right that Finally Spoke

Sodomy has become a metonym for same-sex intimacy or conduct. Historically, sodomy laws were directed at opposite-sex and same-sex conduct, but according to William Eskridge, by 1961 sodomy had become a “thoroughly homosexualized term.”⁴⁷ One way sexual orientation discrimination manifests is by reducing gay people to a sex act—sodomy.⁴⁸ Linking homosexuals,

⁴³ *Obergefell*, 135 S. Ct. at 2597.

⁴⁴ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003). *See also* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.”).

⁴⁵ *See* Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1113 (2004) (explaining that the “rational-basis test . . . as we have known it, will almost never lead to the invalidation of a state law”). *See also* *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (noting that “only fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’ qualify for anything other than rational-basis scrutiny under the doctrine of ‘substantive due process’”); *Witt v. Dept. of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (“Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases.”).

⁴⁶ *Lawrence*, 539 U.S. at 558.

⁴⁷ *See* WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003* 75 (2008) [hereinafter *DISHONORABLE PASSIONS*]; *see also* William N. Eskridge Jr., *Noah’s Curse: How Religion often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 689 (2011) (“Between 1921 and 1961, state and federal governments adopted hundreds of statutes imposing civil disabilities on ‘homosexuals and other sex perverts,’ to use the terminology of the era.”).

⁴⁸ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1905–07, 1909 (2004) (“[B]eing gay or lesbian means being a

particularly gay men, to sodomy occurs despite the fact that heterosexuals engage in sodomy and many gays and lesbians may not do so at all.⁴⁹ As long as consensual sodomy remained unlawful, however, then linking homosexuals to sodomy also linked them to criminal activity.⁵⁰ As Christopher Leslie explains, once society determines that individuals are criminals, it becomes permissible to deny them “rights and privileges” others take for granted.⁵¹ The shadow of criminality justified and resulted in discrimination against gay persons in a host of areas, from public and private employment to custody and immigration battles.⁵² For these reasons, gay rights advocates early on recognized sodomy laws as “the bedrock of legal discrimination against gays and lesbians.”⁵³ The issue of same-sex sexual conduct eventually reached the Court in *Bowers v. Hardwick*,⁵⁴ which held that the Due Process Clause did not confer a fundamental right for homosexuals to engage in sodomy.⁵⁵ *Bowers* was widely criticized, but its holding would remain intact for another seventeen years when the Court overturned that decision in *Lawrence*.⁵⁶ *Lawrence* held that

sodomite, which in turn means being a criminal.”). Professor Susan J. Becker has referred to this reductionist phenomenon as “behavior-identity compression,” which describes “the process through which individuals within the heteronormative, binary sexual paradigm craft an identity for outsiders as one-dimensional sexual deviants.” Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL’Y & L. 177, 194 (2006). One step in the identity construct involves the non-critical, generalized assumption that all sexual minorities engage in “deviant sexual behavior,” such as sodomy and oral sex. *See id.* at 194. According to Professor Becker, these assumptions are formed about all sexual minorities without any actual evidence that they, in fact, have ever engaged in this or any form of sexual conduct. *See id.* at 195. Moreover, “empirical data demonstrating that people who identify as ‘normal’ heterosexuals engage in the condemned behavior is conveniently ignored.” *Id.*

⁴⁹ *See* Becker, *supra* note 48, at 195.

⁵⁰ *See* PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 170 (2000).

⁵¹ Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS. L. REV. 509, 512 (2005).

⁵² *See id.*; *see also* Hunter, *supra* note 45, at 1133 (explaining that the sodomy laws were used most often indirectly to penalize gay persons by denying gay and lesbian parents custody rights or by refusing to employ gays and lesbians; there was a “logical connection between homosexuality and violation of a sodomy law”); *Lawrence v. Texas*, 539 U.S. 558, 581 (2003) (O’Connor, J., concurring) (noting that Texas had acknowledged that the threat of conviction under its anti-sodomy statute had collateral consequences, by subjecting homosexuals to discrimination in a variety of ways); DISHONORABLE PASSIONS, *supra* note 47, at 67 (“The most important effect of sodomy laws . . . was the extent to which they situated homosexuals outside the normal protections of the law.”).

⁵³ CAIN, *supra* note 50, at 170.

⁵⁴ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2005).

⁵⁵ *See Bowers*, 478 U.S. at 192.

⁵⁶ *See Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today.”).

homosexual persons enjoy a liberty interest protected by the Due Process Clause of the Fourteenth Amendment to engage in private, consensual sexual intimacy.⁵⁷

Although *Lawrence* ostensibly involved only the constitutionality of a state imposing criminal penalties for a sex act, the Court recognized that sodomy statutes did a great deal more.⁵⁸ By targeting intimate behavior largely associated with homosexual persons, the laws also burdened intimate relationships in which persons might seek to enter. According to the Court, “the laws have . . . far-reaching consequences, touching upon the most private human conduct, sexual behavior[;] . . . [they] seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”⁵⁹

In striking down the Texas sodomy statute, the *Lawrence* Court relied principally on a series of cases discussing other fundamental rights and particularly the fundamental right to privacy, which the Court had recognized in earlier decisions.⁶⁰ According to the Court, its extensive privacy jurisprudence demonstrated that the constitution grants individuals the autonomy to make certain highly personal choices about their life and destiny, including issues surrounding marriage, procreation, family relationships, and child rearing.⁶¹ It explained that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁶²

Considering the precedent it cited in *Lawrence* to strike down the Texas sodomy ban, the Court appeared to hold that the intimacy right recognized in *Lawrence* was a fundamental right.⁶³ Nowhere did the Court explicitly say so, a fact that Justice Scalia noted in his dissenting opinion: the Court neither

⁵⁷ See *id.* at 5647 (determining that the Texas sodomy statute “seek[s] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals”); see also *id.* at 577–78 (quoting with approval Justice Steven’s dissenting opinion in *Bowers*, which explained that “individual decisions [by married or single persons] . . . concerning the intimacies of their physical relationship . . . are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment”).

⁵⁸ See Tribe, *supra* note 48, at 1903–04 (explaining that the principle evil of the sodomy statute was neither “punishing some people for the only mode of sexual gratification available to them” nor arbitrary enforcement of the sodomy law, but rather it was “stigmatization of intimate personal relationships between people of the same sex”).

⁵⁹ *Lawrence*, 539 U.S. at 567.

⁶⁰ See *id.* at 564–65 (noting that the “most pertinent beginning point [in this line of cases] is our decision in *Griswold*,” which struck down a state law that barred access by married couples to contraceptives (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

⁶¹ See *id.* at 574.

⁶² *Id.*

⁶³ See Tribe, *supra* note 48, at 1916–17.

“declare[d] that homosexual sodomy is a ‘fundamental right’” nor subjected the Texas law to strict scrutiny review.⁶⁴ That omission did not go unnoticed.

Lower courts divided over how to characterize and treat the right articulated by the Court in *Lawrence*.⁶⁵ For instance, in *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit rejected a challenge to a Florida law that bars gays and lesbians from adopting children, and in doing so addressed the scope of the Court’s holding in *Lawrence*.⁶⁶ It explained that “[n]owhere [in *Lawrence*] . . . did the Court characterize [the right to sexual intimacy] as ‘‘fundamental.’”⁶⁷ It further noted that “the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds.”⁶⁸ By contrast, the Ninth Circuit applied a heightened standard of review to analyze the constitutionality of the now repealed Don’t Ask, Don’t Tell (“DADT”) statute.⁶⁹ The court recognized that *Lawrence* did not explicitly articulate the standard of review applicable to claims that the plaintiffs’ right to same-sex sexual intimacy was being violated.⁷⁰ However, among other reasons, because of the privacy cases on which *Lawrence* relied in addressing the liberty right before the Court, the Ninth Circuit determined that something more than rational basis review was required to determine the constitutionality of DADT.⁷¹

Scholars have also debated how the liberty right addressed in *Lawrence* should be articulated and analyzed.⁷² Laurence Tribe, for example, dismissed as

⁶⁴ *Lawrence*, 539 U.S. at 586 (Scalia, J. dissenting).

⁶⁵ Compare *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) (holding that *Lawrence* did not find a fundamental right to engage in private sexual conduct under the Constitution and applying rational basis scrutiny to claim that government employer violated petitioner’s rights by reprimanding her for her private, sexual activity) and *Lofton v. Sec’y of Dep’t of Child. & Fam. Servs.*, 358 F.3d 804, 816–17 (11th Cir. 2004) (*Lawrence* neither identified a fundamental right and applied only rational basis review to the Texas statute) with *Cook v. Gates*, 528 F.3d 42, 53, 56 (1st Cir. 2008) (holding that *Lawrence* recognized “a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one’s home and one’s own private life”) (rejecting argument that *Lawrence* did not recognize a “fundamental right” because it did not explicitly use those words; the Court has recognized a protected liberty interest in prior cases without denominating the rights “fundamental”).

⁶⁶ *Lofton*, 358 F.3d at 815–17.

⁶⁷ *Id.* at 816.

⁶⁸ *Id.* at 817.

⁶⁹ *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008).

⁷⁰ *See id.* at 815.

⁷¹ *See id.* at 818–19 (declining to apply strict scrutiny because *Lawrence* did not do so, and instead adopting a test that balanced the rights of the government against the “significant liberty interest” recognized in *Lawrence*).

⁷² The scholarship on *Lawrence* is voluminous, and, of course, the works of only a few scholars are discussed here.

irrelevant the Court's failure to delineate a precise standard of review in *Lawrence*.⁷³ He explained that considering the privacy cases on which the Court relied and the strictness of the standard it used in striking down the Texas statute, *Lawrence* obviously recognized a fundamental right.⁷⁴ Nan Hunter has opined that although the Court did not use the term "fundamental" in *Lawrence*, it drew analogies to cases that had identified such rights.⁷⁵ She contends that regardless of how the right recognized in *Lawrence* is labeled, the Court considered it to be equivalent to other fundamental rights and thus accorded it the same level of protection as those rights.⁷⁶ In contrast, Randy Barnett argues that there is "not even the pretense of a 'fundamental right'" addressed in *Lawrence* that rebuts the ordinary "presumption of constitutionality" in non-fundamental rights due process cases.⁷⁷ Rather, he contends that the Court in *Lawrence* recognized a right requiring a "'presumption of liberty' that requires the government to justify its restriction on [the] liberty" right rather than the challenger having to prove the liberty interest asserted is a fundamental right.⁷⁸

The many interpretations of *Lawrence* offered by courts and commentators attest to the decision's lack of clarity as to the right at issue in the case. A dozen years after *Lawrence* was decided, *Obergefell* clarifies that the issue in *Lawrence* was a fundamental right. In response to the states' argument that the Court should proceed cautiously and let the democratic process decide the issue of marriage equality, the Court explained "[o]f course the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."⁷⁹ It noted that "[t]his [was] not the first time the Court ha[d] been asked to adopt a cautious approach to recognizing and protecting fundamental rights."⁸⁰ It had also been asked to proceed cautiously in *Bowers* and by doing so "upheld state action that denied gays and lesbians a *fundamental right* and caused them pain and humiliation."⁸¹ That, it continued, is why *Bowers*, as the Court recognized in *Lawrence*, was

⁷³ Tribe, *supra* note 48, at 1916–17.

⁷⁴ *Id.* (noting that "[t]he practice of announcing such a standard . . . is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism, and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis").

⁷⁵ Hunter, *supra* note 45, at 1114, 1117 (relying on cases involving privacy as well as the "freedom of thought, belief [and] expression" (quoting *Lawrence v. Texas*, 539 U.S. 558, 560 (2003))).

⁷⁶ Hunter, *supra* note 45, at 1114, 1117.

⁷⁷ Barnett, *supra* note 40, at 35.

⁷⁸ *Id.* at 36.

⁷⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

⁸⁰ *Id.* at 2606.

⁸¹ *Id.* (emphasis added).

wrong the day it was decided.⁸² Whether courts and scholars will now agree that the right to same-sex sexual intimacy, which was denied to gays and lesbians in *Bowers*, is a fundamental right remains to be seen.⁸³ However, although *Lawrence* was vague, the Court did not mince words in *Obergefell*. It quite clearly discussed *Bowers* and *Lawrence* as involving fundamental rights.

Some authority that rejected the fundamental rights analysis after *Lawrence* did so because of the potential implications for other due process claims that would follow. The concern was that it would “‘break new ground’ in the field of fundamental rights.”⁸⁴ That of course is what *Obergefell* has done, which should undermine concerns about the breadth of *Lawrence*. The Court in *Obergefell* explicitly broke with the fundamental rights analysis set forth in prior cases.⁸⁵ In any event, the point here is not to discuss fully the implications of *Lawrence* or *Obergefell* as a matter of due process. It is to discuss descriptively what the Court said in *Obergefell* about the fundamental right recognized in *Lawrence* and, as set forth later in this article, the potential implications for Title VII.

B. The “Unchangeableness” of “Gayness”

The second aspect of *Obergefell* relevant for present purposes is the Court’s recognition that leading mental health and medical organizations consider sexual orientation to be immutable, a characterization that none of the four dissenting opinions challenged. Justice Kennedy began the opinion by acknowledging the centrality of “immutability” to the plaintiffs’ argument. He first explains the “transcendent importance of marriage” and that it “has existed for millennia and across civilizations.”⁸⁶ He acknowledged that these historical references, as well as the Court’s references in its various decisions discussing marriage,

⁸² *Id.*; *Lawrence v. Texas*, 539 U.S. 558, 578 (“*Bowers* was not correct when it was decided, and it is not correct today . . . and now is overruled.”).

⁸³ *See Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015) (refusing to read *Obergefell* as requiring heightened scrutiny to a sexual orientation claim arising under the Equal Protection Clause, declining to hold that “homosexuals enjoy special protections under the Equal Protection Clause,” and noting that the plaintiffs failed to “explore the relevant cases” concerning the level of scrutiny to apply in the context of sexual orientation).

