

REFRAMING THE ARGUMENT: SEXUAL ORIENTATION DISCRIMINATION AS SEX DISCRIMINATION UNDER EQUAL PROTECTION

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ABSTRACT

Despite four major Supreme Court opinions involving lesbian, gay, and bisexual (“LGB”) rights, how courts should treat sexual orientation under equal protection remains unknown. This ambiguity will persist until LGB advocates abandon the essentialist theoretical model of sexual orientation as a status derived from nature and instead promote a social constructionist framework that conceptualizes sexual orientation as a status derived from sex. Scholars assert that social constructionist arguments are “risky arguments” because they challenge the perceived natural order and incite anxieties about nonincremental change. Surprisingly, federal courts have become increasingly willing to conceptualize sexual orientation as a dynamic concept derived from sex and subsequently, to find that sexual orientation discrimination is a form of sex discrimination.

Courts and scholars have indeed talked about sexual orientation discrimination as sex discrimination, and some scholars have discussed individual cases. This article is the first to take a broad theoretical approach to this growing trend in federal courts. It argues that underpinning this striking development is a profound theoretical shift in how sexual orientation is conceptualized. It systematically reviews the three legal arguments that courts have used when adopting this approach: comparative, associational, and gender-stereotyping. It analyzes a comprehensive dataset of seventy-one cases to determine which of these arguments is gaining the most traction.

Understanding sexual orientation through the lens of sex discrimination not only promises to clarify how courts should approach LGB equality, but also better reflects the diverse reality and fluidity of modern gender identities, and it makes sense, normatively, theoretically, and strategically. This theoretical argument is now the less “risky argument.” In short, this article (1) provides groundbreaking theoretical insights to a remarkable shift in how courts are treating sexual orientation, (2) challenges scholarly notions of how LGB social justice litigation should be approached, and (3) offers a solution to the

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ambiguity in how sexual orientation should be treated under the Equal Protection Clause.

I.	INTRODUCTION	51
II.	THEORETICAL ARGUMENTS: CONCEPTUAL FRAMEWORKS FOR UNDERSTANDING SEXUAL ORIENTATION	54
	A. ESSENTIALISM & SEXUAL ORIENTATION	55
	B. SOCIAL CONSTRUCTION & SEXUAL ORIENTATION	57
III.	RISKY ARGUMENTS: ESSENTIALIST FRAMEWORK AS FUNDAMENTAL TO SEXUAL ORIENTATION DISCRIMINATION	60
	A. DISTINGUISHING LGB INDIVIDUALS FROM HETEROSEXUAL INDIVIDUALS	60
	B. DISTINGUISHING SAME-SEX MARRIAGE FROM MARRIAGE	61
	C. DISTINGUISHING STATUS FROM CONDUCT	63
IV.	SHIFTING ARGUMENTS: SOCIAL CONSTRUCTIONIST CONCEPTUALIZATIONS OF SEXUAL ORIENTATION IN COURT	66
	A. COMPARATIVE ARGUMENTS	67
	1. Comparative Arguments in Court	67
	2. Comparative Counterarguments	69
	B. ASSOCIATIONAL ARGUMENTS	74
	1. Associational Arguments in Court	75
	2. Associational Counterarguments	76
	C. GENDER-STEREOTYPING ARGUMENTS	78
	1. Gender-Stereotyping Arguments in Court	80
	2. Gender-Stereotyping Counterarguments	83
V.	WINNING ARGUMENTS: AN EMPIRICAL ANALYSIS	86
	A. METHODOLOGY	86
	B. WINNING ARGUMENTS	87
VI.	CONSTITUTIONAL ARGUMENTS: HOW WE SHOULD APPROACH SEXUAL ORIENTATION UNDER EQUAL PROTECTION	88
	A. WINNING STRATEGIES	88
	B. REFRAMING SEXUAL ORIENTATION UNDER EQUAL PROTECTION	91
VII.	CONCLUSION	94
	APPENDIX	95
	DATA SET PART I. CASES ACCEPTING SEXUAL ORIENTATION DISCRIMINATION MAY BE A FORM OF SEX DISCRIMINATION AND THEORIES ADOPTED	95

DATA SET PART II. CASES ACCEPTING SEXUAL ORIENTATION
DISCRIMINATION AS A FORM OF SEX DISCRIMINATION AND THEORIES

ADOPTED	98
A. Theory Success Subset	98
B. Excluded Cases	106

I. INTRODUCTION

Although the United States Supreme Court had four major opportunities since 1996 to clarify the applicable level of review, lower courts have little guidance on how to treat sexual orientation under the Equal Protection Clause.¹ For example, the majority opinion in *Romer v. Colorado* and the concurring opinion in *Lawrence v. Texas* purported to apply rational basis review but clearly applied a heightened standard.² Although the Equal Protection issue was central to *United States v. Windsor*, the Court avoided the level of scrutiny issue while it simultaneously applied rational basis review and affirmed the Second Circuit’s opinion, which expressly held that intermediate scrutiny applied.³ Not surprisingly, lower courts have invoked *Windsor* for rational basis review,⁴ heightened scrutiny,⁵ and “no precise equal protection standard.”⁶ The lofty language of *Obergefell v. Hodges* clarified little.⁷ And with four missed opportunities, the Court seems not only uninterested, but also disinclined to expressly add sexual orientation to the rarified group of suspect and quasi-suspect classes, a canon that has not been disturbed since 1977.⁸

This article demonstrates how this problem will persist as long as the Court and lesbian, gay, and bisexual (“LGB”) advocates continue to conceptualize sexual orientation through a discrete-and-insular minority model as a status distinct from sex; that is, as an immutable social category, fixed by nature and

1. The scope of this article is limited to discussion of the U.S. Constitution and federal Equal Protection jurisprudence to the exclusion of similar state constitutional issues. This work also looks beyond Equal Protection cases to understand how courts have conceptualized sexual orientation.

2. See *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Lawrence v. Texas*, 539 U.S. 558, 582–85 (2003) (O’Connor, J., concurring); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760–61 (2011).

3. See 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”); see also *Windsor v. United States*, 699 F.3d 169, 185 (2d. Cir. 2012) (holding that “homosexuals compose a class that is subject to heightened scrutiny”).

4. See, e.g., *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 918 (E.D. La. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1138–39, 1140–41 (D. Ore. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1207–10 (D. Utah 2013).

5. See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014).

6. *Love v. Beshear*, 989 F. Supp. 2d 536, 545 (W.D. Ky. 2014).

7. 135 S. Ct. 2584, 2593–2608 (2015); see, e.g., Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (“*Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity.”).

8. See Yoshino, *supra* note 2, at 757 (arguing “this canon has closed”).

transcendent of history.⁹ Whenever lesbians and gays are conceptualized independently from sex, opponents of equality seize upon this framework to further distinguish sexual orientation as something unique beyond the reach of the Equal Protection Clause and antidiscrimination laws.¹⁰

For the past thirty years, the litigation strategy for LGB rights has relied upon an *essentialist* conceptualization of sexual orientation as a fixed, absolute characteristic derived from nature.¹¹ In many ways, it makes good strategic and tactical sense to argue that LGB plaintiffs are a distinct demographic category, facing discrimination because of a deeply rooted, perhaps biologically-based, natural trait.¹² Such an approach meshes well with the rigid formalism of antidiscrimination jurisprudence that demands neat classification into a protected category.¹³

The alternative *social constructionist* theory conceptualizes sexual orientation as a shifting cultural understanding of gender identity that changes over time, across cultures, and even by individual. Although this theory may reflect the dynamism, fluidity, and complexity of modern sexual identities, litigators and scholars consider this riskier than the essentialist argument.¹⁴ Indeed, Professor Suzanne Goldberg asserts that courts prefer essentialist theories because they simplify the judicial process in antidiscrimination litigation by “leav[ing] courts in the seemingly passive position of receiving a trait definition that is mandated by or derived from ‘nature.’”¹⁵ This allows courts to avoid the inherently subjective process of examining both “society’s role in defining a trait’s contours” and how “variations among trait-bearers shape a trait’s definition.”¹⁶ Professor Goldberg suggests that social constructionist arguments, such as the assertion that sexual orientation discrimination is a function of sex discrimination, are “risky arguments” because they directly target the court’s conceptualization of the issue, challenging “longstanding laws and practices that tend to be treated, uncritically, as part of the ‘natural order.’”¹⁷ Consequently, these arguments challenge judges to make conceptual shifts that “risk inciting decisionmakers’

9. See Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2114–31 (2014).

10. See discussion *infra* Parts II, III.

11. See Goldberg, *supra* note 9, at 2089–94; Suzanne B. Goldberg, *Social Justice Movements and Latcrit Community: On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 636–62 (2002) [hereinafter Goldberg, *Social Justice*].

12. See Goldberg, *supra* note 9, at 2094; Goldberg, *Social Justice*, *supra* note 11, at 636–62.

13. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (“The complainant in a Title VII trial must carry the initial burden. . . . by showing . . . that he belongs to a racial minority.”); *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971) (“The [§ 1985(3)] complaint fully alleges . . . ‘their purpose was to prevent [the] plaintiffs and other negro-Americans . . . from seeking the equal protection of the laws’”); *Rucci v. Thoubboron*, 68 F. Supp. 2d 311, 329 n.10 (S.D.N.Y. 1999) (“if . . . plaintiff was arrested only because she is a woman, then this would be sufficient to state an equal protection claim”).

14. See Goldberg, *supra* note 9, at 2089–98.

15. Goldberg, *Social Justice*, *supra* note 11, at 635.

16. *Id.*

17. Goldberg, *supra* note 9, at 2089.

Burkean anxieties about the dangers of nonincremental change¹⁸ and about their “own naturalized sense of sex and gender.”¹⁹

Surprisingly, courts have become increasingly willing to conceptualize sexual orientation as a dynamic concept derived from sex.²⁰ In fact, the Second Circuit recently held en banc that “sexual orientation is a function of sex.”²¹ As of mid-September 2018, forty federal district and circuit courts have reasoned that sexual orientation discrimination is a form of sex discrimination, and an additional thirty-one federal courts have recognized that it may be a form of sex discrimination.²² The growing trend suggests that these arguments are not so risky after all.²³

This article argues that a profound theoretical shift in how sexual orientation is conceptualized underlies the growing trend among federal courts that embraces sexual orientation discrimination as a form of sex discrimination. Contrary to Professor Goldberg’s claims, this work demonstrates that the social constructionist approach is now the less-risky argument in LGB social justice litigation.²⁴

Understanding sexual orientation discrimination through the lens of sex discrimination better reflects the diverse reality and fluidity of modern gender identities, and it also makes sense normatively, theoretically, and strategically.²⁵ This theoretical approach to equal protection promises to clarify how courts should approach equality. By reframing sexual orientation discrimination as a theory of sex discrimination, sexual orientation discrimination would receive heightened scrutiny without disturbing the canon of protected classes.²⁶ This approach also shifts the argument away from an essentialist conceptualization of sexual orientation, which is fundamental to discrimination.²⁷ Additionally, it allows litigators to employ a full array of analytical arguments that would otherwise conceptually undermine their own heretofore essentialist positions.²⁸

To set a foundation for the discussion that follows, Part I discusses essentialist and social constructionist theoretical approaches to sexual orientation and how these theoretical approaches frame different legal arguments. Part II examines

18. *Id.* at 2090.

19. *Id.* at 2130.

20. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

21. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018) (en banc).

22. For a list of courts accepting reasoning that sexual orientation may be or is a form a sex discrimination, *see infra* Appendix.

23. *See Franchina v. City of Providence*, 881 F.3d 32, 54 n.19 (1st Cir. 2018) (noting “the tide may be turning” regarding sexual orientation discrimination as sex discrimination).

24. *Cf. Goldberg supra* note 9, at 2096 & nn.27–8 (acknowledging that “[w]hat constitutes a basic principle that might best be avoided . . . will change over time, depending on shifts in surrounding law and social norms”).

25. At this juncture, it would ordinarily make sense to define sexual orientation. However, the heart of the issue is how sexual orientation itself is defined—whether it is an essential, natural, fixed attribute of the individual, or whether it is a fluid social identity, defined by social interactions.

26. *See infra* Part V.A.

27. *See* discussion *infra* Part I.

28. *Id.*

how courts have used essentialist conceptualizations of sexual orientation to distinguish LGB individuals from heterosexual women and men, same-sex marriage from a “traditional” marriage, and status from conduct. It concludes that an essentialist conceptualization of sexual orientation is fundamental to legal arguments against for LGB discrimination.

Part III discusses how a theoretical shift is occurring in some federal district and circuit courts which are now conceptualizing sexual orientation as a form of sex discrimination with positive outcomes for LGB equality. It systematically explores the three legal theories under which courts are finding sexual orientation discrimination as a form of sex discrimination: comparative, associational, and gender stereotyping. This section examines their counterarguments in depth, analyzing how they are predicated upon essentialist notions, and how social constructionist approaches can effectively dismantle them, exposing logical inconsistencies. Here, it further develops the associational theory, demonstrating how the dynamics of sexual orientation discrimination are the reverse of those in *Loving v. Virginia*.²⁹ To determine which arguments are gaining the most traction, Part IV analyzes a comprehensive set of seventy-one federal court cases that have explicitly or implicitly recognized that sexual orientation is or may be discrimination on the basis of sex.

Building upon earlier observations, Part V expands my central thesis that sexual orientation and equal protection should be approached from a social constructionist theoretical framework that understands sexual orientation as a form of sex discrimination. It discusses how understanding sexual orientation through the lens of sex discrimination sidesteps problems inherent to equal protection jurisprudence and provides clarity to an otherwise muddled doctrine regarding sexual orientation. The approach is not only normatively and conceptually correct, but it also overcomes problems related to current essentialist framing and increases the likelihood of litigation success. In short, it is the less risky argument.

II. THEORETICAL ARGUMENTS: CONCEPTUAL FRAMEWORKS FOR UNDERSTANDING SEXUAL ORIENTATION

There are two theoretical frameworks social scientists use to conceptualize sexual orientation—essentialist and social constructionist—and courts have used these with divergent legal consequences. First, sexual orientation can be conceptualized through an essentialist lens as an immutable social category, fixed by nature and transcendent to history.³⁰ Courts have most often adopted this framework to distinguish sexual orientation as something unique beyond the

29. *Loving v. Virginia*, 388 U.S. 1 (1967); see *infra* Section III.B.2.

30. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 503–07, 549–51, (1994); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1833–51 (1993).

reach of equal protection and antidiscrimination laws.³¹ Second, under a social constructionist approach, sexual orientations can be conceptualized as social identities that are aspects of societal and cultural expressions of sex and sexuality.³² Courts have recently used this analytical framework to recast sexual orientation discrimination as form of sex discrimination, particularly regarding Title VII claims.³³

A. ESSENTIALISM & SEXUAL ORIENTATION

The essentialist model conceptualizes sexual orientation as rooted in nature.³⁴ This approach is based upon the belief that lesbians and gays are largely biologically determined, and that homosexuality, like gender, is an innate individual trait.³⁵ Under this essentialist framework, lesbians and gays have existed as one discrete group across time and cultures.³⁶ Central to the logic of the essentialist model, lesbians and gays are created by nature, so an individual's behavior alone cannot make one a "homosexual."³⁷ In other words, same-sex sexual conduct cannot confer homosexual status.³⁸ Individuals may engage in same-sex sex in certain circumstances, but this does not make them homosexuals because

31. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals . . ."); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1258–61 (11th Cir. 2017) ("Title VII does not prohibit discrimination against homosexuals.") (quoting *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.3d 69, 70 (8th Cir. 1989) (quotation marks omitted)); see also *Neill v. Gibson*, 278 F.3d 1044, 1055 (10th Cir. 2001) (finding no prejudice at sentencing phase of capital murder trial resulting from prosecutor's statement to jury, "[y]ou're deciding life or death on a person that's a vowed [sic.] homosexual.").

32. See *Halley*, *supra* note 30, at 550–53.

33. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116, 119, 124 (2d Cir. 2018) (en banc); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc); *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J. concurring).

34. John D. DeLamater & Janet Shibley Hyde, *Essentialism vs. Social Constructionism in the Study of Human Sexuality*, 35 J. SEX RESEARCH 10, 16 (1998).

35. *Id.*; cf. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

36. See generally JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980); LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* (1981).

37. See generally HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Martin Duberman, Martha Vicinus & George Chauncey, Jr., eds., 1989).

38. An early Ninth Circuit obscenity case illustrates this reasoning by suggesting that same-sex intimacy is not sufficient to confer LGB status. In *One, Inc. v. Olesen*, the court recounts a short-story about three women: a twenty-year-old "young girl," a lesbian, and the lesbian's college roommate. 241 F.2d 772, 773 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958). Both the young girl and the roommate were intimately involved with the lesbian, but despite this, the court does not seem to consider them to be lesbians. *Id.* The court states that the "lesbian's influence on [the] young girl" caused her to "struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart." The court explains that "in the end "the young girl gives up her chance for a normal married life to live with the lesbian." *Id.* at 61.

homosexuals are *sui generis*.³⁹ Consequently, this has profound legal consequences.⁴⁰

As I later discuss in more detail, this essentialist approach lends itself to doctrinal justifications permitting discrimination against LGB individuals. First, as something distinct from normal women and men, lesbians and gays can be treated differently under the law, as can their marriages.⁴¹ Second, when conduct and status are severable, various forms of conduct closely associated with lesbians and gays can be used as a proxy for anti-lesbian and gay discrimination.⁴² Finally, because the essentialist framework conceives of sexual orientation as something apart from sex, sexual orientation discrimination may be carved out of sex discrimination for purposes of equal protection.⁴³

Nonetheless, successful litigation strategies promoting lesbian and gay civil rights have relied upon equality arguments based on essentialist frameworks.⁴⁴ Essentialist theories of sexuality simplify the judicial process in antidiscrimination litigation because courts are presented with an attribute that is presumably directly or indirectly derived from nature.⁴⁵ Courts then are tasked, for example, with determining whether that attribute is among those enumerated characteristics protected by Title VII,⁴⁶ or whether it fits within the rubric of protected classes under equal protection.⁴⁷

An essentialist framework allows courts to avoid the arduous process of examining society's role in defining sexual orientation.⁴⁸ An essentialist framework

39. See, e.g., *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991) (noting “an officer who commits a homosexual act can remain in the service if he or she is not a homosexual, but must be separated if he or she is homosexual.”); *BenShalom v. Marsh*, 703 F. Supp. 1372, 1375 (E.D. Wis. 1989) *rev'd on other grounds*, 881 F.2d 454 (7th Cir.) (noting “statutes based on heterosexual orientation may be a defense to the commission of homosexual acts, and a person with a heterosexual orientation may engage in conduct which is prohibited on the part of a person with a homosexual orientation”).

