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Dignity, Inequality, and Stereotypes

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Abstract: In *Obergefell v. Hodges*, the Supreme Court held that same-sex marriage bans violate the Equal Protection Clause for two primary reasons. First, they subordinate; they send the message that lesbians and gays are inferior to heterosexuals. Second, they unequally deny lesbian and gay individuals the liberty to make fundamental decisions about identity and self. These two conjoined themes—anti-group subordination and pro-individual liberty—comprise the two pillars of "equal dignity" that anchor *Obergefell*'s holding. This Article proposes that these pillars also support the Court's anti-stereotyping jurisprudence, and equal dignity is thus one important aspect of what the Equal Protection Clause protects. To illustrate: in sex discrimination cases, courts reject state stereotyping when it perpetuates ideas about men's and women's roles and reinforces women's inferior social status; in transgender and sexual orientation discrimination cases, courts have begun to protect LGBTQ individuals from state demands for conformity to normative stereotypes about how to be a man or woman.

Protecting individuals' equal dignity can sometimes become complicated when the reasons for addressing a group's purported needs elide individual concerns and attachments. For example, the government sometimes relies on normative and statistical information about groups to combat group-associated health and poverty risks, to remedy individual disparate treatment, and to prevent wholesale group exclusion from opportunities and civic duties. Addressing these group-based needs, however, may effectively perpetuate stereotypes about what group membership means. Individual group members may object to the identitarian implications of the government's help.

Not all stereotyping both subordinates a group and denies individuals the liberty to be and express who they are. Accordingly, stereotyping is not wrong in and of itself; how the government uses stereotypes should determine whether state action violates the Equal Protection Clause. Counterintuitively, stereotyping can sometimes promote rather than deny equal dignity. While any state reliance on stereotypes risks essentializing identity, an absolute stereotyping prohibition exacerbates certain forms of race, sex, and sexual orientation blindness. Groups are important, and the government requires some flexibility to address group-based needs.

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INTRODUCTION

In the summer of 2015, the Supreme Court in *Obergefell v. Hodges*[1] struck down all remaining same-sex marriage bans in the United States.[2] Justice Kennedy wrote the majority opinion, reasoning that same-sex marriage bans deny "equal dignity" to same-sex couples[3] and, by extension, to gays and lesbians as a group.[4] The Court ultimately held that same-sex marriage bans violate individuals' fundamental right to marry as protected under the term "liberty" in the Due Process Clause,[5]

1. 576 U.S. __, 135 S. Ct. 2584 (2015).

2. *Id.* at 2604–05.

3. *Id.* at 2608 (petitioners "ask for equal dignity in the eyes of the law. The Constitution grants them that right").

4. *Id.* at 2596 (noting that same-sex marriage is one of many "questions about the rights of gays and lesbians" to reach the courts). Justice Kennedy unfortunately overlooks bisexuals in his analysis.

5. *Id.* at 2597–602.

as well as the Equal Protection Clause,[6] but it acknowledged throughout the opinion that the Fourteenth Amendment's textually separate liberty and equality provisions are often conceptually codependent.[7] *Obergefell*'s focus on dignitary harm and its role at the center of a friendly relationship between liberty and equality thus offers important guiding principles for understanding the Court's broader Equal Protection jurisprudence.

One longstanding tenet of Equal Protection law is that the government cannot rely on or perpetuate stereotypes when distinguishing between and among certain groups.[8] In the landmark *Reed v. Reed*[9] decision of 1971, the Supreme Court gave life to the anti-stereotyping principle when it struck down as unconstitutional an Idaho statute that explicitly preferred men over women as estate administrators.[10] In *Reed*, the ACLU argued in a brief co-authored by now-Justice Ginsburg that "legislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women,"[11] and a diverse array of laws perpetuate the overarching sex-role stereotype that a woman's place is "subordinate to man."[12] The Court validated these arguments throughout the following years and decades, holding repeatedly that sex classifications that "ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"[13] violate the Equal Protection Clause.

The anti-stereotyping principle extends beyond sex and applies in other contexts in which the government classifies on the basis of a suspect status or protected trait. In holding that sexual orientation is a suspect classification warranting heightened judicial scrutiny, the Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Laboratories*[14] recently

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6. *Id.* at 2604–05.

7. *See, e.g.*, *id.* at 2603 ("Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.").

8. Professor Cary Franklin argues the anti-stereotyping principle in Equal Protection law as originally developed "dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles." Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010).

9. 404 U.S. 71 (1971).

10. *Id.* at 76 (reasoning that a mandatory preference based solely on sex is arbitrary).

11. Brief for Appellant at 17, *Reed*, 404 U.S. 71 (No. 70-4).

12. *Id.* at 32; *see also* Franklin, *supra* note 8, at 122–25 (documenting the history of Justice Ginsburg's involvement in the *Reed* litigation).

13. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 131 (1994) (regarding sex-based peremptory challenges during jury selection).

14. 740 F.3d 471 (9th Cir. 2014).

applied the anti-stereotyping principle to a defendant's peremptive strike against a potential juror based in part on his status as gay. The Ninth Circuit explained that preemptive strikes based on "preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate"[15] stereotypes, and to revoke a civic responsibility based on these stereotypes "demean[s] the *dignity* of the individual."[16]

What do the anti-stereotyping and equal dignity principles have in common? This Article proposes that equal dignity is one theory of Equal Protection that can explain when governmental stereotyping is unconstitutional.[17] The Court's anti-stereotyping jurisprudence attempts to tackle the dual constitutional harms of group subordination and individual liberty denial, and Justice Kennedy made both harms central to equal dignity's meaning in *Obergefell*. First, Kennedy reasoned that, when buttressed by the "long history of disapproval" surrounding same-sex relationships, bans on same-sex marriage impose a "disability on gays and lesbians" that "serves to disrespect and subordinate them."[18] Second, Kennedy explained that equal dignity also requires space for individuals, "within a lawful realm, to define and express their identity."[19] In other antidiscrimination law contexts, cases that rely on the anti-stereotyping principle to strike down classifications based on sex, race, and sexual orientation likewise reflect anti-group subordination and pro-individual liberty themes. *Obergefell* simply unifies these themes by tying both to a dignitary conception of equality.

Protecting stigmatized groups from subordination while simultaneously providing ample room for individual group members to "define and express their identity"[20] can sometimes create tension. Friction arises when (1) the government acts to address a problem that, based on a statistical correlation between some characteristic and group membership, disproportionately affects the group; (2) that action effectively reinforces or creates ideas about what it means to be a group member; and (3) that group meaning conflicts with individual group members' sense of self. In other words, sometimes the government relies on normative or statistical information about groups to address a group-

15. *Id.* at 486.

16. *Id.* at 485 (emphasis added).

17. *See also* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (arguing that "equal dignity" is a prospective concept that informs ongoing constitutional conversations about the meaning of equality).

18. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2604 (2015).

19. *Id.* at 2593.

20. *Id.*

based problem or alleviate group subordination,[21] but doing so risks reifying group meanings that diverge from individual conceptions of group identity.

This tension is palpable in anti-stereotyping jurisprudence. On one hand, the anti-stereotyping principle typically requires the government to treat individuals as individuals. For example, even if most women would statistically be unsuited for the Virginia Military Institute's adversative style of learning, the government cannot deny admission to all women on that basis.[22] On the other hand, sometimes the government must address groups as groups. Justice O'Connor's analysis was arguably progressive in *Lawrence v. Texas*,[23] for example, by linking sodomy to gays and lesbians as a group when discussing why Texas's same-sex sodomy ban violated the Equal Protection Clause: "[t]he Texas statute makes homosexuals unequal in the eyes of the law," she explained, and it "brands all homosexuals as criminals."[24] To ignore this reality would have been sexual orientation blind in ways that both subordinated gays as a group vis-à-vis straights and denied individuals the liberty to have sex with the consenting adult persons of their choosing. Criminalizing sodomy had the effect of forbidding individuals from engaging in conduct that is important, and often central, to many members of the group. Yet not all homosexuals engage in "sodomy," and many would bristle at the assertion that gay identity has anything to do with sex.[25] Pairing sodomy with "all homosexuals" accounts for statistically relevant information about gays as a group, but it is also stereotyping.

Take justifications for affirmative action programs as another example. In *Regents of the University of California v. Bakke*,[26] the UC Davis Medical School argued that setting aside sixteen out of 100 positions in the entering class for racial minorities was necessary to achieve its interest in providing health care services to underserved minority communities.[27] This is a progressive argument, and the Court conceded that "[i]t may be correct to assume that some of [the admitted minority students] . . . will practice in minority communities."[28] But not

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21. *See, e.g.*, Zachary Herz, *The Marrying Kind*, 83 TENN. L. REV. 83, 147 (2015) ("[R]efusing to recognize a group can also be demeaning . . . .").

22. United States v. Virginia, 518 U.S. 515 (1996).

23. 539 U.S. 558 (2003).

24. *See id.* at 581 (O'Connor, J., concurring).

25. *See infra* section III.B.1.

26. 438 U.S. 265 (1978).

27. *See id.* at 310.

28. *Id.* at 310–11; *see also* James W. Nickel, *Preferential Policies in Hiring and Admissions: A*

all doctors of color will practice in communities of color,[29] and to assume that even some will do so invokes group-based assumptions rather than individual assessments.

The tension between liberty and anti-subordination comes into sharper relief when we consider the varied and expansive definitions of "stereotyping." Statistical stereotypes, for instance, represent factual truths about the conduct, abilities, or lived experiences of most, but not all, members of a given group.[30] Similarly, normative stereotypes reflect informal and largely agreed upon traits, tastes, artifacts, and conduct constitutive of group identities.[31] Under these and other definitions, some scholars have gone so far as to equate stereotypes with culture.[32] But as those who critically study identity have long argued, ignoring culture or being blind to it with respect to sex, race, and sexual orientation may reinforce group stratification, foster cultural appropriation, and otherwise subordinate minorities.[33] Thus, we must ask, can the government protect vulnerable groups from subordination without sometimes stereotyping the individuals who comprise those groups? If not, when does government stereotyping amount to a constitutional wrong?

This Article offers two novel contributions to the scholarly literature about Equal Protection jurisprudence. First, it argues that not all governmental stereotyping amounts to a constitutional violation, or is even harmful. How the government uses stereotypes is key. The distinction rests on whether the government's use of stereotypes denies equal dignity. Second, this Article explores when stereotyping denies equal dignity. It uses *Obergefell* as the doctrinal anchor and then examines the federal judiciary's prominent anti-stereotyping cases and recent developments in LGBTQ antidiscrimination law. This Article proposes that governmental stereotyping denies equal dignity and is thus

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Jurisprudential Approach, 75 COLUM. L. REV. 534, 542 (1975) (endorsing an assumption underlying race-based affirmative action that "blacks who become doctors or lawyers are *more likely* to help meet the medical needs of the black community than whites who become doctors or lawyers" (emphasis in original)).

29. *See* Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEW ENG. J. MED. 1305, 1307 (1996) (explaining that, based on the results of an empirical study, physicians generally but not universally "practiced in areas with relatively high proportions of residents of their own race or ethnic group").

30. *See* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CALIF. L. REV. 41, 47 (2000).

31. *See id.* at 48.

32. *See generally* RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE (2005).

33. *See infra* section III.A.

unconstitutional when it has the purpose or effect of (1) subordinating a group *and* (2) unequally denying individuals' liberty to form and express identity.

This project is motivated in part by a desire to contextualize stereotypes and identify their dangers in a more sophisticated rather than reactionary way. Group-based experiences and problems are real, but legal discourse surrounding stereotypes tends to shift the focus to the individual at the expense of groups. One doctrinal solution could be for courts to define stereotypes narrowly and in a way that permits the government to productively consider normative and statistical information that is true of many but not all group members. Another solution is to develop a theory for when stereotyping, however defined, does not deny dignity. This Article attempts to do the latter.

This Article focuses primarily on race-, sex-, and sexual orientation-based stereotyping, but emphasizes stereotyping concerns in LGBTQ antidiscrimination law. LGBTQ discrimination cases illustrate especially well how the anti-stereotyping principle must guard against both individual liberty deprivations and group subordination to achieve equality. In some cases, the government discriminates against *individual* gay and transgender people precisely because they are uniquely gender non-conforming and fail to match the normative stereotypes associated with their biological sex or the social dictates of heterosexuality. In other cases, the government discriminates against LGBTQ people as a *group*—usually by relying on false stereotypes and animus to deny services or benefits to which many LGBTQ people seek access (e.g., marriage), or by criminalizing or punishing conduct closely associated with LGBTQ culture and practices (e.g., "sodomy").

This Article proceeds as follows. Part I fleshes out the constitutional meaning of "dignity" based on how the Supreme Court uses it in Equal Protection and Substantive Due Process challenges. It then considers how the pro-liberty and anti-subordination themes of dignity converge in *Obergefell*, offering a guide for assessing the constitutional harm of stereotyping in past and future cases. Part II outlines three distinct definitions of stereotypes: false, normative, and statistical. In doing so, it explains how all three definitions can deny equal dignity. Part III discusses beneficial or "dignified" stereotyping. It first discusses group identities, and explores the tension between anti-essentialist and multiculturalist concerns. It then discusses dignified stereotyping in an LGBTQ context, offering examples for when the government may beneficially consider certain normative and statistical information about gays as a group: sodomy decriminalization, justifications for affirmative action policies, and disparate impact claims.

I. DEFINING EQUAL DIGNITY

Conventional wisdom suggests that, when the government classifies on the basis of a quasi-suspect or suspect trait, governmental stereotyping is always forbidden. In *Orr v. Orr*,[34] which dealt with the constitutionality of an Alabama statute requiring ex-husbands but not ex-wives to pay spousal support, the Supreme Court famously reasoned that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."[35] Pursuant to these concerns, the government must engage in individualized assessments if feasible when bestowing benefits or burdens rather than relying on stereotypes about race or sex.[36] This individualistic focus is the hallmark of the Court's current race-conscious affirmative action jurisprudence.[37]

Doctrinally, the anti-stereotyping principle does not apply every time the government classifies on the basis of group status;[38] instead, it applies only when the government classifies on a quasi-suspect or suspect class. In those cases, there is a presumably greater need to ensure that prejudice about socially salient groups has not infected the decision-making process.[39] Since the end of the notorious *Lochner*[40] era, during which the Supreme Court carefully scrutinized and struck down

34. 440 U.S. 268 (1979).

35. *Id.* at 283.

36. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 720 (2007) (noting that courts deploy strict scrutiny when reviewing any state action that "distributes burdens or benefits on the basis of individual racial classifications").

37. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (race-conscious admissions programs require "truly individualized consideration" where race is used in a "flexible, nonmechanical way").

38. "It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence." Miller v. Albright, 523 U.S. 420, 452 (1998) (O'Connor, J., joined by Kennedy, J., concurring).

39. *See, e.g.*, Latta v. Otter, 19 F. Supp. 3d 1054, 1073 (D. Idaho 2014) ("The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment."); Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1285 (N.D. Okla. 2014) ("If the discrimination is against a suspect class or quasi-suspect class, it comes to courts 'under grave suspicions and subject to heightened review' because experience teaches that classifications against these groups is 'so rarely defensible on any ground other than a wish to harm and subjugate.'" (quoting SECSYS, LLC v. Vigil, 666 F.3d 678, 687 (10th Cir. 2012))).

40. Lochner v. New York, 198 U.S. 45 (1905).

hundreds of economic regulations,[41] the Court has reviewed most classifications under a highly deferential rational basis review that permits stereotyped reasoning and generalizations.[42] In *New York City Transit Authority v. Beazer*,[43] for example, the Court determined the constitutionality of a government policy that precluded the employment of anyone who uses methadone as treatment for heroin addiction, regardless of the applicant's merits or time spent in successful treatment.[44] The Court rejected an Equal Protection challenge to the policy, reasoning that, because the policy did not target "a class of persons characterized by some unpopular trait or affiliation," it was not constitutionally significant that generalizations about the whole group of methadone users did not apply to all methadone users.[45] Governmental reliance on stereotypes is thus permissible more often than not.