⁸⁴ *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

⁸⁵ *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (acknowledging that prior fundamental rights cases had “insist[ed] that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices[.]” but rejecting that approach in the context of certain fundamental rights, including the right to marry); *see also id.* at 2618 (Roberts, C.J., dissenting) (explaining that the majority rejects the Courts usual approach to a fundamental rights inquiry, which focuses on whether the right is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997))).

⁸⁶ *See id.*, at 2593–94 (majority opinion).

contemplated the institution in its traditional form—a union between a man and woman.⁸⁷ The traditional understanding of marriage is where respondents wanted to begin and end the issue of marriage equality. According to them, there is no such thing as a marriage between same sex persons.⁸⁸ They argued that to rob the institution of its gendered differentiation would demean it.⁸⁹

Justice Kennedy rejected that characterization, explaining that petitioners' goal is not to demean marriage but to honor and support the institution and in the process also gain access to its privileges and responsibilities.⁹⁰ This they cannot do unless they are able to marry individuals of the same sex. Otherwise their "immutable nature" would place the institution beyond their reach.⁹¹

He returned to the nature of homosexuality after discussing the history of unequal treatment of gays and lesbians in the United States and the Western world for much of the twentieth century.⁹² During that period, until 1973, the American Psychiatric Association considered homosexuality to be a mental illness.⁹³ He explained that "[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable."⁹⁴

The significance of the Court's reference to sexual orientation and particularly homosexuality as immutable and natural has broad implications. The immutability issue is often raised both in the context of Equal Protection jurisprudence,⁹⁵ and as discussed later, with regard to judicial interpretation of

⁸⁷ *Id.* at 2594.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Obergefell*, 135 S. Ct. at 2594 (explaining petitioners' argument that their "immutable nature dictates that same-sex marriage is their only real path to this profound commitment").

⁹² *Id.* at 2596.

⁹³ *Id.*

⁹⁴ *Id.* The Court's use of the term "immutable" is notable. The amicus brief by medical and mental health organizations to which it cites does not use that word. Rather, "rely[ing] [among other things] on the best empirical research available," amici contended that for most gay men and lesbians sexual orientation is not a "voluntary choice." See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713. Moreover, they stated that sexual orientation change efforts "have not been shown to be effective or safe." See *id.* at 7-9. See also Judith Glassgold et al., *Appropriate Therapeutic Responses to Sexual Orientation*, AM. PSYCHOLOGICAL ASS'N TASK FORCE, 1, 3 (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>. Based on these findings, the Court characterized sexual orientation as being immutable.

⁹⁵ See, e.g., *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013); *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring); see also Wolff, *supra* note 11, at 31 (explaining that *Obergefell* may prompt courts to apply heightened scrutiny in Equal Protection Clause challenges to laws that burden gays and

Title VII as well.⁹⁶ Beyond that, the Court's discussion may undermine an argument about sexual orientation that has been a staple for opponents of LGBT equality. Until recently homosexuality was not only classified as a mental illness by many in the scientific community but was also considered to be a choice, a condition that could and should be changed.⁹⁷ Some members of society continue to hold this view; although, as *Obergefell* notes, leading mental health and medical professionals no longer do so.⁹⁸

Opponents of LGBT equality have long relied on arguments that homosexuality is both morally wrong and mutable as reasons not to legitimize it by granting gay and lesbian persons "special rights," which essentially has meant any civil rights at all.⁹⁹ Anti-gay organizations and individuals have often cited morality and mutability as bases for opposing legislation aimed at eradicating the discrimination that gay and lesbian persons have long suffered in such areas as employment, education, and public accommodations. Indeed, in tracing the history of attempts by Congress to pass a civil rights bill protecting gay and lesbian persons, Chai Feldblum has explained that the "key objection . . .

lesbians because "the components of a core equal protection holding are scattered throughout the majority opinion[and t]he Court describes the identity of LGBT people as 'immutable'"). Courts apply heightened scrutiny to laws that burden suspect or quasi-suspect classes. To determine whether government action affecting a particular group warrants such scrutiny, courts consider a number of factors, including whether the group possesses an "obvious, immutable, or distinguishing" trait defining it as a discrete group. *Windsor*, 699 F.3d at 180–81. The Court has never held that immutability is necessary to determine whether a particular class receives heightened scrutiny. *See id.* at 181. *See also* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1510 (2011) (explaining that the Court has never held that immutability is an indispensable factor in the heightened scrutiny analysis).

⁹⁶ *See infra* Part IV.B.

⁹⁷ *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 39–40 (2007) [hereinafter COVERING].

⁹⁸ *Obergefell*, 135 S. Ct. at 2596; *see also* Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713, at 7–8 (explaining that the first Diagnostic and Statistical Manual of Mental Disorders classified homosexuality as a mental disorder, but that "mainstream mental health professionals and researchers" have not held that view for decades).

⁹⁹ *See* Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 214 (John D'Emilio et al. eds., 2000) (explaining that opposition to gay civil rights bill has not changed much since the 1970s: "passage of such [laws] would result in the government's legislating a moral view of homosexuality at odds with the majority's"); *see also* Peter Sprigg & Travis Weber, *Issue Analysis: Obama Executive Order on "Sexual Orientation" and "Gender Identity"*, FAMILY RESEARCH COUNCIL 4 (Sept. 2014), <https://www.frc.org/EF/EF14127.pdf> (arguing against LGBT protective legislation, in part, because these traits are not "inborn, involuntary, immutable, innocuous, and/or in the Constitution of the United States"); Brief for the Respondents at 47–48, *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014) (No. 14-571), 2015 WL 1384104 (arguing against using heightened scrutiny to challenge marriage bans under the Equal Protection Clause because sexual orientation is not "an obvious, immutable, or distinguishing characteristic" and is unlike "race, sex, ethnicity, [or] illegitimacy").

. has always been that it endorses immorality”¹⁰⁰ This objection, she notes, has also been accompanied by the claim that homosexuals are not “bona fide minorities” because unlike race, sex, and national origin, homosexual behavior can be changed if the individual wants to change.¹⁰¹ Some may find that argument to be reasonable, particularly if the mutability of sexual orientation status is taken as fact. As one commentator has noted, it is certainly fair to ask “why not allow discrimination if gayness is essentially changeable and wrong?”¹⁰² The morality argument aside, *Obergefell* may undermine the mutability argument. At the very least, it will be difficult for lower courts considering whether sexual orientation is an immutable trait (for Equal Protection purposes or otherwise) to ignore *Obergefell*’s discussion of the modern understanding of the issue by leading professional organizations.

In sum, *Obergefell* not only requires marriage equality nationwide but also (1) clarifies that adult, same-sex, consensual sexual conduct is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment and (2) recognizes that leading mental health and medical organizations consider sexual orientation to be both immutable and a natural expression of sexuality. Before turning to how *Obergefell*’s fundamental rights and immutability discussions have the potential to extend Title VII to cover gay and lesbian employees, this article first examines in the next section how courts have treated the issue of sexual orientation discrimination under that statute.

III. TITLE VII AND SEXUAL ORIENTATION

Title VII’s principal aim was to address rampant discrimination against African Americans.¹⁰³ Aside from race and color, the statute also protects individuals on the basis of sex, religion, and national origin. Sexual orientation is not explicitly included among the traits the statute protects.¹⁰⁴ For decades, members of Congress have repeatedly tried but failed to enact legislation that would protect employees against sexual orientation discrimination.¹⁰⁵ With

¹⁰⁰ Feldblum, *supra* note 99, at 186.

¹⁰¹ *Id.*

¹⁰² WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY 104 (2014).

¹⁰³ Joseph Kattan, *Employee Opposition to Discriminatory Employment Practices: Protection From Reprisal Under Title VII*, 19 WM. & MARY L. REV. 217, 222 (1977) (“[The] new recognition of the moral imperative of enhancing black Americans’ social and economic standing, together with the fear of growing racial tension and violence, motivated Congress to enact the comprehensive Civil Rights Act of 1964.”); *see also* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 229 (1979) (Rehnquist, J., dissenting) (“To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII.”).

¹⁰⁴ *See* 42 U.S.C. § 2000e-2(b) (2012).

¹⁰⁵ William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. Cal. L. Rev.

explicit federal employment protection elusive, gay individuals have argued that discrimination because of sexual orientation is proscribed by the statute's prohibition of sex discrimination. The argument has met with mixed results among the courts.

A. The Meaning of "Sex"

Early courts universally rejected the argument that by including the word sex in the statute, Congress intended to protect individuals from discrimination on the basis of sexual orientation. They reasoned that Congress intended for the term to carry its traditional meaning; that is, "sex" refers to biological sex and nothing more.¹⁰⁶ However, it is not at all clear what Congress intended by including sex in Title VII.

Legislative history on the matter is sparse.¹⁰⁷ The meaning and scope of "sex" were never discussed in legislative committee hearings.¹⁰⁸ It also was not one of the traits originally protected by the proposed legislation. Rather, an amendment to add it was raised during debate in the House by Representative Howard Smith, a Virginia congressman, who opposed Title VII.¹⁰⁹ It is commonly understood that his proposal, as he put it, to "protect the most

487, 495–99 (2011) (tracing the history of the legislation attempting to address employment discrimination, in particular the Civil Rights Act of 1964, the Equality Act of 1974, and the Employment Non-Discrimination Act ("ENDA")).

¹⁰⁶ See generally *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enter.*, 256 F.3d 864 (9th Cir. 2001); see also *Mowery v. Esambia Cty. Util. Auth.*, No. 3:04CV382-RS-EMT, 2006 WL 327965, at *8 (N.D. Fla. Feb. 10, 2006) (defining sex to mean "one's biological makeup as a man or a woman"); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (explaining "that Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females").

¹⁰⁷ See *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (describing legislative history regarding the "sex" provision to be meager and offering little guidance as to Congressional intent).

¹⁰⁸ See 110 CONG. REC. 2582 (1964) (testimony of Representative Green that there was no testimony regarding the amendment before the Committee on the Judiciary or the Committee on Education and Labor and that no organization petitioned either committee to add sex to the measure); see also *Miller v. Bank of Am.*, 418 F. Supp. 233, 234–35 (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979).

¹⁰⁹ WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 568 (3d ed. 2011); 110 Cong. Rec. 2577 (1964) (explaining that "it is an indisputable fact that all throughout industry women are discriminated against in that, just generally speaking, they do not get as high compensation for their work as do the majority sex"). See also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–15 (1995) (noting that although legislative history is sparse on the issue, sex was added to Title VII against a "rich congressional legislative history concerning the equal rights of women" including failed attempts to pass an Equal Rights Amendment to the U.S. Constitution); *Trait Discrimination*, *supra* note 29, at 168–69 (describing how "'sex' was introduced into the Civil Rights Act one day before its passage," possibly as a "last ditch attempt to kill the Act").

important sex” was a last-minute attempt to scuttle the bill.¹¹⁰ Unsurprisingly, during the brief floor debate regarding the amendment, neither Representative Smith nor anyone else who spoke in support of or against it mentioned homosexuality, sexual orientation, or gay people.¹¹¹ Nothing in the legislative history suggests Congress thought about sexual orientation at all.¹¹² Still, it is unlikely that legislators proposing the amendment intended for it to protect homosexuals, as a class, in the same way that Title VII was intended to protect, say, African-Americans. The social and political climate for gays and lesbians in the country at the time undermines the argument.¹¹³

None of this, however, means that discrimination because of sex cannot arise when it is motivated by an employee’s sexual orientation, whether that orientation is heterosexual, homosexual, bisexual, or asexual.¹¹⁴ While most courts that have addressed the issue have held that Title VII does not protect individuals on the basis of sexual orientation, numerous scholars, a handful of courts, and more recently the EEOC have reached a contrary conclusion.

¹¹⁰ *Trait Discrimination*, *supra* note 29, at 168. In support of that position, opponents of the amendment voiced concern that it was raised as an attempt to defeat the bill and that sex should be included in stand-alone legislation. See 110 CONG. REC. at 2577, 2578 (1964) (opposing the amendment and calling it “ill-timed” and “illogical” and expressing surprise that Representative Smith had raised it); see *id.* at 2581–82 (showing opposition from Representative George (a Congresswoman from Oregon) to the amendment; Representative George argued that adding sex to the bill “may very well—be used to help destroy . . . the bill by some of the very people who today support it”); see also *id.* at 2582 (recounting the testimony of Representative Roosevelt who contended that the House on Education and Labor had agreed that it would later consider a bill to address sex). But see *Legal Protections*, *supra* note 23, at 1339 (arguing that while Smith was no fan of the Civil Rights Act, he had been a supporter of initiatives to advance women’s rights).

¹¹¹ See 110 CONG. REC. at 2577–81 (detailing that after Representative Smith raised the issue, several others spoke in favor of the amendment, including several Congresswomen). Particularly relevant is the testimony of Representative Frances P. Bolton of Ohio, Representative Martha Griffiths of Michigan, and Representative Green of Oregon. Representative Griffiths was concerned that unless the amendment regarding “sex” passed, every group would be protected by Title VII except for white women. See *id.* at 2578–79; see also *Legal Protections*, *supra* note 23, at 2580 (“[A] vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.”). Representative Green of Oregon was the only woman who spoke against amending Title VII to add “sex.” See *id.* at 2581 (acknowledging wide-spread discrimination on the basis of sex but arguing that it pales in comparison to the discrimination against African Americans). Representative Green was also concerned that the amendment might be later used by some of its supporters to defeat passage of the bill. See *id.*

¹¹² Capers, *supra* note 23, at 1168 (“Nothing in the legislative history suggests that Congress considered whether the word ‘sex’ encompassed sexuality or sexual practices.”).