40. See, e.g., *Zarda*, 883 F.3d at 152 (Lynch, J., dissenting) (arguing sexual orientation discrimination “discriminates against *them*, as gay people and does not differentially disadvantage . . . either sex.”); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (holding that “homosexuals do not constitute a suspect or quasi-suspect class . . . under the equal protection component of the Due Process Clause of the Fifth Amendment”), *abrogated by SmithKline Beecham Corp v. Abbott Labs*, 740 F. 3d 471, 489 (9th Cir. 2014).

41. See *id.*; see also discussion *infra* Parts II.A.–B.

42. See discussion *infra* Section II.C.

43. Cf. *High Tech Gays*, 895 F.3d at 570–74.

44. See Goldberg, *Social Justice*, *supra* note 11, at 630–31.

45. *Id.* at 635.

46. Title VII of the Civil Rights Act of 1964 prohibits sex discrimination by certain employers.

47. See, e.g., *EEOC v. Scott Med. Health Ctr.*, 217 F. Supp. 3d 834, 839–40 (W.D. Pa. 2016) (“Title VII’s ‘because of sex’ provision prohibits discrimination on the basis of sexual orientation. Accordingly, the EEOC’s complaint stating that Mr. Baxley was discriminated against for being gay properly states a claim for relief.”); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 268 (6th Cir. 1995) (holding “as a matter of law, gays, lesbians, and bisexuals cannot constitute either a ‘suspect class’ or a ‘quasi-suspect class,’ and, accordingly, the district court’s application of the intermediate heightened scrutiny standard to the constitutional analysis of the Amendment was erroneous”).

48. Goldberg, *Social Justice*, *supra* note 11, at 635. Cf., e.g., *Bostick v. CBOCS, Inc.*, No. 8:13-cv-1319-T-30TGW, 2014 WL 3809169 (M.D. Fla. Aug. 1, 2014) (punctuation omitted) (citation omitted)

allows courts to sidestep more difficult questions of how sexual orientation is both related to, and derivative from sex, including how gender roles and stereotyping define sexual orientation, giving us our threshold presumptions of what it means to be a man or a woman.⁴⁹ This also allows courts to avoid the inherently subjective process of examining how variations among individuals both shape and challenge a characteristic's definition.⁵⁰ The social constructionist approach to understanding sexual orientation raises these complex issues.⁵¹

B. SOCIAL CONSTRUCTION & SEXUAL ORIENTATION

The social constructionist model conceptualizes sexual orientation in a way that allows courts to better understand the dynamics of sexual orientation discrimination and recast it as sex discrimination.⁵² This framework rejects the notion of sexual orientation as a static creation or derivative of nature, and treats it as a sex-based identity created by modern cultural society.⁵³ Within this approach, lesbian and gay identities are conventions of contemporary cultural practices of Western society;⁵⁴ sex, gender, and sexual orientation are socially constructed understandings of the world.⁵⁵ Put differently, lesbians and gays are contemporary social identities that we have collectively created through our

(concluding that if “all gay men fail to comply with male stereotypes simply because they are gay . . . that would mean that every case of sexual orientation discrimination would translate into a triable case of gender stereotyping discrimination”).

49. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation,”* 83 CALIF. L. REV. 1, 20–21 (1995).

50. See Goldberg, *Social Justice*, *supra* note 11, at 635; *cf.*, e.g. Tyndall v. Berlin Fire Co., No. ELH–13–02496, 2015 WL 4396529 (D. Md. 2015)(punctuation omitted) (examining “personal criticism of Tyndall’s hair, clothing, diet, vehicle, home décor, the way he carried himself in general, and even his relationship with his mother” as evidence of gender stereotyping); Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546 (E.D. Pa. 2017) (examining plaintiff’s “tattoo, how she dressed, how she looked, and how she presented herself as a woman” as evidence of gender stereotyping).

51. *Cf.* Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016) (noting the challenge “that no coherent line can be drawn between these two sorts of [sexual orientation and sexual stereotyping] claims. Yet the prevailing law in this Circuit—and, indeed, every Circuit to consider the question—is that such a line must be drawn”); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (concluding “[a]fter further briefing and argument . . . that the distinction is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination.”).

52. See, e.g., Zarda v. Altitude Express, Inc., 883 F.3d 100, 113 (2d Cir. 2018) (“sexual orientation is a function of sex”).

53. Mary McIntosh, *The Homosexual Role*, 16 SOCIAL PROBLEMS 182, 183–85 (1968); see generally 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE WILL TO KNOWLEDGE*, introduction & part IV (Robert Hurley trans. 1978). Although Foucault is often credited with the origins of the social constructionist theory of homosexuality, it originated with McIntosh, who first suggested that understanding homosexuality as a “condition” was incorrect, because it was instead a “social role.” Her work influenced Foucault. See Jeffery Weeks, *The ‘Homosexual Role’ After 30 Years: An Appreciation of the Work of Mary McIntosh*, 1 SEXUALITIES 131, 131–52 (1998).

54. See generally JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* (1983); DAVID HAPERLIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* (1990); FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY (Edward Stein ed., 1990); JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS, AND MODERN SEXUALITIES* (1985).

55. Ortiz, *supra* note 30, at 1836.

interactions to form our shared view of reality regarding sex.⁵⁶ Our own subjective, common-sense knowledge of what is homosexual, what is heterosexual, what is male, what is female, what is gay, what is lesbian—all come together with others' perceptions through our daily interactions to create and reinforce our objective understanding of sexual orientation.⁵⁷ In other words, sexual orientation and sexual identities are socially constructed from our interactions.⁵⁸ The dynamism of the process implies constant change in our notions of sex, gender, and sexual orientation and their interdependent relationship.⁵⁹ Thus, how we both conceptualize and express sexual orientation is a product of our society.⁶⁰

Teasing apart this interrelationship allows us to understand the dynamics of how sexual orientation discrimination is a form of sex discrimination.⁶¹ Courts typically apply one or more of three theories to find that sexual orientation discrimination is a form of sex discrimination: comparative (but-for), associational, and gender-stereotyping.⁶² A social constructionist framework underlies each of these theories, providing insight into how each theory is a different aspect of the same dynamics.⁶³ I will briefly discuss the conceptual underpinnings of each legal theory.

First, under a social constructionist framework, sexual orientation can only be understood in reference to sex because sexual orientation is a dependent variable of sex; that is, sexual orientation only exists in relation to biological sex.⁶⁴ Without knowledge of two key variables, (1) the sex of the individual; and (2) the sex of the target of that individual's intimate relations, we are unable to determine sexual orientation.⁶⁵ Through the social constructionist lens, a fixed notion of sexual orientation divorced from sex is conceptually impossible; it is one hand clapping.⁶⁶ Sex defines sexual orientation. Thus, sexual orientation discrimination is sex discrimination because it discriminates on the basis of sex *per se*.⁶⁷

56. See DeLamater, *supra* note 34, at 14–16.

57. See *id.*

58. See Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1196–99 (2012).

59. Valdes, *supra* note 49, at 12–23.

60. See *id.*

61. See discussion explaining how this theoretical understanding underlies the comparative, associational, and gender-stereotyping theories of sexual orientation discrimination as sex discrimination, *infra* Part III.

62. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116, 119, 124 (2d Cir. 2018) (en banc).

63. See *id.*

64. See NeJaime, *supra* note 58, at 1197–98 (“Sexual orientation identity is linked to (both actual and contemplated) relationships with other bodies.”).

65. See *id.* (noting the relational component of sexual orientation).

66. Cf. Janet E. Halley, “Like Race” Arguments, in *WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 41 (Judith Butler et al. eds., 2000) (“One is a lesbian not because of anything in oneself, but because of social interactions, or the desire for social interactions: it takes two women, or at least one woman and the imagination of another, to make a lesbian.”).

67. *Zarda*, 883 F.3d at 119 (“We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.”); see discussion of comparative theory of discrimination *infra*, Section III.A.

Second, sexual orientation is the intimate association of one's own sex in relation to the sex of another.⁶⁸ It is the conduct of association that results in the status of homosexual, heterosexual, gay, lesbian, or bisexual because one's sexual orientation only exists in association with another individual.⁶⁹ Thus, sexual orientation discrimination is sex discrimination because it discriminates on the basis of sex in relation to one's intimate associates.⁷⁰

Third, sexual orientation is the sexualized dimension of gender, which is the social schema that controls how we express underlying biological sex.⁷¹ The concept of gender gives us our threshold presumptions of what it means to be a man or a woman.⁷² In other words, gender stereotyping is the set of these rules, which guide how we are expected to behave as men and women.⁷³ Central to these presumptions about masculinity and femininity is sexual orientation, namely heterosexuality.⁷⁴ Heterosexuality is the ultimate rule of gender conformity: the social expectation that women should be intimately associated with men and vice versa.⁷⁵ LGB individuals defy this stereotype,⁷⁶ and thus, sexual orientation discrimination is sex discrimination because it discriminates on the basis of sex as it relates to gender expression.⁷⁷

Despite the strong theoretical underpinnings of the legal arguments that sexual orientation discrimination is a form of sex discrimination, advocates have given the social constructionist framework much less attention in discrimination litigation.⁷⁸ Indeed, Professor Suzanne Goldberg has argued that the alternative arguments to essentialism are “potentially more dangerous to the plaintiffs' case than

68. See Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J. L. & HUMAN. 161, 168 (1996).

69. See NeJaime, *supra* note 58, at 1198; Valdes, *supra* note 49, at 15–16.

70. *E.g.*, Zarda, 883 F.3d at 124–28; *see* discussion of associational theory of discrimination *infra* Section III.B.

71. See Valdes, *supra* note 68, at 167.

72. Wendy Wood & Cecilia L. Ridgeway, *Gender: An Interdisciplinary Perspective*, 73 SOC. PSYCHOL. Q. 334, 335 (2010).

73. *Id.*

74. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

75. See JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY*, 1–18 (1995); *see also* Valdes, *supra* note 49, at 121.

76. *See id.*

77. *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 119–24 (2d Cir. 2018); *see* discussion of gender stereotyping theory of sex discrimination *infra*, Section III.C.

78. Goldberg, *supra* note 9, at 2089–99; *see also* Mary Ziegler, *What is Sexual Orientation?* 106 KY. L. J. 61, 99–110 (2018) (arguing how LGB legal rights movement's strategic shift toward a concept of immutable sexual orientation is “a way of maximizing support for the cause and strengthening equal-protection arguments in the courts”). For a history of LGB rights litigation, *see generally* ELLEN ANN ANDERSON, *OUT OF THE CLOSET & INTO THE COURTS* (2006); Patrician A. Cain, *Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1551, 1564–1641 (1993); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2169–92 (2002); *see also* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 669–701 (2017).

most arguments being made by our adversaries.”⁷⁹ Goldberg cautioned that the frame of sexual orientation as a deeply rooted, “natural” trait was critical to courts’ understanding of lesbians and gays as a cognizable class under equal protection.⁸⁰ Although the constructionist approach presents difficulties for recognition of sexual orientation as a separate suspect class, it not only allows courts to conceptualize sexual orientation more broadly as sex discrimination, but also avoids doctrinal risks that arise from an essentialist framework. I discuss this throughout the following two parts.

III. RISKY ARGUMENTS: ESSENTIALIST FRAMEWORK AS FUNDAMENTAL TO SEXUAL ORIENTATION DISCRIMINATION

Courts have used essentialist frameworks in ways that have mixed implications for LGB equality. Opponents of LGB equality rely upon essentialist frameworks to distinguish LGB individuals (i.e. “homosexuals”) as a separate class distinct from heterosexual individuals, to distinguish same-sex marriages from marriages, and to distinguish status from conduct. These distinctions are fundamental to arguments favoring inequality.

A. DISTINGUISHING LGB INDIVIDUALS FROM HETEROSEXUAL INDIVIDUALS

First, courts have used essentialist notions to distinguish heterosexual individuals from homosexual individuals. This distinction provides courts a doctrinal justification to allow discrimination against LGB individuals because this characterization creates its own distinguishable form of discrimination that otherwise would not be tolerated. Conceptualizing lesbians and gays as something distinct from the norm distances sexual orientation discrimination from other broader proscribed forms of discrimination.

For example, in *Bowers v. Hardwick*, the Supreme Court used an essentialist framework to deny a fundamental right to an essentialist category of individuals—“homosexuals”—that would have been “concededly unconstitutional in respect to heterosexuals.”⁸¹ In 1982, Hardwick was charged with violating the Georgia sodomy statute after a roommate permitted a policeman to enter Hardwick’s apartment, and the officer saw Hardwick in his bedroom having sex with another man.⁸² The officer arrested Hardwick, but the district attorney declined to prosecute.⁸³ However, Hardwick filed a lawsuit, challenging Georgia’s sodomy statute as applied to consensual homosexual sodomy.⁸⁴ He argued that, as a practicing homosexual, the statute placed him in imminent danger of arrest in violation of his constitutional rights.⁸⁵

79. Goldberg, *Social Justice*, *supra* note 11, at 630.

80. *See id.* at 630–31.

81. 478 U.S. 186, 220 (1986) (Stevens, J., dissenting).

82. *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985).

83. *Id.*

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

85. *Id.*

The Supreme Court's essentialist framing is most evident when seen in contrast to how the Eleventh Circuit treated *Hardwick* as a normal citizen. The Eleventh Circuit found that the statute violated *Hardwick*'s fundamental right to privacy. It reasoned that strong similarities existed between *Hardwick*'s conduct and associational interests related to marriage.⁸⁶ Although *Hardwick*'s sexual behavior was not procreative, the court noted that the Constitution's protection of intimate associations was not limited to those associations with a procreative purpose nor limited to marriage.⁸⁷ The court also reasoned that "[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage," supporting the idea that sexual activity is an intimate association that provides "unsurpassed opportunity for mutual support and self-expression."⁸⁸ The Eleventh Circuit held that the Georgia statute violated *Hardwick*'s fundamental right to privacy.

In contrast, the Supreme Court conceptualized *Hardwick*'s sexuality through an essentialist model that perceived *Hardwick*, not as an individual with privacy rights under the Constitution, but rather as something distinct from the men and women whose constitutional privacy rights were recognized by the Court's earlier decisions. The Court framed the issue, not in terms of the privacy rights of all individuals, but as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy. . . ."⁸⁹ The Court clearly distinguished the "claimed constitutional right of homosexuals"⁹⁰ from the constitutional right of privacy dealing with child rearing and education, family relationships, procreation, marriage, and abortion.⁹¹ The Court firmly rejected the Eleventh Circuit's observation that same-sex sexual activity for some individuals serves the same purpose as marital intimacy;⁹² it found "[n]o connection between family, marriage or procreation on the one hand and homosexual activity on the other."⁹³ The Court conceptualized homosexuals as something different from normal men and women, apparently without the same emotional needs for family and intimacy.

B. DISTINGUISHING SAME-SEX MARRIAGE FROM MARRIAGE

Second, courts' use of essentialist frames shifted in language and emphasis post-*Obergefell*. However, essentialist concepts are now being deployed to distinguish between families of same-sex and opposite-sex couples. For example, in

86. *Hardwick*, 760 F.2d at 1211.

87. *Id.* at 1211–12.

88. *Id.*

89. *Bowers*, 478 U.S. at 190.

90. *Id.* at 191.

91. *Id.* at 190 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 360 (1923)).

92. *Bowers*, 478 U.S. at 191.

93. *Id.*

Smith v. Pavan, the Arkansas Supreme Court uses an essentialist framework for marriage to distinguish between same-sex and opposite-sex families regarding the state's recognition of parents on a birth certificate.⁹⁴ The Arkansas Supreme Court singles out "same-sex marriages" as a proxy for sexual orientation to allow differential treatment.⁹⁵

The facts in *Pavan* are straightforward. Marisa and Terrah Pavans ("the couple") were legally married and living in Arkansas when Terrah became pregnant through artificial insemination.⁹⁶ She gave birth to a baby girl in 2015 in Little Rock, and the couple completed the birth certificate application at the hospital, listing both as parents.⁹⁷ Arkansas family law, like the law of most states, requires that when a child is born to a mother "married at the time of either conception or birth . . . the name of the husband shall be entered on the certificate as the father of the child."⁹⁸ The Arkansas Department of Health issued the birth certificate with Terrah listed as the sole parent.⁹⁹ The couple successfully sued the Director of the Arkansas Department of Health in circuit court on equal protection grounds, but the Arkansas Supreme Court reversed and dismissed on direct appeal, finding no equal protection violation.¹⁰⁰ The United States Supreme Court further overruled in a summary dismissal.¹⁰¹

The Arkansas Supreme Court conceptualized the couple's marriage through an essentialist model that distinguished it from a family with certain rights and presumptions, including presumptions about parental rights. The Arkansas Supreme Court specifically took issue with the lower court's holding that the birth certificate statute "intertwined the concepts of 'parent' with certain rights and presumptions occurring within a marital relationship, using now impermissible limiting spousal terms of 'husband' and 'wife' . . . categorically prohibit[ing] every same-sex married couple . . . from enjoying the same spousal benefits which are available to every opposite-sex married couple."¹⁰² The court rejected the lower court's conclusion that the statute's use of the words "husband" and "wife" made the statute constitutionally infirm.¹⁰³ It defended the gendered distinction with the claim that "the statute centers on the relationship of the biological mother and the

94. See 505 S.W.3d 169, 175–82 (Ark. 2016).

95. See *id.*

96. See *id.* at 172–73.

97. See *id.*

98. ARK. CODE ANN. § 20-18-401(f)(1) (2018).

99. *Pavan*, 505 S.W.3d at 172.