The Supreme Court's willingness to accept stereotyping in some contexts but not others is a frequent fixture of Equal Protection law. In *J.E.B. v. Alabama ex rel. T.B.*,[46] the Court held that state actors may not strike potential jurors based solely on sex.[47] To do so would perpetuate stereotypes about men and women.[48] But the Court noted in *J.E.B.* that preliminary juror strikes based on membership in other groups do not pose constitutional problems, even if those strikes rely on stereotypes about group membership.[49]

> The popular refrain is that *all* peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the

41. *See, e.g.*, *id.* at 64 (striking down a statute limiting the number of hours that bakers could work per week); Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 34 (2003) (in the *Lochner* era, "the Supreme Court repeatedly invalidated statutes that were enacted to help workers and consumers").

42. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (ending searching judicial review of economic legislation under the Due Process Clause, but reserving searching judicial review for legislation affecting the Bill of Rights, the political process, and discrete and insular minorities); Barry Cushman, Carolene Products *and Constitutional Structure*, 2012 SUP. CT. REV. 321, 321–22 (discussing same).

43. 440 U.S. 568 (1979).

44. *Id.* at 576–77.

45. *Id.* at 593.

46. 511 U.S. 127 (1994).

47. *Id.* at 146.

48. *Id.* at 131.

49. *Id.* at 142 n.14.

> same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.[50]

The Court's distinction in *J.E.B.* for when stereotyping is and is not harmful gets squarely at one of the two pillars of equal dignity: a commitment to counter the subordination of socially salient and oppressed groups. The other pillar functions to protect individuals' liberty to define and express identity.

Going forward, this Article examines how the Court invokes dignity under the Substantive Due Process Clause to protect decisional autonomy regarding identity and notions of self. It then examines how the Court invokes dignity under the Equal Protection Clause to protect oppressed groups from subordination. It also discusses how the Court in *Obergefell* ties these pro-liberty and anti-subordination threads together to strike down same-sex marriage bans as violating the equal dignity principle at the center of the Equal Protection Clause. Finally, it illustrates how equal dignity likewise animates the Equal Protection Clause's anti-stereotyping doctrine.

A. Liberty as Individual Decisional Autonomy

In modern times, the Supreme Court emphasizes dignity as an important constitutional consideration in both Substantive Due Process and Equal Protection jurisprudence.[51] As Reva Siegel explains, "constitutional protections for dignity vindicate, often concurrently, the value of life, the value of liberty, and the value of equality."[52]

Early Substantive Due Process and Equal Protection cases in which the Court interpreted the Fourteenth Amendment's liberty guarantee hinged to a large degree on governmental respect for individual autonomy as a necessary means to promote human dignity. In *Eisenstadt v. Baird*,[53] for example, the Court held that states cannot prohibit individuals from purchasing contraceptives because, if "the right of privacy means anything, it is the right of the individual . . . to be free

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50. *Id.* (emphasis in original) (internal citations omitted).

51. *See, e.g.*, Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 276 (2014) (noting that "dignity" has been "especially prominent in decisions authored by Justice Kennedy").

52. Reva B. Siegel, *Dignity and the Politics of Procreation: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1736 (2008).

53. 405 U.S. 438 (1972).

from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[54] Moreover, the *Eisenstadt* Court anchored its analysis in the Equal Protection Clause, explaining that the government cannot *unequally* deny individuals the *liberty* to exercise a fundamental right to make such deeply personal decisions.[55] The Court soon extended this decisional autonomy conception of liberty to the abortion context, reasoning that "few decisions are 'more basic to individual dignity and autonomy' or more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy."[56]

The Court's fundamental rights jurisprudence firmly establishes that constitutionally protected liberty encompasses the autonomy to make certain decisions because those choices are central to individual dignity. This liberty also includes, among other things, the right to refuse life-sustaining medical treatment so that individuals may "die with dignity,"[57] and the right to privately express sexuality with another person so that individuals may "retain their dignity as free persons."[58] The right to make personal decisions about with whom we have sex, the composition of our families, and how our life will end fundamentally affects our identities and the kinds of existence we lead.[59] Dignity requires that we acknowledge human beings as autonomous agents who make self-defining choices.[60]

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54. *Id.* at 453 (emphasis omitted).

55. *Id.* at 453–55.

56. Webster v. Reprod. Health Servs., 492 U.S. 490, 548–49 (1989) (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (reasoning that the "most intimate and personal choices" that a person makes are "central to personal dignity and autonomy" and are thus central to liberty).

57. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 301 (1990) (Brennan, J., dissenting) (quoting Rasmussen v. Fleming, 741 P.2d 674, 678 (Ariz. 1987) (en banc)). *But see* Washington v. Glucksberg, 521 U.S. 702, 716, 735–36 (1997) (holding that Washington's ban on physician-assisted suicide does not violate the liberty guaranteed by the substantive due process, in part because of disagreements over how best to protect "dignity and independence at the end of life").

58. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

59. Sometimes, however, the Court's use of dignity has frustrated progressive goals, particularly when it perceives the values of individual liberty and life as in conflict. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 156–57 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003, reasoning that the government has a legitimate interest in promoting "respect for the dignity of human life").

60. *See* BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 138–39, 150 (2015) (theorizing that discrimination rooted in stereotypes is troubling because it disregards the standing of individuals as autonomous agents who make unique choices about how to live their lives).

B. Equality as Anti-Group Subordination

The Court has also invoked dignity as a rationale for why dissimilar treatment of similarly situated groups is a constitutional wrong. A recent high-profile example comes from *United States v. Windsor*.[61] There, the Supreme Court struck down as unconstitutional under the Fifth Amendment's Equal Protection Clause a provision of the Defense of Marriage Act (DOMA) that defined marriage under all federal laws as solely between one man and one woman.[62] The Court devoted significant time to a discussion about the respect, honor, and social standing[63] that both the government and society ascribe to marriage.[64] Because marriage is a positive right to which governmental benefits and responsibilities attach, the Court conceptualized the government's role in determining who can obtain those rights and responsibilities as conferring "a dignity and status of immense import."[65] Focusing in large part on evidence of the government's antigay animus, the Court determined that DOMA's "essence" was to interfere with the "equal dignity" that some states had conferred on same-sex and different-sex couples alike by legalizing same-sex marriage.[66] DOMA's principle effect, the Court found, was to single out one group—individuals in state-sanctioned same-sex marriages—and make them unequal to individuals in different-sex marriages, which "demeans" gay and bisexual couples.[67]

The Court's decision in *Brown v. Board of Education*[68] is another poignant example of an equality case in which dignity played a role. In *Brown*, the Court unanimously held that public secondary schools cannot constitutionally operate on a formal racially segregated basis.[69] As Ian Haney-López explains, the Warren Court did not search for discriminatory governmental intent in civil rights cases but instead found

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61. 570 U.S.__, 133 S. Ct. 2675 (2013).

62. *Id.* at 2683.

63. *See* Siegel, *supra* note 52, at 1739 (identifying these attributes as dignitary concerns when equality is implicated by governmental action that deals with individuals as members of the body politic).

64. *Windsor*, 133 S. Ct. at 2691–96.

65. *Id.* at 2681. For a strong critique of the Court's decision to conceive of dignity as sometimes emanating from the State rather than as an inherent part of the respect that the State owes to individuals, see generally Ben-Asher, *supra* note 51.

66. *Windsor*, 133 S. Ct. at 2693.

67. *Id.* at 2694.

68. 347 U.S. 483 (1954).

69. *Id.* at 495.

Equal Protection violations based primarily on the impact of the challenged governmental action.[70] In *Brown*, the Court anchored its analysis on the effects that segregation has on Black[71] schoolchildren: "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[72]

The *Brown* Court never explicitly draws on "dignity" as an equality component, but its focus on state-sanctioned inferiority and subordinate status of Blacks vis-à-vis whites provides an early template for the constitutional relevance of equal dignity as a theory of Equal Protection in future cases.[73] Group subordination on the basis of socially salient status denies opportunities in both tangible (e.g., exclusion from a quality education) and intangible (e.g., feelings of inferiority) ways.

Notably, the Court has never outlined a test or even a unifying theory of *when* state action subordinates a group. Professor Siegel notes that, while many scholars agree that anti-subordination is central to equal dignity's guarantee, there is little consensus around what practices subordinate and why.[74] Accordingly, this Article does not purport to create a test or rule for what subordination means and looks like in all contexts. Based on respected scholarly thought and Supreme Court analysis, however, governmental action that creates group hierarchies is

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70. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1798–802 (2012). Professor Haney-López identifies the Burger Court's Equal Protection jurisprudence from the 1970s as the genesis of the Court's now rigid focus on discriminatory intent over impact. *Id.*

71. Like many critical race theorists, I use an uppercase "B" when discussing "Blacks" as a group. Kimberlé Crenshaw explains her decision to use an uppercase "B" in the following way: "[w]hen using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (emphasis in original). Other scholars capitalize both "White" and "Black" to, for example, "emphasize that 'Whiteness' is itself a social construct and not a natural phenomenon." Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189, 1191 n.4 (2006). While there are good reasons for capitalizing both "White" and "Black," I hesitate to do so and risk fueling claims that whites constitute a specific identitarian-based group, particularly at this historical moment in which white supremacist sentiment appears to be on the rise.

72. *Brown*, 347 U.S. at 494.

73. *See generally* Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword, Equality Divided*, 127 HARV. L. REV. 1 (2013) (noting the similarities between the Court's analysis in *Windsor* and *Brown*, and specifically the Court's attention to meaning and impact of laws as judged from the perspective of historically subordinated groups).

74. Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 87, 115–16 (2000).

one critical feature of subordination. In other words, at the very least, the government subordinates when it acts with either the purpose or effect of disfavoring one similarly situated group over another, thus creating or reinforcing existing social hierarchies that tell outgroup members that they are inferior.[75]

Even this basic definition of subordination is complicated somewhat by the reality of intersectionality.[76] Kimberlé Crenshaw first coined intersectionality as a theory to explain how individuals invariably have multiple identities that overlap and trigger unique experiences of oppression, thus creating seemingly infinite subgroups that may experience oppression differently depending on context.[77] Nevertheless, it is possible to discern a subordinating purpose or effect even at the subgroup level without always privileging dominant configurations of group identity. Defining subordination as, at bare minimum, government action that disfavors a (sub)group should focus the analysis.

C. Equal Dignity as Individual Decisional Autonomy and Anti-Group Subordination

In sum, the Supreme Court's Equal Protection and Substantive Due Process jurisprudence weave two prominent strains of dignity: one pro-liberty and the other anti-subordination. As Kenji Yoshino notes, however, these two dignitary strains are not always distinct, and in fact

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75. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–10 (1986) (explaining that subordination at root is about domination, power differences, and hierarchies between groups); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 2–5 (1991) (equating racial subordination with racial hierarchy and domination that implies "racial inferiority," specifically focusing on "the social, economic, and political advantages that whites hold over other Americans"); Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 949 (2007) (explaining that equal protection values, and specifically anti-stereotyping principles, oppose systemic gender hierarchies); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1415 (1998) (noting the interconnected nature of subordination by reminding "all outgroups that *all* forms of identity hierarchy impinge on the social and legal interests of their members" (emphasis in original)).

76. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (critiquing "dominant conceptions of discrimination" that "condition us to think about subordination as disadvantage occurring along a single categorical axis").

77. *Id.* at 150–52; *see also* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 312–13 (2001) (discussing as one example how the experiences of lesbians of color will differ from the experiences of white lesbians).

they often converge.[78] This link is starkly apparent in the Supreme Court's *Obergefell* decision of 2015.

In *Obergefell*, the Court considered the constitutionality of state laws that define marriage as between one man and one woman.[79] This litigation capped a stunning series of victories in which LGBTQ plaintiffs won twenty-six of twenty-nine federal challenges to same-sex marriage bans in the two years following the Supreme Court's *Windsor* decision striking down DOMA.[80] The historical context leading to *Obergefell* is lengthy, fraught, and seminal in the fight for LGBTQ liberation and equality. Long before any federal court victories, however, in the immediate wake of the 1969 Stonewall riots, a handful of rogue same-sex couples formally began the legal movement for same-sex marriage.[81] These brave women and men sought and were denied marriage licenses in a far less tolerant climate than today's, and in an era in which formal legal service organizations and many of the LGBTQ community's own members were hesitant to endorse same-sex marriage as a worthy political and legal goal.[82] Same-sex marriage advocates did not score a formal legal victory until 1993, when the Hawaii Supreme Court held as colorable a claim that same-sex marriage bans may constitute sex discrimination under the Hawaii Constitution.[83] It is these early pioneer plaintiffs and their attorneys who paved the way for the Court's decision in *Obergefell*, handed down forty-six years after Stonewall.

Justice Kennedy wrote the majority opinion in *Obergefell*, and the two dignitary pillars of pro-individual liberty and anti-group subordination guide his analysis. With respect to anti-subordination, Kennedy begins by outlining the legal and social history of the institution of marriage as traditionally reserved for one man and one

78. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (noting that courts and scholars often place too much emphasis on a formal distinction between equality and liberty claims, and that dignity "acknowledges the links" between the two concepts).

79. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2593 (2015) (petitioners challenged laws in Michigan, Kentucky, Ohio, and Tennessee).

80. Tom Watts, *From* Windsor *to* Obergefell*: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. ONLINE S52, S71–S72 (2015).

81. *See generally* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015).

82. Professor Michael Boucai beautifully chronicles the events and personal stories that led to the first U.S. court cases regarding the constitutionality of laws that limit the definition of marriage to one man and one woman. *See id.* at 22–54.

83. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), *abrogated by Obergefell*, 135 S. Ct. 2584.

woman.[84] Echoing *Windsor*'s analytical themes, Kennedy explains that marriage—and, by implication, a government that grants a marriage license and its attendant benefits and responsibilities—confers "nobility and dignity to all persons, without regard to their station in life."[85] From there, Kennedy shifts his focus to what message governments send to individuals who cannot lawfully marry a same-sex partner, but for whom "their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."[86] Against a long and hostile backdrop of social and state-sponsored discrimination against LGBTQ people, Justice Kennedy reasons that same-sex marriage bans have "the effect," if not the purpose, "of teaching that gays and lesbians are unequal in important respects."[87] In unambiguous terms, Justice Kennedy characterizes this formal inequality as "subordinat[ion]."[88]

Same-sex marriage bans are a poignant example of how the government can unconstitutionally deny equal dignity. These laws by design confer benefits to one group (heterosexuals) that they withhold from another similarly situated group (lesbians, gays, and bisexuals), strongly signaling the government's distaste for the latter group. Justice Kennedy was wise to forego a searching inquiry into whether antigay intent may have motivated this dissimilar treatment because, frankly, sex-differentiated marriage has existed "for millennia and across civilizations"[89] and long before society's recognition of homosexuals and bisexuals as a distinct social group.[90] Nevertheless, after lesbians, gays, and bisexuals came into political consciousness and sought equal treatment, both old and new restrictive marriage laws conveyed the unmistakable message that same-sex sexuality is inferior to heterosexuality.

The government's strong preference for heterosexuality over homosexuality is well documented given its overt discrimination in employment,[91] military service,[92] and child custody and visitation

84. *Obergefell*, 135 S. Ct. at 2594.

85. *Id.*

86. *Id.*

87. *Id.* at 2602.

88. *Id.* at 2604.

89. *Id.* at 2594.

90. *See, e.g.*, Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 934 (1989) (explaining that the concept of homosexuality as "a fixed propensity that fundamentally characterizes individuals who desire or participate in homosexual acts" did not emerge in western culture until the late nineteenth century).