¹¹³ See *Oiler v. Winn-Dixie Louisiana, Inc.*, No. CIV. A. 00–3114, 2002 WL 31098541, at *4 (E.D. La. 2002 Sept. 16, 2002) (When Title VII was enacted, “. . . the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted.”).

¹¹⁴ See *infra* Part III.B(2)(a).

1. Sex: A Matter of Biology

Whether discrimination because of one's sexual orientation is actionable under Title VII has been a matter of fierce debate in legal scholarship and among the judiciary.¹¹⁵ As explained, early courts adopted a biological reductionist argument to reject claims raised by gay and lesbian as well as transgender employees.¹¹⁶ One early case, *DeSantis v. Pacific Telegraph and Telephone Co.*,¹¹⁷ sets forth this position. There, several gay and lesbian plaintiffs filed separate actions alleging they had been discriminated against "because of their homosexuality."¹¹⁸ The district court dismissed each complaint and in a consolidated appeal the Ninth Circuit affirmed. All of the plaintiffs alleged being fired, harassed or otherwise discriminated against because of their "homosexuality."¹¹⁹ In particular, one plaintiff alleged that he had been fired for wearing a small gold hoop earring, and thus the employer's discrimination was based on his effeminacy.¹²⁰ Two lesbian plaintiffs alleged they were harassed and then fired because of their same-sex relationship.¹²¹ The male plaintiffs further asserted a disparate impact claim,¹²² alleging that a higher incidence of homosexuality exists among males than among females, and thus the employer's policy of discriminating on the basis of sexual orientation disproportionately affected men in violation of Title VII.¹²³

The court found that none of the allegations showed discrimination because of sex but pertained more to discrimination based on "sexual preference" or "homosexuality." According to the court, the proscription against "sex discrimination" was meant "to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."¹²⁴ The court also noted that Congress on several occasions had attempted but failed to enact a statute to protect employees on the basis of "sexual preference," failures that the court found probative of Congress's view

¹¹⁵ See *infra* Part III.B.(1)–(2).

¹¹⁶ See *Oiler*, 2002 WL 31098541, at *3–4 n.51–52 (collecting cases as to transgender plaintiffs).

¹¹⁷ *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

¹¹⁸ *Id.* at 328.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 328, 331.

¹²¹ *Id.* at 329.

¹²² See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009) (describing how Title VII allows a "disparate treatment" claim, where the employer is alleged to have engaged in intentional discrimination, and/or a disparate impact claim, where an employer enacts a "facially neutral practice[] that, in fact, [is] . . . 'discriminatory in operation'" by more harshly impacting a protected group).

¹²³ See *DeSantis*, 608 F.2d at 329.

¹²⁴ *Id.*

that Title VII did not protect employees on that basis.¹²⁵ According to the court, under a biology-based understanding of sex, discrimination against a male employee because of his effeminacy is not discrimination against him because of his sex. Likewise, an employer does not engage in unlawful discrimination when it treats male employees who prefer male sexual partners differently than it treats female employees who prefer male sexual partners. It determined that such an allegation, as well as the allegation concerning disparate impact, is no more than an attempt to “‘bootstrap’ Title VII protection for homosexuals.”¹²⁶

Notwithstanding *DeSantis*, it seems obvious that when an employer treats a male employee who sleeps with men differently from a female employee who does the same, the employer’s action violates Title VII as a matter of formal equality.¹²⁷ Moreover, relying on the sex stereotyping theory that was set forth in the Court’s seminal decision *Price Waterhouse v. Hopkins*,¹²⁸ some courts have begun to acknowledge that sex under Title VII does not refer exclusively to biology. That acknowledgment has resulted in some protection from discrimination for LGBT individuals under Title VII.

2. Sex Discrimination as Sex Stereotyping

Price Waterhouse had nothing to do with sexual orientation. Ann Hopkins was a married heterosexual woman who applied for partnership, and her application was placed on hold (and effectively denied) at least in part because of stereotypical notions of how she (and other women) should behave.¹²⁹ In her reviews by other partners, she was described as “macho” and told to take “a course at charm school.”¹³⁰ One partner said that at one time she had been “a tough-talking somewhat masculine hard-nosed [manager]” but that she had matured into a more appealing lady-like candidate.¹³¹ The partner responsible for delivering the blow about her promotion told her that to improve her chances she should walk, talk, and dress more femininely, “wear make-up, have her hair styled and wear jewelry.”¹³² The Court held that such statements showed that some of the negative reactions to Ms. Hopkins were because she was a woman.¹³³ Writing for a plurality of the Court, Justice Brennan determined that

¹²⁵ *Id.*

¹²⁶ *See id.* at 330–31.

¹²⁷ *See generally* Goldberg, *supra* note 34 and accompanying discussion.

¹²⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹²⁹ *See id.* at 233–34.

¹³⁰ *See id.* at 235.

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See id.* at 256–58.

these comments demonstrated that sex stereotyping was at work.¹³⁴ According to the plurality opinion, when an employer acts on the basis of a belief that a woman cannot be aggressive or that she must not be, the employer has acted because of sex.¹³⁵ Objecting to aggressiveness in women when their position requires such a trait places women in an untenable Catch-22—out of a job if they behave aggressively and out of a job if they do not.¹³⁶ That was undoubtedly true for Ms. Hopkins, who had to be aggressive to be successful but was then punished for acting that way.

Justice Brennan did not limit the prohibition on sex stereotyping to employees like Hopkins who find themselves in Catch-22 situations.¹³⁷ According to Justice Brennan, gender must be irrelevant to employment decisions to comply with Title VII's nondiscrimination mandate.¹³⁸ He suggested that Title VII is violated whenever an employee is forced to conform to gender stereotypes by stating that,

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹³⁹

Price Waterhouse makes clear that sex and gender are treated the same under Title VII.¹⁴⁰ Sex may refer to biology; gender, however, has been described as “socially constructed roles, behaviors and activities” that society

¹³⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

¹³⁵ See *id.*

¹³⁶ *Id.*; See Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. Pa. L. Rev. 757, 762–63 (2013) [hereinafter *Soul of a Woman*] (arguing that the Court's statements regarding the double bind in which Ms. Hopkins was placed might have been read to mean that the Court was limiting the reach of *Price Waterhouse* to those situations where women, in particular, are treated differently than men in ways that limit their opportunities. However, the Court's holding “extended well beyond double-binds.” The Court's opinion makes clear that Title VII proscribes all sex stereotyping.).

¹³⁷ See *Soul of a Woman*, *supra* note 136, at 763.

¹³⁸ *Price Waterhouse*, 490 U.S. at 251 (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)).

¹³⁹ *Id.* at 251.

¹⁴⁰ See *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (citing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977)); *Baldwin v. Foxx*, EEOC Decision No. 012013380, 2015 WL 4397641, at *4 n.4 (July 16, 2015) (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)); Franke, *supra* note 109, at 95; *Soul of a Woman*, *supra* note 136, at 771 (“Title VII . . . prohibits discrimination on the basis of sex and gender.”).

considers appropriate for one's sex.¹⁴¹ Punishing Ms. Hopkins because of her aggressiveness or for being perceived as macho evidenced that Price Waterhouse believed that she and other women should not exhibit those traits, which society has deemed appropriate for boys or men but not for girls or women.

After *Price Waterhouse*, every federal circuit considering the matter has recognized that discrimination based on one's failure to conform to gender norms may constitute sex discrimination under Title VII.¹⁴² Failing to conform to gender norms with regard to whom one should be attracted, marry, or have sex with would seem to fit comfortably within the scope of *Price Waterhouse*.¹⁴³ If an employer discriminates against a woman because she is not sexually attracted to men, although "real" women should be, then the employer has acted on the basis of a sex stereotype. Just as Price Waterhouse unlawfully discriminated against Ann Hopkins because she was too macho and acted too aggressively (behavior it rewarded men for exhibiting), it also would unlawfully discriminate against her for being sexually intimate with or marrying another woman—which, like aggressiveness, is associated with behavior reserved for men.

Numerous scholars have recognized that one of the prime motivations for discrimination against gays and lesbians is discomfort with the manner in which homosexuality departs from traditional gender roles: in short, real men and real

¹⁴¹ See Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 *Hastings L.J.* 77, 87 (2014) (defining the terms "sex" and "gender"); See generally *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression: What is the Difference Between Sex and Gender?*, AM. PSYCHOLOGICAL ASS'N, www.apa.org/topics/lgbt/transgender.aspx (last visited Oct. 10, 2016) ("Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes" whereas "[g]ender refers to the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for boys and men or girls and women.").

¹⁴² See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (*en banc*) (explaining that discrimination because of an employee's failure to conform to gender norms may be evidence of actionable "sex discrimination" under Title VII, a position that has been adopted by every federal circuit court of appeals to have considered the issue); see also Friedman, *supra* note 23, at 219 (noting that "where a plaintiff alleges discrimination associated with his or her unconventional behavior, attire, or other form of presentation of self, the courts usually . . . reject defense motions to dismiss. . .").

¹⁴³ See Friedman, *supra* note 23, at 205. See also Koppelman, *supra* note 35, at 234 ("It should be clear from ordinary experience that the stigmatization of the homosexual has something to do with the homosexual's supposed deviance from traditional sex roles."); Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming And Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 490–91 (2004) (suggesting that "sexual orientation-based harassment" stemming from nonconformity with behaviors commonly expected of a "real man" or "real woman" constitutes the "ultimate gender stereotype").

women should not be attracted to a member of the same sex.¹⁴⁴ As Joel Friedman explains:

Disapprobation of an individual's homosexuality or transgender identity is nothing more or less than condemnation of that person's failure or refusal to adhere to traditional expectations of how a "real" man or woman should live his or her life and/or present him or herself to the outside world. Whether it is based on how they dress, how they carry themselves, how they groom themselves, or with whom they choose to engage in sexual conduct, these decisions are, at their core, based on a prejudice against individuals' nonconformity to those societally generated norms of behavior imposed on members of each of the two biological sexes.¹⁴⁵

Despite the ample scholarship examining the connection between sexual orientation and sex discrimination, courts are divided on this issue. I briefly explain this split below.

B. Sexual Orientation and Sex

As explained below, most courts have rejected gender stereotyping claims where the stereotype at issue is or involves sexual orientation. Other courts and the EEOC have allowed such claims, and in some instances, have also determined that sexual orientation discrimination is *per se* discrimination

¹⁴⁴ See Soucek, *supra* note 23, at 726 ("Following *Price Waterhouse* to its logical conclusion would appear to require that sexual orientation be brought, along with the rest of the spectrum of gender stereotypes, under the protective umbrella of Title VII."); Kramer, *supra* note 143, at 490 ("The primary thrust of . . . discrimination [against gays and lesbians], deriv[es] from the idea that homosexuality departs from traditional gender roles and that "real" men and women should not be attracted to a member of the same sex."); Capers, *supra* note 23, at 1059 ("Discrimination against lesbians and gays simultaneously flows from and perpetuates traditional notions of appropriate sex roles."); MICHELANGELO SIGNORILE, IT'S NOT OVER: GETTING BEYOND TOLERANCE, DEFEATING HOMOPHOBIA, AND WINNING TRUE EQUALITY 48–51 (2015) (discussing studies that indicate continued implicit bias against gay people as well as studies that indicate that the "triggers at the root of homophobia" may lie in biases toward gender nonconforming individuals).

Some suggest the discrimination may stem from sincerely held religious beliefs about religious teachings about homosexuality. See, e.g., Ian Ayers & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preference Could Mean For Sexuality Claims Under Price Waterhouse*, 123 Yale L.J. 714, 730 (2013). However, even where this is the case, such beliefs are most likely grounded in biblical or religious doctrine concerning the proper roles for men and women in sexual relations. See, e.g., DISHONORABLE PASSIONS, *supra* note 47, at 1–2 (explaining that the primary textual basis for criminalizing sodomy in the American colonies was the biblical passage forbidding men to lie with other men as they would with women).

¹⁴⁵ Friedman, *supra* note 23, at 226; *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014) (explaining that discrimination against LGBT persons "reflects, in large part, disapproval of their nonconformity with gender-based expectations").

because of sex. This section demonstrates that the law in this area is, to say the least, muddy.

1. Gay Exceptionalism

Every court of appeals to decide the matter has held that Title VII does not protect employees on the basis of sexual orientation.¹⁴⁶ Many courts distinguish sex stereotyping claims based on sexual orientation from other forms of gender non-conforming behavior, such as workplace appearance, behavior, and mannerisms.¹⁴⁷ These courts proclaim that a sex stereotyping claim may not be based on a failure to conform to gender norms regarding one's actual or perceived sexual practices.¹⁴⁸ The plaintiff in that instance is a "bootstrap[per],"

¹⁴⁶ See, e.g., *Eltsity v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007) (holding that sexual orientation discrimination based on "a person's status as a transsexual is not discrimination because of sex under Title VII."); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (noting that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (explaining that "[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation"); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (Title VII does not protect against sexual orientation discrimination); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (Title VII does not proscribe sexual orientation harassment). See also *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1065 (7th Cir. 2003) (noting that the court's inquiry does "not focus on the sexuality of the plaintiff in determining whether a Title VII violation has occurred"); *Soucek*, *supra* note 23, at 722 (explaining that "courts have almost universally refused to derive protection for sexual orientation from Title VII's "sex" prong"). In *Hively v. Ivy Tech Cmty. Coll., S. Bend*, consistent with other courts of appeals, a panel of the Seventh Circuit held that Title VII does not protect individuals on the basis of sexual orientation. No. 15-1720, 2016 WL 4039703 at *2 (7th Cir. 2016). On October 11, 2016, the opinion was vacated and the court granted a petition to rehear the case *en banc*.