100. The Arkansas Supreme Court applied intermediate scrutiny to the statute and found that it survived, *id.* at 181, despite the state's concession at oral argument that that applying the law differently to opposite-sex and same-sex couples who artificially conceive "fails equal protection under the plain old rational basis standard." Pet. for Writ of Cert., *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (No. 160992), 2017 WL 587527, at *10.

101. *Pavan v. Smith*, 137 S. Ct. 2075, 2076–79 (2017).

102. *Pavan*, 505 S.W.3d at 176, 178.

103. *Id.* at 178.

biological father to the child.”¹⁰⁴ In other words, when the statute used the marital terms husband and wife, it really meant biological mother and father.

Underlying these legal contortions is an essentialist concept of marriage as a social institution based upon nature that involves male and female, husband and wife, mother and father. As the Arkansas Supreme Court described it, there was no equal protection violation because “this statute considers the relationship of the biological mother and the biological father to the child.”¹⁰⁵ Thus, the court saw no reason to interpret a “biologically based phrase” in the birth certificate statute as inclusive of the minor children of a married “same-sex couple.”¹⁰⁶ Per the Arkansas Supreme Court’s logic in *Pavan*, married same-sex couples with minor children are thus distinguishable from Arkansas families; as long as they are distinguishable, there can be justifications for differential treatment. Same-sex marriage, as distinguished from marriage, has become an essentialist proxy for sexual orientation.¹⁰⁷

C. DISTINGUISHING STATUS FROM CONDUCT

Third, courts have used essentialist conceptions of sexual orientation to distinguish status from conduct, allowing discrimination by proxy.¹⁰⁸ The logic of an essentialist approach is based upon a world where social categories and roles are based upon nature; thus, an individual’s behavior cannot confer status. An individual is LGB, irrespective of her behavior. Oddly, within this framework, individuals can engage in same-sex sex, but their heterosexual orientation remains unaltered.¹⁰⁹ Conversely, under this logic, individuals can be LGB without ever engaging in sex, a relationship, or marriage with someone of the same-sex.¹¹⁰

104. See *id.*

105. See *id.*

106. See *id.*

107. See *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J. dissenting) (reframing the question from *Obergefell* to “whether a State must recognize same-sex marriages”); see also *Pidgeon v. Turner*, 538 S.W.3d 73, 86–87 (Tex. 2017) (asserting that “[t]he Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons . . .”).

108. See generally Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017) (discussing the broader use of the artificial status-conduct distinction to prevent antidiscrimination protection for not only LGB individuals, but also heterosexuals engaging in non-marital intimacy and child-rearing).

109. This was a common distinction in the military discharge cases of the 1980s and 1990s. See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1339 (9th Cir. 1988) (observing that “[i]f a straight soldier and a gay soldier of the same sex engage in homosexual acts . . . the straight soldier may remain in the Army while the gay soldier is automatically terminated”), *withdrawn on other grounds*, 875 F.2d 689 (9th Cir. 1989); see also cases cited *supra* note 39.

110. See, e.g., *Meinhold v. United States Dep’t of Def.*, 34 F.3d 1469, 1479 (9th Cir. 1994) (concluding that “[h]is statement—‘I am in fact gay’ . . . manifests no concrete, expressed desire to commit homosexual acts”); *benShalom v. Sec’y of Army*, 489 F. Supp. 964, 975 (E.D. Wis. 1980) (concluding “the petitioner was treated in the same way as one who openly engages in homosexual activity, even though she is ‘guilty’ of nothing more than having a homosexually-oriented personality”).

Within the essentialist frame of sexual orientation, this is possible because sexual behavior and sexual orientation are severable.¹¹¹ The doctrinal implication of severing status and conduct is that sexual orientation discrimination can be distinguished from closely-associated conduct, conceptually allowing discrimination against the status by using the conduct as a proxy.¹¹²

A recent Eleventh Circuit case, *Evans v. Georgia Regional Hospital*, displayed this contorted logic.¹¹³ Jameka Evans is a lesbian who worked as a security guard at Georgia Regional Hospital.¹¹⁴ She did not discuss her sexuality at work where she wore a male uniform, a short, predominately male haircut, and men's shoes.¹¹⁵ She claimed she was harassed and subjected to unequal conditions because of her sexual orientation and gender nonconformity.¹¹⁶ She quit and filed a constructive discharge claim under Title VII alleging sex discrimination.¹¹⁷ The federal district court dismissed her claim because Title VII, which prohibits employment discrimination because of sex, "was not intended to cover discrimination against homosexuals."¹¹⁸ The magistrate judge also rejected her theory of gender nonconformity as "just another way to claim discrimination based on sexual orientation."¹¹⁹ The Eleventh Circuit affirmed that sexual orientation discrimination was not actionable under Title VII.¹²⁰

In his concurrence, Eleventh Circuit Judge William Pryor¹²¹ relied upon an essentialist framework that distinguished status and conduct, claiming that sexual orientation discrimination and discrimination based on gender nonconformity are legally distinct concepts.¹²² Judge Pryor rejects the argument that sexual orientation discrimination always involves gender nonconformity; he dismisses gender

111. One district court went as far as to "take notice of the logical distinction between gay individuals who simply prefer the companionship of members of their own sex and homosexual individuals who actively practice homosexual conduct." *Cyr v. Walls*, 439 F. Supp. 697, 702 (N.D. Tex. 1977).

112. Under such, a discrimination by proxy scenario where conduct and status are divisible, "a tax on wearing yarmulkes" is no longer "a tax on Jews." See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); *c.f.* *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 672, 689 (2010) (holding that discrimination against individuals who engage in "unrepentant homosexual conduct" is discrimination due to status). For a discussion of the history of status-conduct arguments in LGB rights litigation, see Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too*, 5–22 (Sept. 22, 2017), available at <https://ssrn.com/abstract=3041377>.

113. 850 F.3d 1248, 1258–61 (11th Cir. 2017) (Pryor, J., concurring).

114. *Id.* at 1251.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1252 (internal quotations omitted).

119. *Id.*

120. *Id.* at 1255.

121. Judge Pryor, along with Judge Diane Sykes of the 7th Circuit, was widely considered to be a front-runner to replace Justice Scalia on the Supreme Court. See, e.g., Kevin Russell & Charles Davis, *Potential nominee profile: William Pryor (Expanded)*, SCOTUSBLOG, (Jan. 10, 2017, 3:35 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-william-pryor/>.

122. *Evans*, 850 F.3d at 1258 (Pryor, J., concurring).

stereotyping arguments as themselves a form of stereotyping.¹²³ To make this argument, Judge Pryor uses some novel moves to distinguish between LGB status and conduct. He begins by severing LGB status from same-sex sexual desire, claiming that “[s]ome gay individuals adopt . . . the gay ‘social identity’ but experience a variety of sexual desires.”¹²⁴ Next, he separates LGB status from same-sex sex, claiming that “some gay individuals may choose not to marry or date at all or may choose a celibate lifestyle.” To finalize the status-conduct distinction, he asserts, “other gay individuals choose to enter mixed-orientation marriages,” which presumably means lesbians and gays marrying opposite sex heterosexuals.¹²⁵ In other words, there may not be anything particularly gender nonconforming about LGB individuals because they may be married to a straight person of the opposite sex, have no sexual desire for the same-sex, have no same-sex sex, and never date someone of the same sex.¹²⁶ When status and conduct become so severed as to render status meaningless, it follows that sexual orientation discrimination is not always a form of sex discrimination: “just as a woman cannot recover under Title VII when she is fired because of her heterosexuality, neither can a gay woman sue for discrimination based on her sexual orientation.”¹²⁷ Of course, the “gay woman” in Judge Pryor’s reasoning has no cognizable sex discrimination claim under a gender stereotyping theory of sexual orientation discrimination because she may have no desire for another woman, may have never dated another woman, may have never had sex with another woman and may even be married to a straight man.

Judge Pryor takes the essentialist conduct - status distinction to an arguably greater extreme when he applies it to the Eleventh Circuit’s landmark decision in *Glenn v. Brumby*.¹²⁸ In *Glenn*, Glenn successfully asserted a Title VII claim that she was discriminated against on the basis of sex after she was fired because she is transgender.¹²⁹ Judge Pryor proffered that the court found sex discrimination under Title VII, not because of Glenn’s status as a transgender woman, but because of her behavior, arguing, “Title VII would have protected any biological male under those facts, not because of status, but because of behavior.”¹³⁰ These facts, per Judge Pryor, where the court would have protected “any biological male” include, not just transgender women, but any biological male “tak[ing] steps to transition,” “present[ing] and dress[ing] as a woman at work,” and notifying a supervisor that Glenn intended to go through with the transition.¹³¹ Unless there is some set of biological males who are not transgender, but nonetheless go

123. *Id.* at 1258–59.

124. *Id.* at 1259.

125. *Id.*

126. *See id.*

127. *Id.* at 1258.

128. *Id.* at 1259 (citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)).

129. 663 F.3d 1312, 1313–14, 1321 (11th Cir. 2011).

130. *Evans*, 850 F.3d at 1260 (Pryor, J. concurring).

131. *Id.* (internal quotations omitted).

through sex change, dress as women, and inform others they are transitioning, Judge Pryor demonstrated that severing conduct and status is conceptually suspect and often absurd.

In sum, arguments against LGB equality are commonly rooted in an essentialist framework. A common thread in these cases is an essentialist framing that views something distinct about sexual orientation and related societal categories. If homosexuals and LGB individuals are distinct from heterosexuals, and this distinction is unrelated to gender, then it follows that these two groups can be treated differently under the law. Moreover, creating a distinct form of sexual orientation discrimination precludes understanding sexual orientation discrimination as a form of sex discrimination. Similarly, creating a distinct form of marriage, namely “same-sex marriage,” allows some marriages to be treated distinctly different from others.

Under this essentialist model, LGB individuals are a fixed social category. As a result, individual behavior cannot confer and/or remove status, allowing status and conduct to be divorced. This conduct-status distinction is conducive to disparate treatment because behavior can be used as an unprotected proxy for discrimination. Treating sexual orientation discrimination as a distinct form of discrimination is fundamental to arguments against LGB equality as we see in the next part.

IV. SHIFTING ARGUMENTS: SOCIAL CONSTRUCTIONIST CONCEPTUALIZATIONS OF SEXUAL ORIENTATION IN COURT

A growing trend among federal district courts and circuit courts of appeal is the use of a social constructionist framework to find that sexual orientation discrimination is a form of sex discrimination.¹³² A social constructionist framework allows courts to approach sexual orientation discrimination through the lens of sex discrimination. Through this conceptual frame, courts have probed more complex issues of how sexual orientation discrimination derives from sex discrimination. These changes have primarily occurred in the Title VII context, but the reasoning is equally applicable to equal protection cases since the question of what encompasses sex discrimination is identical under either framework.¹³³

132. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116, 119, 124 (2d Cir. 2018) (en banc); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring) (per curiam); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc); *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 702–18 (7th Cir. 2016) (panel) (collecting cases); *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J. concurring).

133. See *Latta*, 771 F.3d at 486 (observing, “[t]he notion underlying the Supreme Court’s anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling . . .”); see also Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 9–23 (1975) (situating Title VII sex-discrimination jurisprudence within the context of constitutional sex-discrimination jurisprudence).

Equal protection and Title VII opinions from the Second, Seventh, and Ninth Circuits have embraced three complementary theories of sexual orientation discrimination as sex discrimination: comparative, associational, and gender stereotyping.¹³⁴ The theories were first successfully argued in an EEOC case,¹³⁵ then rapidly gained traction in Article III courts. In this section, I examine each theory and its counterarguments.

A. COMPARATIVE ARGUMENTS

Under a comparative theory of sexual orientation discrimination, sexual orientation discrimination is a form of sex discrimination when similarly situated men and women would not be treated differently but for their sex.¹³⁶ Courts analyze these discrimination claims through a simple scientific cause-and-effect test that uses a comparator to isolate the protected characteristic to determine if the treatment changes when the protected characteristic is changed.¹³⁷ Thus, discrimination is present if a woman who is intimately involved with another woman is treated worse than a similarly situated man who is intimately involved with a woman.¹³⁸ This seemingly straightforward test becomes a flashpoint in sexual-orientation-discrimination-as-sex-discrimination cases where there is confusion about whether sexual orientation is introducing a new variable into the analysis, and what role that variable plays.¹³⁹

1. Comparative Arguments in Court

Both the Second and Seventh Circuits have embraced the comparative theory to hold that sexual orientation discrimination is a form of sex discrimination.¹⁴⁰ In the Seventh Circuit's *en banc* opinion in *Hively v. Ivy Tech Community College of Indiana*, the methodology of the comparator test was particularly prominent, and it was a focal point for the dissent.¹⁴¹ The plaintiff, Kimberly

134. *Zarda*, 883 F.3d at 116, 119, 124 (Title VII - sex discrimination); *Christiansen*, 852 F.3d at 202–06 (Title VII - sex discrimination); *Hively*, 853 F.3d at 346 (same); *Hively*, 830 F.3d at 702–18 (same); *Latta*, 771 F.3d at 485–87 (equal protection – marriage); see also *Franchina v. City of Providence*, 881 F.3d 32, 51–54, n.19 (1st Cir. 2018) (allowing a “sex-plus” Title VII claim where the plus factor was sexual orientation).

135. See *Baldwin*, EEOC No. 0120133080, 2015 WL 4397641, at *4–10 (EEOC July 15, 2015).

136. The comparative theory is a but-for argument, but I generally avoid referencing it this way to avoid confusion because Title VII does not require but-for causation, something irrelevant to this discussion. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (“To construe the words ‘because of’ [sex] as colloquial shorthand for ‘but-for causation’ . . . is to misunderstand them.”).

137. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L. J. 728, 744–45 (2011).

138. See *Zarda*, 883 F.3d at 116–19; *Hively*, 853 F.3d at 345–46.

139. See *Zarda*, 883 F.3d at 116–17 (discussing sexual orientation as a control variable); *Hively*, 853 F.3d at 345, 365–67 (discussing sexual orientation as a possible second variable).

140. *Zarda*, 883 F.3d at 116; *Hively*, 853 F.3d at 345–46.

141. 853 F.3d at 345; *id.* 365–67 (Sykes, J., dissenting). The Sixth Circuit recently used the *Hively* majority's comparative test under a gender-stereotyping theory to determine whether sex discrimination impermissibly affected an employment action involving a transgender employee. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018).

Hively, began working as a part-time adjunct professor at Ivy Tech Community College in 2000.¹⁴² Between 2009 and 2014, she unsuccessfully applied for at least six full-time positions.¹⁴³ In 2014, Ivy Tech did not renew her part-time contract.¹⁴⁴ Hively sued, alleging sexual orientation discrimination under Title VII.¹⁴⁵ The federal district court dismissed her case for failure to state a claim, relying upon Seventh Circuit precedent that sexual orientation was not a protected class under Title VII.¹⁴⁶ In an exhaustive analysis of why sexual orientation discrimination is a form of sex discrimination, a Seventh Circuit panel affirmed the dismissal because it was bound to follow circuit precedent.¹⁴⁷ The full en banc court overruled the precedent and reversed.¹⁴⁸

The en banc court used a comparative analysis test to determine if the defendant took a discriminatory action against Hively because she is a woman.¹⁴⁹ The court formulated the test by asking whether the plaintiff “described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?”¹⁵⁰ The inquiry is not whether a lesbian is being treated differently than a gay man, but rather, whether a woman is being treated differently because of her sex, so the test is the counterfactual in which the comparator “is a man, but everything else stays the same: in particular, the sex or gender of the partner.”¹⁵¹ Applied to *Hively*, the test is whether the plaintiff “had been a man and married to a woman (or living with a woman, or dating a woman) and [if] everything else had stayed the same,” would the defendant have refused to promote him and have fired him?¹⁵² The majority reasoned that Ivy Tech would not have acted adversely against hypothetical comparator and concluded that Ivy Tech had discriminated against Hively because of her sex.¹⁵³

142. *Hively*, 853 F.3d at 341.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 WL 926015, at *3–4 (N.D. Ind. Mar. 3, 2015).

147. *Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 830 F.3d 698, 702–18 (7th Cir. 2016).

148. *Hively*, 853 F.3d at 350–52.

149. *Id.* at 345; see *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711–12 (1978) (applying “simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”); see also *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring).

150. *Hively*, 853 F.3d at 345. Judge Berzon of the Ninth Circuit applied this straightforward analysis in a same-sex marriage case and described her similar approach as: “Latta may not marry her partner . . . for the sole reason that Latta is a woman; Latta could marry [her partner] Ehlers if Latta were a man. . . . But for [her] gender, plaintiff[] would be able to marry the partner[] of [her] choice. [Her] rights . . . are wholly determined by [her] sex.” *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J. concurring).

151. *Hively*, 853 F.3d at 345.

152. *Id.*

153. *Id.* at 346–47 (holding sexual orientation discrimination is sex discrimination).