91. *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997) (ruling that the Georgia Attorney General's office did not violate the Equal Protection Clause when it revoked a woman's

disputes.[93] These forms of subordination keep queer people in their hierarchical place. In a different historical time and context, the government somewhat similarly[94] marked Blacks as inferior to whites through interracial marriage bans.[95] Consider also the governmental subordination that prohibited women from practicing law[96] and other professions,[97] thereby keeping women in the socially undervalued domestic sphere and men in the socially respected marketplace of ideas.

Beyond formally extending benefits to similarly situated groups on an equal basis, Justice Kennedy explains that equal dignity also means that all persons have the equal liberty "to define and express their identity"[98] free from governmental subordination of a socially salient group to which they belong. This powerful identity-affirming language appears in the very first line of *Obergefell*,[99] and it offers an expansive vision of both the liberty and equality guaranteed by the U.S. Constitution. It weds the Court's decisional autonomy and anti-subordination analyses in one equal dignity partnership.

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offer of employment after it found out that she was a lesbian).

92. National Defense Authorization (Don't Ask Don't Tell) Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1574 (repealed 2010) (prohibiting openly gay and bisexual men and women from serving in the military).

93. *See* Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 652–55 (2013) (discussing courts' preference that children have "heterosexual role models" in disputes between straight and sexual-minority parents).

94. Interracial and same-sex marriage bans, while similar in practical effect on those who seek to enter such relationships, are not perfectly analogous examples of governmental subordination due to the different ways in which race and sexual orientation manifest in individuals' lives and as tools of social and legal balkanization. For a thorough critique of the race analogies that often surface in pro-LGBTQ legal strategizing, see generally Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379.

95. Loving v. Virginia, 388 U.S. 1, 11 (1967) ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

96. *See* Bradwell v. Illinois, 83 U.S. 130, 131 (1872) (holding that an Illinois law barring women from the practice of law does not violate the Fourteenth Amendment). "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth." *Id.* at 132.

97. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 465 (1948) (holding that a Michigan law barring women from holding bartending licenses "unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment" does not violate the Equal Protection Clause), *abrogated by* Craig v. Boren, 429 U.S. 190 (1976). "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature." *Id.* at 466.

98. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2593 (2015).

99. *Id.*

In the specific context of same-sex marriage bans, this form of governmental subordination unequally denies LGBTQ individuals the liberty to form and express identities around their sexual orientation, simply because the government finds same-sex relationships to be inferior. Douglas NeJaime explains that "[s]exual orientation by its very nature includes an active, relational component. Sexual orientation identity is linked to (both actual and contemplated) relationships with other bodies."[100] For some, then, "[e]ntering, performing, and publicly showing a same-sex relationship serves as a central way of embracing and maintaining one's lesbian or gay *identity*."[101]

Because governments typically favor heterosexuality, state actions actively promote possibilities and provide room for straight individuals to form identities around their sexual orientation, which, for many, requires a public and state-recognized marriage to a different-sex partner. Prohibiting this identity-affirming activity and denying formal relational status to LGB people as a group impedes individual liberty on an unequal and subordinating basis, and, therefore, violates the dignitary foundation underlying the Equal Protection Clause.

Decisional autonomy has long been a feature of the Supreme Court's Substantive Due Process jurisprudence. But never before *Obergefell* had the Court so clearly connected choices about identity to liberty,[102] and never had equality so clearly included the liberty to express identity free from government subordination on the basis of group status.[103] Moreover, *Obergefell* connects equality to a long line of decisional privacy cases[104] under the Fourteenth Amendment's Substantive Due Process and Equal Protection Clauses in which the Court protected individuals' rights to not conform[105] to prevailing social norms and mores.[106] *Obergefell* makes clear that the government can no longer

100. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1197–98 (2012).

101. *Id.* at 1199 (emphasis added).

102. *See, e.g.*, Julie A. Nice, *Conjuring "Equal Dignity": Mapping the Constitutional Dialogue to and from Same-Sex Marriage*, *in* 31 NAT'L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 376 (Steven Saltzman ed., 2015) (finding it particularly noteworthy that Justice Kennedy "treated identity as an inherent aspect of liberty").

103. Professor Kenji Yoshino calls this aspect of equal dignity "antisubordination liberty." Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015).

104. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down Texas's sodomy ban because it infringes on adults' liberty to have consensual sex in their own homes if they so choose).

105. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (arguing that "liberty" must include "the freedom not to conform").

106. *See* Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2599 (2015).

enact policies that unequally deny individuals the liberty to engage in identity-constitutive conduct if the government's purpose or effect is to validate social perceptions about lesbian, gay, and bisexual group inferiority.[107] Laurence Tribe predicts that *Obergefell*'s real promise extends "beyond same-sex couples to ensure that *all* individuals are protected against the specter of coerced conformity."[108]

D. Anti-Stereotyping as Equal Dignity

The Supreme Court's Equal Protection and Substantive Due Process jurisprudence, and the convergence of anti-subordination and pro-liberty principles at the heart of *Obergefell*'s equal dignity command, explain the harms of stereotyping and why it is constitutionally forbidden with respect to historically marginalized groups.[109] Regarding sex classifications, the Supreme Court since the 1970s has reasoned that the government cannot act with either the purpose or effect of perpetuating stereotyped views about men and women.[110] An examination of some of the federal judiciary's key anti-stereotyping cases reveals that courts have long been skeptical of stereotyped thinking precisely because it carries the dual risks of group subordination and unequal individual liberty deprivation.

Traditionally, courts most often invoke the anti-stereotyping doctrine to preclude overt forms of group subordination through exclusionary state action. When the government categorically treats men and women differently or excludes women outright from certain civic functions, governmental reliance on sex stereotypes reinforces a sex hierarchy with men on top, buttressing women's perceived status as inferior.[111] Noa Ben-Asher argues that courts tend to forbid sex stereotyping *only* when it reinforces sex hierarchies, and particularly when it limits women's economic opportunities and men's domestic opportunities.[112] Anti-

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107. *See id.* at 2604.

108. Tribe, *supra* note 17, at 30 (emphasis in original).

109. *See infra* notes 243–50 and accompanying text (discussing J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127 (1994)).

110. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982).

111. *See, e.g.*, Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1301–12 (2012) (discussing the Burger Court's resistance to stereotypes in Equal Protection claims due to its propensity to role-cast men and women in ways that deny opportunities to women).

112. *See generally* Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187 (2016).

subordination is indeed a core pillar of equal dignity, but it does not act alone.

Modern courts are increasingly reasoning that plaintiffs can bring discrimination claims when evidence suggests that a decision-maker treated the plaintiff differently due to his or her failure to conform to norms about appropriate gendered behavior.[113] These courts are both guarding against status degradation and protecting individual identity choices. On one hand, modern anti-stereotyping decisions promote anti-subordination principles by freeing individuals from assigned roles that implicate the inferior or dominant status of the group to which they or others belong. On the other hand, these decisions also promote liberty by guarding individuals' freedom to form and express identities without the government's weighty hand dictating their behavioral and identitarian gender choices. Accordingly, anti-stereotyping at root is about protecting the equal dignity of every individual.

For example, in a 2017 case, *Sessions v. Morales-Santana*,[114] the Supreme Court declared unconstitutional a sex-based immigration law that dictates the circumstances in which a child who is born abroad may acquire U.S. citizenship if one parent is not a U.S. citizen.[115] The statute treats U.S. citizen mothers more favorably than U.S. citizen fathers,[116] and the Court reasoned that this differential treatment is rooted in stereotypical assumptions about fathers' relatively loose relationships with their children as compared to mothers, and mothers' traditional role as child caretakers.[117] Concluding its Equal Protection analysis, the Court explained that, because sex stereotypes undergird the disparate treatment of mothers and fathers, the statute violates the constitutional

113. *See, e.g.*, Deneffe v. Skywest Inc., No. 14-cv-00348-MEH, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (permitting plaintiff's sex discrimination claim to go forward under Title VII based on allegations that plaintiff's homosexuality did not conform to his co-workers' expectations of masculinity); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015) (permitting plaintiff's sex discrimination claim to go forward under Title VII based on allegations that plaintiff's transgender status and gender transition did not conform to her co-workers' expectations of how a biological male should act).

114. __ U.S. __, 137 S. Ct. 1678 (2017).

115. *Id.* at 1686.

116. The acquisition of citizenship differs significantly depending on whether the child's father or mother is a U.S. citizen, making it much easier for the child's mother to confer citizenship. The statute "requires a period of physical presence in the United States for the U.S.-citizen parent," and, "currently, the requirement is five years prebirth." *Id.* Congress created an exception for unwed U.S.-citizen mothers, allowing an "unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth." *Id.*

117. *Id.* at 1692.

requirement that the government "respect the *equal dignity* and stature of its male and female citizens."[118]

If governmental stereotyping has the purpose or effect of subordinating an oppressed group and unequally denying individual group members the liberty to form and express their identities, it violates the Equal Protection Clause. It is important at this point to note that both pillars of equal dignity stand together. Protecting individual liberty presumably allows people to express their identities free of governmentally prescribed norms and roles. Without the anti-subordination component, however, individuals might claim that their identity expression requires the subordination of others.

Contemporary debates over religious freedom offer a cautionary analogy. Today, religious individuals and businesses increasingly argue that antidiscrimination laws protecting LGBTQ individuals and women's reproductive choices infringe on religious liberty.[119] Courts that accept these claims effectively permit individuals' religious liberty to trump equality principles. When the government exempts religious individuals from antidiscrimination laws, permitting denials of services or accommodations to certain people, this sends a subordinating message to those excluded: these "are actions that address third parties as sinners in ways that can stigmatize and demean."[120] To avoid this problem under an equal dignity theory of Equal Protection, the government may burden individuals' identity expression as long as it does not *also* subordinate a historically oppressed group. In practice, the anti-subordination pillar may do most of the analytical work given that any practice that subordinates a historically oppressed group also likely denies individual group members the ability to express their identities on their own terms.

Still, if the government acts in reliance on statistically relevant information about a historically oppressed group, does that action *always* both unequally deny individual identity expression and send a subordinating message about group status? Can the government progressively account for factual information about groups to address group-specific problems, even if the group-based information on which the government relies has the effect of conveying a message about the group that conflicts with individual group members' sense of identity

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118. *Id.* at 1698 (emphasis added).

119. For a rigorous discussion of the conservative movement's legal strategy to oppose LGBTQ rights under statutory religious freedom laws, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2558–65 (2015).

120. *Id.* at 2576.

and self? To answer these questions, it is crucial to first determine what the term "stereotyping" in the anti-stereotyping principle means. The following analysis examines three different versions of stereotypes: false, normative, and statistical. As this analysis shows, "stereotyping" can be construed so broadly as to encompass governmental application of even statistically relevant group-based information.

II. DEFINING STEREOTYPES

What does it mean to call something a stereotype? Since at least the 1960s, the Supreme Court has excoriated state actors in Equal Protection cases when the purpose or effect of state action is to reinforce stereotypes about certain groups of people. In *Mississippi University for Women v. Hogan*,[121] the Court ruled that a state-sponsored nursing school's female-only enrollment policy was unconstitutional because it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[122] In statutory civil rights laws, like Title VII and Title IX, the federal judiciary has been similarly adamant that individuals should not suffer disparate treatment because they fail to conform to stereotypes associated with a group to which they belong. The most famous judicial decree under Title VII against stereotyping came in *Price Waterhouse v. Hopkins*,[123] where the Court proclaimed that "we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[124]

The Supreme Court has focused on the evils of stereotyping in a wide range of antidiscrimination contexts, including in race-based affirmative action policies, in peremptive juror strikes, and in policies affecting domestic relations between men and women. Yet despite a robust body of jurisprudence warning against stereotyping as a motivation for or effect of state and private action, the Court has never precisely defined the word "stereotype."[125]

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121. 458 U.S. 718 (1982).

122. *Id.* at 729.

123. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012).

124. *Id.* at 251.

125. *See* Roger Craig Green, Case Note, *Equal Protection and the Status of Stereotypes*, 108 YALE L.J. 1885, 1886 n.10 (1999) ("The Supreme Court has never defined what constitutes a stereotype; nor has it explained how stereotypes differ from other, non-invidious generalizations.").

To stereotype often involves a reflexive rather than thoughtful intellectual process. In that vein, the Supreme Court once characterized stereotyping as "a frame of mind resulting from irrational or uncritical analysis."[126] An irrational or uncritical analysis is one that ignores or downplays evidence in favor of generalizations as a mental shortcut.[127] As Jerry Kang explains, "a stereotype is an association between a social group and a specific trait"[128] where "the correlation between social group and trait is far from perfect."[129]

In a sense, however, these mental shortcuts are unavoidable, which in part explains why courts have been remiss to condemn them altogether. Linda Hamilton Krieger explains that stereotypes are "cognitive mechanisms that *all* people, not just 'prejudiced' ones, use to simplify the task of perceiving, processing, and retaining information about people in memory. They are central, and indeed essential, to normal cognitive functioning."[130] Charles Lawrence offers a similar depiction of stereotyping as a normal human sorting device, and identifies the moment at which this device causes harm as when the stereotyped thinking "eschews reality even when facts are available."[131]

Not all stereotypes are born of reflexive and unthinking impulses. To the contrary, many stereotypes are based on available facts. In her dissenting opinion in *Tuan Anh Nguyen v. I.N.S.*,[132] Justice O'Connor summarized much of the Court's anti-stereotyping jurisprudence, explaining: "[t]his Court has long recognized . . . that an impermissible stereotype may enjoy empirical support and thus be in a sense 'rational.'"[133] O'Connor then cites for support the following language from *J.E.B. v. Alabama ex rel. T.B.*: "[w]e have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."[134] For

126. Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 68 (2001).

127. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1228 (2012).

128. Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 628 (2015) (emphasis omitted).

129. Kang et al., *supra* note 127, at 1228 n.9.

130. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) (emphasis in original).

131. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 333 (1987).

132. 533 U.S. 53 (2001).

133. *Id.* at 89 (O'Connor, J., dissenting).

134. *Id.* (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994)).

Justice O'Connor and her dissenting colleagues, a stereotype can be false and therefore irrational, or statistically informed and therefore rational. Both kinds of stereotyping may pose constitutional problems, however, because attention to individuals and context may lead to more accurate and less overbroad results.[135]

This Article proposes that the crux of stereotyping, false and true alike, is a focus on groups over individuals. Focusing on groups inevitably means ignoring or downplaying available evidence about an individual's traits, capabilities, and perspectives, while giving greater or definitive weight to group-based generalizations. While this Article's primary focus is on the Equal Protection Clause, courts' analysis and the animating principles of equality and disparate treatment are substantially similar under both the Constitution and statutory antidiscrimination laws.[136] Accordingly, this Article uses both Equal Protection and Title VII case law to illustrate the mechanics and harms of stereotyping as defined in three different ways.

A. False Stereotyping

Anthony Appiah suggests that at least three different versions of stereotyping can operate in law: false, normative, and statistical. First and most straightforwardly is false stereotyping, which includes "a false belief about a group."[137] In antidiscrimination law, false stereotyping occurs when an actor takes some action because of an incorrect belief that an individual possesses a group characteristic that is not actually common to the group.[138] Even if some members of the group possess that characteristic, the actor's association is still a false stereotype if these group members are no more likely than anyone else to possess the characteristic.[139] It is easy to see why false stereotyping is harmful, particularly when false stereotypes are unambiguously negative. No individual should be subordinated or denied liberty due to baseless generalizations about their group membership.

A common example in the LGBTQ context is the false stereotype that LGBTQ people, and especially gay men, are pedophiles. In same-sex marriage litigation, states and amici curiae argued that the government

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135. *See id.* at 90 (citing Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting)).

136. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 285 (1997).