¹⁴⁷ See *Pagan v. Gonzalez*, 430 F. App'x. 170, 172 (3d Cir. 2011) (determining that a claim of discrimination based on sexual orientation was not cognizable under Title VII, and "offensive comments relating to [the plaintiff's] sexual orientation" do not establish a gender stereotyping claim absent "any evidence to show that the discrimination was based on [the plaintiff's] acting in a masculine manner"); *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 291 (3d Cir. 2009) (holding that a genuine issue of material fact existed concerning whether the plaintiff's harassment stemmed from his sexual orientation or his effeminacy and only the latter is actionable under Title VII); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–64 (6th Cir. 2006) (regarding sex stereotypes, Title VII does not protect against discrimination because of sexual orientation but only gender nonconforming behavior that is readily demonstrable in the workplace, such as appearance and behavior); *Silas v. Hous. Auth. of New Orleans*, No. CA 15-3296, 2016 WL 164916, at *6 n.13 (E.D. La. Jan. 13, 2016) (determining that the plaintiff did not state a stereotyping claim by alleging that "he is bisexual and his sexual practices did not conform to the gender stereotypes" particularly when the plaintiff's complaint was "silent about his workplace appearance or behavior or perceived appearance or behavior"); *Burrows v. Coll. of Cent. Fla.*, No. 5:14-CV-197-OC-30PRL, 2015 WL 4250427, at *9 (M.D. Fla. July 13, 2015) (characterizing the plaintiff's claim as a "repackaged claim for discrimination based on sexual orientation," which is not actionable under Title VII; gender stereotyping claim must relate to traits demonstrable in the workplace, such as behaviors, mannerisms, and appearances).

¹⁴⁸ See *Soucek*, *supra* note 23, at 726; *Kramer*, *supra* note 143, at 410; *Capers*, *supra* note 23, at 1160; *SIGNORILE*, *supra* note 144, at 48–51; see also *Friedman*, *supra* note 23, at 218 (noting that

attempting to amend Title VII to add sexual orientation as a protected trait when Congress has not seen fit to do so.¹⁴⁹

Courts have not exactly turned a blind eye to the connection between sexual orientation and sex stereotyping. Rather, they engage in a type of gay exceptionalism when addressing the issue. The Second Circuit, for instance, has explained that “[w]hen utilized by an avowedly homosexual plaintiff . . . gender stereotyping claims can easily present problems for an adjudicator . . . for the simple reason that ‘[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’”¹⁵⁰ To root out a sexual orientation claim masquerading as sex stereotyping, courts have held that the sex stereotyping plaintiff must allege the discrimination was based on specific gender-nonconforming behavior that does not involve sexual orientation.¹⁵¹ For instance, the male who is harassed because of his observed effeminacy (or his female counterpart because of her masculinity) would arguably, at least in some courts, be protected under a *Price Waterhouse* theory.¹⁵² This approach to sex stereotyping claims has offered protection to some gay and lesbian employees who outwardly behave in gender nonconforming ways. Keith Cunningham-Parmeter has explained, however, that these cases have hardly been slam dunks even for that group. Even where a plaintiff carefully pleads harassment because of gender stereotypes associated with behavior or mannerisms and sets forth proof to support the claim, courts

“nearly all courts . . . insist that hostility towards an individual’s sexual orientation . . . is a self-standing phenomenon, unrelated to and independent of the perpetuation of gender norms”).

¹⁴⁹ See *Dawson*, 398 F.3d at 218; see also *Vickers*, 453 F.3d at 763–64 (limiting *Price Waterhouse* sex stereotyping claims to gender non-conforming behavior that is readily demonstrable in the workplace, such as appearance and behavior, and excluding claims based on off-work, gender non-conforming behavior as not actionable); *Burrows*, 2015 WL 4250427 at *10 (adopting the Sixth Circuit’s “readily demonstrable at work” standard); *E.E.O.C. v. Family Dollar Stores, Inc.*, No. CIV.A. 1:06CV2569TWT; 2008 WL 4098723, at *14–18 (N.D. Ga. Aug. 28, 2008) (granting employer’s summary judgment in plaintiff’s sexual harassment claim where harassing conduct “was based primarily on [the plaintiff’s] perceived sexual orientation, rather than his gender or gender stereotypes”); *Lynch v. Baylor Univ. Med. Ctr.*, No. CIV.A. 3:05-CV-0931-P, 2006 WL 2456493, at *5 (N.D. Tex. Aug. 23, 2006) (noting “when an admitted homosexual brings suit under a gender stereotype theory, courts scrutinize such claim to ensure that it is not ‘used to bootstrap protection for sexual orientation into Title VII’”).

¹⁵⁰ *Dawson*, 398 F.3d at 218; see also *Hamm*, 332 F.3d at 1065 n.5 (“We recognize that distinguishing between failure to adhere to sex stereotypes . . . and discrimination based on sexual orientation . . . may be difficult [because] perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes.”)

¹⁵¹ See Soucek, *supra* note 23, at 726; Friedman, *supra* note 23, at 226; Kramer, *supra* note 143, at 490; Capers, *supra* note 23, at 1160; SIGNORILE, *supra* note 144, at 48–51; see also Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1127 (2015) (“To this day some courts still fear that ‘avowed homosexuals’ dishonestly attempt to squeeze sexual orientation protections out of Title VII . . . caus[ing] them to parse through the judicial record to distinguish between discrimination based on homosexuality . . . and workplace mistreatment based on effeminacy.”).

¹⁵² See *Prowel*, 579 F.3d at 290–91.

may still reject a claim when the plaintiff's sexual orientation becomes an issue in the case. In that instance, a court may find that the crux of the discrimination was sexual orientation dressed up as a sex-based claim.¹⁵³ For instance, in *Kalich v. AT&T Mobility, LLC*,¹⁵⁴ the court acknowledged that the plaintiff's "complaint and the discovery lay out a pattern of conduct by [his supervisor] that is designed to ridicule the plaintiff's effeminate characteristics"¹⁵⁵ However, the court determined that plaintiff's stereotyping claim was not viable, in part, because the facts also demonstrated that the supervisor attributed the plaintiff's effeminacy to his perceived homosexuality.¹⁵⁶ Thus, the court analyzed the claim as one of sexual orientation and not sex stereotyping.¹⁵⁷

In contrast to the cabined, unpredictable approach to the issue described above, an increasing number of courts and the EEOC have recognized that sexual orientation discrimination may also constitute sex discrimination prohibited by Title VII.

2. Sexual Orientation Discrimination Is Sex Discrimination

Despite the weight of authority to the contrary, several courts have held that discrimination on the basis of sexual orientation is actionable as sex discrimination under Title VII. The EEOC reached the same conclusion in *Baldwin v. Foxx*,¹⁵⁸ a decision on which this section primarily focuses. The *Baldwin* decision relies on and discusses the analyses of many of the courts that have adopted this position.

a. *Baldwin v. Foxx: The Inextricable Link Between Sex and Sexual Orientation*

The EEOC's position on sexual orientation discrimination has changed over time. Consistent with *DeSantis* and other similar cases of that era, the EEOC once held the view that "sex" was an immutable trait with which one is born. Homosexuality, it determined was a "condition . . . relate[d] to a person's sexual

¹⁵³ See *Cunningham-Parmeter*, *supra* note 151, at 1129.

¹⁵⁴ *Kalich v. AT & T Mobility, LLC*, 748 F. Supp. 2d 712, 717 (E.D. Mich. 2010).

¹⁵⁵ *Id.* at 718.

¹⁵⁶ See *id.* at 719.

¹⁵⁷ See *id.*; see also *Kay v. Indep. Blue Cross*, 142 F. App'x 48, 50 (3d Cir. 2005) (holding that despite some evidence that the plaintiff had been the victim of gender stereotyping, the record as a whole "demonstrates that the harassment was based on perceived sexual orientation, rather than gender.").

¹⁵⁸ *Baldwin v. Foxx*, EEOC Decision No. 012013380, 2015 WL 4397641, at *10 (July 16, 2015) ("Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII.").

proclivities or practices, not to his or her gender.”¹⁵⁹ It reversed course in *Baldwin*. The EEOC considered many of the same arguments in *Baldwin* that had been raised almost four decades earlier in *DeSantis*, but it reached different conclusions as to each one of them.

David Baldwin worked as a temporary Front Line Manager in a federal Department of Transportation (“Agency”) facility in Miami. He alleged that because of his sexual orientation, he was not selected for a permanent position despite being qualified for it and despite management’s knowledge of his interest in it.¹⁶⁰ Although Baldwin’s formal Agency complaint alleged that he was discriminated against on the basis of sex, the substance of his claim was that the discrimination occurred because he was gay.¹⁶¹ In addition to his sex/sexual orientation claim, Baldwin also alleged that he was subject to retaliation for complaining about his discriminatory treatment.¹⁶²

Because Baldwin worked for the federal government, the federal sector anti-discrimination provisions of Title VII applied to his claims. Those provisions are worded a bit differently from—but in substance are analogous to—the provisions governing private sector employees.¹⁶³ The Agency investigated Baldwin’s complaint and dismissed it. It notified Baldwin that the portion of his claim involving sexual orientation was only appealable to the Agency but not to the EEOC, because it did not involve an issue that arose under Title VII.¹⁶⁴ Baldwin nevertheless appealed the Agency’s decision to the EEOC,

¹⁵⁹ See EEOC Decision No. 76-67, 1975 WL 4475, at *2 (Nov. 21, 1975); see also *Capers*, *supra* note 23, at 1169 (articulating the EEOC’s position).

¹⁶⁰ See *Baldwin*, 2015 WL 4397641, at *2.

¹⁶¹ See *id.* This section describes the personal experiences creating the basis for Baldwin’s claim. For instance, he alleged that when he had once mentioned that he and his partner had attended Mardi Gras in New Orleans, his supervisor told him “[w]e don’t need to hear about that gay stuff.” He also alleged that on numerous occasions when he would speak about his partner, his supervisor would tell him that he was being a distraction.

¹⁶² See *id.* at *1.

¹⁶³ See *id.* at *4.

¹⁶⁴ See *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal/otherprotections.cfm>. (last visited Dec. 14, 2016). This section notes that “[t]he EEOC enforces the prohibitions against employment discrimination” through enforcing several statutes, including Title VII); *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm. (last visited Dec. 14, 2016) (providing an overview of the process whereby employees may file a complaint and may appeal a negative final Agency decision of a discrimination claim to the EEOC); see also 29 C.F.R. § 1614.102(a)–(c) (2012) (detailing required agency programs; through these federal regulations, federal sector employees—including executive agency employees—may file claims of discrimination covered by statute); *Baldwin*, 2015 WL 4397641, at *2 (describing how in the FAD, the Agency informed Baldwin that he could appeal the dismissal of his retaliation claim to the EEOC, as it was covered by Title VII. However, because

which determined that it had jurisdiction to hear his appeal on the sexual orientation claim as such a claim does in fact arise under Title VII.¹⁶⁵

The EEOC acknowledged that Title VII does not mention sexual orientation, but it determined that the relevant issue was whether the Agency had “relied on [sex based] considerations” or taken gender into account when taking the challenged employment action.¹⁶⁶ According to the EEOC, “sexual orientation [discrimination] is inherently a ‘sex based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”¹⁶⁷ It continued:

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite-sex. . . . It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations.¹⁶⁸

The EEOC explained that these sex-based considerations may manifest in a number of ways when it comes to sexual orientation, and it set forth three non-exclusive ways to establish that sexual orientation discrimination is sex discrimination. First, it occurs when an employer treats an employee less favorably because of sex by—for instance, suspending a lesbian employee for displaying a picture of her wife on her desk while a male employee is able to do so without penalty.¹⁶⁹

the Agency determined that Title VII does not protect against sexual orientation discrimination, it advised Baldwin that he had to appeal the dismissal of that claim to the Agency).

¹⁶⁵ See *Baldwin*, 2015 WL 4397641, at *2–4.

¹⁶⁶ See *id.* at *4.

¹⁶⁷ *Id.* at *5.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.* at *5–6 (citing *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at *2 (W.D. Wash. Sept. 22, 2014)); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Hall*, 2014 WL 4719007, at *2 (employing a similar analysis to find that the employer discriminated against a male employee when it denied spousal benefits for his husband although female employees married to men were allowed the benefits); *Heller*, 195 F. Supp. 2d at 1223 (detailing a case where the plaintiff alleged that her supervisor had directed a litany of anti-gay comments to her and other employees, in which the court determined that a reasonable jury could have found that the employer would have acted differently had the plaintiff been a man dating a

Second, the EEOC explained that sexual orientation discrimination is sex discrimination when it occurs because of an employee's association with a member of a particular sex.¹⁷⁰ Such claims are not novel and have arisen in other contexts under Title VII. Courts have had no problem holding that unlawful discrimination includes discrimination against an individual because of the race of an individual with whom the employee associates. In *Parr v. Woodmen of the World Life Ins., Co.*, for instance, a white male applicant stated a claim under Title VII when his prospective employer refused to hire him because of his interracial marriage.¹⁷¹ A claim lies in these circumstances because *but for* the employee's race, the employer would not have treated him adversely; *his* race was a factor in the adverse employment decision.¹⁷² The EEOC determined that the same analysis should apply with regard to sex. If an employer discriminates against an employee because her spouse is female, the employer has engaged in associational discrimination if it treats similarly-situated male employees differently.¹⁷³

Finally, the EEOC recognized that sexual orientation discrimination is sex discrimination because it relies on stereotypical notions of how men and women should behave in their respective sexual roles.¹⁷⁴ Even courts that refuse to recognize sexual orientation discrimination under Title VII acknowledge that the line between sexual orientation and sex discrimination blurs, but, as explained, some courts have attempted to separate the two. For instance, some courts have required that a sex stereotyping claim be based only on outward workplace conduct. The EEOC, however, saw no statutory support for restricting sex stereotyping claims in this manner. It noted that "discrimination against people who are lesbian, gay, or bisexual . . . often involves far more than assumptions about *overt* masculine or feminine behavior."¹⁷⁵ Rather, "sexual orientation discrimination and harassment '[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.'"¹⁷⁶

woman, instead of a woman doing so). These cases demonstrate a straightforward case of sex discrimination as members of one sex have been subjected "to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

¹⁷⁰ *Baldwin*, 2015 WL 4397641, at *6.