2. Comparative Counterarguments

To overcome comparative arguments, opponents of equality must show that sexual orientation has nothing to do with sex, or rather that sexual orientation is not sexual. Here, the analytical challenge facing opponents of equality is to somehow extract sex from sexual orientation as to deny and obscure that an individual's sex in relation to the sex of another is what defines sexual orientation.¹⁵⁴ So, it is no surprise that the counterarguments rely upon conceptualizing sexual orientation within an essentialist framework, which unquestionably accepts sexual orientation as something unique and distinct from sex.¹⁵⁵ They generally avoid direct engagement with these arguments¹⁵⁶ beyond quoting separate dictionary entries, asserting that the “two traits [sex and sexual orientation] are categorically distinct and widely recognized as such” and pointing to “a commonsense understanding.”¹⁵⁷ As the *Hively* majority noted, it requires “considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”¹⁵⁸

The primary counterargument mustered against this comparative approach is that the application of the comparator test that is used to isolate “but-for” discrimination is flawed.¹⁵⁹ The assertion is that it merges two distinct categories of discrimination—sex and sexual orientation.¹⁶⁰ The counterclaim is that all things are not being held constant, but rather the extra variable of sexual orientation is being introduced into a comparator analysis.¹⁶¹ In other words, sexual orientation

154. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018) (en banc) (“[O]ne cannot fully define a person’s sexual orientation without identifying his or her sex. . . .”); *Hively*, 853 F.3d at 358 (Flaum, J., concurring) (“Fundamental to the definition of homosexuality is the sexual attraction to individuals of the ‘same sex.’ . . . One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render “same” . . . meaningless.”). *Contra Hively*, 853 F.3d at 367 n.5 (Sykes, J., dissenting) (“This attempt to conceptually split homosexuality into two parts—a person’s sex and his or her sexual attraction to persons of the same sex—doesn’t make sexual-orientation discrimination actionable as sex discrimination.”).

155. *See Hively*, 853 F.3d at 363 (Sykes, J., dissenting) (punctuation omitted) (“[S]ex is not reasonably understood to include . . . sexual orientation, a different immutable characteristic”). *See also* discussions on essentialist and social constructionist theoretical approaches to sexual orientation *supra* Part I.

156. *See Zarda*, 883 F.3d at 113 n.8.

157. *Hively*, 853 F.3d at 363 (Sykes, J., dissenting); *see Zarda*, 883 F.3d at 148–49 (Lynch, J., dissenting).

158. *Hively*, 853 F.3d at 350.

159. *Id.* at 365. The Department of Justice filed an amicus brief and participated in oral arguments at the en banc hearing of *Zarda v. Altitude Express*, proffering other counterarguments to the comparative test, including a slippery-slope claim portending the end of sex-segregated bathrooms. *See* Oral Argument at 01:14–15, 01:22, 01:26, 01:31, 01:36–46, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775) (en banc), <https://www.c-span.org/video/?433984-1/zarda-v-altitude-express-oral-argument&start=4446>; *see also* Brief for Arkansas, et al., as Amici Curiae Supporting Appellee, at *13, *Horton v. Midwest Geriatric Mgmt. LLC*, (No. 18–1104), 2018 WL 3089600 (8th Cir. June 13, 2018) (warning that use of a “simple” comparator test would “prohibit sex-specific restrooms”). *But see Zarda*, 883 F.3d at 118 (dismissing the government’s toileting concerns as addressing the wrong prong of the Title VII analysis).

160. *Hively*, 853 F.3d at 365–67.

161. *Id.*

discrimination is its own independent form of discrimination, agnostic toward sex, dividing the world not between males and females, but between heterosexuals and homosexuals.¹⁶² This counterargument relies upon conceptualizing sexual orientation within an essentialist framework that understands sexual orientation as something unique and distinct from sex. This argument was forcefully made in the *Hively* dissent written by Judge Diane Sykes.¹⁶³

According to Judge Sykes, comparing a woman attracted to a woman with a man attracted to a woman fails to “hold *everything* constant except the plaintiff’s sex.”¹⁶⁴ Judge Sykes claims that “[t]he court’s reasoning essentially distills to this: If we compare [the plaintiff] *Hively*, a homosexual woman, to hypothetical Professor A, a heterosexual man, we can see that [defendant] Ivy Tech is actually disadvantaging *Hively* because she is a woman.”¹⁶⁵ She argues that the majority “load[s] the dice by changing *two* variables—the plaintiff’s sex *and* sexual orientation—to arrive at the hypothetical comparator.”¹⁶⁶ This is a classic essentialist theoretical framing of sexual orientation, conceptualizing sex and sexual orientation as two entirely distinct, unrelated variables.¹⁶⁷

Superimposing this logic from the *Hively* dissent onto *Loving v. Virginia* is instructional.¹⁶⁸ The Lovings were an interracial married couple that Virginia charged with violating its anti-miscegenation laws because, per the statute, the husband was “white” and the wife “colored.”¹⁶⁹ Virginia argued that “because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance upon racial classifications[,] do not constitute an invidious discrimination based upon race.”¹⁷⁰ The Court firmly rejected Virginia’s equal application theory and found that the state violated both their equal protection and substantive due process rights.¹⁷¹ Applying the comparative methodology from the *Hively* majority to *Loving*, we change only the variable of race and then ask if Mr. Loving would be subject to the miscegenation law if he were “colored” and Mrs. Loving remained “colored”?¹⁷² The law would not apply to the comparator, so the test result is race-based discrimination.

162. *Id.* at 365 (“Simply put, sexual-orientation discrimination doesn’t classify people by sex; it doesn’t draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.”).

163. *Hively*, 853 F.3d at 366.

164. *Id.*

165. *Id.*

166. *Id.*

167. See discussion of essentialism and sexual orientation, *supra* Section I.A.

168. See *Loving v. Virginia*, 388 U.S. 7–8 (1967).

169. *Id.* at 2–4. Throughout my discussion of *Loving*, I use the racial categories of “white” and “colored” from the Virginia statute in recognition that these classifications likely had a different meaning than from any superficially analogous racial classifications today.

170. *Id.* at 8.

171. *Id.* at 12.

172. The *Hively* dissent argues that “[t]his case is not a variant of *Loving*” because “sexual-orientation discrimination springs from a wholly different kind of bias than sex discrimination.”

After we recognize that there are indeed multiple variables involved in the test, then the question arises: whether this still is a valid cause-and-effect test when two variables are changing. The answer lies in the relationship among all variables. A closer look at the above *Loving* analysis suggests that another variable lurks in the equation: the racial orientation of the marriage. When the comparator's race changes, the racial orientation of the marriage also changes, and this racial orientation determines whether the anti-miscegenation laws apply.¹⁷³ The social sciences describe such a causal relationship as in *Loving*, where a third variable comes between what is being tested and the outcome, linking the cause and effect in a chain reaction.¹⁷⁴ Simply put, a change in the first variable affects a change in the next, which in turn acts upon the last variable, providing the outcome.¹⁷⁵ In scientific terms, the independent variable acts upon the mediating variable, which in turn transmits the effect of the independent variable to the dependent variable.¹⁷⁶ This mediating variable explains the why and how of a causal relationship because it directly affects the value of the dependent variable that is the outcome.¹⁷⁷ One researcher described this process as "a line of dominos and knocking over the first domino starts a sequence where the rest of the dominos are knocked over one after another."¹⁷⁸

What is seen in *Loving* is such a chain reaction. It is a test of whether a similarly situated comparator of a different race than Mr. Loving would have the same discriminatory outcome. When the comparator's race is changed to "colored" and the wife remains "colored," the combination of races creates the racial orientation of a same-race marriage.¹⁷⁹ This racial orientation, in turn, determines the outcome: the anti-miscegenation law does not apply to a same-race marriage. The outcome is a dependent variable of racial orientation, which is, in turn, a

Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 367 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) ("Miscegenation laws plainly employ invidious racial classifications; they are inherently racially discriminatory."). See *contra* Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 197–20, 203 (2d Cir. 2017) (Katzmann, C.J., concurring) (concluding that the logic from *Loving* "suggests that it is sex discrimination to treat all individuals in same-sex relationships the same, but less favorably than individuals in opposite-sex relationships"). See also *infra* Section III.B.2.

173. Cf. Tetro v. Elliott Popham Pontiac, 173 F.3d 988, 994–95 (6th Cir. 1999) (reasoning that the nexus of associational discrimination was "the contrast in races between Tetro and his daughter").

174. Amery D. Wu & Bruno D. Zumbo, *Understanding and Using Mediators and Moderators*, 87 SOC. INDICATORS RES. 367, 368 (2008).

175. See *id.*

176. This mediating variable is itself a dependent variable of the independent variable changed by the investigator. See David P. MacKinnon, et al., *Mediation Analysis*, ANN. REV. PSYCHOL. 593, 594 (2007).

177. Reuben M. Baron & David A. Kenny, The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations, 51 J. OF PERSONALITY & SOC. PSYCHOL. 1173, 1176–79 (1986).

178. See Wu & Zumbo, *supra* note 174, at 369 (quotations omitted).

179. Here, the independent variable is Mr. Loving's race in association with the control variable of his partner's race. The mediating variable is the racial orientation, which determines the dependent variable, which is the outcome of applicability of miscegenation laws.

dependent variable of race. Thus, racial orientation discrimination is race discrimination.

The same dynamics from *Loving* are at play in *Hively* when we test whether a similarly situated comparator would have the same discriminatory outcome.¹⁸⁰ The outcome is the domino effect of the comparator's sex (male), interacting with the partner's sex (female), determining the sexual orientation (heterosexual), which in turn affects whether there is discriminatory treatment.¹⁸¹ Thus, sexual orientation discrimination is sex discrimination; only a few dominoes have to fall to get there.

Returning to Judge Sykes' *Hively* dissent, recall that she argues that the majority misapplied the comparative method when it "chang[ed] *two* variables—the plaintiff's sex *and* sexual orientation—to arrive at the hypothetical comparator."¹⁸² Judge Sykes is correct only insofar as she identifies that two variables were indeed involved, but she ignores the relationship among all variables. She treats sexual orientation as an isolated, independent variable, thereby sidestepping the above-described domino effect.

However, the problem with treating sexual orientation as an independent variable is that sexual orientation cannot be independently changed without an accompanying change in the sex of either the comparator *or* the partner. For example, in *Hively*, it is impossible to change the comparator to male and maintain the partner's sex constant as female, while keeping the sexual orientation constant as homosexual without ending up with the paradox of a gay man with a female partner. Similarly, in *Loving*, it is impossible to change the comparator to "colored," and keep the partner's race constant as "colored," while keeping the racial orientation constant as mixed race without ending up with a similar paradox: a marriage that is somehow racially mixed but both spouses share the same race. Nonetheless, this is what Judge Sykes urges when she argues that "*everything* [must be] held constant except the plaintiff's sex. That includes the plaintiff's sexual orientation."¹⁸³ Judge Sykes describes her version of the correct comparator test:

180. For a discussion of how *Hively* is a "reverse-*Loving*" when analyzed through an associational theory of discrimination, see *supra* Section III.B.2.

181. Here, the independent variable is *Hively*'s sex in association with the control variable of her partner's sex. The mediating variable is the sexual orientation, which determines the dependent variable, which is the outcome of applicability of Title VII. The Second Circuit majority in *Zarda* gets the test right but misidentifies sexual orientation ("the trait") as a control variable while ignoring the actual control variable, the sex of the partner. This can become consequential because it is often used to confuse and obscure the dynamics of the proper test. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 117 (2d Cir. 2018) (en banc) ("In the comparison, the trait [i.e. sexual orientation] is the control, sex is the independent variable, and employee treatment is the dependent variable.").

182. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 366 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

183. *Id.*

[f]or the comparison to be valid as a test for the role of sex discrimination in this employment decision, the proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination.¹⁸⁴

She is suggesting that to hold everything constant as a valid test for sex discrimination, gay women should be compared to gay men.¹⁸⁵ Judge Sykes' approach, however, does not hold everything constant. Instead, she quietly flips the sex of the comparator's *partner* from female to male to counteract the effect of the change in the comparator's sex upon sexual orientation so as to avoid the folly of a gay male comparator who has a female partner.¹⁸⁶ This exposes the fundamental flaw of the essentialist framing of sexual orientation as something unique and independent from sex: *essentialism fails to account for the relational dynamics that determine sexual orientation*.¹⁸⁷

For this sleight of hand to work, it is critical to keep the sex of the partner out of the equation. However, the *Hively* majority not only changes the comparator's sex (female to male), but explicitly holds the partner's sex constant (female)

184. *Id.* at 366. This essentialist approach creates a perplexing evidentiary issue of who belongs in the categories of homosexual, gay, lesbian. See *Hutchinson v. Cuyahoga Cty. Bd. of Cty. Comm'rs*, No. 1:08-CV-2966, 2011 WL 4452394, at *2 n.4 (N.D. Ohio Sept. 26, 2011) (discussing the plaintiff's burden of proof as "not required to prove her comparators' sexual orientation to a mathematical certitude. She need only produce evidence sufficient for a jury to conclude by a preponderance of the evidence that those persons are heterosexual."); *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754, 762 (D.D.C. 1995) (discussing evidentiary issues of "what would be legally sufficient to submit the issue of a supervisor's bisexuality to the jury[?] Would the supervisor's sworn statement of his or her bisexuality be adequate? Would the supervisor need to introduce affirmative evidence of his liaisons with members of both sexes?"); see also *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) ("Inevitably a case such as this impels the employer to try to prove that the plaintiff is a homosexual . . . and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into individuals' sexual preferences—to what end connected with the policy of the statute I cannot begin to fathom."). However, the Fifth Circuit has held that in cases of same-sex sexual harassment it is sufficient to show that it was the harasser's subjective perception that the plaintiff failed to conform to gender stereotypes. *EEOC v. Boh Bros. Constr. Co., LLC*, 731 F. 3d 444, 456–57 (5th Cir. 2013) (en banc) ("We do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth"); see also *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 WL 591190, at *17 (S.D. Tex. Feb. 21, 2012) (holding that perceived homosexuality is sufficient for a Title IX sex discrimination claim).

185. The government made a similar argument at the Second Circuit, which the court rejected. See *Zarda*, 883 F.3d at 123 (rejecting the government's argument by reasoning that "the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right . . . [A]n employer . . . has engaged in sex discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.").

186. *Cf. Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 203 (2d Cir. 2017) (Katzmann, C.J., concurring) (arguing that "when evaluating a comparator for a gay, lesbian, or bisexual plaintiff, we must hold every fact except the sex of the plaintiff constant—changing the sex of both the plaintiff and his or her partner would no longer be a 'but-for-the-sex-of-the-plaintiff' test").

187. See *NeJaime supra* note 58, at 1196–99.

while keeping silent about the comparator's sexual orientation.¹⁸⁸ After all, they are testing for causality.¹⁸⁹ Hence, Judge Sykes has no better option other than to argue that the *Hively* majority's test surreptitiously changes the comparator's sex and sexual orientation.¹⁹⁰ Ultimately, something did shift the sexual orientation; Judge Sykes alleges that it is the majority's manipulation of the test. Otherwise, she cannot account for a male comparator with a female intimate partner without the nonsensical claim that he is nonetheless homosexual.¹⁹¹ Even so, her assumption of heterosexuality implicitly, and perhaps unwittingly, acknowledges that the comparator's sex (male) in relation to the partner's sex (female) determines the comparator's sexual orientation (heterosexual). Therefore, Judge Sykes proves the majority's point: sexual orientation derives from sex, and thus, sexual orientation discrimination is a form of sex discrimination.

B. ASSOCIATIONAL ARGUMENTS

Under the association theory, sexual orientation discrimination is sex discrimination because it treats otherwise similarly situated individuals differently because of their sex in relation to that of their intimate partner.¹⁹² Recall the social constructionist underpinnings of the argument: an individual's sexual orientation exists only in association with another. The individual's sex in relation to a partner's sex determines whether the individual is in a same-sex or opposite-sex pairing, and it is this relationship that defines sexual orientation.¹⁹³ Under the related legal theory, sexual orientation discrimination is a form of sex discrimination because it treats similarly situated individuals differently because of their sex, perceived in relation to the sex of their intimate partners.¹⁹⁴ Counterarguments to the associational approach rely upon conceptualizing sexual orientation within an essentialist framework in which the arguments depend upon an understanding of sexual orientation as something unique and distinct.¹⁹⁵ The main counterargument largely relies upon a claim that sexual orientation discrimination and sex

188. *Hively*, 853 F.3d. at 345 (“The counterfactual we must use is a situation in which *Hively* is a man, but everything else says the same: in particular, the sex or gender of the partner.”).

189. *Id.* The *Hively* majority's version of the comparator method for simple causality is correct, even though it disregards the sexual orientation of the hypothetical comparator. Because the plaintiff's sex determines sexual orientation, sexual orientation is explanatory of why the discrimination occurs, but it is not dispositive. In social science terms, the mediating variable of sexual orientation has explanatory value of *why* the relationship exists between the independent variable of sex and the dependent variable testing for discrimination, but the mediating variable is not necessary to test for the dependency. See Baron & Kenny, *supra* note 177.

190. See *Hively*, 853 F.3d. at 366 (Sykes, J., dissenting).

191. *Id.* Nonetheless, some judges seem prepared to go into such bizarre contortions to separate conduct from status. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1258–61 (11th Cir. 2017) (Pryor, J., concurring) (“gay individuals choose to enter mixed-orientation marriages,” or rather some gay people, he claims, marry the opposite sex); see also conduct and status discussion *supra* Section II.C.

192. Baldwin, No. 0120133080, 2015 WL 4397641, at *6 (July 15, 2015).

193. See *supra* Section I.B.

194. *Christiansen*, 852 F.3d at 204–06 (Katzmann, C.J., concurring); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 347–49, 358–60 (7th Cir. 2017) (en banc).