137. Appiah, *supra* note 30, at 48.

138. *Id.*

139. *Id.*

has a legitimate and even compelling interest in prohibiting same-sex marriage because gays and lesbians are more likely to molest children.[140] Gay and lesbian state employees have been harassed at work by co-workers who equate homosexuality with pedophilia.[141] The Boy Scouts of America once prohibited gay men from holding positions as scout leaders, implicitly relying on legal arguments about "the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts."[142] State court judges have denied gays and lesbians custody and visitation rights to their children because of the assumption that they will engage in sexual abuse;[143] as three judges on a Missouri Court of Appeals put it, "[e]very trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys" by gay men is not uncommon.[144] Florida enacted and later justified its ban on same-sex adoptions with thinly veiled references to the false link between child molestation and homosexuality.[145]

In the famous civil trial over the constitutionality of California's Proposition 8, which prohibited same-sex marriage by ballot referendum, Judge Vaughn Walker noted that "stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality."[146] After reviewing extensive testimony from dozens of credible witnesses and scientific studies, Judge Walker concluded, "[n]o evidence supports these stereotypes."[147]

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140. *See, e.g.*, Anderson v. King Cty., 158 Wash. 2d 1, 114 n.14, 138 P.3d 963, 1036 n.14 (2006) (en banc) (Bridge, J., dissenting) (citing arguments put forth by the Family Research Council, and noting the flawed research supporting those arguments), *abrogated by* Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584 (2015).

141. *See, e.g.*, Shankle v. Vill. of Melrose Park, No. 12 C 6923, 2013 WL 1828929, at *2 (N.D. Ill. Apr. 30, 2013).

142. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1243 (N.J. 1999) ("The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished."), *rev'd on other grounds by* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

143. *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 286–94 (2009) (detailing family court cases in which false stereotypes conflating homosexuality and molestation played a role in the outcome).

144. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982).

145. *See* Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL'Y 125, 150 (2014) ("The narrative that gay people are dangerous to children also helped move the Florida legislature to pass a law banning adoptions by gays and lesbians . . . .").

146. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 983 (N.D. Cal. 2010).

147. *Id.*

LGBTQ individuals are simply no more likely than heterosexuals to sexually abuse children. Social science studies support this finding.[148]

Federal and state governments have relied for decades on false stereotypes about the various sexual and social dangers that LGBTQ people present to keep queer adults away from children. Perhaps no part of the LGBTQ community has been hurt more by these false stereotypes than schoolteachers. William Eskridge explains that the "first antigay initiative to draw nationwide attention was Anita Bryant's 1977 'Save Our Children' campaign to repeal an antidiscrimination law adopted in Dade County, Florida."[149] Bryant focused specifically on the sexual and indoctrinating threats that openly gay teachers posed to children, and the initiative was ultimately successful.[150] In 1978, the Briggs Initiative appeared on the California state ballot (eventually failing). It was, as Nan Hunter notes, "widely understood to be a vote on whether the state should fire gay teachers and thus purge that group from the schools and from contact with children."[151] These voter-initiated efforts were fueled by the familiar false stereotypes depicting gay people as "disgusting people and predatory child molesters."[152]

Even today, teachers risk losing their jobs if they come out as lesbian, gay, or bisexual. In a 2008 Wyoming case, for example, a lesbian schoolteacher was fired after her students' parents complained about her same-sex relationship: she lost her discrimination case before the Tenth Circuit.[153] Famously, Marjorie Rowland was fired from her job as a school guidance counselor in Ohio when she came out to a co-worker as bisexual.[154] Dissenting from the Supreme Court's denial of certiorari in

148. *See, e.g.*, Dale v. Boy Scouts of Am., 734 A.2d 1196, 1243 (N.J. 1999) (citing studies "demolish[ing]" the "myth that a homosexual male is more likely than a heterosexual male to molest children"); R. L. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN (1979) (finding that more heterosexual men than homosexual men molest children); Jerry J. Bigner & Frederick W. Bozett, *Parenting by Gay Fathers*, 14 MARRIAGE & FAM. REV. 155, 171 (1989) ("[I]t is rare for a gay man to be a pedophile.").

149. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1351 (2000).

150. *Id.* at 1351–52.

151. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1703 (1993).

152. William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014–19 (2005) (documenting the propaganda materials used to sway voters during the "Save Our Children" campaign and in the lead-up to the vote on the Briggs Initiative).

153. Milligan-Hitt v. Bd. of Trs. of Sheridan Cty. Sch. Dist., 523 F.3d 1219, 1234 (10th Cir. 2008).

154. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1009 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

Rowland's case, Justices Brennan and Marshall reviewed the lower court record and noted the "unchallenged" jury findings "that petitioner was suspended and not rehired solely because she was bisexual . . . and not for 'any other reason.'"[155] The record is not explicit about why Marjorie Rowland's employer or her students' parents objected to her bisexuality. It is logical to assume that many of the same false stereotypes undergirding antigay initiatives aimed at school teachers across America at that time motivated the firing decision.[156]

False stereotyping violates both the anti-subordination and pro-liberty pillars of equal dignity. In *Rowland v. Mad River Local School District*,[157] dissenting Justices Brennan and Marshall explained that this case raises important constitutional questions regarding individuals' rights to "maintain and express their private sexual preferences."[158] This language sounds in the same register as Justice Kennedy's emphasis in *Obergefell* on individuals' rights "to define and express their identity" on an equal basis.[159] These and other false stereotypes are often used to deny gay people the liberty to create and express their sexual identities in ways that are not denied to heterosexual individuals.[160] It is highly unlikely that any school would fire a heterosexual woman simply for discussing her husband or disclosing that she had one. Moreover, false stereotypes also subordinate LGBTQ people. First, they subordinate in intangible ways by sending a clear message that homosexuality and bisexuality are inferior to heterosexuality. Second, they subordinate LGBTQ people in tangible ways by excluding them from opportunities in the market, relegating them to jobs that society deems appropriate for gay people.

Simply put, false stereotyping is when the fit between the presumed group characteristic and the individual to whom that characteristic is ascribed is extremely poor or nonexistent. False stereotyping is the height of irrationality, and the government's reliance on false stereotypes about any group to justify disparate treatment of individuals should be unconstitutional.

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155. *Id.* at 1010.

156. "This case demonstrates one of the most pernicious stereotypes wielded against the LGBT community: that these individuals are a detrimental influence over children." Lisa Kye Young Kim, Comment, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 LOY. J. PUB. INT. L. 495, 514 (2011).

157. 470 U.S. 1009 (1985).

158. *Id.* at 1009 (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

159. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2593 (2015).

160. *See* NeJaime, *supra* note 100, at 1199.

B. Normative Stereotyping

Normative stereotyping is a second operative version in antidiscrimination law. As Professor Appiah explains, normative stereotyping involves taking some action due to beliefs about how an individual *ought* to behave based on his or her group membership.[161] Whereas false stereotyping often implicates passive reliance on inaccurate group generalizations, normative stereotyping involves the active construction and policing of what group identity should be.[162]

LGBTQ individuals are all too aware of how normative stereotyping can materially disadvantage. Workplaces and schoolyards are riddled with bullies who harass sexual minorities and create a hostile environment because of a belief that men should be masculine and women should be feminine. In one well-known case, *Prowel v. Wise Business Forms, Inc.*,[163] Brian Prowel, a gay man, was harassed at his workplace in rural Pennsylvania by his ostensibly straight coworkers. In Prowel's words, the normative man at his workplace fit the following profile: "[b]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn't drink gin and tonic. Just you know, all into football, sports, all that kind of stuff . . . ."[164] By contrast, Prowel testified that, among his many other attributes, he "had a high voice and did not curse," wore dressy clothes, "was neat," "filed his nails instead of ripping them off with a utility knife," crossed his legs in an effeminate manner, had a rainbow decal on his car, talked about "art, music, interior design, and décor," and pushed machine buttons with "pizzazz."[165]

Over two years, Prowel's co-workers relentlessly tormented him and "mock[ed] his effeminate mannerisms and appearance."[166] They called him "Princess," "Rosebud," "fag," and "faggot."[167] They left notes at his

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161. Appiah, *supra* note 30, at 48.

162. The specific normative stereotypes at play may differ according to context. *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119–21 (2d Cir. 2004) (explaining that what constitutes a gender-based stereotype depends on the "particular context" in which the question arises). For a robust discussion of how normative gender stereotypes can differ across race, class, and geographic lines, see generally Luke A. Boso, *Real Men*, 37 U. HAW. L. REV. 107 (2015).

163. 579 F.3d 285 (3d Cir. 2009).

164. *Id.* at 287.

165. *Id.*

166. Prowel v. Wise Bus. Forms, Inc., No. 2:06-cv-259, 2007 WL 2702664, at *1 (W.D. Pa. Sept. 13, 2007), *aff'd in part, vacated in part, remanded by Prowel*, 579 F.3d 285.

167. *Prowel*, 579 F.3d at 287.

workstation, mockingly requesting sexual favors.[168] They wrote antigay graffiti on the bathroom walls, specifically claiming that Prowel had AIDS.[169] They commented to each other, "[d]id you see what Rosebud was wearing," "[d]id you see Rosebud sitting there with his legs crossed, filing his nails," and "[l]ook at the way he walks."[170] They even vocally expressed a desire that someone "should shoot all the fags."[171] Prowel sued, claiming that this harassment amounted to unlawful sex discrimination under Title VII.[172] The Third Circuit Court of Appeals permitted Prowel's case to go forward, reasoning that the facts "constitute sufficient evidence of gender stereotyping harassment—namely, Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act."[173]

The federal reporters are filled with cases containing similarly shocking facts.[174] But not all instances of normative stereotyping showcase such stark mistreatment. In fact, normative stereotyping is a ubiquitous mechanism for sorting and differentiating between men and women in workplaces, places of public accommodation, schools, and social life. When and whether normative stereotyping amounts to a constitutional or statutory wrong is thus a contextual and controversial question. As Robert Post argues, normative stereotypes about differences between men and women are the very "conventions that underwrite the social practice of gender,"[175] and antidiscrimination law does not and should not obliterate gender altogether.[176] Judith Butler, famous for her theories on the social construction of gender, concedes, "it is not clear that the elimination of gender is an undisputed political goal of feminism."[177]

Courts have so far resisted calls to forbid all normative stereotyping, perhaps sensing that it is impossible and maybe even undesirable to render gender obsolete. Nowhere is this resistance more apparent than in

168. *Id.*

169. *Id.* at 287–88.

170. *Id.* at 287.

171. *Id.*

172. *Id.* at 286.

173. *Id.* at 292.

174. For examples of cases in which gay men are harassed because they fail to satisfy masculine norms, see generally Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575 (2016).

175. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 18 (2000).

176. *Id.* at 20.

177. Judith Butler, *"Appearances Aside,"* 88 CALIF. L. REV. 55, 60 (2000).

cases challenging gendered grooming and dress codes.[178] A famous example is *Jespersen v. Harrah's Operating Co.*,[179] in which plaintiff Darlene Jespersen was fired from her job as a bartender when she refused to wear makeup.[180] Jespersen had worked in Harrah's casino for twenty years before it instituted and enforced a new dress and grooming code policy.[181] The policy, known as the "Personal Best" program, included some requirements that applied to men and women alike, including a "standard uniform of black pants, white shirt, black vest, and black bow tie."[182] In addition, the Personal Best program relied on normative gender stereotypes in the following key ways: for women, (1) "[h]air must be teased, curled, or styled" and always worn down; and (2) "[m]ake up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times."[183] The Personal Best program expressly forbade men from wearing makeup.[184]

Darlene Jespersen sued Harrah's, arguing that the Personal Best program unlawfully treated men and women differently on the basis of sex.[185] Specifically, Jespersen claimed that the program required that "women conform to sex-based stereotypes as a term and condition of employment."[186] The Ninth Circuit Court of Appeals sitting en banc rejected Jespersen's claims, invoking a theory of sex discrimination that permits policy differentiations between men and women provided that the policy does not impose "unequal burdens."[187] In a somewhat baffling analysis, the Court also rejected the contention that the Personal Best program had either the purpose or effect of requiring men and women to adhere to normative gender stereotypes.[188]

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178. *See, e.g.*, RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES 60–68 (2013) (discussing courts' unwillingness to rule that grooming and dress distinctions between men and women constitute sex discrimination under the Equal Protection Clause).

179. 444 F.3d 1104 (9th Cir. 2006) (en banc).

180. *Id.* at 1105–06.

181. *Id.* at 1105–07.

182. *Id.* at 1107.

183. *Id.*

184. *Id.*

185. *Id.* at 1108.

186. *Id.*

187. *Id.* at 1110.

188. *Id.* at 1111–12. The court offered a tautology rather than a critical analysis of what sex stereotyping means. *See id.*

In both Brian Prowel's and Darlene Jespersen's cases, decision-makers expected an individual to adhere to normative sex stereotypes. Prowel's coworkers presumably wanted him to be manlier—perhaps by fishing, hunting, looking rougher rather than tidy, and, most importantly, being straight. Jespersen's employer wanted her to be more feminine by conforming to norms of female beauty, which apparently deem women's natural faces unacceptable.[189]

What accounts for these different outcomes? Why did normative stereotyping suggest sex discrimination for Prowel and not for Jespersen? As Professor Ben-Asher argues, courts historically treated subordination, particularly regarding group-based exclusion from opportunities in the marketplace, as the overriding wrong of stereotyping.[190] Under this theory, normative stereotyping is unlawful when it subordinates men or women by pigeon-holing individuals into specific sex roles at work or home, thereby limiting market opportunities.[191] In *Prowel*, the ways in which Brian Prowel's coworkers deployed normative stereotypes ignored his individual skills and tangibly obstructed his ability to earn a living. Because of his sex, he was excluded from opportunity. The Third Circuit noted that his "work environment became so stressful that he had to stop his car on the way to work to vomit."[192] In *Jespersen*, by contrast, the Ninth Circuit found no evidence "to suggest the grooming standards would objectively inhibit a woman's ability to do the job."[193] The court went on to state that the "*only* evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement."[194]

The Ninth Circuit's decision in *Jespersen* supports Professor Ben-Asher's observations: whether normative stereotyping is unlawful, or even recognized as stereotyping, often turns on whether it subordinates by denying equal opportunity due to group status. The *Jespersen* court ignores how normative stereotyping also denies individual liberty; the court is indifferent to a person's "subjective reaction" and resistance to requirements that he or she conform to conventional notions of masculinity and femininity. This is particularly problematic for LGBTQ

189. *See* Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL'Y 285, 287 (2007). Pizer represented Jespersen in her appeal before the Ninth Circuit. *Id.* at 285.

190. *See generally* Ben-Asher, *supra* note 112.

191. *Id.*

192. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 288 (3d Cir. 2009).

193. *Jespersen*, 444 F.3d at 1112.

194. *Id.* (emphasis added).

individuals who by virtue of their sexual orientation may be unable to conform to normative gender stereotypes,[195] and for whom the burden of assimilation demands may keenly deny core components of self.[196]

Discrimination against transgender individuals vividly demonstrates how normative stereotyping can both subordinate and deny individual liberty choices in identity formation and expression. In early litigation, most courts failed even to recognize how normative stereotyping permeates the disparate treatment of transgender individuals.[197] In *Etsitty v. Utah Transit Authority*,[198] for example, Krystal Etsitty's employer terminated her employment after she "began wearing makeup, jewelry, and acrylic nails," and after she began using women's restrooms while at work.[199] The Tenth Circuit Court of Appeals first rejected the claim that discrimination on the basis of an individual's identity as transgender is per se sex discrimination.[200] Next, the court rejected the claim, due to insufficient evidence, that Etsitty was "a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear."[201] The court did not understand that requiring a transwoman to wear men's clothing and use restrooms consistent with the male sex that she was assigned at birth is a demand for gender conformity—a demand that a transwoman "act like a man."