¹⁷¹ *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889 (11th Cir. 1986).

¹⁷² *See id.* at 892; *see also* *Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008) (holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race").

¹⁷³ *See Baldwin*, 2015 WL 4397641, at *6–7.

¹⁷⁴ *See id.* at *7.

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ *Id.* at *8 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

b. Baldwin v. Foxx: Plain Language and Congressional Intent

The EEOC also responded to oft-cited reasons courts have offered to refuse recognizing sexual orientation discrimination under Title VII. These reasons include that the Congress that enacted Title VII intended for the statute to cover only traditional notions of sex and that Congress has repeatedly tried but failed to enact a statute providing explicit protection for sexual orientation—an action that arguably demonstrates that the trait is not already covered under Title VII.¹⁷⁷ The EEOC disposed of both arguments in turn.

As to the first issue, the EEOC noted that when it recognized the viability of same-sex sexual harassment claims under Title VII, the Court was guided by the statute's plain meaning and not what Congress may have intended to do in 1964.¹⁷⁸ In *Oncale v. Sundowner Offshore Services*, the Court resolved a circuit split regarding whether same-sex sexual harassment was actionable under the statute.¹⁷⁹ The plaintiff in that case, a male who worked as a roustabout with an all-male crew, alleged that his coworkers subjected him to sexual abuse.¹⁸⁰ Relying on circuit precedent, the district court dismissed his claim, and the U.S. Court of Appeals for the Fifth Circuit affirmed.¹⁸¹

Prior to *Oncale*, courts addressed the issue of same-sex sexual harassment in one of the three ways. Some, like the Fifth Circuit, which decided *Oncale*, held that same-sex sexual harassment was “never cognizable under Title VII.”¹⁸² Other courts allowed such claims only if the plaintiff could prove the harasser was homosexual and thus the harassing conduct was motivated by sexual desire.¹⁸³ Finally, other courts suggested that such claims were viable as long as the harasser's conduct was sexual in nature.¹⁸⁴ The Court did not explicitly adopt any of these approaches. Instead, the Court held generally that same-sex sexual harassment was cognizable under Title VII as long as the harassment occurred “because of . . . sex.”¹⁸⁵

Writing for a unanimous Court, Justice Scalia explained that Title VII's proscription against sex discrimination protects women and men and “evinces a congressional intent to strike at the entire spectrum of disparate treatment of

¹⁷⁷ See *id.* at *8–9.

¹⁷⁸ See *id.* at *9.

¹⁷⁹ See generally *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁸⁰ See *id.* at 77.

¹⁸¹ See *id.*

¹⁸² See *id.* at 79.

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Oncale*, 523 U.S. at 81.

men and women.”¹⁸⁶ He acknowledged that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”¹⁸⁷ However, he continued, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁸⁸ *Oncale* established that sexual orientation discrimination could also be actionable under Title VII regardless of what Congress may have envisioned in the 1960s as long as such discrimination is discrimination because of sex. Mary Anne Case has explained that *Oncale* “demonstrated willingness on the part of conservative textualists like Justice Scalia to apply the plain . . . language of Title VII—rather than seek to restrict it by reference to legislative history”¹⁸⁹

It is also worth noting that members of Congress today are fully aware that Title VII has been and may be interpreted to protect LGBT employees. Until recently, the sexual orientation measure that had failed repeatedly to pass in Congress was referred to as the Employment Non-Discrimination Act (“ENDA”).¹⁹⁰ Congress last considered ENDA in 2013, and at that time, six Senators voiced concern about the measure in a committee report.¹⁹¹ One of the several reasons for their opposition was that ENDA was unnecessary because “[numerous] States and the District of Columbia have adopted” laws proscribing employment discrimination against gay, lesbian, and transgender employees.¹⁹² They continued, “[i]t is also noted that employment protections for LGBT individuals have been granted under Title VII . . . [and] courts do have the power to extend such protections under certain circumstances.”¹⁹³ Accordingly,

¹⁸⁶ *Id.* at 78 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); see also *id.* at 79 (explaining that “[i]f our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex”).

¹⁸⁷ *Id.* at 79.

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *Legal Protections*, *supra* note 23, at 1342.

¹⁹⁰ Congress has since abandoned ENDA and in 2015 introduced the Equality Act, a more comprehensive bill to combat discrimination against LGBT individuals. See Zack Ford, *The Equality Act Could End Legal LGBT Discrimination for Good*, THINK PROGRESS (July 23, 2015), <http://thinkprogress.org/lgbt/2015/07/23/3683728/equality-act-introduction/> (describing how unlike ENDA, the Equality Act would not be a stand-alone measure but would amend existing civil rights laws to protect LGBT individuals from discrimination in a number of areas, including employment, public accommodations, housing, and equal access to credit).

¹⁹¹ See S. REPT. NO. 113-105, at 5, 24–25 (2013), <https://www.congress.gov/congressional-report/113th-congress/senate-report/105/1>.

¹⁹² See *id.* at 26.

¹⁹³ *Id.*

even some of ENDA's opponents in Congress recognize that Title VII's prohibition against sex discrimination has been used to protect gay and lesbian employees in some instances, and even more importantly, that courts have authority to interpret the statute in this manner.

As for the second reason courts have refused to recognize sexual orientation claims (Congress' repeated attempts but failure to enact a new statute), the EEOC explained that Congressional inaction in this regard lacks persuasive significance. Numerous inferences may be drawn from that inaction, the EEOC noted, including "that the existing legislation already incorporate[s] the offered change."¹⁹⁴ As explained, some legislators had argued that ENDA was unnecessary because LGBT individuals already enjoy some protection from discrimination under Title VII, which strengthens the EEOC's position.¹⁹⁵

Similarly, the EEOC also rejected the argument that recognizing sexual orientation discrimination would create a new protected class, requiring a new statute.¹⁹⁶ The EEOC pointed out that this argument was inconsistent with prior interpretations of Title VII that had addressed analogous situations.¹⁹⁷ For instance, when courts held that Title VII protects an individual of one race from discrimination because she associates with someone of another race, a new statute protecting "people in interracial relationships" was unnecessary. Rather, courts simply applied "existing Title VII principles" to these new scenarios and found the statute reached such claims.¹⁹⁸ The same result follows for the female employee who experiences an employer's ire because her wife, partner, or other associate is also female, although her similarly-situated male colleague is treated differently. No new statute protecting people in "same-sex relationships" is necessary. The discrimination is because of sex, which applying the statute as written, is covered by Title VII. Because the EEOC determined that sexual orientation discrimination was cognizable under Title VII, it remanded the case to the Agency for consideration on the merits.

C. Sex Discrimination: A Continuing Evolutionary Process

Baldwin represents an evolving understanding of sex discrimination. Many courts have not yet caught up. There is nothing new, however, about courts adopting a cabined approach to understanding the many ways in which sex

¹⁹⁴ *Baldwin v. Foss*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *9 (July 15, 2015) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

¹⁹⁵ See *Legal Protections*, *supra* note 23, at 1342; Ford, *supra* note 190; S. REPT. No. 113-105, at 5, 24–26, <https://www.congress.gov/congressional-report/113th-congress/senate-report/105/1>; see also *supra* text accompanying notes 189–92.

¹⁹⁶ See *Baldwin*, 2015 WL 4397641 at *9.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* (noting several similar examples in which the court found Title VII protection).

discrimination may manifest. Catharine MacKinnon, for instance, has explained that courts were slow to acknowledge that sexual harassment involving opposite sex persons could constitute sex discrimination because, they opined, “the acts complained of were not seen to be sufficiently tied to the workplace context.”¹⁹⁹ Some courts also blamed the harassing conduct on factors other than sex. For instance, in *Tomkins v. Public Service Electric & Gas Company*,²⁰⁰ the plaintiff alleged her supervisor had invited her to lunch where he made sexual advances toward her, physically detained her against her will, and threatened her job if she did not submit.²⁰¹ The court refused to see how the victim’s sex played a role in the way she was treated. According to the court, Title VII’s purpose was to remove barriers to opportunities for women and not to provide a federal tort remedy for a physical attack, motivated, not by the sex of the victim, but by sexual desire for her.²⁰² The court also stated that to recognize Tomkins’ claim would mean having to recognize sexual harassment in other contexts, including when claims involved individuals of the same-sex, a proposition it called “ludicrous.”²⁰³ As explained, courts were also slow to recognize the viability of same-sex sexual harassment claims until the Court corrected course in *Oncale*. Similar to the discussion here with regard to Title VII, the Court also has recognized an evolving understanding of discrimination because of sex under the Equal Protection Clause.²⁰⁴

Like sexual harassment before it, sexual orientation discrimination is merely another step in the evolving understanding of what it means to discriminate because of sex. Courts that reject this argument effectively treat sexual orientation as if it were any number of neutral factors on which employers might discriminate. Title VII’s substantive anti-discrimination

¹⁹⁹ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 59 (1979).

²⁰⁰ *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976). *Tomkins* was ultimately reversed by the Third Circuit on these grounds, but this case provides a good example of the type of analysis where the court considered contributing factors other than sex. See generally *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).

²⁰¹ See *Tomkins*, 422 F. Supp. at 555.

²⁰² See *id.* at 556; see also *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974) (“The substance of plaintiff’s complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor.”).

²⁰³ See *Tomkins*, 422 F. Supp. at 556 (“The gender lines might as easily have been reversed, or even not crossed at all.”); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (holding that Title VII protects women and men from opposite as well as same-sex sexual harassment).

²⁰⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–04, 2595 (2015) (“[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.” The Court specifically discussed how the law has evolved to reflect better the understanding that women are entitled to equal dignity under the U.S. Constitution.).

provision only forbids employers from firing, refusing to hire, or otherwise discriminating against individuals in the terms and conditions of employment on the bases of “race, color, religion, sex, or national origin.”²⁰⁵ In that regards, discriminating against an employee on other bases typically raises no Title VII issue.²⁰⁶ However, as *Baldwin* explains, sexual orientation is never neutral with regard to sex because sexual orientation discrimination encompasses sex-based classifications, assumptions, and stereotypes.

The position is supported by the APA and other leading mental health and medical organizations. The APA explained in its amicus brief filed in *Obergefell* that “[s]exual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved, relative to each other.”²⁰⁷ Thus, there is an inextricable link between one’s sex and one’s sexual orientation.²⁰⁸ Sex may be taken into account without consideration of sexual orientation, as when, for example, an employer refuses to hire women. The same is not true for sexual orientation, which necessarily takes into account the sex of the individual and individuals to whom he or she is attracted or intimate.²⁰⁹ The concept of sexual orientation is meaningless without considerations of sex.

Title VII imposes liability where sex (or another protected trait) is a motivating factor in the adverse employment action.²¹⁰ The ultimate, relevant inquiry under a Title VII disparate treatment theory is whether an employer imposes on one sex “disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”²¹¹ Because sexual orientation, as a concept, takes into account one’s sex (relative to the sex of others to whom one is attracted), discrimination because of an individual’s sexual orientation in some respect is related to and motivated by his or her sex. As *Baldwin* explains,

²⁰⁵ See 42 U.S.C. § 2000e-2(a) (2012).

²⁰⁶ The exception is where a neutral factor creates a disparate impact on a given group. See 42 U.S.C. § 2000e-2(k); *Ricci v. DeSefano*, 557 U.S. 557, 577–78 (2009) (describing how Title VII did not expressly include provisions for disparate treatment until the Civil Rights Act of 1991).

²⁰⁷ See Brief of the Am. Psychological Ass’n at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-574), 2015 WL 1004713.

²⁰⁸ See *id.*; see also Koppelman, *supra* note 35, at 239 (explaining that “[e]veryone understands ‘sexual preference’ or ‘sexual orientation’ to refer to the gender of one’s object-choice”).

²⁰⁹ See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (“Sex and sexual orientation are necessarily interrelated, as an individual’s choice of romantic or intimate partner based on sex is a large part of what defines an individual’s sexual orientation.”).

²¹⁰ See 42 U.S.C. § 2000e-2(m) (2012).

²¹¹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" when making employment decisions.²¹²

Treating a subset of men differently from women who engage in the same type of intimate behavior or are perceived to do so is disparate treatment because of sex either as a matter of formal equality or sex stereotyping.²¹³ Courts have been hesitant to recognize sex discrimination when it imposes gender-based restrictions regarding with whom an individual is or may be intimate. Suzanne Goldberg has addressed that hesitancy in the context of the marriage litigation. She explains that while some courts struck down state marriage bans because they discriminated on the basis of the sex of individuals wanting to marry, litigators rarely led with this theory to challenge the bans.²¹⁴ Further, when the argument was raised it had little traction with most judges.²¹⁵ Goldberg opines that courts may have shunned this argument for fear of its potential impact in other contexts, such as the right of employers to maintain gender-based dress and grooming codes.²¹⁶

There is in this regard a path dependence issue. Recognizing sex discrimination in one context may weaken the argument for sustaining it in others.²¹⁷ Indeed, courts may have been concerned that accepting the argument in the context of marriage might have eventually led to the erasure of all "social distinctions between men and women."²¹⁸ Goldberg explains that some judges may have been concerned that "if sex based rules were not tolerated on occasion, we would all wind up in unisex tunics"²¹⁹

Goldberg's observations may well be true, but any upheaval may be cabined to some extent by extant interpretations of the Constitution and Title VII. The Court has sanctioned appearance regulations by government employers that enforce gendered distinctions despite constitutional challenge.²²⁰ Some sex-

²¹² Baldwin v. Foxx, EEOC Decision No. 012013380, 2015 WL 4397641, at *4 (July 16, 2015) (citation omitted).