195. See discussion of essentialist framework of sexual orientation *supra* Section I.A.

discrimination classify individuals based upon two different traits, a familiar argument.¹⁹⁶

1. Associational Arguments in Court

The Seventh Circuit explained in *Hively*, “a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits.”¹⁹⁷ The Supreme Court adopted this reasoning in the context of race discrimination in *Loving v. Virginia*, namely that the rights of both parties were infringed on the basis of their races.¹⁹⁸ The *Hively* court notes that an associational theory of discrimination has long been recognized, citing *Parr v. Woodmen of the World Life Insurance Company*, an Eleventh Circuit case in which an employer refused to hire a white man who was married to an African-American woman.¹⁹⁹ The Eleventh Circuit held that “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he was discriminated against because of his race.”²⁰⁰

The Second Circuit has also recognized this associational theory of discrimination for race, holding “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.”²⁰¹ Relatedly, the Seventh Circuit has in previous cases “assumed for the sake of argument that an associational race discrimination claim is possible.”²⁰² The *Hively* court broadly conceived associational discrimination, explaining that “[n]o matter which [protected] category is involved, the essence of the claim is that the *plaintiff* would not be suffering adverse action had his or her sex, race, color, national origin, or religion been different.”²⁰³ The *Hively* court applied this reasoning to same-sex associations: discrimination against a female plaintiff for intimately associating with another woman is discrimination against the plaintiff because of her sex.²⁰⁴ It held that

196. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 151–52 (2d Cir. 2018) (Lynch, J., dissenting). Other less persuasive arguments include status-conduct distinctions. See *id.* at 127 (majority) (“The fallback position for those opposing the associational framework is that associational discrimination can be based only on acts—such as Holcomb’s act of getting married—whereas sexual orientation is a status.”).

197. *Hively*, 853 F.3d at 347.

198. *Id.*; see also *Loving v. Virginia*, 388 U.S. 1, 7–8 (1967).

199. *Hively*, 853 F.3d at 347–48 (citing *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986)).

200. *Id.* (quoting *Parr*, 791 F.2d at 888 (alteration in original) (internal quotations omitted)).

201. *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); accord *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *aff’d en banc*, 182 F.3d 333 (5th Cir. 1999).

202. *Hively*, 853 F.3d at 348; see also *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 204–06 (2d Cir. 2017).

203. *Hively*, 853 F.3d at 349.

204. *Id.* at 347–49.

that sexual orientation discrimination is a form of associational sex discrimination.²⁰⁵

2. Associational Counterarguments

To overcome associational arguments, opponents of equality must show that sexual orientation has nothing to do with orientation; or rather, that sexual orientation is not relational. Here, the difficulty is that sexual orientation is conceptually about relational dynamics of gender insofar as one's sexual orientation is defined by the sex of their partner.²⁰⁶ The associational counterarguments sidestep the associational aspects of sexual orientation and instead focus upon distinguishing sex and race discrimination from one another to separate the argument from its doctrinal basis.²⁰⁷ This has perhaps been best articulated in the *Hively* dissent.²⁰⁸ Judge Sykes distinguished *Loving* by arguing that “the contextual foundation” for extending *Loving*'s equal protection holding to racial discrimination claims is that miscegenation laws sought “to perpetuate white supremacy.”²⁰⁹ She claims that sexual orientation discrimination is not “inherently sexist” because “[n]o one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex.”²¹⁰ Judge Sykes seems to be suggesting that a test for associational discrimination should ask whether the defendant's action aims “to promote or perpetuate the supremacy” of one sex or one race.²¹¹ However, a defendant's intent to promote or perpetuate *supremacy* has never been part of antidiscrimination jurisprudence.²¹²

Nonetheless, this argument needs to be taken seriously because we are likely to see more of it. The Trump Justice Department suggests a similar supremacy intent test in its amicus brief submitted for the Second Circuit's en banc hearing of *Zarda v. Altitude Express, Inc.*, a Title VII case that held sexual orientation

205. *Id.* at 347.

206. See Halley, *supra* note 66, at 41; see also NeJaime, *supra* note 58, at 1197–98.

207. An extreme form of this is advanced in an amicus brief from eight states that advocate a convoluted dismissal of an associational theory for race discrimination. See Brief for Arkansas et al., as Amici Curiae Supporting Appellee, at *14, *Horton v. Midwest Geriatric Mgmt. LLC*, (No. 18–1104), 2018 WL 3089600 (8th Cir. June 13, 2018) (“But this is not ‘associational discrimination’ as such—it is race discrimination. The employer is treating the employee in an interracial relationship adversely because of the employer's judgment about the employee's race relative to other races. . . . This is purely race discrimination.”); see also *infra* note 215.

208. *Hively*, 853 F.3d at 368 (Sykes, J., dissenting).

209. *Id.*

210. *Id. Contra, e.g.*, ADRIENNE RICH, COMPULSORY HETEROSEXUALITY AND LESBIAN EXISTENCE 642 (1980); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 198 (1994); Valdes, *supra* note 68, at 162–63, 169–70, 209–11. See also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 126–27 (2d Cir. 2018) (arguing such a claim “is squarely foreclosed by the Supreme Court's precedents . . .” which extend “well-outside the bounds of what is traditionally conceptualized as sexism”).

211. *Hively*, 853 F.3d at 368.

212. See *id.* at 348 n.4 (majority op.).

discrimination is sex discrimination.²¹³ In its *Zarda* brief, the United States attempts to distinguish racial discrimination from sexual orientation discrimination.²¹⁴ It argues that “treating an employee of one race differently from similarly situated employees of the partner’s race, solely because the employer deems the employee’s own race to be either *inferior* or *superior* to the partner’s race.”²¹⁵ It seems to suggest a test similar to that of Judge Sykes; i.e., whether the action is intended to promote the supremacy of one sex or one race.²¹⁶ The United States concludes its rejection of an associational theory with the argument that discrimination against individuals in same-sex relationships “is not . . . sex-based treatment of women as inferior to similarly situated men (or vice versa), but rather is . . . sex-neutral treatment of homosexual men and women alike.”²¹⁷ Again, we see an essentialist frame of sexual orientation—i.e. homosexuals as a distinct category—being used as a device to justify disparate treatment. It is not altogether surprising that long-rejected separate-but-equal arguments²¹⁸ are being dusted off because under an associational theory of discrimination, a sexual orientation discrimination case is essentially a “reverse-*Loving*.”²¹⁹

To better understand how associational discrimination functions, we return to *Loving*. At that time, Virginia disapproved of marital associations between *dissimilar* subclasses (i.e. “white” and “colored”) of a protected characteristic (i.e. race). Society created the essentialist category of “miscegenation” to distinguish this disfavored association from the favored norm of same-race marriages, grounding it in the myth of the natural order.²²⁰ The *Loving* trial judge illustrated this when he wrote, “[t]he fact that he [god] separated the races shows that he did

213. Brief for the United States as Amicus Curiae at 29–30, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. July 26, 2017) (No.15-3775).

214. *Id.*

215. *Id.* at *29. Oddly, the United States argues that Title VII prohibits discrimination against an individual in an interracial relationship “*not* because that constitutes associational discrimination . . . but rather because that constitutes discrimination against the individual because of such individual’s race.” *Id.* (quotations omitted). This is stating, of course, the associational discrimination argument the government is trying to rebut.

216. *See id.*; *see also Hively*, 853 F.3d at 368.

217. Brief for the United States as Amicus Curiae at *30, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. July 26, 2017) (No.15-3775); *see* Brief for Arkansas et al., as Amici Curiae Supporting Appellee at *14–15, *Horton v. Midwest Geriatric Mgmt. LLC*, (No. 18–1104), 2018 WL 3089600 (8th Cir. June 13, 2018) (“The employer is not treating one sex differently than the other; rather, it is engaging in sex-neutral treatment of both gay men and women.”).

218. *See, e.g., Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (“*Obergefell* proscribes such disparate treatment.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152–53 (1994) (Kennedy, J., concurring) (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (punctuation omitted) (rejecting separate-but-equal arguments regarding gender by noting “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.”)).

219. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967).

220. For the interesting history of miscegenation in Virginia, *see* Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191–1208 (1966).

not intend for the races to mix.”²²¹ Discrimination occurs because parts of American society at that time disfavored intimate associations of *dissimilar* subcategories of a protected category (i.e. race). In *Loving*, Virginia disapproved of Mr. Loving’s intimate association with an individual of a different subcategory (i.e. “white” and “colored”) of a protected class (i.e. race).²²²

Associational discrimination functions similarly in *Hively* regarding sex as it does in *Loving* regarding race. The employer disapproved of an intimate association of *same* subcategories of a protected category. In other words, Hively’s employer disapproved of her intimate association with someone of the same sex. Society created the essentialist category of “homosexual” to distinguish this intimate association from the favored norm of “heterosexuals,” grounding it in the myth of the natural order.²²³ But the underlying motivation is actually a disfavored combination of subcategories of sex. Thus, sexual orientation functions as a proxy for sex discrimination.

The nexus of associational discrimination is the mixture of subcategories that results in a socially unacceptable combination. For whatever reason, society sometimes strongly favors associations of like or dislike subcategories of a characteristic. In an essentialist move, society sometimes distinguishes these disfavored associations—mixed-marriages, miscegenation, homosexuals. These derivative concepts are then used as proxies for discrimination, obscuring the origins of the discrimination, and thus facilitating the discrimination.²²⁴ To illustrate, in *Loving*, the discrimination occurs because of the association of two dissimilar subgroups of a protected category. In *Hively*, the discrimination occurs because of the socially unacceptable pairing of two of the same, rather than dissimilar subcategories of a protected characteristic, a mirror-image of *Loving*. Thus, sexual orientation discrimination is conceptually a reverse-*Loving*. The dynamics are identical.

C. GENDER-STEREOTYPING ARGUMENTS

Under the gender-stereotyping theory, sexual orientation discrimination is a form of sex discrimination because it is discrimination for failure to conform to

221. *Loving*, 388 U.S. at 3 (quotations omitted).

222. Courts have recognized associational discrimination claims not only in regard to race, but also sex, national origin, and religion. See *Montes v. Cicero Pub. Sch. Dist. No. 99*, 141 F. Supp. 3d 885, 900 (N.D. Ill. 2015) (national origin); *Morales v. NYS Dep’t of Labor*, 865 F. Supp. 2d 220, 243 (N.D.N.Y. 2012), *aff’d* 530 Fed. Appx. 13 (2d Cir. 2013) (race & national origin); *Kauffman v. Maxim Healthcare Servs., Inc.*, No. 04-CV-2869, 2006 WL 1983196, at *4 (E.D.N.Y. July 13, 2006) (race & sex); *Chiara v. Town of New Castle*, 2 N.Y.S. 3d 132, 140–41 (N.Y. App. Div. 2015) (religion).

223. See discussion *supra* Section I.A.

224. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 160 (2d Cir. 2018) (Lynch, J., dissenting) (“An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and religion cases[.], . . . against a ‘protected group’ to which the employee’s associates belong, but against an (alas) *unprotected* group to which they belong: other gay men.”).

the most basic form of gender stereotyping, namely that women should be romantically and intimately involved with men and men with women.²²⁵ Recall the social constructionist underpinnings of the argument are that gender is where the dominant social understanding of masculinity and femininity take on their sexualized form and the rules concerning its expression are played out through the norm of heterosexuality.²²⁶ Under the related legal theory, sexual orientation discrimination is a form of sex discrimination because it involves gender-stereotyping where women should be intimately involved only with men and men only with women.²²⁷

The gender-stereotyping argument emerges from the Supreme Court's *Price Waterhouse v. Hopkins* opinion, which held that gender-stereotyping is a form of sex discrimination.²²⁸ *Price Waterhouse* was a watershed opinion that recognized that the failure to conform to gender-based expectations of how a protected characteristic should be expressed and how members of a protected class should behave was a form of sex discrimination.²²⁹ Prior to *Price Waterhouse*, sex discrimination under Title VII was considered only when an employee possessed a characteristic that the employer would stereotypically assume would cause them to act in a certain manner associated with the group.²³⁰ In *Price Waterhouse*, the Court expanded its cramped concept of gender-stereotyping to include failure to conform to a stereotype.²³¹ The employer demanded that Ann Hopkins conform to its vision of its stereotypical "nice" female²³² and the Court held that failure to conform to a gender-stereotype was a form of sex discrimination.²³³

Counterarguments to the associational approach rely upon conceptualizing sexual orientation within an essentialist framework in which the arguments depend upon an understanding of sexual orientation as something unique and distinct. The counterarguments again largely rest upon a claim that sexual

225. Baldwin, No. 0120133080, 2015 WL 4397641, at *7–8 (July 15, 2015).

226. See discussion *supra* Section I.B.

227. See, e.g., *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring) (observing, "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women"); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (observing "homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus").

228. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (citation omitted) ("For close to a half century, . . . this Court has viewed with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'").

229. *Price Waterhouse*, 490 U.S. at 251.

230. See Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 404–09 (2014).

231. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1262–63 (11th Cir. 2017) (Rosenbaum, J., concurring); see also Herz, *supra* 230, at 406.

232. *Price Waterhouse*, 490 U.S. at 258.

233. *Id.*

orientation discrimination is a unique form of discrimination, and they repackage separate-but-equal and conduct-versus-status arguments.²³⁴

1. Gender-Stereotyping Arguments in Court

In three distinct lines of gender-stereotyping cases, courts grapple with how to distinguish between sexual orientation discrimination and gender stereotyping. The first two lines of cases illustrate different approaches to unprincipled line-drawing between sexual orientation discrimination and gender stereotyping whereas the third line abandons the distinction all together. In the first line of cases, courts reject the entire sex discrimination claim if there is any indication of sexual orientation discrimination and abstain from any attempt to disaggregate the claims.²³⁵ They typically dismiss the sex discrimination claim as impermissible bootstrapping.²³⁶ Even this seemingly harsh yet apparently straightforward approach sometimes leads to arbitrary line-drawing.²³⁷ For example, in 2016, one district court reasoned that “[i]f the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.”²³⁸ In other words, the court drew the line at the sexual orientation of the harassed individual. This is hardly principled reasoning.

In the second line of gender stereotyping cases, courts attempt to tease out gender stereotyping claims from sexual orientation claims. The line drawing here is difficult and arbitrary.²³⁹ For example, in *Prowel v. Wise Business Forms, Inc.*,

234. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 158 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (arguing “[discrimination] results from a distinct type of objection to anyone . . . who is . . . homosexual”).

235. See, e.g., *Phipps v. Housing Auth. of New Orleans*, No. 15–3296, 2016 WL 164916, at *6 (E.D. La. Jan. 13, 2016) (dismissing both sex and sexual orientation claims because “the factual content of his complaint does not point to animus based on gender, but, rather, at most based on his perceived homosexual relationship or bisexuality”); *Ayala-Sepulveda v. Mun. of San German*, 661 F. Supp. 2d 130, 134–35, 137 (D.P.R. 2009) (holding “the line between sexual orientation discrimination and discrimination because of sex can be difficult to draw . . . [but] the plaintiff’s allegations in this case do fall clearly on one side of the line”) (quotation marks omitted).

236. See, e.g., *Evans v. Ga. Reg’l Hosp.*, No. CV415-103, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) (concluding that “to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation Evans’ allegations . . . even if labeled a ‘gender conformity’ claim . . . rest[] on her sexual orientation no matter how it is otherwise characterized”); see also *Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 830 F.3d 698, 706–07 (7th Cir. 2016) (collecting cases).

237. See *Herz*, *supra* note 230, at 435–41; see also discussion of evidentiary challenges surrounding sex discrimination cases turning on the sexual orientation of litigants *supra* note 184.

238. *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332–33 (N.D.N.Y. 2016) (citation omitted).

239. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (noting that “it is often difficult to discern when . . . the various adverse employment actions . . . were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these”); cf. *Bostock v. Clayton Cty. Bd. of Comm’rs*, 894 F.3d 1335, 1339 (11th Cir. 2018) (Rosenbaum J., dissenting) (challenging the circuit court to “grant en banc rehearing and perform the ‘considerable

the Third Circuit struggled to discern whether the plaintiff was subjected to harassment “because of his homosexuality, his effeminacy, or both.”²⁴⁰ It eventually determined that he had a cognizable gender-stereotyping claim because of evidence that he “has a high voice and walks in an effeminate manner,” wears “dressy clothes” when sitting, crosses his legs and shakes his foot “the way a woman would,” talks about things like “art, music, interior design, and pushed the buttons on his nale encoder [machine] with ‘pizzazz.’”²⁴¹ Another court believed it found the elusive line, observing “that the line is crossed once the plaintiff’s behavior or appearance no longer strikes his harassers as merely effeminate—assuming the plaintiff is a male—and begins to give them the impression that he is a homosexual.”²⁴² However, the court was not certain its rule also worked for women “exhibiting masculine traits, although it is easy to imagine that a case involving such a plaintiff would involve a full complement of lesbian epithets, making it difficult to draw the line.”²⁴³

This parsing leads to some unusual line-drawing between sexual orientation and gender nonconformity, namely the more stereotypically gay the plaintiff is, the more likely the claim is cognizable as sex discrimination.²⁴⁴ In these cases, courts often sidestep the issue of exactly where the distinction lies by dismissing the sexual orientation claim, but allowing a sex discrimination claim to proceed.²⁴⁵ Courts sometimes make a status-conduct distinction *in favor of the plaintiffs* to allow the claims to survive since sexual orientation-related status is not protected, but discrimination based upon gender non-conforming behavior is protected.²⁴⁶

The impossibility of drawing a principled line makes it arbitrary as to whether a case will fall within the first line of cases that dismisses sex discrimination

calisthenics’ to explain why gender nonconformity claims are cognizable except for when a person fails to conform to the ‘ultimate’ gender stereotype by being attracted to the ‘wrong’ gender”).