Recently, and in a welcome development, some courts are beginning to understand how transgender discrimination involves normative stereotyping. In *Barnes v. City of Cincinnati*,[202] the Sixth Circuit permitted a transgender individual's sex discrimination claim to go forward because she alleged that her demotion in the police department

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195. *See, e.g.*, Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (noting that antigay harassment is often categorically sex discrimination because the gender stereotype at work is: "'real' men should date women" and vice versa).

196. *See, e.g.*, Pizer, *supra* note 189, at 286–87 (noting that LGBTQ individuals are disproportionately burdened by gendered dress and appearance codes).

197. The earliest cases to reject sex discrimination claims by transgender individuals made the facile distinction between sex classifications and transgender classifications, concluding that the former are impermissible while the latter are not. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) ("to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation" because "Congress had a narrow view of sex in mind"); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 663 (9th Cir. 1977) ("[t]his court cannot conclude that transsexuals are a suspect class" under the Equal Protection Clause).

198. 502 F.3d 1215 (10th Cir. 2007).

199. *Id.* at 1219.

200. *Id.* at 1222. Simply put, the argument is that transgender discrimination necessarily involves the considerations about a person's biological sex. *See id.*

201. *Id.* at 1223–24.

202. 401 F.3d 729 (6th Cir. 2005).

was due to her "failure to conform to sex stereotypes concerning how a man should look and behave."[203] Likewise, in *Glenn v. Brumby*,[204] the Eleventh Circuit answered in the affirmative the question of whether discrimination against transgender individuals constitutes sex discrimination under the Equal Protection Clause: "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," and there "is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."[205]

Governmental discrimination against transgender individuals also sends the subordinating message that trans people as a group are inferior to cisgender people as a group. That message rang loud and clear when the North Carolina legislature—in a rushed special session that was the first of its kind in thirty-five years[206]—passed a sweeping antigay and anti-trans bill (HB2) in the spring of 2016. HB2 eliminated all local antidiscrimination protections for LGBTQ people and required transgender individuals to use public restrooms that match their biological sex.[207] The ACLU promptly sued North Carolina, arguing that North Carolina enacted HB2 out of LGBTQ animus, and because of its adverse effects on LGBTQ people.[208] The Obama administration also filed suit, arguing that HB2, and specifically its provisions requiring that transgender individuals use the restroom corresponding to their biological sex, is a violation of the anti-stereotyping principle underlying several federal antidiscrimination laws.[209] In public statements explaining the administration's lawsuit, Attorney General Loretta Lynch spoke directly and empathetically to the transgender community: "[w]hat

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203. *Id.* at 737 (finding that Barnes stated a claim for relief under Title VII).

204. 663 F.3d 1312 (11th Cir. 2011).

205. *Id*. at 1316.

206. *See* Luke A. Boso, *Animus and Unequal Dignity: The Purpose and Effect of North Carolina's New Anti-LGBT Law*, OXFORD HUM. RTS. HUB (Apr. 14, 2016), http://ohrh.law.ox.ac.uk/animus-and-unequal-dignity-the-purpose-and-effect-of-north-carolinas-new-anti-lgbt-law/ [https://perma.cc/4ZAE-XLX7].

207. *See* Motoko Rich, *North Carolina Gay Bias Law Draws a Sharp Backlash*, N.Y. TIMES (Mar. 24, 2016), http://www.nytimes.com/2016/03/25/us/north-carolina-law-antidiscrimination-pat-mccrory.html [https://perma.cc/M53Y-WY8R].

208. Complaint for Declaratory and Injunctive Relief at 36, Carcano v. North Carolina, No. 1:16-cv-236 (M.D.N.C. Mar. 28, 2016).

209. Memorandum of Law in Support of Plaintiff United States's Motion for Preliminary Injunctive Relief at 1–2, United States v. McCrory, No. 1:16-cv-425 (M.D.N.C. July 5, 2016), http://ftpcontent4.worldnow.com/wbtv/pdf/2368454-0—22077.pdf [https://perma.cc/HMZ3-HF5R].

this law does is inflict further *indignity* for a population that has already suffered far more than its fair share."[210]

More than countering subordination, though, the primary effect of recent transgender discrimination cases that acknowledge the role of normative stereotyping is to liberate all individuals from certain norms dictating the proper ways to be a (biological) man or a woman. A biological man may now identify as a woman, wear acrylic nails, and use the women's restroom if she so chooses, as long as biological women are equally permitted to do so.[211] Even these relatively progressive cases, however, offer a cramped vision of equal liberty. Many transgender individuals reject sex and gender binaries,[212] forming and expressing identities that rely not on a framework of fixed categories but on a spectrum of fluid sex- and gender-expressions.[213] Further, as *Jespersen* demonstrates, courts have ruled that individuals may only express their gender identities in accordance with dress and grooming codes that rely on a binary sex model.[214] In other words, courts are beginning to prohibit the government and private entities from insisting that individuals identify and express gender congruently with their biological sex, but those individuals may only express their gender in ways deemed normatively appropriate for men and women (depending on how the individual identifies).[215] Much legal work remains before equality law guarantees a robust vision of equal dignity that protects

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210. David A. Graham, *'State-Sponsored Discrimination': Loretta Lynch Takes on North Carolina's Bathroom Bill*, ATLANTIC (May 9, 2016) (emphasis added), http://www.theatlantic.com/politics/archive/2016/05/state-sponsored-discrimination-loretta-lynch-takes-on-north-carolinas-hb2/481986/ [https://perma.cc/PD3K-R44Y].

211. As this point subtly illustrates, one key problem with these anti-stereotyping cases is that a transwoman must frame herself as a biological male who was punished for acting like a woman; in other words, she must uncomfortably position her female self-identity against her male assignation to fit the gender stereotyping theory.

212. *See, e.g.*, Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 23–24 (2003) (discussing how the medical model of transgender identity and status legitimizes a binary gender system). Many trans people reject notions of "real" men and women, and instead regard their transformations as "freeing them to express more of themselves, and enabling more comfortable and exciting self understandings and images." *Id.* at 28.

213. *See, e.g.*, Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 746 (2010) (explaining that transgender individuals include those who wear "opposite-sex" clothing for emotional purposes, those who wear "opposite-sex" clothing for sexual purposes, and "androgynous, bigendered, and gendered queer people").

214. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc).

215. *See* Ben-Asher, *supra* note 112, at 1214 (noting that transgender discrimination cases involving the anti-stereotyping theory "have not involved reassessing norms of mandatory appearance").

individuals' liberty to form and express gender identities on their own terms.

In truth, normative stereotypes often reflect majoritarian beliefs about group membership that many individual group members may not find offensive. Lots of women, for example, do not object to grooming policies that mandate makeup.[216] Nevertheless, normative stereotyping can be harmful when, like false stereotyping, it both (1) subordinates individuals by keeping them locked in fixed patterns of group oriented conduct that may have broad social implications about that group's standing and value; and (2) denies individual autonomy to express identity not tethered to someone else's beliefs about what group membership means or should mean. This is precisely the kind of stereotyping that kept Ann Hopkins—who famously lost a job promotion because she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"[217]—from expressing her identity as a woman on her own terms, which in turn perpetuated the group subordination of women in the workplace.

C. Statistical Stereotyping

For antidiscrimination law, statistical stereotyping is perhaps the most vexing. When can the government account for statistically relevant information about a group when it enacts a policy that responds to that group's needs, capabilities, or interests? Does governmental reliance on that information constitute stereotyping? Does reliance on certain statistical truths reinforce stereotypes, keeping in motion self-perpetuating and self-justifying cycles of discrimination?[218]

Consider a public health example regarding a drug called Truvada, which doctors now regularly prescribe to certain high-risk individuals as

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216. "[S]ome women are sufficiently accustomed to wearing makeup" and "consider it inoffensive and nonremarkable." Pizer, *supra* note 189, at 311.

217. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012).

218. *See* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1106 (2015) (arguing that discriminatory practices premised on statistical stereotypes about male and female differences lead to normative (i.e., "prescriptive") stereotypes about how men and women should behave, cyclically perpetuating the discriminatory practices). Schultz discusses employers' "lack of interest" defense to sex discrimination claims, under which employers explain disparities in men's and women's hiring and promotion practices by arguing that men and women have different interests regarding certain jobs or promotion opportunities. *Id.* at 1048–66. Courts' acceptance of this defense ignores that these practices "may have been the consequence, and not the cause," of the disparities. *Id.* at 1052.

one way to prevent HIV transmission.[219] The federal government explicitly recommends Truvada as Pre-Exposure Prophylaxis (PrEP) for any non-monogamous "gay or bisexual man who has had anal sex without using a condom."[220] As Russell Robinson and David Frost explain, the federal government "has chosen to direct Truvada as PrEP at HIV-negative gay and bisexual men broadly, as if their identities alone constitute risk of infection."[221] To the extent that some statistical truth underlies the generalization that gay and bisexual-identified men as a group are at greater risk for HIV transmission than straight-identified men as a group,[222] does the government's PrEP recommendation deny equal dignity by ascribing non-monogamy, HIV status, or PrEP usage stereotypes to gay and bisexual group membership in contradiction with individual gay and bisexual men's lived experiences?

As Professor Appiah explains, statistical stereotyping involves (1) a statistically true correlation between some characteristic and group membership, and (2) ascribing or applying that characteristic to an individual group member.[223] Thus, the government engages in statistical stereotyping whenever policy hinges on statistical data tied to group membership rather than an evaluation of individuals' characteristics.[224]

Statistical stereotyping is necessarily pervasive. It would be impossible and even foolhardy to enact public policy in a country as large and diverse as the United States without reliance on statistical

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219. *HIV Basics: PrEP*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/basics/prep.html [https://perma.cc/MRQ2-V8TC].

220. *Id.*

221. Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, ARIZ. L. REV. (forthcoming 2018) (manuscript at 38) (on file with author).

222. Fujie Xu et al., *Men Who Have Sex with Men in the United States: Demographic and Behavioral Characteristics and Prevalence of HIV and HSV-2 Infection, Results from National Health and Nutrition Examination Study 2001–2006*, 37 SEXUALLY TRANSMITTED DISEASES 399, 399 (2010) (finding that, "[i]n the United States, male-to-male sexual contact remains the most important route of HIV transmission"). Importantly, there is a significant categorical difference between men who have sex with men (or have had sex with another man at least once) and men who identity as gay or bisexual. *See, e.g.*, Luke A. Boso, *Urban Bias, Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 594–99 (2013) (explaining that many people in rural America who have same-sex sex are uncomfortable identifying as lesbian, gay, or bisexual); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009) (explaining why many Black men who have sex with men do not identify as bisexual or gay).

223. Appiah, *supra* note 30, at 47.

224. In *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707–08 (1978), for example, the Supreme Court accepted the "generalization" that women live longer than men as "unquestionably true," but nevertheless characterized this statistical generalization as "stereotyped" because "all individuals in the respective classes do not share the characteristic that differentiates the average class representatives."

evidence that considers group identity. The potential problem with statistical stereotyping is that individuals are often atypical of their groups.[225] When the government acts on the basis of statistical information about groups, and that information does not reflect reality for a particular individual, that individual may be impacted unfairly.

1. The Supreme Court's Sex-Based Statistical Stereotyping Jurisprudence

In several important cases, the Supreme Court has responded with opprobrium when the government relies on statistical stereotypes to justify discriminatory policies that treat men and women as groups differently. Consider the following three examples.

First, in *United States v. Virginia*,[226] the United States sued the state of Virginia after a female high school student sought and was denied admission to the Virginia Military Institute (VMI).[227] In the two years prior to the lawsuit's initiation, 347 women inquired about enrollment at VMI, yet VMI's formal policy precluded female admissions.[228] VMI defended its male-only admissions policy in part by asserting that it had an important ("exceedingly persuasive") interest in preserving the rigorous and physically demanding adversative educational program that it used to teach cadets.[229] VMI argued that admitting women would require "radical," "drastic," and ultimately destructive modifications.[230] Namely, VMI would have to modify "housing assignments and physical training programs for female cadets," as well as the adversative method itself.[231] VMI made these arguments in partial reliance on the findings of a Task Force compromised of experts in educating women at the college level.[232] The Task Force found that "a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training *most women*,"[233] and "while 'some women would be suited

225. *See id.*
226. 518 U.S. 515 (1996).
227. *Id.* at 523.
228. *Id.*
229. *Id.* at 534–35.
230. *Id.* at 540.
231. *Id.*
232. *Id.* at 526–27.
233. *Id.* at 549 (emphasis in original).

to and interested in [a VMI-style experience],' VMI's adversative method 'would not be effective for *women as a group*.'"[234]

In an opinion written by Justice Ginsburg, the Court rejected VMI's arguments. The Court did not dismiss evidence of statistical differences between men and women, and in fact "assumed, for purposes of this decision, that most women would not choose VMI's adversative method."[235] Nevertheless, the Court did not permit the government to rely on these statistical stereotypes because it should instead focus on the individual women "who have the will and capacity" to endure the adversative program.[236] Accordingly, even if VMI could prove a strong statistical correlation between women as a group and certain characteristics that do not mesh well with VMI's educational program—such as relatively less physical strength compared to men, and a preference for a softer educational style—these statistical facts do not matter under the Equal Protection Clause. VMI simply cannot engage in "categorical exclusion" of women "in total disregard of their individual merit."[237]

In *Craig v. Boren*,[238] as a second example, the Court struck down an Oklahoma statute that differentiated when individuals can buy non-intoxicating beer based solely on sex: women could purchase when they turned eighteen years old, but men had to wait until they were twenty-one.[239] Oklahoma defended this sex classification by introducing statistical evidence of male and female differences regarding drunkenness, driving under the influence, and automobile fatalities.[240] The Court responded: "[e]ven were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here."[241] The statistical differences themselves, the Court worried, likely reflect social stereotypes wherein "'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."[242]

234. *Id.* (emphasis in original).

235. *Id.* at 542.

236. *Id.*

237. *Id.* at 546.

238. 429 U.S. 190 (1976).

239. *Id.* at 191–92.

240. *Id.* at 200–01.

241. *Id.* at 201.

242. *Id.* at 202 n.14.

Here, validating statistical stereotypes would necessarily perpetuate the normative social stereotypes that lead to statistical male and female differences regarding alcohol use and unsafe behavior. Percolating in the Court's analysis is precisely this concern: alcohol laws that facially burden men more than women have the actual effect of subordinating women by keeping young women dependent on men as their presumably sober chauffeurs and guardians. In turn, young men who drive while taking young women out on dates, and who are legally required to remain sober while their date may drink non-intoxicating alcohol, may nevertheless drink on the date and engage in drunk driving.

Third and finally, in *J.E.B. v. Alabama ex rel. T.B.*, Alabama filed a complaint on behalf of a mother seeking a paternity determination and child support payments against the presumed father of her minor child.[243] During jury selection, the State used nine of its ten peremptory strikes to remove male jurors, and the jury ultimately consisted entirely of women.[244] On appeal after trial, at which the all-woman jury found J.E.B. to be the biological father and liable for child support payments, the Supreme Court began its analysis of the sex-based peremptory strikes by detailing the history of women's exclusion from jury service.[245] It then explained why all sex classifications receive heightened judicial scrutiny: because of the "real danger" that sex classifications may reflect "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"[246]

The State went on to defend its sex-based peremptory strikes by relying on statistical stereotypes about male and female differences in their relative biases and sympathies.

> [M]en otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.[247]

The State cited one empirical study purporting to show some difference in how men and women judge in gendered cases.[248] The Court

243. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

244. *Id.*

245. *Id.* at 131–34.

246. *Id.* at 135 (citing *Craig*, 429 U.S. at 198–99).

247. *Id.* at 137–38 (quoting Brief for Respondent at 10, *J.E.B.*, 511 U.S. 127 (No. 92-1239)).