²¹³ The same of course is true for women who are treated differently than their male counterparts who are intimate with women.

²¹⁴ See Goldberg, *supra* note 34, at 2130.

²¹⁵ See *id.*

²¹⁶ See *id.* at 2133 n.171.

²¹⁷ See *id.*

²¹⁸ *Id.* at 2133.

²¹⁹ *Id.* at 2133–34.

²²⁰ See Kelley v. Johnson, 425 U.S. 238, 248 (1976) (rejecting the claim that a hair length policy violated a male police officer's due process rights, particularly because the employer was a police force; this fact entitled the force's imposition of a dress code to a presumption of validity as a uniform appearance among police officers is a desirable goal, promoting the "esprit de corps" and making officers readily recognizable by the public).

based distinctions also have been permitted under Title VII.²²¹ The issue is one of degree. Some courts, for instance, have upheld sex-differentiated grooming standards that are part of an overall appearance code and that do not impose greater burdens on one sex or the other.²²²

Putting aside gendered appearance codes for the moment, sex-based distinctions that discriminate on the basis of association or intimate conduct with members of a particular sex should violate Title VII. It is hard to imagine that courts would hold otherwise with regard to some other protected traits. Race-based associational discrimination has long been unlawful. It also would surely violate Title VII's proscription against religious discrimination if an employer acted adversely toward a Catholic employee who, instead of dating another Catholic, elects a Protestant instead. Likewise, an employer who discriminates against its female employees because they choose to associate with other women and not men should likewise violate Title VII. The type of relationship has not mattered in other contexts, such as marriage,²²³ dating,²²⁴ or business dealings.²²⁵ The nature of the relationship should not matter with regard to sex either. The employer is taking sex into account in all these instances when making a decision that harms the employee.

Finally, the fact that the employer applies the same discriminating criteria (e.g., the prohibition of same-sex attraction or conduct) to male and female employees alike does nothing to eliminate the taint of sex discrimination.²²⁶ A contrary argument has surface appeal but unravels upon inspection. Suppose, for

²²¹ See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109–12 (9th Cir. 2006) (*en banc*) (rejecting a sex stereotyping claim that an alleged employer's grooming policy requiring women to wear make-up violated Title VII and explaining that appearance policy that imposed different but essentially equal burdens on men and women does not violate Title VII); see also *Viscecchia v. Alrose Allegria, LLC*, 117 F. Supp. 3d 243, 250 (E.D.N.Y. 2015) (noting that "every federal court of appeals that has addressed the issue has similarly found that prescribing gender-differentiated hair length standards does not create an actionable claim under Title VII" and collecting cases); see also *Williamson*, *supra* note 31, at 694–96 (explaining the "Equity Approach" adopted by some courts, which allows employers to "impose different but essentially equal burdens on men and women").

²²² See *Jespersen*, 444 F.3d at 1109–12; *Viscecchia*, 117 F. Supp. 3d at 250–51.

²²³ See *Parr v. Woodmen of the World Life Ins., Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (holding that where a discrimination claim is based on interracial marriage or association, it is a claim of racial discrimination for purposes of Title VII); see also *Holcomb v. Iona College*, 521 F.3d 130, 138–140 (2d Cir. 2008).

²²⁴ *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 585, 589 (5th Cir. 1998), *vacated in part on other grounds*, 182 F.3d 333 (5th Cir. 1999) (*en banc*) (holding that a discrimination claim based on interracial dating is a valid claim under Title VII).

²²⁵ See *Latta v. Otter*, 771 F.3d 456, 481 (9th Cir. 2014) (noting that a law "providing that women may enter into business contracts only with other women" creates a valid claim under Title VII).

²²⁶ See *McLaughlin v. Florida*, 379 U.S. 184, 184–85, 288 (1964) (striking down as violative of the Equal Protection Clause a statute that prevented unmarried interracial, but not same-race, couples from habitually occupying the same room at nighttime as the statute did not survive strict scrutiny, the standard of review applicable when classifications are race-based).

instance, that an employer refuses to grant a promotion to mothers (but not fathers) with young daughters because of the belief that instead of spending the additional time it would take to do the job, the employee should be home teaching her daughter how to be ladylike. Similarly, suppose the same employer imposes the same rule for men (but not women) who have young sons because of the belief that they should spend their evenings teaching their tykes how to be “real men.” The employer’s rules classify by gender, and the fact that an ostensibly similar rule is imposed on both men and women does not save it from Title VII challenge.²²⁷ The rule treats men and women differently based on their sex in relation to the sex of their children and is also grounded in stereotypes. The same holds true for the male employee who is harassed or otherwise punished because of attraction to or intimacy with other men or the female employee with regard to other women, when opposite sex pairings would be treated differently. The sex discrimination is apparent on its face.

Below, the article seeks to expound upon the proposition that sexual orientation discrimination is Title VII actionable. To that end, the next section discusses a common framework courts use to address some Title VII claims and through which sexual orientation claims might be filtered—sex plus theory. It then argues that aided by *Obergefell* this framework might be used to conceptualize sexual orientation discrimination as impermissible sex discrimination under Title VII.

IV. STRIKING (ALMOST) AT THE ENTIRE SPECTRUM OF SEX DISCRIMINATION

Title VII’s broad proscription against sex (or other proscribed) discrimination is not absolute.²²⁸ Both Congress and the courts have limited the reach of the statute in certain instances. The section below explains.

A. Permissible Sex Discrimination

The statute permits employers to show that sex is a bona fide occupational qualification reasonably necessary to the operation of the employer’s business

²²⁷ See *Latta*, 771 F.3d at 481 (Berzon, J., concurring) (explaining that “a law providing that women may enter into business contracts only with other women would classify on the basis of gender. And that would be so whether or not men were similarly restricted to entering into business relationships only with other men”); see also *Dothard v. Rawlinson*, 433 U.S. 321, 325–26, 332 n.16 (1977) (explaining that a regulation requiring the sex of prison guards to match the sex of the inmate population with which they worked explicitly discriminated on the basis of sex, but ultimately holding the regulation was permissible under Title VII as a bona fide occupational qualification).

²²⁸ 42 U.S.C. § 2000e-2(a)(1) (2012) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .”).

(“BFOQ”).²²⁹ While interpreted narrowly, that defense allows an employer to argue that the job requires that an employee be one sex or the other.²³⁰ The BFOQ defense, however, does not establish the end point for when employers may treat the sexes differently under Title VII.

Despite the plurality’s broad rhetoric in *Price Waterhouse* that Title VII requires that sex must be irrelevant when making employment decisions,²³¹ the statute in practice has not required trait blindness as some scholars have argued. Mary Ann Case, for instance, has suggested that after *Price Waterhouse*, employers must be indifferent to the gender expressions of men and women.²³² If an employer allows women to express gender by, for instance, wearing lipstick and skirts, then it must permit men to do the same.²³³ Taken at face value, *Price Waterhouse* could be read as extending beyond sex stereotypes and forbidding employers from taking sex into account under any circumstance absent a BFOQ.²³⁴

Such a reading would be troubling because it forbids employers from considering protected traits for benign purposes. For example, a purely trait-blind approach would undermine an employer’s voluntary affirmative action programs, which the Court has sanctioned under Title VII.²³⁵ These programs necessarily take protected traits into account in determining whether to award or

²²⁹ 42 U.S.C. § 2000e-2(e)(1) (2012) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

²³⁰ See *Dothard*, 433 U.S. at 333–34 (explaining that the “bfoq [bona fide occupational-qualification] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex”).

²³¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (“We take these words to mean that gender must be irrelevant to employment decisions.”).

²³² See *Disaggregating Gender*, *supra* note 33, at 48 (“The language both of Title VII itself and of the Court in interpreting it does, however, suggest that, at least where sex is not a BFOQ, Congress has required an employer to treat the sexes as fungible.”).

²³³ See *id.*; see also *Trait Discrimination*, *supra* note 29, at 177–79 (discussing this theory, which Professor Yuracko also refers to as “trait equality”).

²³⁴ See *Price Waterhouse*, 490 U.S. at 230–40 (explaining that unless the BFOQ defense applies, “gender must be irrelevant to employment decisions”). See also *Soul of a Woman*, *supra* note 136, at 776 (“[T]rait neutrality simply restates a conventional understanding of the sex discrimination prohibition that has been used in a range of contexts. It is a reading that extends beyond situations involving sex stereotypes and does not rely on them.”).

²³⁵ See *United Steelworkers of Am., v. Weber*, 443 U.S. 193, 201–02 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616, 626–627 (1987); Roberto L. Corrada, *Ricci’s Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 243–46 (2011) (discussing *Weber* and *Johnson*). Cf. *Ricci v. DeStefano*, 557 U.S. 557, 579–84 (2009) (sanctioning another scenario in which discrimination would be permissible under Title VII; an employer may violate Title VII’s disparate treatment provision where it has a strong basis in evidence that a failure to do so would subject the employer to liability under the statute’s disparate impact provision).

withhold particular employment opportunities. The Court, however, has upheld these programs in narrow circumstances because they advance the statute's salutary purpose to provide equal employment opportunities to persons Title VII was designed to protect.²³⁶

The Court's gloss on sexual harassment jurisprudence represents another instance where discrimination may be permissible despite Title VII's broad proscriptions. In *Oncale v. Sundowner*,²³⁷ the Court rejected arguments that recognizing the viability of same-sex sexual harassment would turn Title VII into a civility code.²³⁸ It reasoned that the risk of that happening is no greater than it is for recognizing opposite-sex harassment.²³⁹ The Court also stated that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."²⁴⁰ Title VII, it declared, "requires neither asexuality nor androgyny."²⁴¹ It "forbids only behavior so objectively offensive as to alter the 'conditions'" of the victim's employment.²⁴² "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."²⁴³ That harassing conduct must be "objectively" offensive means that some conduct, even if accompanied by a discriminatory motive, is beyond Title VII's reach.²⁴⁴

²³⁶ See *United Steelworkers of Am.*, 443 U.S. at 195 (explaining that a literal reading of the statute, which bars such programs, conflicts with the statute's purposes, which included "open[ing] employment opportunities for [African Americans] in occupations which have been traditionally closed to them").

²³⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

²³⁸ See *id.* at 80.

²³⁹ See *id.*

²⁴⁰ *Id.* at 81.

²⁴¹ See *id.*

²⁴² *Id.*

²⁴³ *Oncale*, 523 U.S. at 81 (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 20 (1993)) (internal quotations omitted).

²⁴⁴ See, e.g., *Stacombe v. New Process Steel, LP*, No. 15-11791, 2016 WL 3090691, at *4 (11th Cir. June 2, 2016) ("Not all workplace harassment, even if it [*sic*] based on sex, violates Title VII Harassment is actionable only if the conduct is sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment.") (citation omitted); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 506 (6th Cir. 2001) (Gilman, J., dissenting) (explaining that "not . . . every sexually hostile work environment will ground a Title VII claim"; complained-of conduct also must be "so objectively offensive as to alter the conditions of the victim's employment.") (citation omitted); *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 790 (6th Cir. 2000) (holding that while some of the conduct plaintiff complained of occurred "because of sex," the sexual harassment claim was not viable where "defendant's conduct was not severe enough to create an objectively hostile environment"); *Rigau v. Pfizer Caribbean Corp.*, 525 F. Supp. 2d 272, 282 (D.P.R. 2007) ("Despite Title VII's protection against discrimination based on sex . . . the

Oncale's statement that Title VII requires neither asexuality nor androgyny also means that some sex-based distinctions may occur in the workplace without sanction.²⁴⁵ This point is obvious. While some workplaces have transitioned to unisex bathrooms, all have not. Judicial precedent suggests that an employer is likely able to maintain separate restrooms for men and women without engaging in unlawful sex discrimination²⁴⁶ (although Congress may legislate further on this issue).²⁴⁷ Allowing female employees, because they are women, to eat lunch only after every male employee has done so would certainly be unlawful.²⁴⁸ Every case is not so straightforward. For instance, courts have struggled with the legality of an employer's right to draw sex-based distinctions in the context of gendered dress and grooming codes. In some instances courts have relied on a fundamental rights/immutability analysis to address this issue and others under Title VII.

B. Sex Plus Theory

Title VII's sparse legislative history regarding sex as a protected class shows that proponents of the amendment to protect that trait under the statute were concerned about the lack of opportunities for women in the workplace. Women, for instance, were excluded from entire categories of jobs.²⁴⁹ Title VII

prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the conditions of the victim's employment.") (citation omitted).

²⁴⁵ See *Trait Discrimination*, *supra* note 29, at 187 n.91 (suggesting that *Oncale* represents that the Court imposed some limits on the theory of trait equality or neutrality).

²⁴⁶ See *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) ("Few would disagree that an employer's blanket exclusion of women from certain positions constitutes 'discrimination' within the meaning of Title VII. At the same time, few would argue that separate toilet facilities for men and women constitute Title VII 'discrimination.'"). *Cf. G.G. ex. rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718–21 (4th Cir. 2016) *cert granted sub nom.*, *Gloucester Cty. Sch. Bd. v. G.G. ex. rel. Grimm*, No. 16-273, 2016 WL 4565643 (Oct. 28, 2016) (holding, in a Title IX case, that the Department of Education's interpretation of a regulation that allowed for sex-segregated bathrooms was reasonable regarding transgender students; sex should be determined with reference to an individual's gender identity and not merely his or her biological or birth sex).