240. 579 F.3d 285, 291 (3d Cir. 2009).

241. *Id.* at 287, 291.

242. Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004).

243. *Id.*

244. See, e.g., *Prowel* 579 F.3d at 287 (finding a cognizable gender-stereotyping claim for a gay man when he wore “dressy clothes,” crossed his legs and shook his foot “the way a woman would sit,” “talked about things like art, music, interior design,” and “pushed the buttons on the nale encoder [machine] with ‘pizzazz’”); see also *Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 830 F.3d 698, 709 (7th Cir. 2016); Herz, *supra* note 230, at 428–35.

245. See, e.g., *Maldonado-Catala v. Mun. of Naranjito*, 876 F.3d 1, 11 n.12 (1st Cir. 2017) (concluding, “[m]uch of the verbal harassment Maldonado describes falls within the sexual orientation category. Given our disposition, we have no occasion to . . . decide whether enough of the comments could be characterized as gender-based, rather than based on sexual orientation . . . under our current caselaw”).

246. See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151–52 (N.D.N.Y. 2011) (relying upon plaintiff’s gender non-conforming conduct to allow the claim to survive while also noting that claims “based on sexual orientation do not defeat a sex stereotyping harassment claim”); *McMullen v. So. Cal. Edison*, No. EDCV 08-957-VAP, 2008 WL 4948664, at *7 (C.D. Cal. Nov. 17, 2008) (relying upon plaintiff’s effeminate behavior to allow the claim to survive while noting that Title VII does not include sexual orientation).

claims if there is any hint of sexual orientation discrimination, or whether it will fall within the second line that allows a sex discrimination claim to proceed. For example, in *Rosado v. American Airlines*, a district court allowed a sex discrimination claim to proceed to a jury on a gender stereotyping theory because the plaintiff “was perceived by his alleged harassers as failing to meet their standards of masculinity precisely because he dated men, not women.”²⁴⁷ In *Ayala-Sepulveda v. Municipality of San German*, that same court rejected a similar claim on a motion to dismiss when “the only allegation of sex stereotyping included in plaintiff’s complaint is . . . that they knew of plaintiff’s sexual orientation; that he had an affair with another man. . . and that adverse employment actions were taken against him as a consequence”²⁴⁸

Finally, in the third (more recent) line of gender stereotyping cases, courts recognized that sexual orientation discrimination is a form of sex discrimination.²⁴⁹ As one court put it, “the line is so difficult to draw because that line does not exist, save as a lingering and faulty judicial construct.”²⁵⁰ The Second and Seventh Circuits held that sexual orientation discrimination is a gender-stereotyping form of sex discrimination.²⁵¹ Additionally, individual circuit court judges in the Second, Seventh, Ninth, and Eleventh Circuits applied *Price Waterhouse* to sexual orientation discrimination and concluded, “it is logically untenable for us to insist that this particular gender stereotype is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*.”²⁵² They all found that sexual orientation discrimination is a form of sex discrimination because of inherent failure to conform to the general social expectation that women should date men and vice versa.²⁵³ To illustrate, the *Hively* Court observed, “[v]iewed through the lens of the gender nonconformity line of cases, *Hively* represents the

247. 743 F. Supp. 2d 40, 58 (D.P.R. 2010).

248. 661 F. Supp. 2d 130, 137 (D.P.R. 2009).

249. See, e.g., *Spellman v. Ohio Dep’t of Transp.*, 244 F. Supp. 3d 686, 699 (S.D. Ohio 2017) (holding that the plaintiff “may assert a [Title VII] claim . . . on the basis of her gender or sexual orientation”).

250. *Videckis v. Pepperdine*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (concluding that “claims of sexual orientation discrimination are gender stereotype or sex discrimination claims”); accord *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) (stating “I decline to embrace an ‘illogical’ and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination.”).

251. See, e.g., *Zarda v. Altitude Express*, 883 F.3d 100, 119 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc). Additionally, the Sixth Circuit has acknowledged that “any discrimination based on sexual orientation would be actionable under a sex stereotyping theory . . . as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices,” although it carefully avoided that outcome. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); see also discussion *infra* Section V.A.

252. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring); accord *Zarda*, 883 F.3d at 119–123; *Hively*, 853 F.3d at 346; *Latta v. Otter*, 771 F.3d 456, 485–87 (9th Cir. 2014) (Berzon, J. concurring); see also *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1262–63 (11th Cir. 2017) (Rosenbaum, J., dissenting); *Bostock v. Clayton Cty. Bd. Of Comm’rs*, 894 F.3d 1335, 1339 (2018) (Rosenbaum & Pryor, J.J., dissenting).

253. *Christiansen*, 852 F.3d at 205–06.

ultimate case of failure to conform to the female stereotype . . . she is not heterosexual.”²⁵⁴ Lower courts applied similar reasoning.²⁵⁵

2. Gender-Stereotyping Counterarguments

To overcome gender-stereotyping arguments, opponents of equality face the challenge of creating a principled way to allow discrimination based on nonconformance with a fundamental gender stereotype—heterosexuality—within a legal regime that generally proscribes discrimination based on gender stereotypes.²⁵⁶ Here, the primary argument against a gender stereotyping theory raised in the circuits is that sexual orientation discrimination does not involve gender stereotypes.²⁵⁷ Judge Sykes argues in her *Hively* dissent that sex is not the motive when someone discriminates against an LGB individual, but rather the discrimination is motivated by something other than “a sex-specific bias.”²⁵⁸ She relies upon an essentialist frame to reason that:

heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their sex*. Sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes.²⁵⁹

Her logic’s fallacy becomes apparent when returned to the observation that sexual orientation discrimination is a reverse-*Loving*; that is, the same dynamics

254. *Hively*, 853 F.3d at 346.

255. *See, e.g.*, *Winstead v. Lafayette Cty. Bd. of Cty. Commr’s*, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fla. 2016) (holding that “to treat someone differently based on her attraction to women is necessarily to treat that person differently because of her failure to conform to gender or sex stereotypes, which, in turn, necessarily discriminates on the basis of sex”); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding that plaintiff had stated a claim under Title VII when he alleged adverse employment action because “he is ‘a homosexual male whose sexual orientation is not consistent with Defendant’s perception of acceptable gender roles’”).

256. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”).

257. *See Zarda*, 883 F.3d at 158 (Lynch, J., dissenting); *Hively*, 853 F.3d at 370 (Sykes, J., dissenting).

258. *Hively*, 853 F.3d at 370.

259. *Id.* For a variation on the argument by Judge Lynch, *see Zarda*, 883 F.3d at 158 (arguing the animating belief behind sexual orientation discrimination is “not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex”). The majority responds that rights are individual and “the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether the individual is discriminated against because of his or her sex.” *Id.* at 153 n.23.

drive both *Loving* and *Hively*. Here, Judge Sykes insists that sex discrimination is not involved because an employer who hires only based upon the essentialist societal category (e.g. no homosexuals, no one in mixed-race marriages) requires his employees to match the dominant essentialist category (e.g. heterosexual, same-race marriages,) irrespective of their protected category (e.g. sex, race). To illustrate, here is Judge Sykes' argument, repackaged with the corresponding categories and language lifted from *Loving* replacing those from *Hively*:

Same-race marriage is not a *white* stereotype; it is not a *colored* stereotype; it is not a *race-specific* stereotype at all. An employer who hires only employees from same-race marriages is neither assuming nor insisting that his white and colored employees match a stereotype specific to their race. He is instead insisting that his employees' marriages match the dominant racial orientation *regardless of their race*. Miscegenation does not classify people according to invidious or idiosyncratic *white* or *colored* stereotypes.²⁶⁰

One can just as easily substitute religion and two different faiths, or national original and two different nationalities, and the stereotyping remains clear. Here, in Judge Sykes' example, sex discrimination is the motive. Consequently, there is no principled way to exclude sexual orientation discrimination from other forms of proscribed sex-based stereotyping.

Nonetheless, conduct and status arguments are also raised to rebut the gender stereotyping theory. In the Eleventh Circuit's concurring opinion discussed earlier, Judge Pryor laid out the argument for excluding sexual orientation discrimination from sex discrimination through a conduct versus status distinction.²⁶¹ Judge Pryor argues, "a claim of gender nonconformity is a behavior-based claim, not a status-based claim."²⁶² He recasts *Price Waterhouse*, the Supreme Court's decision recognizing gender-stereotyping theory of sex discrimination, and *Brumby*, the Eleventh Circuit decision recognizing gender-identity discrimination as a form of sex discrimination, into decisions that were behavior-based.²⁶³ He

260. *Hively*, 853 F.3d at 370.

261. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1258–61 (11th Cir. 2017) (Pryor, J. concurring); see also *supra* Section II.C.

262. *Evans*, 850 F.3d at 1260.

263. Judge Pryor's support for his revision of *Price Waterhouse* is a selective quotation from an academic work in which the author is not recasting *Price Waterhouse*, but rather is discussing defendant *Price Waterhouse*'s stereotyping of the plaintiff's expected behavior as well as the problem of courts protecting stereotypically gay behavior, but not LGB status. Compare *id.* at 1260 (describing Herz' argument as "stating that the stereotype the plaintiff in *Price Waterhouse* deviated from was not 'behaving as a woman should' and that the 'basic problem' today is that 'employers are evaluating employees . . . according to discriminatory ideas about how men and women should *behave*.'") with Herz, *supra* note 230, at 406–07, 433 (arguing that the revolution in *Price Waterhouse* was that the plaintiff was assessed as an individual against prescriptive stereotyping about how she should behave as a woman).

claims that “[t]he only possible ‘status’ in *Price Waterhouse* was the employee’s status as an ‘aggressive’ woman.”²⁶⁴

The crux of Judge Pryor’s argument is that because gender non-conformity is behavior-based, a plaintiff must still show that the defendant relied upon plaintiff’s sex to prove sex discrimination.²⁶⁵ What Judge Pryor seems to be saying is discrimination due to conduct (e.g. a woman dating a woman) that fails to conform to a gender stereotype (e.g. women date men) that derives from a status (e.g. lesbian—not female) is insufficient to prove sex discrimination, but the plaintiff must still demonstrate that the defendant’s discriminatory motivation was sex. The dissent in *Evans* observed that “by their [Judge Pryor and the panel’s] reasoning, discrimination against a lesbian happens not because she is a woman, but because she is a lesbian, as though being sexually attracted to men only is somehow divorced from a . . . stereotype of women.”²⁶⁶ The argument depends upon an essentialist notion of sexuality in which LGB individuals have a separate, distinct status from their sex. The Supreme Court has firmly rejected status-conduct distinctions in regard to sexual orientation.²⁶⁷

A theory of sex stereotyping further explores the relationship between sexual orientation and sex, demonstrating that sexual orientation discrimination is almost invariably rooted in assumptions about how men and women should behave intimately with the opposite sex. Counter arguments follow the now-familiar pattern of relying upon essentialist notions that separate LGB individuals from ordinary men and women, and treat them as something *sui generis* to obscure the sex-based origins of the discrimination as to allow separate-but-equal and conduct verses status arguments. Even while loudly denying the relationship between sex and sexual orientation, proponents of this argument rely upon concepts derived from sex: men, women, homosexual, heterosexual. The Supreme Court has made it clear that disparate treatment of an individual based upon sex-based stereotyping is sex discrimination.²⁶⁸ Viewing sexual orientation through a social constructionist lens makes it clear there is no limiting principle to justify an exception for failure to conform to the ultimate gender stereotype: heterosexuality. Counterarguments to the other two theories of sexual orientation discrimination also rely upon essentialist conceptions of sexuality to distinguish LGB

264. *Evans*, 850 F.3d at 1260. *Contra* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (observing that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender”).

265. *Id.* See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 373 (7th Cir. 2017) (en banc) (Sykes, J., dissenting). Judge Sykes’ dissent in *Hively* echoes this argument when she claims the majority decision that sexual-orientation discrimination is a form of sex discrimination removes the Title VII requirement that the defendant’s decision is “*actually* motivated by the plaintiff’s sex”.

266. *Evans*, 850 F.3d at 1264 (Rosenbaum, J., dissenting).

267. *Christian Legal Soc’y Chapter of the UC, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) (“Our decisions have declined to distinguish between status and conduct in this [sexual orientation] context.”).

268. *Price Waterhouse*, 490 U.S. at 250.

individuals from those deserving of protection. Nonetheless, they have fatal flaws; namely, the comparative counterarguments must demonstrate that sexual orientation has nothing to do with sex, and the associational counterarguments similarly must convince that sexual orientation does not involve orientation to, or rather association with, someone of the same or opposite sex. The time has come for advocates of LGB equality to fight on essentialist turf and to force opponents of equality to explain how sexual orientation involves neither sex nor anything in orientation to sex.

V. WINNING ARGUMENTS: AN EMPIRICAL ANALYSIS

Seventy-one federal courts explicitly or implicitly acknowledged that sexual orientation discrimination may be a form of sex discrimination.²⁶⁹ Of these, forty federal courts held, recognized, or applied the rule that sexual orientation discrimination is discrimination on the basis of sex.²⁷⁰ Additionally, courts accepting that sexual orientation *is* sex discrimination, rather than *may be* sex discrimination, is a clear trend. The average age of cases recognizing sexual orientation discrimination as sex discrimination is three years younger than those acknowledging it may be sex discrimination.²⁷¹ To see how the arguments are playing out on the ground, including which arguments were working best, I assembled a dataset of these federal cases, including underlying pleadings, and examined it for trends.²⁷² A winning argument emerged.

A. METHODOLOGY

A description of the study's methodology follows. In order to populate the dataset of relevant federal cases, I used the Seventh Circuit's *Hively* decisions as a seed sample, then reviewed cited references to find additional cases. I repeated the process with each additional case located.²⁷³ I then searched on Westlaw with the terms "lesbian," "gay," "homosexual," "sex," "sexual orientation," and "discrimination." I continued to monitor key cases and terms through Westlaw alerts to stay abreast of new opinions. I excluded cases that held sexual orientation was a complete bar to a discrimination claim. After creating the comprehensive

269. See *infra* Appendix.

270. See *infra* Appendix, Data Set Part II.

271. As of this writing in mid-September 2018, the average case acknowledging that sexual orientation discrimination is sex discrimination is 4.3 years, and the average case recognizing that it may be a form of sex discrimination is 7.6 years. The average age of the subset of thirty cases examined more closely is 2.9 years.

272. For the dataset and coding, see *infra* Appendix.

273. Sociologists have developed this method of "chain referral" or "snowball" sampling to research social networks and access hard-to-reach populations. Legal databases are particularly conducive to this approach, which overcomes weaknesses of relying primarily upon search terms. See Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOCIOLOGICAL METHODS & RESEARCH 141, 142 (1981). See also Susan Nevelow Mart, *The Relevance of Results Generated by Human Indexing and Computer Algorithms*, 102 LAW LIBR. J. 221, 222–23 (2010) (discussing challenges of legal database research).

database of cases, I reviewed and coded the arguments in each majority and concurring opinion as comparative, associational, and/or gender-stereotyping according to how the court approached the case. I noted a pincite of where the opinion supported each relevant theory.

Additionally, I coded each case for whether the court: (1) holds, recognizes, or applies the rule that antidiscrimination law protects individuals who are discriminated against on the basis of sex because of their sexual orientation; (2) implicitly or explicitly acknowledges that in some circumstances the essence of sexual orientation discrimination claim may be pursued as a sex discrimination claim; or (3) holds, recognizes, or applies the rule that that a sex discrimination claim is not barred by a non-actionable claim for sexual orientation discrimination. In other words, category one cases acknowledge that sexual orientation is a form of sex discrimination; category two cases acknowledge that sexual orientation discrimination may be a form of sex discrimination. These first two categories of cases largely track courts' splintered approach to gender stereotyping, where courts allow the claims to proceed either by finding sexual orientation is gender stereotyping or by reframing the case as a sex discrimination case. Category three cases take no position on whether sexual orientation discrimination is a form of sex discrimination.²⁷⁴ I eliminated all category three cases because these holdings were Title VII or IX specific. I also excluded Title VII and IX cases that applied circuit precedent after the precedent held that sexual orientation discrimination is sex discrimination. This produced a final dataset of seventy-one cases.

Next, to determine which theories were working, I examined the subset of category-one cases that hold, recognize, or apply the rule that antidiscrimination law protects individuals who are discriminated against on the basis of sex because of their sexual orientation. This included forty cases. I pulled the dockets for each one and accessed the plaintiff's briefs and a sampling of amicus briefs, if available. Briefing was unavailable for five cases; four cases did not rely upon one of the three theories, and one applied precedent from a recent circuit holding to a new area of law, so these ten cases were excluded. This created a subset of thirty cases. Within this subset, I reviewed the pleadings and noted whenever a theory was raised, and I coded it as comparative, associational, or gender stereotyping. I also noted which party raised an argument. Several trends emerged.