248. *Id.* at 138 n.9.

did not outright reject the premise that statistical differences may exist between men's and women's sympathies in court cases wherein gender is relevant, suggesting that "a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges."[249] Nevertheless, the Court rejected the State's rationale, explaining that this kind of stereotyped thinking is reminiscent of the very justifications that subordinated women as a group and kept them off of juries for most of the Nation's history.[250]

2. Contemporary Examples of LGBTQ Statistical Stereotyping

Consider the FDA's stance on whether gay and bisexual men are eligible to donate blood and sperm. In the wake of a June 2016 shooting at an Orlando, Florida gay bar that left forty-nine people dead and fifty-three others hospitalized, the LGBTQ community came forward in droves to grieve, connect with loved ones, and donate blood.[251] Many gay and bisexual men were shocked to find out that they were ineligible to donate.[252] After the deadliest mass shooting in modern history in which one person targeted the LGBTQ community with extreme violence, gay and bisexual men who wanted to donate blood to help their injured friends and family were turned away—shut out from assisting their own community when it needed them, and when they needed it most.

Before December 2015, the FDA flatly prohibited any man who had had sex with another man since 1977 from donating blood.[253] The FDA has since tweaked its policy, and it now recommends barring from donation men who have sex with men only if they have been sexually active within the last year.[254] Similarly, the FDA requires any entity that

249. *Id.* at 139 n.11.

250. *Id.* at 138.

251. *See, e.g.*, Blake Lynch, *I Am a Gay Man from Orlando. Why Can't I Donate Blood?*, N.Y. TIMES (June 15, 2016), http://www.nytimes.com/2016/06/14/opinion/i-am-a-gay-man-from-orlando-why-cant-i-donate-blood.html [https://perma.cc/K7MR-X4JY].

252. *See, e.g.*, Donald G. McNeil Jr., *Orlando Shooting Renews Debate Over Limits on Gay Men Donating Blood*, N.Y. TIMES (June 15, 2016), http://www.nytimes.com/2016/06/16/health/orlando-shooting-renews-debate-over-limits-on-gay-men-donating-blood.html [https://perma.cc/K7P9-QU33].

253. Emily K. White, Essay, *A Reason for Hope? A Legal and Ethical Implementation of the HIV Organ Policy Equity Act*, 96 B.U. L. REV. 609, 621 (2016).

254. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, DEP'T OF HEALTH & HUMAN SERVS., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF HUMAN IMMUNODEFICIENCY VIRUS TRANSMISSION BY BLOOD AND BLOOD PRODUCTS: GUIDANCE FOR INDUSTRY 14 (2015), http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformati

accepts human sperm donations to screen as ineligible potentially risky donors,[255] and the FDA's guidance document lists "[m]en who have had sex with another man in the preceding 5 years" as the top risk.[256] In effect, federal law prohibits most gay and bisexual men from donating blood and sperm. The federal government cites statistics to justify these policies,[257] pointing to data showing that men who have sex with men comprise the group most likely to contract HIV in the United States.[258]

While statistical data may show that gay and bisexual men as a group are more likely to contract HIV than other groups,[259] obviously not all individual gay and bisexual men have HIV or engage in the kinds of risky conduct that can lead to infection. These individual men suffer a dignitary harm at the hands of the government. The government is telling them that they are less worthy and even subordinate to straight men in the exercise of a vital public service. This subordination is particularly pronounced given that the FDA does not presume that straight men are likely to have HIV simply because of their sexuality, regardless of how many sexual partners a straight man has had or whether he has engaged in unprotected oral, anal, or vaginal sex.[260] Moreover, the government's reliance on statistical stereotypes subordinates gay and bisexual men because an individual assessment of infection is readily available. In fact, the FDA's own rules and guidelines provide for rigorous testing of all blood donations, and these tests are almost 100% effective in screening for HIV antibodies and the virus itself.[261] The FDA's protocol for testing sperm donations is even

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on/Guidances/Blood/UCM446580.pdf (last visited Aug. 24, 2017) ("Defer for 12 months from the most recent sexual contact, a man who has had sex with another man during the past 12 months.").

255. 21 C.F.R. § 1271.75(a), (d) (2015).

256. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS (HCT/PS) 14 (2007), http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/UCM091345.pdf (last visited Aug. 24, 2017).

257. Mathew L. Morrison, Note, *Bad Blood: An Examination of the Constitutional Deficiencies of the FDA's "Gay Blood Ban,"* 99 MINN. L. REV. 2363, 2364 (2015).

258. *Id.* at 2372; *see also HIV Among Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/group/msm/index.html [https://perma.cc/D2Q6-VNK6] (last updated Apr. 25, 2017) ("Gay, bisexual, and other men who have sex with men made up an estimated 2% of the population but 55% of people living with HIV in the United States in 2013.").

259. Xu et al., *supra* note 222, at 399 (finding that the prevalence of HIV was 0.2% in men who reported having sex with only women, 9.1% in men who had sex with another man at least once in his life, and 11.8% in men who had sex with another man within the past year).

260. *See* Luke A. Boso, Note, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool*, 110 W. VA. L. REV. 843, 844 (2008).

261. Dwayne J. Bensing, Comment, *Science or Stigma: Potential Challenges to the FDA's Ban*

more rigorous and prolonged.[262] Nevertheless, no court has ever held either of these antigay policies to be unconstitutional under the Equal Protection Clause.

There are signs of positive change in some federal courts. In a case comparable to the Supreme Court's *J.E.B. v. Alabama ex rel. T.B.* decision, the Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Laboratories* implicitly recognized that statistical stereotypes about gays as a group, when used to justify peremptory jury strikes, can *both* subordinate and deny equal liberty.[263] The litigation at issue in *SmithKline* involved two pharmaceutical companies and their disputes over certain HIV medications.[264] During jury selection, "Abbott used its first peremptory strike against the only self-identified gay member of the venire."[265] In addition to indicating that he has a male partner, the potential juror also revealed that he takes a medication produced by defendants, and that he has HIV-positive friends (who theoretically could have an interest in defendants' HIV-related medications).[266] Despite these facts, the Ninth Circuit found a "prima facie case of intentional discrimination" because the potential juror was "the only juror to have identified himself as gay on the record, and the subject matter of the litigation," HIV medications, "presented an issue of consequence to the gay community."[267] Given the devastating toll that HIV and AIDS have had on gay and bisexual men, it is not unreasonable to presume that gay men may statistically care more about HIV medications than the general population.

Nevertheless, the court rejected an interest in HIV/AIDS related issues as a characteristic statistically correlated to the LGBTQ community as a reason for striking a gay juror. The court began its analysis by hitting chords of anti-subordination, stating emphatically that "[g]ays and lesbians have been systematically excluded from the most important institutions of self-governance."[268] To exclude gay men from juries in trials involving gay related issues would perpetuate this systematic exclusion of gay people from civic life.[269] Sexual orientation-

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on Gay Blood, 14 U. PA. J. CONST. L. 485, 492–94 (2011).

262. Boso, *supra* note 260, at 847–48.

263. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486 (9th Cir. 2014).

264. *Id.* at 474.

265. *Id.*

266. *Id.* at 471.

267. *Id.* at 476.

268. *Id.* at 484.

269. "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of

based strikes "tell the individual who has been struck . . . that our judicial system treats gays and lesbians differently."[270] Moreover, exclusion "demean[s] the dignity of the individual."[271] While the court does not ground its analysis in gays' rights to create and express *identity*, its analysis invokes ideas about freedom: wholesale exclusion denies "individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice"[272]—a liberty not denied to straight people simply because of their sexual orientation.

Using the LGBTQ community's heightened interest in LGBTQ issues as a foundation for exclusion is reminiscent of the public controversy over Judge Vaughn Walker, who famously presided over the Proposition 8 trial. In *Perry v. Schwarzenegger*,[273] plaintiffs in same-sex relationships challenged California's voter-enacted constitutional amendment that redefined marriage as only between a man and a woman.[274] After the trial, in which Judge Walker found Proposition 8 to be unconstitutional, Judge Walker retired, came out as gay, and revealed that he was in a long-term same-sex relationship.[275] Proponents of Proposition 8 then filed a motion seeking to vacate the judgment, implicitly arguing that Judge Walker's status as gay and in a same-sex relationship affected his judgment in the case.[276] Although the proponents did not argue that gay judges are per se biased in cases affecting LGBTQ rights,[277] an argument to that effect could likely be supported by statistical evidence showing the relatively unsurprising finding that gay-identified individuals largely favor gay rights.[278]

A federal judge nevertheless ruled against the proponents, reasoning that the fact that a judge shares characteristics with those members of the

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treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." *Id.* at 485.

270. *Id.*

271. *Id.*

272. *Id.*

273. 790 F. Supp. 2d 1119 (N.D. Cal. 2011).

274. *Id.* at 1121.

275. *Id.*

276. *Id.* at 1124.

277. The proponents of Proposition 8 were careful to assert that their motion was not based on "bias against gay or lesbian judges or based on the broad proposition that a gay or lesbian judge is incapable of being fair if sexual orientation is an issue in a case." *Id.*

278. *See* Patrick J. Egan, *Group Cohesion Without Group Mobilization: The Case of Lesbians, Gays, and Bisexuals*, 42 BRIT. J. POL. SCI. 597, 599 (2012) (showing empirically that lesbians, gays, and bisexuals are more liberal than the general population and "hold distinctive views on the legal recognition of same-sex relationships").

public who will be affected by the outcome of a case is not a basis for judicial disqualification. In fact, the attempt to discredit Judge Walker is just one instance in a history of litigants' unsuccessful attempts to remove minority judges from cases involving civil rights.[279] Crediting statistical stereotypes about group biases and political sentiments as a justification for excluding women, people of color, and LGBTQ individuals from the justice system would further subordinate groups that exist outside of the majority and have relatively little political power.

D. Recap: How False, Normative, and Statistical Stereotyping Can Deny Equal Dignity

In the summer of 2016, Donald Trump, then the Republican nominee for President, came under intense political fire when he criticized the federal judge overseeing a fraud case against Trump University.[280] Donald Trump argued that Judge Gonzalo Curiel could not be impartial in the class action suit against Trump because Judge Curiel is of "Mexican" heritage and was a member of the La Raza Lawyers Association.[281] Meanwhile, Trump had previously stated publicly that Mexican immigrants are "criminals, drug dealers, rapists, etc.,"[282] and a core component of his political platform was that the U.S. would "build a wall" along the U.S.-Mexico border to curtail illegal immigration.[283] Perhaps Trump's assumptions about Judge Curiel's potential biases due

279. *See, e.g.*, United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987). Here, the United States sued to end segregation of Alabama's institutions of higher learning, and various individuals intervened as plaintiffs. *Id.* at 1534–35. Appellants argued that Judge Clemon—a Black man with two minor children who were members of the plaintiff class—was disqualified from hearing the case in part because his impartiality could reasonably be questioned. *Id.* at 1541–42. The Eleventh Circuit explained that Judge Clemon's background cannot disqualify him because "[a]ll judges come to the bench with a background of experiences, associations, and viewpoints." *Id.* at 1543.

280. Jose A. DelReal & Katie Zezima, *Trump's Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/politics/2016/06/01/437ccae6-280b-11e6-a3c4-0724e8e24f3f_story.html [https://perma.cc/GXZ9-YRLU].

281. Hanna Trudo, *Trump Escalates Attack on 'Mexican' Judge*, POLITICO (June 2, 2016, 11:27 PM), http://www.politico.com/story/2016/06/donald-trump-judge-gonzalo-curiel-223849 [https://perma.cc/G35S-WVJ3].

282. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/ [https://perma.cc/P9SL-MH3Z].

283. Bob Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for the Border Wall*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/politics/trump-would-seek-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html [https://perma.cc/K5L6-GFC4].

to his Mexican ethnicity simply rest on false stereotypes. Or, perhaps they are rooted in statistics, especially considering that the vast majority of Latino Americans had a strongly negative view of Donald Trump during his run for the Presidency.[284] Either way, in this context, these assumptions operate to subordinate groups of color and other marginalized communities in America by seeking to deny them rights and responsibilities, and by sending the message that they are less trustworthy than the white majority.

Parts I and II have thus far summarized one theory of equal dignity that lies at the heart of the Equal Protection Clause while also articulating three versions of stereotyping that may be unconstitutional deprivations of equal dignity depending on context. The three variations of stereotyping—false, normative, and statistical—are sweeping and offer an uncomfortable takeaway: whenever the government enacts policies that affect individuals based on assumptions about groups, even if most people believe those assumptions to be normatively true or if the link between the characteristic and the group is statistically relevant, the government engages in stereotyping.

The Supreme Court has tempered the consequences of characterizing all group-based governmental policymaking as potentially unconstitutional stereotyping by reviewing carefully only those classifications that are suspect or quasi-suspect.[285] In other words, the judiciary applies heightened scrutiny to classifications that rest on a socially salient status where the risk of political disempowerment[286] and

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284. Léon Krauze, *Me Gusta Trump: Portrait of a Hispanic Trump Voter*, NEW YORKER (Mar. 20, 2016), http://www.newyorker.com/news/news-desk/me-gusta-trump-portrait-of-a-hispanic-trump-voter [https://perma.cc/24D5-TY9N] (noting that, according to early election polling, "eighty per cent [sic] of Latino voters held an unfavorable opinion of Trump").

285. Suspect class doctrine "[t]heoretically . . . treats discrimination against historically disadvantaged groups as suspicious and presumptively unconstitutional." Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 978 (2014).

286. A group's relative lack of political power in part determines whether courts will review governmental classifications based on that group status with heightened scrutiny; this prong of suspect class doctrine originated in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Professor Jane Schacter explains, however, that courts do not agree on how to assess a group's political power or why political powerlessness is an important factor, nor do courts consistently evaluate political power in determining which group classifications should receive heightened scrutiny. Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1372–77 (2011). Schacter goes on to suggest, however, that courts should conceptualize political powerlessness "as an aspect of past discrimination—that is, as a continuing manifestation of past discrimination that has impaired the group in the political process." *Id.* at 1403.

prejudice[287] towards that group status is high. Race is the emblematic suspect classification,[288] whereas sex is quasi-suspect.[289] In part because women and people of color have suffered a long history of discrimination and remain structurally subordinate in the United States, the government's reliance on race- and sex-based stereotypes raises a red flag regarding the purpose and effect of the government's actions. Thus, suspect and quasi-suspect status doctrines originally developed as means to judicially protect women and people of color from burdensome governmental action, even as conservative ideological commitments have subverted those doctrines in the years since their inception to limit racial and feminist progress.[290]

In light of the risk that sex and race classifications come loaded with prejudicial baggage that tends to subordinate rather than liberate, the Supreme Court has largely rejected the government's reliance on stereotypes as appropriate ends and means for enacting policy.[291] The Court has instead emphasized the importance of equal treatment across the board irrespective of group status and individualized assessments when differential treatment is necessary, eschewing even relevant statistical differences between groups. As Cornelia Pillard explains, "even statistically accurate generalizations about 'typically male or female tendencies'—such as men's greater aggressiveness versus

287. Race is the paradigmatic example. As the Supreme Court explained in *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns."

288. Korematsu v. United States, 323 U.S. 214, 216 (1944) (declaring for the first time that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

289. Craig v. Boren, 429 U.S. 190 (1976) (holding that sex classifications warrant intermediate scrutiny, which requires a slightly less close fit between governmental means and ends). One of the reasons that sex is not subject to strict scrutiny is because "real differences" between men and women may sometimes justify differential treatment. Justice Ginsburg noted in *United States v. Virginia*, 518 U.S. 515, 533 (1996), that "'[i]nherent differences' between men and women . . . remain cause for celebration."

290. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Supreme Court ruled that all race-based classifications—even those meant to benefit racial minorities—warrant heightened scrutiny due to a need for judicial consistency. *See id.* at 229–30. The Court's conservative members all joined this opinion (while the liberals dissented), and the majority opinion is widely understood as an attempt to limit the use of race-based affirmative action in response to right-wing activism. *See, e.g.*, Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1062 (2014) (citing *Adarand* as an example of how the Supreme Court uses strict scrutiny "to scrutinize closely and often invalidate race-based policies meant to address racial subordination," effectively "protect[ing] white claimants").