²⁴⁷ The Equality Act, which would amend Title VII and other federal statutes to protect LGBT individuals and is currently pending before Congress, would permit individuals to use the restroom and other shared facilities consistent with their gender identity. See *H.R. 3185: Equality Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr3185> (last visited Nov. 26, 2016). *But see generally* Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom that Matches Gender Identity—Are Co-ed Bathrooms Next?*, 83 UMKC L. REV. 57 (2014) (arguing that sex-segregated bathrooms should be held to violate equal protection principles under the U.S. Constitution).

²⁴⁸ *Cf. Fisk*, *supra* note 30, at 1134 n.47 (setting forth examples of discrimination that would likely violate Title VII but do not involve fundamental rights or immutable traits).

²⁴⁹ See *Trait Discrimination*, *supra* note 29, at 169–70, n.15 (referring to workplace discrimination against women as "ontological" in that the discrimination goes to the very womanhood of the individual, i.e., her status of being a woman). See also *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (en banc) (describing discrimination based on "sex alone" as when an

has gone far in protecting women from this type of discrimination.²⁵⁰ The ways in which discrimination occurs, however, are often much more complex. For instance, an employer may not exclude all women from the workplace or from a class of jobs, but may do so with respect to a subgroup of women. The latter category of discrimination does not affect all members of a class, but affects a subgroup of them. This type of discrimination has been referred to as “sex plus” discrimination by some courts.²⁵¹ It occurs when an employer “classifies employees on the basis of sex plus another characteristic.”²⁵²

The Supreme Court addressed a sex plus claim in *Phillips v. Martin Marietta Corp.*²⁵³ The employer in that case refused to hire the plaintiff consistent with its policy of not hiring women with pre-school age children, although it employed similarly situated male employees.²⁵⁴ Both the district court and court of appeals rejected her claim. In vacating and remanding the case, the Court noted that Martin Marietta hired women and thus the record did not show “bias against women as such.”²⁵⁵ However, it held the court of appeals had erred in interpreting Title VII to permit an employer to impose one hiring policy for women with small children and another for men.²⁵⁶ Although the Court did not elaborate on the rationale for its holding, other courts have explained that the decision rested on the principle that Title VII is intended to place men and women on equal footing with respect to job opportunities.²⁵⁷ The employer’s rule in *Martin Marietta* undermined that goal by imposing a barrier to opportunities for a subclass of women to which similarly-situated men were not subjected.²⁵⁸

employer “refuses to hire, promote or raise the wages of an individual solely because of sex, as, for instance, if [the employer] had refused to hire any women for the job . . . because of their sex”).

²⁵⁰ *Trait Discrimination*, *supra* note 29, at 169–70 (describing this form of discrimination as occurring rarely today).

²⁵¹ *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009). The court in *Chadwick* noted that the phrase “sex plus” may be misleading because use of the “plus” term does not mean more than sex discrimination is being alleged. *See id.* at 43. Rather, it means that “not all members of a disfavored class are discriminated against.” *Id.* (citation omitted). As the main text explains, however, the “plus” refers to the fact that a non-sex based criterion (e.g., hair length) is used to discriminate against a subclass of men or women. *See infra* text accompanying notes 253–266.

²⁵² *See Chadwick*, 561 F.3d at 43.

²⁵³ *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam).

²⁵⁴ *See id.* at 543.

²⁵⁵ *Id.*

²⁵⁶ *See id.* at 544.

²⁵⁷ *See Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1120 (D.C. Cir. 1973).

²⁵⁸ *See id.*

Several courts have addressed these claims under a “sex plus” paradigm,²⁵⁹ which has been applied to such diverse issues as dress and grooming codes,²⁶⁰ parental status,²⁶¹ child care responsibilities,²⁶² and marital status,²⁶³ with varying results depending on the nature of the “plus” factor.²⁶⁴ Under a sex plus theory, lines have been drawn between sex-based distinctions that are proscribed by Title VII and those that are permitted.²⁶⁵ Some courts have drawn the proscribed line at fundamental rights and immutable traits.²⁶⁶

The Fifth Circuit adopted this approach in *Willingham v. Macon Telegraph Publishing Co.*,²⁶⁷ an *en banc* decision. The employer in *Willingham* refused to hire the plaintiff because of his long hair.²⁶⁸ Macon Telegraph believed that the local business community associated long-haired males with hippies and imposed a dress and grooming code on both men and women. Both sexes had to dress in accord with “standards customarily accepted in the business community,” which was interpreted to mean that only female employees could have long hair.²⁶⁹

The Fifth Circuit held that the hair-length policy did not violate Title VII. After examining the legislative history of Title VII and authority interpreting the statute, the court determined that Congress’s primary goal in enacting Title VII

²⁵⁹ See *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009) (noting that “sex plus” describes a case where not all members of a disfavored class are discriminated against, but a sub-class is treated differently).

²⁶⁰ See *Williamson*, *supra* note 31, at 687; see also *Viscecchia v. Alrose Allegria LLC*, 117 F. Supp. 3d 243, 250–52 (E.D.N.Y. 2015).

²⁶¹ See *In re Consol. Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1145 (7th Cir. 1978).

²⁶² See *Chadwick*, 561 F.3d at 43; *Gingrass v. Milwaukee Cty.*, 127 F. Supp. 3d 964, 973–75 (E.D. Wis. 2015).

²⁶³ See *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

²⁶⁴ See *Chadwick*, 561 F.3d. at 43 (describing how “plus” is not merely more than sex discrimination, but a case where “not all members of a disfavored class are discriminated against”).

²⁶⁵ See *Willingham v. Macon Tel. Publ’g. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (analyzing Congressional intent to determine where to draw a line “beyond which employer conduct is no longer within reach of the statute”).

²⁶⁶ See *Trait Discrimination*, *supra* note 29, at 205 (explaining that “commonly . . . courts interpreted *Martin Marietta* narrowly, as prohibiting only sex-specific trait discrimination based on immutable characteristics or fundamental rights”).

²⁶⁷ See *Willingham*, 507 F.2d 1084 (*en banc*).

²⁶⁸ See *id.* at 1087 (explaining that that the employer’s decision was based on disapproval of long-haired males in the local community and further explaining that the incident stemmed from a pop music festival that had recently taken place in nearby Byron, Georgia where long-haired youth and scantily clad women attended the festival, in adopting its hair-length policy, Macon Telegraph had taken note of the community’s “indignation” over these events.).

²⁶⁹ See *id.* at 1087.

was to provide equal access to the job market for men and women.²⁷⁰ It believed that goal would be advanced if employers were forbidden from discriminating against employees on the basis of immutable traits, such as race or a fundamental right.²⁷¹ It explained that *Martin Marietta* recognized that a policy forbidding women but not men with pre-school age children to work violated the statute because that attribute was preexisting and not easily changeable.²⁷² Moreover, the court recognized a distinction between, on the one hand, an employer discriminating on the basis of a fundamental right—like having children or marrying—and, on the other, factors that it believed pertain to an employer’s judgment on how to run its business.²⁷³ It considered the hair-length policy to fall in the latter category. The court opined that allowing employers to make sex-based distinctions on that basis would not significantly affect employment opportunities, because male employees who are denied employment because of their hair length can easily cut it.²⁷⁴

Scholars have heavily criticized the reasoning in *Willingham* and similar cases. Catherine Fisk, for instance, has noted that the standard is vulnerable because Title VII protects individuals from discrimination even when a plus factor is neither an immutable trait nor fundamental right.²⁷⁵ This criticism is fair. It is unlikely, for instance, that a court would allow an employer to subject women but not men to mutable, arbitrary hiring criteria (e.g., women but not men who drive to work must wash their cars on Sunday before noon).

Scholars also have been highly critical of using immutability as a means to determine characteristics worthy of protection from discrimination.²⁷⁶ The criticism is particularly compelling if immutability is limited to so-called “hard”

²⁷⁰ See *id.* at 1091.

²⁷¹ See *id.*

²⁷² See *id.* (explaining that in *Martin Marietta*, the Court “condemned a hiring distinction based on having pre-school age children, an existing condition not subject to change”).

²⁷³ See *Willingham*, 507 F.2d at 1091.

²⁷⁴ See *id.* at 1091–92 (“If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job” and “distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity”). See also Williamson, *supra* note 31, at 693 (explaining that because individuals have control over hairstyle and “modes of dress [some courts held] that discrimination on the basis of such characteristics does not stand in the way of equal employment opportunity and therefore is not proscribed by Title VII.”).

²⁷⁵ See Fisk, *supra* note 30, at 1133–34 n.47.

²⁷⁶ See e.g., Hoffman, *supra* note 95, at 1541 (explaining that “advocates believe that the concept of immutability is excessively rigid and that reliance on it will prevent liberalization of the employment discrimination statutes”); see also COVERING, *supra* note 97, at 48 (explaining the “wrongness” of the immutability argument as it relates to homosexuality because it acts as “an apology[;] . . . [i]t resists the conversion demand by saying ‘I cannot change,’ rather than by saying ‘I will not change.’”).

immutability, that is, traits that are “not chosen,” unchangeable, and/or an accident of birth, like race or national origin.²⁷⁷ However, immutability is increasingly understood by courts and commentators as also encompassing “soft” immutability, which includes characteristics that are difficult to change or so fundamental to personal identity that one should not be forced to change them.²⁷⁸ Religion, marital status, and sexual orientation have been described as falling within the scope of this latter understanding of immutability.²⁷⁹

Despite this criticism, lines inevitably must be drawn in determining employer actions that are permissible under Title VII or proscribed by it. This is so because Title VII represents a balance between the employee’s right to a workplace free from *unlawful* discrimination and the employer’s right to manage its workforce.²⁸⁰ The word *unlawful* is important because courts determine the meaning of that term.²⁸¹ The statute’s legislative history reveals that Congress intended for “management prerogatives . . . to be left undisturbed to the greatest extent possible . . . except to the limited extent that correction is required because of unlawful discrimination.”²⁸² Because an employer has an interest in the way it presents itself to the public, it should be allowed some say in employee appearance standards.²⁸³ Courts generally have allowed employers some leeway with these policies even when they contain sex-based distinctions

²⁷⁷ See Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 890–91 (2016) (discussing “hard” immutability); Hoffman, *supra* note 95, at 1489. See also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

²⁷⁸ See Stein, *supra* note 277, at 890–91 (describing “soft” immutability as “being very difficult to change or . . . so important to a person’s identity that it is deeply problematic” to force change and noting that “far more courts have been persuaded by soft immutability arguments for LGBT rights as compared to hard immutability arguments for LGBT rights”); Hoffman, *supra* note 95, at 1509 (defining an immutable characteristic as one “that is so fundamental to the identities or consciences of its members that members either cannot or should be not be required to change it.”).

²⁷⁹ See Hoffman, *supra* note 95, at 1530, 1533–36 (describing such characteristics as sexual orientation and marital status as being fundamental to personal identity); see also Stein, *supra* note 277, at 890–91, n. 91 (arguing that religion is softly immutable, and further noting that what Professor Stein calls “soft” immutability has also been referred to as “the new immutability”).

²⁸⁰ See Hoffman, *supra* note 95, at 1521 (explaining that employers are generally afforded autonomy to run their business as they see fit, requiring that “[t]he law . . . balance the goal of combatting pernicious discrimination against the goal of creating a hospitable environment for American employers.”).

²⁸¹ See Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 135 (2014) (“Discrimination is undefined in the 1964 Civil Rights Act, and in key decisions the Court has subtly charged itself with defining the contours of discrimination.”).

²⁸² *Beam v. General Motors Corp.*, No. C-78-1130A, 1979 WL 41, at *3 (N.D. Ohio Oct. 11, 1979) (quoting 1964 U.S.C.A.N 2515).

²⁸³ See Williamson, *supra* note 31, at 705–06 (arguing that employer interests must be taken into account in grooming code challenges under Title VII).

that conform to community standards, including gender norms.²⁸⁴ Thus, the crux of the issue is not whether any policies distinguishing on the basis of gender are permitted under Title VII. They are. The issue is the point at which they result in unlawful discrimination.

An employer's invasion of a constitutionally protected fundamental right or reliance on an immutable characteristic as a basis to discriminate on a trait protected by Title VII could be used to determine whether discrimination is unlawful under the statute. That standard does not have to mark the outer boundary of the statute's protection. Rather, it would mean that the statute reaches discrimination of this sort. The point here is not to make a normative argument about where to draw the line (if one should be drawn at all) with respect to permissible dress and grooming policies. It is to recognize that beyond the BFOQ defense, Title VII permits discrimination in some instances, and some courts have used a fundamental rights and immutability analysis to determine which claims are covered by the statute. The purpose here is to demonstrate how, post-*Obergefell*, these existing frameworks might be used to advance gay rights in the workplace. As I argue below, wherever the line between protected and proscribed discrimination should be drawn, at a minimum, the statute should protect employees when constitutionally significant rights or certain highly personal, intransigent characteristics that are fundamental to a person's identity are involved.²⁸⁵ If this rationale is taken to its logical conclusion, Title VII unequivocally should proscribe discrimination against men or women because of sexual orientation after *Obergefell*.

²⁸⁴ See Soucek, *supra* note 23, at 770–71 (explaining that workplace appearance standards and dress and grooming codes have often survived challenge under Title VII); Williamson, *supra* note 31, at 693, 698 (arguing that many courts continue to use an employer friendly approach to the issue of grooming challenges, and noting that employees have not met with much success by challenging gendered grooming codes under a *Price Waterhouse* sex-stereotyping theory). See also *Soul of a Woman*, *supra* note 136, at 786–87 (explaining that transsexual employees have been more successful in challenging workplace dress and grooming codes than other employees because courts are most likely to hold that such policies are burdensome and presumptively invalid if the plaintiff is transsexual as the gender demand under those circumstances imposes high compliance costs. The plaintiff will then win unless the employer can “name a business justification of some special weight.”).