B. WINNING ARGUMENTS

The gender-stereotyping theory is the most persuasive to federal judges. Seventy-six percent of courts that reasoned that sexual orientation discrimination either is or may be a form sex discrimination embrace the gender-stereotyping theory.²⁷⁵ The gender-stereotyping theory is accepted twice as often as the two other theories combined.²⁷⁶

274. See discussion of gender stereotyping arguments in court *supra* Section III.C.1.

275. Table 1—Percentage of Courts Using Each Theory.

276. Table 1—Relative Use of Each Theory.

TABLE 1. USAGE OF THEORIES BY COURTS ACKNOWLEDGING SEXUAL ORIENTATION DISCRIMINATION IS OR MAY BE SEX DISCRIMINATION²⁷⁷

Theory	Total Times Used	Percentage of Courts Using Each Theory	Relative Use of Each Theory
Comparative	17	24%	20%
Associational	8	11%	9%
Gender-Stereotyping	54	76%	63%
Other	7	10%	8%

Turning the focus to the subset of courts equating sexual orientation discrimination with sex discrimination, two winning arguments emerge. Among the courts studied, the associational theory is the most successful, winning in all cases when a court considered it.²⁷⁸ Nevertheless, this impressive record is thin, with only eight courts adopting the theory. The gender stereotyping theory, however, has a nearly comparable success rate of 92%. It was raised in twenty-six courts in the sample and was successful twenty-four times, which lends greater confidence in its ability to persuade.²⁷⁹ When this success rate is viewed within the overall context of its use in 76% of all cases which acknowledge that sexual orientation discrimination may be or is a form of sex discrimination, the gender stereotyping theory is the clear winner.

VI. CONSTITUTIONAL ARGUMENTS: HOW WE SHOULD APPROACH SEXUAL ORIENTATION UNDER EQUAL PROTECTION

A. WINNING STRATEGIES

The data strongly suggests that advocates should focus their efforts most heavily upon the associational and gender stereotyping theories because of their high

277. Seventy-one courts have accepted at least one theory that sexual orientation discrimination may be a form of sex discrimination. Since they have often embraced more than one theory, the total number of times they accepted a theory is eighty-six, thus n=86. For the underlying data, see *infra* Appendix.

278. See Table 2. Surprisingly, this includes three cases where the court raised it sua sponte. See *Somers v. Digital Realty Trust, Inc.*, No. 14-cv-05180-EMC, 2018 WL 3730469, at *7 (N.D. Cal. Aug. 6, 2018); *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 267–68 (D. Conn. 2016); *Isaacs v. Felder Servs.*, 143 F. Supp. 3d 1190, 1193–94 (M.D. Ala. 2015).

279. See Table 2.

280. The total number of successful theories analyzed here is drawn from the earlier-described subset of thirty cases for which the underlying briefing was available, and one of the three theories was invoked. For the underlying data, see *infra* Appendix, Data Set Section II.A.

TABLE 2. SUCCESS RATES OF THEORIES IN COURTS ACKNOWLEDGING SEXUAL ORIENTATION DISCRIMINATION IS SEX DISCRIMINATION²⁸⁰

Theory	Total Times Raised	Total Times Successfully Raised	Success Rate
Comparative	14	11	79%
Associational	8	8	100%
Gender-Stereotyping	26	24	92%

success rates.²⁸¹ The comparative theory is less persuasive, likely due to the confusion that can be created surrounding the proper comparator test.²⁸²

Even though the associational theory has a 100% success rate in the cases studied, it should be approached with some caution because of its limited adoption and history; it only first emerged in federal district court decisions in 2015.²⁸³ In contrast, the gender-stereotyping theory is a proven winner, with a long and successful track record.²⁸⁴ The relative success of the gender-stereotyping theory is at least partially explained by how well developed gender-stereotyping theory is in Title VII jurisprudence.²⁸⁵ Moreover, it is most likely successful because it is normatively correct: there is no principled way to proscribe all discriminatory gender stereotyping except the one that women should date men and vice versa.²⁸⁶ Additionally, broad gender-stereotyping theories find broader resonance among the federal circuits; they are being embraced in a parallel development in gender identity cases.²⁸⁷

The gender-stereotyping theory, however, is not a silver bullet.²⁸⁸ Advocates should not rely exclusively upon a gender stereotyping theory because these cases

281. See *infra* Tables 1, 2.

282. See discussion *supra* Section III.A.2.

283. See *Isaacs*, 143 F. Supp. 3d at 1193–94.

284. See Table 2; *cf.* *Centola v Potter*, 183 F. Supp. 2d 403, 408–09 (D. Mass. 2002); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

285. See generally Herz, *supra* note 230, at 403–22.

286. See, e.g., *Hively*, 853 F.3d at 346 (“Hively’s claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers . . . were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man.)”); *Videckis v. Pepperdine*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (“the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”).

287. See *EEOC v. R.G. & G. R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–74 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011).

288. See *Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 830 F.3d 698, 705–12 (7th Cir. 2016) (panel) (cataloging courts’ irregular treatment of gender-stereotyping theory).

can occasionally go sideways when courts adopt a mash-up of social constructionist and essentialist approaches toward sexual orientation. For example, particularly bizarre results were on display in *Vickers v. Fairfield Medical Center* where the Sixth Circuit tied itself into knots after embracing a social constructionist conceptualization of sexual orientation, only to deploy an essentialist argument to deny the claim.²⁸⁹ The *Vickers* plaintiff was allegedly discharged from his job because he was gay, and he argued that sexual orientation discrimination is a form of sex discrimination.²⁹⁰ The Sixth Circuit opined that “[i]n all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”²⁹¹ By recognizing the relationship between gender norms and sexual orientation, the court adopted a social constructionist theoretical approach to sexual orientation. Nonetheless, to prevent the claim from standing, it deployed status-conduct distinction arguments that depend upon an essentialist theoretical framework to cabin off sexual orientation from sex discrimination in order to deny the claim.²⁹²

The *Vickers* court recharacterized *Vickers*’ gender stereotyping claim as an issue of sexual conduct when it wrote that “his sexual practices. . . did not conform to the traditionally masculine role. Rather, in his supposed sexual practices, he behaved more like a woman.”²⁹³ Because *Vickers* did not exhibit this gender non-conforming behavior “in any observable way at work,” the court dismissed his claim as “more properly viewed as. . . based on. . . homosexuality, rather than on gender non-conformity.”²⁹⁴ In other words, it resorted to the classic essentialist construction of a homosexual to exclude the sexual orientation claim, thus mixing incompatible approaches in its analysis in such a way that precludes discrimination protection for non-stereotypical LGB individuals in virtually all public settings.

Although the comparative theory has been less persuasive to courts than the gender-stereotyping and associational theories, its use alongside gender-stereotyping arguments decreases the risk of courts mixing and matching theoretical approaches to achieve desired outcomes as discussed above. A deeper understanding of the dynamics of the theories and their counterarguments as explored should help advocates deploy them to greater success.²⁹⁵ Advocates should note that although a clear majority of courts studied— sixty out of seventy-one— relied upon a single theory, each time a circuit court opinion held that sexual orientation

289. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–64, 768 (6th Cir. 2006).

290. *Vickers*, 453 F.3d at 768.

291. *Id.* at 764.

292. See *supra* Section II.C.

293. *Vickers*, 453 F.3d at 763.

294. *Id.* at 763–64.

295. See *supra* Sections III.A.2., III.B.2.

discrimination is a form of sex discrimination, it embraced multiple theories, and each time it included gender stereotyping.²⁹⁶

B. REFRAMING SEXUAL ORIENTATION UNDER EQUAL PROTECTION

Reframing the conceptual approach to sexual orientation shifts the debate away from suspect class analysis, which suffers from unpredictable and inconsistent results,²⁹⁷ among other problems.²⁹⁸ When sexual orientation discrimination is understood as a form of sex discrimination, the clear equal protection implication is that sexual orientation discrimination claims would then receive heightened scrutiny, as is the practice with all sex-based classifications.²⁹⁹ Currently, federal courts' application of suspect class analysis to sexual orientation equal protection claims is all over the map: some federal courts have applied the four-factor test to conclude that heightened scrutiny applies,³⁰⁰ while even more have applied the same factors to determine that rational basis is the appropriate.³⁰¹

296. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116, 119, 124 (2d Cir. 2018) (en banc) (comparative, associational, gender stereotyping); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring) (comparative, associational, gender-stereotyping); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (comparative, associational, gender stereotyping); *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 702–18 (7th Cir. 2016) (panel) (associational, gender stereotyping); *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (comparative, gender stereotyping). *But see* *Franchina v. City of Providence*, 881 F.3d 32, 54 & n.19 (1st Cir. 2018) (acknowledging the viability of a sex-plus Title VII claim where “the ‘plus-factor’ is sexual orientation,” although the question of whether sexual orientation discrimination is sex discrimination was not before the court); *but cf.* *Wetzel v. Glen St. Andrew Living Cmty.*, No. 17-1322, 2018 WL 4057365 (7th Cir. Aug. 27, 2018) (applying recent circuit precedent that sexual orientation discrimination is sex discrimination to the Fair Housing Act).

297. See Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1591–93 (2017) (quotations omitted) (observing that the four-factor suspect class analysis “creates an appearance of structure and definiteness that is illusory because it remains unclear how these criteria are weighted or what combination triggers heightened scrutiny.”). See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938). The *Carolene Products*' four-factor test includes a group's history of discrimination, characteristic unrelated to ability to contribute to society, immutability and political powerlessness.

298. See Bruce A. Ackerman, *Beyond Carolene Products*, 8 HARV. L. REV. 713, 737–46 (1985).

299. See *Hively*, 853 F.3d at 372 (Sykes, J., dissenting) (observing that “[i]f sex discrimination and sexual-orientation discrimination were really one and the same, then the Court would have applied the intermediate standard of scrutiny . . .”).

300. See, e.g., *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480–84 (9th Cir. 2014).

301. Leslie, *supra* note 297, at 1591. The inquiry used to turn on the immutability factor, but recently courts have become more likely to find that sexual orientation satisfies the factor, or that the factor is of less significance than in previous decisions. See *id.* at 1593–1609. Currently, the gravamen seems to be the political power factor, with courts all over the map in its application. Compare *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (finding no political powerlessness when “*Time* magazine reports that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual”) and *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1011 (D. Nev. 2012) (finding no political powerlessness “[a]lthough the right to vote could have been lost for conviction under a felony anti-sodomy law, the fraction of homosexuals [so] disenfranchised . . . was almost certainly miniscule . . . [and] would have no effect on one’s ability to vote, serve on a jury, or otherwise participate in American democracy.”) with *Windsor*, 699 F.3d at 185 (finding political

Given the confusing, unprincipled way that the level of scrutiny for sexual orientation is often applied, the outcome is likely to depend upon the luck of the draw of judge assignment and the subsequent appellate panel.³⁰² Conceptualizing sexual orientation as sex discrimination sidesteps this suspect class analysis morass.³⁰³

Reframing is also a solution to the Court's aversion to recognizing new suspect or quasi-suspect classes. The Court has declined to clearly treat sexual orientation as a suspect or quasi-suspect class for equal protection, despite opportunities in *Romer*, *Lawrence*, *Windsor*, *Obergefell*, and, arguably, *Pavan*.³⁰⁴ Professor Kenji Yoshino convincingly argued that the heightened scrutiny canon is closed.³⁰⁵ He attributes this to "pluralism anxiety" and points to the majority opinion in *Cleburne v. Cleburne Living Center, Inc.*³⁰⁶ The *Cleburne* majority expressed this "pluralism anxiety" when they wrote:

it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice [. . .] We are reluctant to set out on that course and decline to do so.³⁰⁷

Given the increasing diversity of the population, finding a principled way to distinguish among discriminated groups has only grown more challenging. The Court is not going to add sexual orientation to the pantheon, despite consistently expressing concern that the group is the target of discrimination.³⁰⁸ As the Court grows more conservative, this is even less likely. However, recognizing sexual orientation discrimination as a form of sex discrimination provides it with a tidy, and perhaps satisfying, workaround that would clarify how courts should approach equality for LGB individuals.

At an earlier point in time, relying upon essentialist frames to combat LGB discrimination may have made sense tactically and strategically, but, with recent shifts in the circuits, any advantages from this approach have deteriorated so that essentialist arguments are now the riskier arguments.³⁰⁹ An essentialist frame precludes conceptualizing sexual orientation discrimination as sex discrimination

powerless when "homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public").

302. *Cf. supra* notes 4, 5, 6.

303. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

304. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558, 558 (2003); *Romer v. Evans*, 517 U.S. 620, 620–21 (1996); *see also* *Pavan v. Smith*, 137 S. Ct. 2075, 2076–79 (2017).

305. Yoshino, *supra* note 2, at 757.

306. *Id.* at 758–59.

307. *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 445–46 (1985).

308. *See* Yoshino, *supra* note 2, at 757.

309. *See* Goldberg, *supra* note 9, at 2113–21; Goldberg, *Social Justice*, *supra* note 11, at 630–31.

because it relies on fixed and independent social categories of homosexual, lesbian, gay and bisexual, distinct from sex.³¹⁰ Framing sexual orientation discrimination as sex discrimination under equal protection gives litigators a clear framework to analyze the essentialist moves that are being used to obscure the real basis of discrimination.

As recently as the marriage litigation, it was ill-advised to ask the Court to shift its conceptualization of sexual orientation at the same time it was being asked to make a similar conceptual move regarding marriage.³¹¹ As the Court made the giant conceptual move of removing gender from marriage, it simultaneously relied upon a theoretical jumble of social constructionist and essentialist concepts.³¹² Nonetheless, the Court's holding was unequivocally social constructionist and signaled that it was receptive to re-conceptualizing something that had been believed to be a "timeless institution."³¹³ Now that the Court has re-framed its conception of marriage, it may be time to urge the Court to take the next step and reevaluate how it theorizes sexual orientation.³¹⁴ Indeed, at oral arguments, Chief Justice Roberts signaled that he may be receptive to arguments that sexual orientation discrimination is a form of sex discrimination.³¹⁵ In many ways, the gender stereotyping approach develops upon Justice Ginsburg's earlier opinions in which she has rejected archaic and overbroad gendered generalizations as sex-based classification.³¹⁶ This approach is thus likely to appeal to her.³¹⁷

Relying upon essentialist arguments when litigating for LGB equality is giving the opponent the home-court advantage. An essentialist framework is key to the arguments for disparate treatment on the basis of sexual orientation. It conceptually allows courts to treat sexual orientation discrimination as something distinct from sex discrimination, subject to differential legal treatment. It is also conducive to conceptually isolating status from conduct, allowing targeting of the conduct as proxy for discrimination. Moreover, the counterarguments to sexual

310. See *supra* Section II.C.

311. See Goldberg, *supra* note 9, at 2114–21; see also Douglas NeJaime, *Wining Through Losing*, 96 IOWA L. REV. 941, 949 (2011).

312. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (rejecting essentialist framing of marriage "by its nature a gender-differentiated union of man and woman.") (emphasis added) with *id.* at 2594–95 (adopting an essentialist framing of sexual orientation as "[t]heir immutable nature dictates that same-sex marriage is their only real path to this profound commitment.") (emphasis added).

313. See *id.* at 2594.

314. Professor Russell K. Robinson has argued that had *Windsor* and *Obergefell* were framed as implicating sex-based classifications, Kennedy would have sided with those opposed to marriage equality. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 212–13 (2016) (observing "[h]e gets sexual orientation, but he 'wrestles' with gender").

315. See Transcript of Oral Argument at 61–62, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (Roberts, C.J.) (stating, "I'm not sure it's necessary to get into sexual orientation to resolve the case. . . . 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 sexual discrimination?").

316. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

317. Cf. Ginsburg *supra* note 133.

orientation discrimination as a form of sex discrimination rely upon an essentialist framing of the issue. By removing this advantage, the more sophisticated social constructionist approaches can be used to illustrate the logical fallacies that are inherent to essentialist arguments.

VII. CONCLUSION

The marriage litigation is behind us, and what lies ahead demands new approaches. Marriage equality asked the Court to take a giant conceptual leap to remove gender from marriage. Advocates were wise to limit this, and not ask for a simultaneous reframing of both marriage and sexual orientation.³¹⁸ However, in the last two decades, the Court has shown us on four occasions that it is ill-disposed to add sexual orientation to the rarified classes invoking heightened scrutiny. Reframing the argument as sex discrimination promises to clarify the uncertainty surrounding the level of scrutiny for sexual orientation. It is also conceptually the correct approach, conforming with how the social sciences understand sex and sexual orientation.³¹⁹

Shifting the theoretical framework in sexual orientation equal protection litigation from an essentialist to a social constructionist conceptualization of sexual orientation moves the battleground from one where essentialist arguments have the upper hand to one where they cannot withstand analytical scrutiny. Moving the debate away from the discrete-and-insular minority approach, which relies upon an essentialist framing, frees up litigators to use social constructionist analytical tools to dismantle contradictory and dated essentialist notions of sexual orientation. Essentialist arguments are predicated upon an understanding of a world that is akin to that of natural law. They depend upon the creation of social distinctions that are set apart from dominant, favored social identities and institutions, but they cannot withstand modern methods of inquiry to explain why they are separate.

Sexual orientation is being reframed as sex discrimination in district and circuit court cases regarding Title VII and Title IX. Those arguments crosswalk to equal protection claims, but they require letting go of the Holy Grail of sexual orientation litigation: recognition as a suspect or quasi-suspect class. Tomorrow's battles in health care, education, family law and other areas require a social constructionist approach to avoid competing conceptualizations of sexual orientation so that discrimination can be challenged without stepping into theoretical crossfire.

Understanding sexual orientation through the lens of sex discrimination better reflects the diverse reality and fluidity of modern gender identities, and it makes sense, normatively, theoretically, and strategically. As the *Hively* majority described it, “[i]t would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”³²⁰ This is because sexual orientation is derivative from sex, and sexual orientation discrimination is, thus, a form of sex discrimination. It is time to reframe the argument to reflect this reality.

318. See Goldberg, *supra* note 9.

319. See discussion *supra* Section I.B.

320. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc).