291. *See supra* section II.C.1.

women's comparatively more cooperative temperament . . . cannot be grounds for official, sex-based discrimination."[292]

Based on the Court's reasoning in cases like *VMI*, *Craig v. Boren*, and *J.E.B.*, one rationale for rejecting even statistical stereotypes is to guard against the risk that the government may use that statistical information to subordinate women, or that the statistics themselves reflect normative stereotypes.[293] Women as a group have historically been oppressed in both the public and domestic sphere, and the Court's heightened scrutiny of sex classifications and rejection of most stereotypes seeks to combat that subordination.[294] Moreover, governmental stereotyping can deny individuals the equal liberty to create and express an identity free from predetermined roles and their attendant social meanings. These are the two core pillars of equal dignity.

The government can also deny equal dignity, however, to individuals who are not members of suspect or quasi-suspect groups. The LGBT community provides perhaps the best example of a group that, while never considered suspect or quasi-suspect for Equal Protection purposes by the Supreme Court,[295] has regularly been denied equal dignity at the hands of the government. Historic and ongoing discrimination strongly suggests that the Court should review sexual orientation and gender identity classifications under a heightened standard of review, and dozens of scholars have well-argued that case.[296] This Article does not

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292. Pillard, *supra* note 75, at 948.

293. In his groundbreaking work on the various kinds of stereotypes and how each works in antidiscrimination law, Professor Appiah highlights the "obvious connections" between normative and statistical stereotypes. Appiah, *supra* note 30, at 49. "Many of the generalizations involved in statistical stereotyping are true because there are normative stereotypes to which people are conforming." *Id.*

294. *See generally* Ben-Asher, *supra* note 112 (explaining that anti-subordination is the central wrong animating nearly all the Supreme Court's sex stereotyping cases).

295. *But see generally* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (arguing that the Court implicitly applies a version of heightened scrutiny to sexual orientation-based Equal Protection claims that effectively creates more progressive results than do strict scrutiny or intermediate scrutiny as applied to race- and sex-based Equal Protection claims).

296. *See, e.g.*, Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 499 (2015) ("The Court's clarification that heightened scrutiny should be applied to sexual orientation classifications in equal protection cases would provide fairness, predictability, and protection for lesbian, gay, and bisexual people."); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) (arguing that courts should apply heightened scrutiny to sexual orientation classifications); Jeffrey A. Williams, Student Article, *Re-Orienting the Sex Discrimination Argument for Gay Rights After* Lawrence v. Texas, 14 COLUM. J. GENDER & L. 131, 142 (2005) ("Homosexual litigants are also entitled to greater scrutiny as a 'suspect class.'").

dwell on that issue. Instead, it demonstrates how the anti-stereotyping principle should work to promote equal dignity even when courts apply rational basis review to certain classifications, such as sexual orientation.[297] Moreover, to the extent that the Supreme Court has emphasized subordination as the predominant wrong of stereotyping, the sexual orientation and transgender discrimination cases uniquely highlight how stereotyping can infringe on the other tenet of equal dignity: the equal liberty to make choices regarding the formation and expression of identity.

III. STEREOTYPING THAT DOES NOT DENY EQUAL DIGNITY

This Article has devoted considerable time to discussing cases in which courts have rejected or should reject the government's reliance on false, normative, and statistical stereotypes about groups when acting in ways that affect individual group members. But does stereotyping always deny equal dignity? One negative consequence of a robust anti-stereotyping doctrine that looks with skepticism at all group generalizations is an elevation of individuals at the expense of groups. An anti-stereotyping doctrine that applies forcefully any time the government acts to address a group organized around a suspect or quasi-suspect trait, regardless of the government's purpose or effect in relying on stereotypes, suggests that the government can rarely if ever take group correlated traits and behaviors into account. As antidiscrimination scholars have long argued, however, groups do matter.[298] The following analysis offers an explanation for why and examples of when it may be desirable for the government to take certain normative and statistical stereotypes into account when crafting policies.

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297. Because the Supreme Court has used strict scrutiny "consistently" under *Adarand* principles, applying strict scrutiny to classifications that both burden and benefit people of color, some scholars have resisted calls to elevate sexual orientation to suspect status. This resistance is motivated by fears that the judiciary will use strict scrutiny to thwart progressive goals. *See, e.g.*, Robinson, *supra* note 295, at 172–73 (noting that strict scrutiny "rarely benefits people of color because modern racial discrimination does not rely on overt racial classifications to do its dirty work," while still advocating for a transparent application of heightened scrutiny to sexual orientation-based Equal Protection claims). For a review of cases in which LGBTQ plaintiffs have won arguments under mere rational basis review, see Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 837–40 (2012) (noting that judges "all seem to agree that the government must prove that the fit between its means and its ends has some footing in social reality").

298. *See, e.g.*, Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 945–46 (2014) (proposing a liberty-based model for antidiscrimination law that provides ample room for individual identity formation and expression, but noting that this model should merely supplement and not replace antidiscrimination regimes focused on group status).

A. Group Cultures

Groups are exceedingly important for socially stigmatized individuals: for many individuals, groups offer safety and solidarity, an avenue for political mobilization to achieve shared goals, and a template for creating nuanced and fully formed identities among other like-minded people who share similar experiences, viewpoints, and cultures. Still, claims about group identity and group cultures are controversial. Such claims risk essentializing individual identities tied to group membership, "engaging in the very stereotyping that the antidiscrimination paradigm is meant to retire."[299]

Essentialization has proven problematic for courts that attempt to sniff out discriminatory intent in statutory disparate treatment claims when determining whether a defendant's consideration of cultural proxies proves that discriminatory treatment is "because of" a protected trait.[300] Devon Carbado and Mitu Gulati explain that this task is dangerous because it could "entrench particular expressions of identity."[301] For example, "to say that a firm discriminated against [hypothetical plaintiff] because she acted black risks establishing—as a matter of law—what it means to be black based on the conduct in which [she] engaged."[302] In other words, what does it mean to "act black," and does a court itself engage in stereotyping if it gleans through subtle evidentiary cues that a defendant discriminated against an individual due to the individual's cultural manifestations of blackness?

Richard Ford directly tackles these questions[303] in his examination of the famous *Rogers v. American Airlines, Inc.*[304] case. In *Rogers*, American Airlines enforced a grooming policy that prohibited male and female employees "from wearing an all-braided hairstyle."[305] The plaintiff, a Black woman, sued under Title VII, arguing that the policy constituted facial race discrimination.[306] Underlying plaintiff's claim is

299. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 782 (2002).

300. In previous work, I spend considerable time explaining how courts sometimes reinforce concrete and oppressive definitions of sex and sexual orientation based identities when they evaluate evidence of discriminatory intent. *See generally* Boso, *supra* note 174; Boso, *supra* note 162.

301. DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA 148 (2013).

302. *Id.*

303. FORD, *supra* note 32, at 27.

304. 527 F. Supp. 229 (S.D.N.Y. 1981).

305. *Id.* at 231.

306. *Id.*

the premise that the practice of braiding hair is central to many Black women's identities[307] and in fact reflects the "cultural, historical essence of the Black women in American society."[308] Accordingly, a policy that prohibits all-braided hairstyles bolsters white identity norms and subordinates Black women.[309]

The *Rogers* court ruled in favor of the defendant on the basis that American Airlines' grooming policy applied evenly to all individuals irrespective of race.[310] Professor Ford acknowledges that the plaintiff's argument in *Rogers* reflects a multiculturalist desire for the law to celebrate and protect group differences, but he worries that a cultural argument "endorses" group stereotypes rather than rejects them.[311] "If braids are the immutable cultural essence of black women," Ford wonders, then "what else is?"[312] He rightly notes that the answer to that question is inherently "subject to debate, change, and manipulation."[313] What we might celebrate as cultural difference in one moment might reek of old-school prejudice in another.[314]

Yet shared cultures, however constituted, are real, and they are informed in part by the lived experiences of discrimination that stem from socially salient categories and "material arrangements like segregated cities."[315] They also stem from the histories and traditions that naturally ferment around group-based identities. Neil Gotanda argues that "culture-race" accounts for "all aspects of culture,

307. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 376–81 (1991) (discussing the *Rogers* case and the cultural and political significance of all-braided hairstyles for Black women).

308. *Rogers*, 527 F. Supp. at 232 (quoting Plaintiff's Memorandum in Opposition to Motion to Dismiss at 4, *Rogers* 527 F. Supp. 229 (No. 81 Civ. 4474)).

309. Caldwell, *supra* note 307, at 383–85 (explaining that hairstyle choices are important forms of identity expression, and that prohibitions of all-braided hairstyles reflect social, political, and economic choices that condition subordinated groups to reflect norms of the dominant culture).

310. *Rogers*, 527 F. Supp. at 232.

311. FORD, *supra* note 32, at 3, 23–36.

312. *Id.* at 27.

313. *Id.* at 71.

314. "[T]o say that a person 'talks white' or 'talks black' is to assume that people of a particular race have a particular language, dialect, or rhetorical style in which they speak. That sounds downright offensive—tantamount to old-school racism." CARBADO & GULATI, *supra* note 301, at 47 (arguing nevertheless that these perceptions are "real" and can inform an intersectional theory of discrimination).

315. IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 44–45 (2014).

community, and consciousness," and, for Black Americans, includes "customs, beliefs, and intellectual and artistic traditions."[316]

Indeed, acknowledging the material and immaterial realities of shared cultures, progressives and social justice activists in recent years have increasingly drawn attention to instances of cultural appropriation as a form of racism and group-based oppression.[317] The media frenzy surrounding Rachel Dolezal's highly public "outing" in 2015 as a biologically white woman who identifies as Black offers a compelling example.[318] Khaled Beydoun and Erika Wilson summarize Dolezal's identity performance in the following way:

> Dolezal tanned her skin, rotated through several hairstyles traditionally associated with Black womanhood, helmed the Spokane chapter of the National Association for the Advancement of Colored People (NAACP), and obtained an adjunct lecturer position at Eastern Washington University in Africana Studies. She held herself out to the world as a Black woman.[319]

Dolezal's performance, Beydoun and Wilson argue, is appropriation done with the purpose and certainly the effect of commodifying a non-white racial identity for personal gain at the expense of communities of color.[320]

To acknowledge Dolezal's identity performance as reflective of Black culture in some sense reinforces stereotypes about what being Black means. Conversely, ignoring how Dolezal's identity pulls from Black culture would be colorblind in a way that perpetuates ignorance about how majority groups can exploit marginalized communities without compensation or attribution, further subordinating the already oppressed.[321] To the point: an anti-stereotyping doctrine that rejects as

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316. Gotanda, *supra* note 75, at 56.

317. *See, e.g.*, Angela R. Riley & Kristen A. Carpenter, *Owning* Red*: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 864 (2016) (explaining that cultural appropriation occurs "in a societal context of power imbalance, racism, and inequality, rather than in an atmosphere of fair, open, and multilateral exchange").

318. *See* Kirk Johnson, *Rachel Dolezal, in Center of Storm, Is Defiant: 'I Identify as Black,'* N.Y. TIMES (June 16, 2015), http://www.nytimes.com/2015/06/17/us/rachel-dolezal-nbc-today-show.html [https://perma.cc/EAE8-SQCF] (Dolezal was born to two white parents and identified as white well into her adult life).

319. Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 287 (2017).

320. *See id.* at 292–93.

321. *See, e.g.*, Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 308, 311 (2002) (explaining that claims of cultural appropriation revolve around groups' efforts to secure political and cultural sovereignty, and the act

invalid any correlation between certain behaviors and identities would have the unfortunate effect of promoting a conservative version of race, sex, and sexual orientation blindness.[322]

Accordingly, stereotyping is not per se harmful—or, as Judith (now Jack) Halberstam reasons, stereotypes "are not in and of themselves right or wrong."[323] Instead, the moral and legal wrong of stereotyping depends on its purpose and effect.[324] Under the Equal Protection Clause, as this Article explains above in Parts I and II, federal courts have focused particularly on how stereotyping can subordinate groups and unequally deny liberty with respect to individual choices regarding identity. This is the crux of *Obergefell*'s emphasis on equal dignity. Sometimes, however, the government's *failure* to consider group-based normative or statistical stereotypes can subordinate groups and unequally deny liberty. Consider the Supreme Court's controversial decision in *Hernandez v. New York*.[325]

In *Hernandez*, the petitioner, Dionisio Hernandez, was charged and convicted of two counts of murder and two counts of criminal possession of a weapon.[326] At the petitioner's trial, a New York prosecutor used four peremptory challenges to exclude potential Latino jurors.[327] The potential jurors' Spanish fluency—and specifically the potential jurors' ability to listen and follow the official interpreter when Spanish speaking witnesses took the stand—was the prosecutor's stated rationale for two of those strikes,[328] and petitioner challenged the exclusion of those two potential jurors as unconstitutional race discrimination under the Equal Protection Clause.[329] Petitioner relied on the "close relation" between Spanish fluency and Latino identity to make his claim of intentional race discrimination.[330] The Court rejected the petitioner's claim, reasoning that, while exercising peremptive strikes against individuals who speak Spanish "might well result in the

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of cultural appropriation enables dominant groups to maintain power).

322. Yoshino, *supra* note 299, at 782–83 (making the same point).

323. JUDITH HALBERSTAM, FEMALE MASCULINITY 180 (1998). Professor Halberstam explains that, although we tend to think of them as pejorative, stereotypes often represent a "true" subtype within a given group. *Id.*

324. "It is important to judge the work that the stereotype performs within any given . . . context . . . ." *Id.*

325. 500 U.S. 352 (1991).

326. *Id.* at 355.

327. *Id.* at 356.

328. *Id.* at 356–57.

329. *Id.* at 358.

330. *Id.* at 360.

disproportionate removal of prospective Latino jurors,"[331] impact alone is not enough. The Court went on to note that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis"[332]—but not in this case. The Court accepted as valid the prosecutor's concern that these individual potential jurors might have difficulty accepting an interpreter's rendition of Spanish language testimony, and the group of persons for whom that concern applied consisted of both Latinos and non-Latinos.[333]

Not all Latino individuals speak Spanish, of course. Yet statistically, more Latinos do speak Spanish than non-Latinos, and Justice Kennedy's opinion for the majority in *Hernandez* recognizes as common knowledge that a "significant percentage of the Latino population speaks fluent Spanish" and consider it the language "used to define the self."[334] Imagine a law that required English fluency to vote: ignoring the connection between Spanish fluency and Latino identity in the context of upholding such a law under an Equal Protection challenge would effectively validate race discrimination through exclusion. Similarly, the *Hernandez* Court's refusal to view Spanish-speaking as a proxy for race (i.e., a statistically significant stereotype)[335] in the context of excluding individuals from a jury denies equal dignity. In effect, "given the widely understood connection between Spanish fluency and cultural identity,"[336] and the historical and ongoing discrimination against Latinos in the United States, the exclusion of some Spanish speakers from jury service in *Hernandez* sends a subordinating message of Latino group inferiority.[337] Further, it denies liberty on an unequal basis: no English-speaking person would be excluded from performing a core civic duty on the basis of concerns about how their English language fluency affects their ability to follow instructions,[338] and English fluency

331. *Id.* at 361.

332. *Id.* at 371.

333. *Id.* at 361.

334. *Id.* at 363–64.

335. *See, e.g.*, Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 168–69 (2005) (characterizing a juror's ability to speak Spanish as "closely associated with being Hispanic").

336. Herz, *supra* note 21, at 118.

337. *See, e.g.*, Miguel A. Mendez, Hernandez*: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193, 193 (1993) (to Spanish speakers, *Hernandez* is "another painful reminder of how proficiency in another language is a liability").