²⁸⁵ Individuals may consider a characteristic that is wholly within their control to change or that physically may be easily altered to be a fundamental aspect of their identity and thus softly immutable. See e.g., D. Wendy Greene, *Black Women Can't Have Blonde Hair. . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 406–08 (2011) (describing the unique harm black women endure because of employer policies that forbid them from wearing hairstyles reflective of their culture and identity). Nothing said here suggests otherwise. So far, however, courts have been resistant to these arguments. See *id.* at 411–21 (discussing cases that have rejected these claims).

V. SEXUAL ORIENTATION: THE TYPE OF DISCRIMINATION TITLE VII SHOULD PROSCRIBE

An employer who treats female employees who engage in intimate behavior with other women, or who are perceived to do so, differently than it treats similarly-situated male employees sets up a classic sex plus scenario. Discrimination is present even if the same employer treats male employees who engage in intimate behavior with other men, or who are perceived to do so, differently than it treats similarly situated women it employs. At its core, this type of discrimination is no different than an employer refusing both to hire women, but not men, raising young daughters, and men, but not women, with young sons. This type of sex-based classification should violate Title VII.²⁸⁶

Moreover, despite the connection between sexual orientation and sex, most courts treat them as distinct concepts for purposes of Title VII.²⁸⁷ In that regard, sexual orientation is treated similar to marriage, child rearing, and any number of other neutral plus factors. As explained below, it also should be considered an impermissible plus factor under Title VII.

First, the traditional rationale for recognizing immutable traits as plus factors is that using them as discriminatory criteria significantly limits employment opportunities because they are beyond the employee's control.²⁸⁸ Few would disagree that sexual orientation is fundamental to one's identity.²⁸⁹ Moreover, although the causes of sexual orientation remain a matter of

²⁸⁶ See *Latta v. Otter*, 771 F.3d 456, 481 (9th Cir. 2014) (Berzon, J., concurring); see also *Dothard v. Rawlinson*, 433 U.S. 321, 325–26, 332 n.16 (1977); see also *supra* text accompanying note 227.

²⁸⁷ See *supra* discussion Part III(B)(1) and accompanying notes.

²⁸⁸ See *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (explaining that in *Martin Marietta*, the Court “condemned a hiring distinction based on having pre-school age children, an existing condition not subject to change”); cf. *Wiseley v. Harrah’s Entm’t, Inc.*, No. CIV.A. 03-1540(JBS), 2004 WL 1739724, at *5 (D.N.J. Aug. 4, 2004) (noting that “one’s personal appearance and dress is sufficiently within one’s control such that it is easily alterable, while Title VII aims at policies that specifically discriminate on the basis of immutable characteristics that are a fundamental aspect of that person” and rejecting argument that grooming code policy discriminated on the basis of an immutable characteristic as the plaintiff admitted he cut his hair to retain his job). *But see Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (noting that except for religion, Title VII forbids discriminations only traits “beyond the victim’s power to alter” or that burden one of the statute’s protected traits; if not strictly immutable, discrimination must involve a fundamental right to fall within the statute’s scope).

²⁸⁹ See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713 (“Sexual orientation . . . refers to an enduring disposition to experience sexual, affectional, or romantic attractions to men, women, or both. It also encompasses *an individual’s sense of personal and social identity* based on those attractions, behaviors expressing them, and membership in a community of others who share them”) (emphasis added); Hoffman, *supra* note 95, at 1530 (“Scientific research has not proven conclusively whether sexual orientation is a biological trait that is an accident of birth, but it seems always to be fundamental to personal identity.”).

debate,²⁹⁰ a 2007 a task force established by the American Psychological Association—the world’s largest association of psychologists—found that sexual orientation for most people is not a matter of volition, that there is no evidence that shows that sexual orientation change efforts have proven to be effective, and, in fact, that some evidence demonstrates that they may cause harm.²⁹¹ In terms of modern understandings of sexual orientation, *Obergefell* acknowledged the APA’s position and none other.²⁹² Based on the task force’s findings, it is difficult to argue that requiring an employee to *try* to change her sexual orientation for a job would not significantly limit her employment opportunities; the effect on those opportunities would certainly be more than *de minimis*. Forcing attempts at such change as a condition of employment is in no way analogous to requiring an employee to get a haircut, don a uniform, or take any action that is fully within the person’s volition. Under those circumstances, sexual orientation should be considered sufficiently intransigent to be an impermissible plus factor under a sex plus theory.²⁹³

²⁹⁰ See Hoffman, *supra* note 95, at 1530.

²⁹¹ In February 2007, the American Psychological Association (APA) created a task force, among other things, to study, peer-reviewed journal literature on sexual orientation change efforts (SOCE). The report noted that “change to an individual’s sexual orientation [was] uncommon” for individuals going through SOCE. The report also found that individuals have experienced harm from aversive forms of SOCE, including “loss of sexual feeling, depression, suicidality, and anxiety.” Many individuals who participate in SOCE do so because of deeply held religious beliefs concerning homosexuality. “Individuals who failed to change sexual orientation, while believing they should have changed with such efforts, described their experiences as a significant cause of emotional and spiritual distress and negative self-image.” The report further found that the recent research on individuals seeking SOCE did not distinguish between “sexual orientation” and “sexual orientation identity” which obscured the issue of what can and cannot be changed. Studies show that while “sexual orientation is unlikely to change, some individuals modified their sexual orientation identity” as well other aspects of their sexuality, like sexual behavior. See APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, 1,3 (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

Cf. Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 8–9, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713 (offering similar views on sexual orientation and SOCE. The brief noted “[m]ost gay men and lesbians do not experience their sexual orientation as a voluntary choice” and “clinical interventions that purport to change sexual orientation from homosexual to heterosexual . . . have not been shown to be effective or safe.”) See also Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 SEX RES. SOC. POL’Y 176, 188 (2010) (reporting results from a national probability study that show that ninety-five percent of gay men and eighty-four percent of lesbians “could be characterized as perceiving that they had little or no choice at all about their sexual orientation”).

²⁹² See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (discussing the trajectory of the rights of gays and lesbians in the Twentieth Century until present time and noting that “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable”).

²⁹³ This article treats immutability and fundamental rights as separate inquiries with regard to sex plus analysis although the case law is not always clear whether these inquiries are wholly unrelated.

Second, discrimination because of sexual orientation also implicates a fundamental right. *Obergefell* clarifies that the Fourteenth Amendment's Due Process Clause confers a fundamental right upon adults to engage in consensual, private, intimate same-sex sexual conduct. Both *Lawrence* and *Obergefell* recognize that choosing the person with whom one shares one's life and bed are among the most profound choices individuals make, regardless of the sexuality or the sex of the individuals involved.²⁹⁴ Where sexual orientation discrimination occurs, the matter of same-sex intimacy is typically front and center. Just as sexual orientation cannot be conceptualized without taking sex into account,²⁹⁵ it also cannot be conceptualized without reference to sexual conduct or the propensity to engage in such conduct with other individuals of a particular sex.²⁹⁶ According to the APA, sexual orientation is integrally connected to the personal relationships individuals form or desire to form to satisfy the basic human need for intimacy.²⁹⁷

In her concurring opinion in *Lawrence*, Justice O'Connor recognized the inextricable link between sexual orientation and the sexual conduct associated with it. Texas argued that its anti-sodomy statute survived constitutional scrutiny because it did not punish homosexuals as a class, but only homosexual conduct.²⁹⁸ Justice O'Connor rejected the distinction. Targeting the sex act in which homosexual persons are inclined to engage targets them as a class.²⁹⁹ As Justice O'Connor observed, "[a]fter all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."³⁰⁰ Likewise, history shows that targeting homosexual persons because

Cf. Wiseley, 2004 WL 1739724, at *5 (explaining that "Title VII aims at policies that specifically discriminate on the basis of immutable characteristics that are a fundamental aspect of that person" but rejecting the argument that grooming code policy was unlawful because it did not discriminate on the basis of a trait over which plaintiff had no control, *and* also it was not a fundamental aspect of his identity) (emphasis added).

²⁹⁴ See *Obergefell*, 135 S. Ct. at 2596 ("Choices about marriage shape an individual's destiny."); *Lawrence v. Texas*, 539 U.S. 558, 564–72 (striking down Texas sodomy statute and holding that the state law making same-sex sodomy a crime demeaned the existence of homosexual persons and controlled their destiny).

²⁹⁵ See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713; see also Koppelman, *supra* note 35, at 239; see also *supra* text accompanying notes 207–08.

²⁹⁶ See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713.

²⁹⁷ See *id.*

²⁹⁸ See *Lawrence*, 539 U.S. at 558, 583 (2003) (O'Connor, J., concurring).

²⁹⁹ See *id.*

³⁰⁰ *Id.*

of their sexual orientation status is indistinguishable from targeting the conduct typically associated with that status.

As stated earlier, employers and others often used sodomy laws as a means to fire or refuse to hire gay men and lesbians.³⁰¹ It did not matter whether an individual had actually ever engaged in sodomy or ever intended to.³⁰² Rather, employers assumed that homosexual does as homosexual is. Status presupposed conduct. Because of the homosexualization of sodomy, discrimination on the basis of homosexual sexual orientation became a shorthand for punishing homosexual conduct.³⁰³ As Andrew Koppelman has explained “[i]t should be clear from ordinary experience that the stigmatization of the homosexual has something to do with the homosexual’s supposed deviance from traditional sex roles.”³⁰⁴

This connection between status and conduct is also seen in Title VII harassment cases. Discrimination because of one’s actual or perceived sexual orientation often involves a suspicion or accusation that the victim is engaging in same-sex intimate conduct.³⁰⁵ Permitting an employer to discriminate on the

³⁰¹ See *supra* text accompanying notes 46–52.

³⁰² See *id.*

³⁰³ See *Hastings Christian Fellowship v. Martinez*, 561 U.S. 661, 689 (2010) (recognizing the connection between homosexual status and conduct by noting “[o]ur decisions have declined to distinguish between status and conduct in this context.”).

³⁰⁴ Koppelman, *supra* note 35, at 234. See also Mary Riege Laner & Roy H. Laner, *Sexual Preference or Personal Style?: Why Lesbians are Disliked*, 5 J. HOMOSEXUALITY 339, 350–51 (1980) (finding that, consistent with earlier studies regarding gay men, lesbians are disliked because of their sexual orientation and also to the extent they deviate from heteronormative behavior as a departure from conventional gender norms in personal style maximizes the likelihood of disapproval).

³⁰⁵ See *Dawson v. Entek, Int’l*, 630 F.3d 928, 933 (9th Cir. 2011) (alleged harassers claimed that plaintiff “liked to suck dick” and “take it up the ass”); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006) (holding that discrimination for perceived homosexuality included “frequent derogatory comments regarding [the plaintiff’s] sexual preferences and activities”); *Hamm v. Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1063 (7th Cir. 2003) (detailing how alleged harassment included rumors about plaintiff being involved in a “romantic” relationship with another man); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 260 (3d Cir. 2001) (determining that alleged harassment included such comments as “everybody knows you’re a faggot,” and “everybody knows you take it up the ass”); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (alleged harassing comments included “go fuck yourself, fag,” “suck my dick,” and “so you like it up the ass?”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257 (1st Cir. 1999) (noting that alleged harassment including coworkers making “obscene remarks about [the plaintiff’s] imagined sexual activities”); *Guerrero v. T-Mobile USA, Inc.*, No. 13 C 1567, 2015 WL 1043535, at *2 (N.D. Ill. Mar. 6, 2015) (detailing a series of derogatory comments such as, “since you fuck bitches, do you pee standing up” and “do you think you’re a dude because you’re with girls”); *E.E.O.C. v. Family Dollar Stores, Inc.*, No. CIV.A. 1:06-CV-2569-TWT, 2008 WL 4098723, at *16 (N.D. Ga. Aug. 28, 2008) (describing conduct that included comments claiming the plaintiff “liked boys” and “like[d] boy’s penis [*sic*]”); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002) (harassment included supervisor’s “obsess[ion] with the fact that [the plaintiff] was having an intimate relationship with a woman”).

basis of sexual orientation therefore imposes a significant burden on the right of individuals to engage in that constitutionally protected conduct.

Some may decry using the fundamental rights/immutability approach to addressing sexual orientation discrimination under Title VII because it may legitimize its use in other contexts like the grooming code challenges. However, to the extent courts continue to analyze Title VII claims using the fundamental rights/immutability metric in other contexts, they should be called to task if they fail to apply it when sexual orientation discrimination is at issue. There should be no carve out for sexual orientation discrimination just as there is no carve out when an employer uses marriage or parenthood as discriminating factors. Title VII does not explicitly protect individuals on those bases, yet Title VII forbids discrimination in both instances under a traditional sex plus theory. Likewise, an employee's sexual orientation should never be subject to management prerogatives.

VI. CONCLUSION

Whatever Congress intended when it amended Title VII to protect against sex discrimination, the statutory meaning of that term has evolved. While Congress likely did not contemplate that Title VII would protect individuals on the basis of sexual orientation in 1964, members of Congress recognize that possibility today. Congress in all likelihood also did not foresee Title VII protecting employees against same-sex sexual harassment, but the statute has been held to do so. Sexual orientation discrimination is merely another step in the evolving understanding of what constitutes discrimination because of sex. Perhaps *Obergefell* could have done more to aid that process had it struck down the marriage bans under a sex-based Equal Protection analysis. The Court chose instead to rely principally on a Due Process fundamental rights analysis. Thus, that is the clay that scholars and gay rights advocates were handed to mold arguments in favor of expanding rights for sexual minorities under existing statutes. The sex plus theory articulated here is a step in that direction.