Appendix

DATA SET PART I. CASES ACCEPTING SEXUAL ORIENTATION DISCRIMINATION MAY BE A FORM OF SEX DISCRIMINATION AND THEORIES ADOPTED³²¹

C = comparative, A = associational, GS = gender stereotyping
EP = equal protection

Case	Case Type	Theories Adopted & Pincites
Doe v. Wm Operating, LLC, No. 17-2204, 2017 WL 3390195 (E.D. Pa. Aug. 7, 2017).	Title VII	(GS) *3
Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546 (E.D. Pa. 2017).	Title VII	(GS) 551–54
Hall v. BSNF Ry. Co., No. C13-2160-RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).	Title VII	(C) *3–5
Henderson v. Labor Finders of Va., Inc., No. 3:12cv600, 2013 WL 1352158 (E.D. Va. Apr. 2, 2013).	Title VII	(GS) *5–6
Ianetta v. Putnam Investments, Inc., 142 F. Supp. 2d 131, 133–34 (D. Mass. 2001).	Title VII	(GS) 133–34
J.R. v. New York City Dep't of Educ., No. 14 Civ. 0392(ILG)(RML), 2015 WL 5007918 (E.D. N.Y. 2015).	Title IX	(GS) *5
Kay v. Indep. Blue Cross, 142 F. App'x 48 (3d Cir. 2005).	Title VII	(GS) 50–51
Klein v. Novoselsky, No. 17 C 7177, 2018 WL 3831528 (N.D. Ill. Aug. 13, 2018).	§ 1985	(Other) *8 n.15
Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032 (N.D. Ohio 2012).	Title VII	(GS) 1037–38

321. Dataset excludes Second and Seventh Circuit Title VII and IX district court cases after the circuit precedent changed.

(CONTINUED)

Case	Case Type	Theories Adopted & Pincites
Maldonado-Catala v. Mun. of Naranjito, No. 13-1561 (JAG), 2014 WL 610362 (D.P.R. Feb. 15, 2014).	Title VII	(GS) *3-4
McMullen v So. Cal. Edison, No. EDCV 08-957-VAP, 2008 WL 4948664 (C.D. Cal. Nov. 17, 2008).	Title VII	(GS) *7
Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).	Title IX	(GS) 1092–93 & n.11
N.K. v. St. Mary’s Springs Acad. of Fond Du Lac Wisc., Inc., 965 F. Supp. 2d 1025 (E.D. Wisc. 2013).	Title IX	(GS) 1034
Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001).	Title VII	(GS) 874
Pambianchi v. Ark. Tech. Univ., No. 4:13-cv-00046-KGB, 2014 WL 11498236 (E.D. Ark. Mar. 14, 2014).	Title VII	(GS) *5
Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135 (N.D.N.Y. 2011).	Title IX	(GS) 151
Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3rd Cir. 2009).	Title VII	(GS) 290
Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000).	Title IX	(GS) 1170
Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc).	Title VII	(GS) 1069
Reed v. Kerens Indep. Sch. Dist., No. 3:16-CV-1228-BH, 2017 WL 2463275 (N.D. Tex. 2017).	Title IX	(GS) *10
Reed v. South Bend Nights, Inc., 128 F. Supp. 3d 996 (E.D. Mich. 2015).	Title VII	(GS) 1000–01

(CONTINUED)

Case	Case Type	Theories Adopted & Pincites
Rhea v. Dollar Tree Stores, Inc., 395 F. Supp. 2d 696 (W.D. Tenn. 2005).	Title VII	(GS) 700 n.2, 704–05
Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219 (D. Conn. 2006).	Title IX	(C) 226 (GS) 225–26
Robertson v. Siouxland Cmty Health Ctr., 938 F. Supp. 2d 831 (N.D. Iowa 2013).	Title VII	(Other) 842, 847, 850
Rosado v. American Airlines, 743 F. Supp. 2d 40 (D.P.R. 2010).	Title VII	(GS) 58
S.E.S. v. Galena Unified Sch. Dist. No. 499, No. 18–2042–DDC–GEB, 2018 WL 3389880 (D. Kan. July 12, 2018).	Title IX	(GS) *3
Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942 (S.D. Ind. 2007).	Title IX, EP	(GS) 953 & n.8
Snelling v. Fall Mountain Reg'l Sch. Dist., No. CIV.99-448-JD, 2001 WL 276975 (D.N.H. Mar. 21, 2001).	Title IX	(Other) *4
T.B. v. New Kensington-Arnold Sch. Dist., No. 15–606, 2016 WL 6879569 (W.D. Pa. Nov. 22, 2016).	Title IX	(GS) *5 & n.7
Thompson v. CHI Health Good Samaritan, No. 8:16CV160, 2016 WL 5394691 (D. Neb. Sept. 27, 2016).	Title VII	(GS) *2 & n.1
Tyndall v. Berlin Fire Co., No. ELH-13-02496, 2015 WL 4396529 (D. Md. 2015).	Title VII	(GS) *30

DATA SET PART II. CASES ACCEPTING SEXUAL ORIENTATION DISCRIMINATION AS
FORM OF SEX DISCRIMINATION AND THEORIES ADOPTED

A. Theory Success Subset³²²

Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255 (D. Conn. 2016).	Title VII		(A) 267–68 (GS) 269
Amended Complaint & Request for Jury Trial, Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255 (D. Conn. 2016) (No. 2:13-cv-01303-WWE).		(GS) 13	
Bowe v. Eau Claire Area Sch. Dist., No. 16–cv-746-jdp, 2017 WL 1458822 (W.D. Wisc.).	Title IX		(GS) *3 & n.1
Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss, Bowe v. Eau Claire Area Sch. Dist., 2017 WL 1458822 (W.D. Wisc. Jan. 3, 2017) (No. 16-CV-746).		(GS) 10–11	
Burnett v. Union R.R., No. 17-101, 2017 WL 2731284 (W.D. Pa. June 26, 2017).	Title VII		(GS) *4
Complaint, Burnett v. Union R.R., 2017 WL 2731284 (W.D. Pa. June 26, 2017) (No. 17-101).		(GS) 10–11	

322. Cases hold, recognize, or apply a rule that antidiscrimination law protects individuals who are discriminated against on the bases of sex because of their sexual orientation. Underlying pleadings are available. If a theory is cited in multiple pleadings from the same party, only one source is cited.

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Carmichael v. Galbraith, 574 F. App'x. 286 (5th Cir. 2014) (Dennis, J., concurring).	Title IX		(GS) 292, 294
Brief of Plaintiff-Appellants, Carmichael v. Galbraith, 574 F. App'x. 286 (5th Cir. 2014) (No. 12-11074).		(GS) 23–28	
Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017) (Katzmann, concurring).	Title VII		(C) 202-04 (A) 205-06 (GS) 204-05
Brief for Plaintiff-Appellant, Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017) (No. 16-748-cv).		(GS) 24–25	
Brief of Amicus Curiae EEOC in Support of Plaintiff/Appellant & Reversal, Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017) (No. 16-748-cv).		(C) 18–20 (A) 21–23 (GS) 10–18	
Churchill v. Prince George's Cty. Pub. Sch., No. PWG-17-980, 2017 WL 5970718 (D. Md. Dec. 1, 2017).	Title VII		(GS) *5
Opposition to Motion to Dismiss at 6–7, Churchill v. Prince George's Cty. Pub. Sch., WL 5970718 (D. Md. Dec. 1, 2017) (No. PWG-17-980, 2017).		(C) 7 (GS) 6	
Deneffe v. SkyWest, Inc. No. 14-cv-00348-MEH, 2015 WL 2265373 (D. Colo. May 11, 2015).	Title VII		(GS) *6
Second Amended Civil Complaint for Equitable & Monetary Relief & Demand for Jury, Deneffe v. SkyWest, Inc., 2015 WL 2265373 (D. Colo. May 11, 2015) (No. 14-cv-00348-MEH).		(GS) 18	

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 814 (W.D. Pa. 2016).	Title VII		(A) 840 n.5 (GS) 840-42
Plaintiff EEOC's Brief in Opposition to Defendant's Rule 12(b)(1) & 12(b)(6) Motion to Dismiss, EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834 (W.D. Pa. 2016) (No. 2:16-cv-00225).		(C) 5-7 (A) 7-10 (GS) 10-17	
EEOC v. Boh Bros. Const., 731 F.3d 444 (5th Cir. 2013) (en banc).	Title VII		(GS) 454-62
EEOC's Supplemental en banc Brief as Appellee, EEOC v. Boh Bros. Const., 731 F.3d 444 (5th Cir. 2013) (No. 11-30770).		(GS) 21-56	
Estate of Brown v. Ogletree, No. 11-cv-1491, 2012 WL 591190 (S.D. Tex. Feb. 21, 2012).	Title IX		(GS) *17
<i>See</i> Plaintiff's Response to Defendant Sch. Dist. First Amend. Motion to Dismiss or, in the Alternative, to Strike &, in the Alternative, Plaintiffs' Motion for Leave to Amend at 20-25, Estate of Brown v. Ogletree, (No. 11-cv-1491) 2012 WL 591190 (S.D. Tex. Feb. 21, 2012).		N-A	
Harrington v. City of Attleboro, No. 15-cv-12769-DJC, 2018 WL 475000 (D. Mass. Jan 17, 2018).	Title VII		(GS) *5-6
Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Complaint, Harrington v. City of Attleboro, No. 15-cv-12769-DJC) 2018 WL 475000 (D. Mass. Jan 17, 2018).		(GS) 10	
Hively v. Ivy Tech Cmty. Coll., S. Bend, 830 F.3d 698 (7th Cir. 2016) (panel).	Title VII		(A) 715-17 (GS) 704-715

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Opening Brief of Plaintiff-Appellant Kimberly Hively, <i>Hively v. Ivy Tech Cmty. College of Ind.</i> , 853 F.3d 339 (7th Cir. 2017) (No. 15-1720).		(C) 18 (A) 27–34 (G) 22–26	
<i>Hively v. Ivy Tech Cmty. Coll. of Ind.</i> , 853 F.3d 339 (7th Cir. 2017) (en banc).	Title VII		(C) 345-6 (A) 347-49 (GS) 346
Opening Brief of Plaintiff-Appellant Kimberly Hively, <i>Hively v. Ivy Tech Cmty. College of Ind.</i> , 853 F.3d 339 (7th Cir. 2017) (No. 15-1720).		(C) 18 (A) 27–34 (G) 22–26	
<i>Isaacs v. Felder Servs.</i> , 143 F. Supp. 3d 1190 (M.D. Ala. 2015).	Title VII		(A)1193-94 (GS) 1194
Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 6, <i>Isaacs v. Felder Servs.</i> , 143 F. Supp.3d 1190 (M.D. Ala. 2015) (No. 2:13-CV-693-MHT-PWG).		(GS) 6–11	
<i>Jernigan v. Crane</i> , 64 F. Supp. 3d 1260 (E.D. Ark. 2014).	EP		(C) 1286-87
Plaintiff’s Brief in Support of Motion for Summary Judgment, <i>Jernigan v. Crane</i> , 64 F. Supp. 3d 1260 (E.D. Ark. 2014) (No. 4:13-cv-00410-KGB).		(C) 19–20	
<i>Kitchen v. Herbert</i> , 961 F. Supp. 2d 1181 (D. Utah 2013).	EP		(C) 1206
Brief of Plaintiffs-Appellees Derek Kitchen, <i>Kitchen v. Herbert</i> , 961 F. Supp. 2d 1181 (D. Utah 2013) (No. 2:13-cv-00217-RJS).		(C) 56–59 (GS) 59–61	
<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014) (Berzon, J. concurring).	EP		(C) 479-85 (GS) 485-90

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Brief of Plaintiffs-Appellees, <i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014) (Nos. 14-35420, 14-35421).		(C) 34–36 (GS) 36–38	
<i>Lawson v. Kelly</i> , 58 F. Supp.3d 923 (W.D. Mo. 2014).	EP		(C) 934
Suggestions in Support of Plaintiffs’ Motion for Summary Judgment, <i>Lawson v. Kelly</i> , 58 F. Supp. 3d 923 (W.D. Mo. 2014) (No. 4:14-cv-00622-ODS).		(C) 39	
<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010).	EP		(C) 996
Plaintiffs’ and Plaintiff-Intervenor’s Trial Memorandum, <i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-cv-2292-VRW).		(C) 14–15	
<i>Philpott v. New York</i> , 252 F. Supp.3d 313 (S.D.N.Y. 2017).	Title VII		(GS) 317
<i>See Philpott v. New York</i> , 252 F. Supp.3d 313, 316–17 (S.D.N.Y. 2017) (noting that plaintiff “has requested leave to amend his complaint, presumably for the purpose of reframing his allegations in terms of gender stereotyping discrimination”).		N-A	
<i>Rosenbrahn v. Dugaard</i> , 61 F. Supp. 3d 845 (D.S.D. 2014).	EP		(C) 860
Plaintiffs’ Consolidated Memorandum Opposing Defendants’ Motion to Dismiss & Supporting Plaintiffs’ Motion for Summary Judgment at 15, 20–21, <i>Rosenbrahn v. Dugaard</i> , 61 F. Supp. 3d 845 (D.S.D. 2014) (No. 14-CV-4081-DES).		(C) 20–21 (GS) 15	

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Somers v. Digital Realty Trust, Inc., No. 14-cv-05180-EMC, 2018 WL 3730469 (N.D. Cal. Aug. 6, 2018).	Title VII		(C) *7 (A) *7 (GS) *7
Opposition to Defendants Motion of Summary Judgement or in Alternative Summary Adjudication, Somers v. Digital Realty Trust, Inc., 2018 WL 3730469 (Aug. 6, 2018) (No. 3:14-cv-05180-EMC).		(GS) 13	
Spellman v. Ohio Dep't of Transp., 244 F. Supp. 3d 686 (S.D. Ohio 2017).	Title VII		(GS) 699
<i>See generally</i> Plaintiff's Memorandum Contra Motion for Summary Judgment Files by Defendants, Spellman v. Ohio Dep't of Transp., 244 F. Supp. 3d 686 (S.D. Ohio 2017) (No. 2:15-cv-01115-EAS-KAJ).		N-A	
Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014).	Title VII		(GS) 115-16
Tendered Brief of Amicus Curiae Lambda Legal Defense & Education Fund, Inc. in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's Title VII Claims, Terveer v Billington, 34 F. Supp. 3d 100 (D.D.C. 2014) (No. 12-1290 (CKK)).		(C) 2	
Amended Complaint, Terveer v Billington, 34 F. Supp. 3d 100 (D.D.C. 2014) (No. 12-1290 (CKK)).		(GS) 14	
Tinory v. Autozoners, No. 13-11477-DPW, 2016 WL 320108 (D. Mass. Jan. 26, 2016).	Title VII		(GS) *5
<i>See generally</i> Memorandum of Law in Sport of Plaintiff's Opposition to		N-A	

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Defendant Autozoners' Motion for Summary Judgment, Tinory v. Autozoners, 2016 WL 320108 (D. Mass. Jan. 26, 2016) (No. 13-11477-DPW).			
<i>See generally</i> Memorandum of Law in Support of Plaintiff's Opposition to Defendant Ilya Aksman's Motion for Summary Judgment, Tinory v. Autozoners, 2016 WL 320108 (D. Mass. Jan. 26, 2016) (No. 13-11477-DPW).		N-A	
Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006).	Title VII		(GS) 764
Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) (C2-03-858).		(GS) 5-17	
Videckis v. Pepperdine, 150 F. Supp. 3d 1151 (C.D. Cal. 2015).	Title IX		(GS) 1159-60
Third Amended Complaint for Damages, Videckis v. Pepperdine, 150 F. Supp. 3d 1151, 11600(C.D. Cal. 2015) (No. 2:15-CV-00298-DDP (JCx)).		(GS) 32	
Winstead v Lafayette Cty. Bd. of Cty. Commr's, 197 F. Supp. 3d 1334 (N.D. Fla. 2016).	Title VII		(GS) 1346
Plaintiffs' Memorandum in Opposition to Defendant's Motion for Partial Dismissal of Corrected Amended Complaint, Winstead v Lafayette Cty. Bd. of Cty. Comm'rs, 197 F. Supp. 3d 1334 (N.D. Fla. 2016) (No. 1:16-cv-00054-MW-GRJ).		(GS) 5	

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Case	Claim Type	Theories Raised & Pincites ³²³	Theories Adopted & Pincites
Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc).	Title VII		(C) 116–19 (A) 119–24 (GS) 124–32
Appellant’s Brief (replacement), Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (No. 15-3775).		(C) 38 (A) 38 (G) 38	

323. N-A indicates no discernable theory raised in briefing.

B. Excluded Cases³²⁴

Case	Claim Type	Theories Adopted & Pincite
Centola v Potter, 183 F. Supp. 2d 403 (D. Mass. 2002).	Title VII	(GS) 408-10
Foray v. Bell Atlantic, 56 F. Supp. 2d 327 (S.D.N.Y. 1999).	Title VII	(GS) 329
Franchina v. City of Providence, 881 F.3d 32 (1st Cir. 2018).	Title VII	(Other) 54
Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Ore. 2002).	Title VII	(C) 1223 (GS) 1224
In re Fonberg, 736 F.3d 901 (9th Cir. 2013).	Other	(C) 903
In re Levenson, 560 F.3d 1145 (9th Cir. 2009).	Other	(C) 1147
Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d (N.D. Ohio 2003).	Title IX	(Other) 879–80
Squire v. FedEx Freight, Inc., No. MJG-17-3597, 2018 WL 3036474 (D. Md. June 19, 2018).	Title VII	(Other) *5
Wetzel v. Glen St. Andrew Living Cmty., No. 17-1322, 2018 WL 4057365 (7th Cir. Aug. 27, 2018).	Fair Housing Act	(Other) *3
Williams v. Dist. of Columbia, 317 F. Supp. 3d 195 (D.D.C. 2018).	Title VII	(Other) 199 n.1

324. Cases hold, recognize, or apply a rule that antidiscrimination law protects individuals who are discriminated against on the bases of sex because of their sexual orientation. Cases excluded from analysis of successful theories because pleadings were unavailable or a different theory other than comparative, associational, or gender stereotyping was adopted.