338. Herz, *supra* note 21, at 118.

is a characteristic that many English speakers may consider central to self.

It is important to note that recognizing group-based differences in culture, lived experiences, and other quirks of life does not necessarily mean naturalizing those differences. As Vicki Schultz argues, activists and lawyers should seek to disrupt differences by questioning their "origins and stability."[339] Those in power often use real and imagined differences between groups precisely to deny opportunity and create inequality. Those in power have also engaged in discriminatory conduct that effectively produces the very differences upon which others rely to perpetuate existing inequalities.[340] Institutional actors nevertheless can and should account for statistical and normative group-based differences to combat rather than fuel oppression.

B. The Case of LGBTQ Equality

In Kenji Yoshino's seminal work, *Covering*, he explores the myriad ways that law and society encourage lesbian, gay, and bisexual individuals to tamp down the queer components of their identities.[341] Covering is about assimilation, or trying to fit into mainstream life by helping others overlook a stigmatized aspect of self.[342] For queer individuals, majority imposed and minority imposed covering demands[343] may only become even more common as mainstream society lurches towards greater acceptance of LGBTQ people in theory but not necessarily LGBTQ people in practice.[344]

Underlying the practice of covering is the idea that identity is performative, and that certain behaviors are recognizable as constitutive of group-based identities.[345] Professor Yoshino makes this point in

339. Schultz, *supra* note 218, at 1107.

340. *Id.*

341. Yoshino, *supra* note 299, at 781, 837.

342. *Id.* at 837.

343. Professor Russell Robinson discusses the ways in which gays of color, effeminate gay men, religious gays, and other non-homonormative gay people experience pressure from within the LGBTQ community to "act gay" according to mainstream gay norms. Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809, 1821–24 (2007).

344. Boso, *supra* note 174, at 620–21; *see also* Alexander Nourafshan & Angela Onwauchi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521, 533–34 (2015) (discussing how gays of color still face barriers of acceptance both outside and within the gay community because successfully performing gay identity requires "self-whitewashing").

345. *See* Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 811 (2008) ("[T]he demand for covering deforms the behavioral aspect of

Covering, and in fact articulates a list of traits and behaviors widely associated with lesbian, gay, and bisexual identities, including: certain gay fashions, gay music, gay divas, gay authors, gay magazines, gay neighborhoods, and gay films.[346] Yoshino concedes that protecting traits and behaviors like these as proxies for identity risks essentializing identity, but argues that the alternative of identity blindness is worse from an equality perspective.[347] Yoshino's point here maps onto a central theme of this Article: the purpose and effect of stereotyping matters.

1. Sodomy

On August 3, 1982, an Atlanta policeman entered Michael Hardwick's home to issue an arrest warrant on an unrelated charge and witnessed Hardwick having oral sex with another man.[348] At the time, having oral or anal sex—i.e., committing sodomy—was a crime in Georgia.[349] The ACLU brought suit in federal court, seeking a declaratory judgment that Georgia's anti-sodomy statute was unconstitutional.[350] Famously, Hardwick's case went all the way to the U.S. Supreme Court.[351] Although the Georgia law at issue criminalized all acts of sodomy and not just those committed between two people of the same sex, the Court analyzed the statute's constitutionality as if it only applied to same-sex oral and anal sex.[352] Viewed in a generous light,[353] perhaps the Court's singular focus on same-sex sodomy makes some sense: in an amicus brief, Lambda Legal argued that laws like Georgia's "impose an added burden on gay people, blocking their sense

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personhood . . . ."). *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (Lind J. Nicholson ed., 1990).

346. Yoshino, *supra* note 299, at 845.

347. *Id.* at 933–94.

348. *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1612 (1993).

349. "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (2010).

350. Cain, *supra* note 348, at 1612.

351. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

352. *See* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 531 (1992).

353. The Court's focus on same-sex sodomy despite the statute's application to both same and different-sex sodomy seems like a purposeful move to weaken the petitioner's Substantive Due Process claim.

of self as well as their sexual fulfillment."[354] Nevertheless, the Supreme Court upheld Georgia's law on Substantive Due Process rather than Equal Protection grounds, reasoning that no right announced in the Court's decisional autonomy cases "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."[355]

Just seventeen years later, the Supreme Court in *Lawrence v. Texas* struck down a Texas law that did single out same-sex sodomy for unique prohibition.[356] The Court in *Lawrence* expressly overruled *Bowers v. Hardwick*,[357] holding that the "liberty" guarantee in the Substantive Due Process Clause protects the right of an adult to have oral or anal sex with another consenting adult in the privacy of a home.[358] Notably, Justice O'Connor relied on equality principles in her concurrence.[359] Echoing Lambda Legal's sentiment from nearly two decades prior, O'Connor explained, "the Texas statute makes homosexuals unequal in the eyes of the law" and "brands all homosexuals as criminals."[360] Just like that, Justice O'Connor conflated conduct with group status. Numerous scholars have noted this conflation with relative approval.[361]

Not all gay-identified people engage in oral and anal sex.[362] For health-related, spiritual, or a variety of personal reasons, some gay and

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354. Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund, Inc. et al., *Bowers*, 478 U.S. 186 (No. 85-140), 1986 WL 720449, at *30.

355. *Bowers*, 478 U.S. at 190–91.

356. *See Lawrence*, 539 U.S. at 578. The law states, "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

357. 478 U.S. 186, *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

358. *Lawrence*, 539 U.S. at 578–79. For a critique of Justice Kennedy's narrow vision of liberty in *Lawrence v. Texas*, see generally Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004). "*Lawrence*-like decriminalization merely signals a public tolerance of the behavior, so long as it takes place in private and between two consenting adults in a relationship." *Id.* at 1411.

359. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

360. *Id.* at 581.

361. *See, e.g.*, Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 463 (2012) (noting that it makes some sense, given widely understood social meanings and discursive practices, to conflate sodomy and status because that conflation describes the "conditions under which same-sex couples actually live"); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1905–06 (2004) (explaining that, while it is not a "gays only" act, sodomy is associated with gay men and lesbians, and any anti-sodomy law is antigay "in terms of both its practical impact and its cultural significance").

362. *See, e.g.*, Cain, *supra* note 348, at 1625 ("A woman who chooses another woman as her life partner may attribute her lesbian identity to aspects of her relationship and events in her life apart from actual sexual conduct."); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-*

bisexual individuals engage in lifelong abstinence.[363] Moreover, some may strongly reject any conflation of sexual conduct and gay identity. Individuals can claim a lesbian, gay, or bisexual identity based on same-sex desire alone: sexual conduct is not a requirement for group membership. Accordingly, to conflate sodomy and gay identity is to invoke stereotypes about what it means to be gay that do not match individual realities, which can deny individuals some agency in defining what their bisexual or homosexual identity means to them.

Statistically speaking, of course, many LGBTQ individuals are sexually active and do engage in sodomy (defined as any sexual activity involving genital contact with another person's mouth or anus). A legal prohibition on sodomy thus has the effect of tangibly harming most, but not all, individual LGBTQ people. Further, given the strong cultural associations with sodomy and LGBTQ status, legal prohibitions subordinate LGBTQ people as a group by sending the message that the primary mode of gay sexual expression is inferior to straight sexual expression—and, by extension, that gays are inferior to straights.

In the context of articulating a rationale for repealing or striking down a law that prohibits sodomy, conflating bisexual and homosexual status with sodomy does not deny equal dignity. While this conflation does deny some LGBTQ individuals the liberty to form and express their own identities free of state-imposed assumptions about what that identity means, the purpose and effect of this state-imposed assumption are anti-subordinating. Courts and scholars may not always agree on what practices subordinate and when, but acknowledging the practical and cultural importance that sodomy has for many LGBTQ people, for the purpose of decriminalization, does not effectively send a message of queer inferiority. Instead, operationalizing this stereotype in this context has the purpose and effect of dismantling an old social order that denigrated all queer people as worthy of moral condemnation backed by

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Determinism: Implications for Equal Protection and Substantive Due Process, 18 U. HAW. L. REV. 571, 597 (1996) (explaining that homosexuality is "an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one's own sex that exists independent of any physical sexual act").

363. *See, e.g.*, Teresa M. Bruce, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1164 (1996) (explaining that lesbians "retain a sexual attraction toward women regardless of whether or not they have sexual relationships with women," and noting that some lesbians choose celibacy); Halley, *supra* note 90, at 949 (criticizing a court ruling that excluded from the class "homosexual" "[l]esbians who forego cunnilingus, the many gay men who have abandoned fellatio and anal intercourse to protect themselves and their lovers from AIDS, [and] self-identified gay men and lesbians who remain celibate").

criminal punishment. This is therefore one example of a constitutionally permissible, and even desirable, use of statistical stereotypes.

2. LGBTQ Affirmative Action

Federal and state governments have historically invoked an individual's non-straight sexual orientation as a basis for negative treatment. In the not-too-distant future, however, public universities and employers could consider lesbian, gay, and bisexual status a positive consideration in admission and hiring decisions.[364] The U.S. Supreme Court has not yet ruled that sexual orientation is a suspect or quasi-suspect status, and thus any such action would likely warrant rational basis judicial review.[365] Under rational basis review, as Peter Nicolas explains, a state actor that seeks to implement an LGBTQ affirmative action policy "would have an extraordinary amount of flexibility, both with respect to the justifications for establishing such policies and the means employed for accomplishing those goals."[366] Governmental reliance on statistical stereotypes usually poses no Equal Protection problem under mere rational basis review.

Even if federal courts ultimately agree that sexual orientation classifications warrant heightened judicial scrutiny, the government should be permitted to rely on some statistical stereotypes in support of affirmative action policies without offending equal dignity principles. From prior Supreme Court cases, we can imagine at least two justifications that a state actor might offer. In a 1986 case, *Wygant v. Jackson Board of Education*,[367] a public school argued that race-based affirmative action in hiring and firing decisions was justified by a compelling interest in providing minority role models to minority students.[368] In a 1978 case, *Regents of the University of California v. Bakke*, the UC Davis Medical School argued that a race-based affirmative action policy in student enrollment was justified by a compelling interest in "increasing the number of physicians who will practice in communities currently underserved."[369]

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364. *See* Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 735 (2015) (noting that some public universities have already begun to collect data on applicants' sexual orientation and gender identity).

365. *Id.* at 768–71.

366. *Id.* at 768.

367. 476 U.S. 267 (1968).

368. *Id.* at 274.

369. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978).

In a hypothetical world in which a public university sets aside a set number of seats for gay and lesbian students, or just considers LGBTQ status to be a strong "plus" factor in decision-making, the government could make arguments similar to those mentioned above.[370] For example, the government could argue that LGBTQ affirmative action relates to an interest in providing mentors and role models for other gay students. Perhaps it could argue that admitting more gay students relates to an interest in producing more gay professionals who will go on to lift other aspiring gay professionals up the ladder towards success, or who will serve the gay community's needs.

Both *Wygant*- and *Bakke*-style justifications arguably reflect statistical stereotypes.[371] Not all teachers of color will be good role models for racial minority students, just as not all LGBTQ students will mentor other gay students or even be visible as role models (some may not want to be defined by sexuality or be out on campus). Similarly, not all physicians of color will go on to work in underserved minority communities, and not all gay professionals will specialize in a field important to the LGBTQ community or promote other gay professionals up the employment ladder.

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370. If federal courts find that sexual orientation is a suspect classification, the application of strict scrutiny to LGBTQ affirmative action policies likely forecloses the government's use of justifications similar to the aforementioned rationales offered in *Wygant* and *Bakke*. In *Wygant*, the Supreme Court held the role-model justification to be insufficiently compelling. 476 U.S. at 274–75. In *Bakke*, the Court found insufficient evidence that the means used—the race-based quota—achieved a compelling interest in "facilitating the health care of its citizens." 438 U.S. at 310–11. I join the series of scholars who have criticized the Court with respect to those holdings, yet I do not re-litigate the compelling nature of those justifications or the fit between the government's means and ends here. *See, e.g.*, Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1435–36 (1996) (offering a variety of role model theories, and arguing in favor or a theory that purports to provide examples for emulation and visible affirmations of the presence of racial minority students); Thomas E. Perez, *Enhancing Access to Health Care and Eliminating Racial and Ethnic Disparities in Health Status: A Compelling Case for Health Professional Schools to Implement Race Conscious Admissions Policies*, 9 J. HEALTH CARE L. & POL'Y 77, 96–98 (2006) (citing statistical evidence that "race in and of itself is a powerful and better indicator and predictor of service to poor, underserved, and minority communities" than race-neutral factors).

This Article discusses these justifications solely for the sake of argument and under an assumption that one of three hypothetical situations could occur: (1) a more progressive Supreme Court revisits and approves alternative affirmative action justifications in the future; (2) intermediate scrutiny applies to sexual orientation classifications and LGBTQ affirmative action policies require only a substantial relationship to an important governmental interest; or (3) rational basis review applies to sexual orientation classifications and the government is largely free to rely on statistical stereotypes.

371. The Court in *Bakke* conceded as much: "[i]t may be correct to assume that . . . it is more likely [that minority doctors] will practice in minority communities than the average white doctor." 438 U.S. at 310–11.

However tainted with stereotypes, these rationales for LGBTQ affirmative action programs are anti-subordinating—certainly in purpose, and most likely in effect. The government would send the message that LGBTQ individuals are just as welcome in the marketplace of ideas as straight individuals. Some queer beneficiaries of LGBTQ affirmative action policies would undoubtedly go on to be role models, mentors, and professionals who help others along the way, thus removing barriers to jobs in both the private and public sector. Representation matters. If subordination, defined most simply, is about creating and reinforcing social hierarchies best exemplified by group-based exclusion or relegation to specific roles, the effect here is quite the opposite: to facilitate inclusion and expand opportunities. Moreover, any state-sponsored ascription of meaning to gay identities through the use of these statistical stereotypes is negligible; more individuals than before would have the liberty to craft a gay identity that reflects their career aspirations and talents. A violation of equal dignity requires *both* group subordination and an unequal denial of individuals' liberty to express identity.

Some would disagree that the effect of affirmative action policies is to remedy rather than perpetuate governmental subordination. To those in this ideological camp, the government's invocation of suspect and quasi-suspect classifications for even benevolent purposes still sends a subordinating message. Justice Thomas, only the second Black jurist in the Supreme Court's long history, is famously critical of affirmative action policies precisely because of the message they send. In *Adarand Constructors, Inc. v. Pena*,[372] Justice Thomas argued that any race-based affirmative action policy "teaches" whites and non-whites alike that racial minorities "cannot compete" without paternalistic help, and that affirmative action policies "stamp minorities with a badge of inferiority."[373] In *Grutter v. Bollinger*,[374] Justice Thomas invoked the specter of equal dignity by arguing, "[e]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[375]

This Article acknowledges that jurists and scholars do not agree on what practices subordinate and why. Instead of resolving that question, it seeks to ground a discussion of subordination on a baseline definition

372. 515 U.S. 200 (1995).

373. *Id.* at 241 (Thomas, J., concurring).

374. 539 U.S. 306 (2003).

375. *Id.* at 353 (Thomas, J., concurring in part and dissenting in part).

that hinges on whether the government acts with either the purpose or effect of disfavoring one group over another, thus establishing or reinforcing a social caste. Members of every group and subgroup will undoubtedly continue to disagree on subordinating outcomes under even this simplistic analytical prompt. Nevertheless, Justice Stevens's dissent in *Adarand* offers a useful gloss on what a governmental policy that disfavors a group and perpetuates hierarchy looks like: "[i]nvidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority."[376] Affirmatively relying on statistical information about a group to facilitate inclusion and expand opportunities for that group should not reasonably be understood to maintain the power of the majority. As Justice Stevens in *Adarand* went on to note, there is "a difference between a 'No Trespassing' sign and a welcome mat."[377]

3. LGBTQ Disparate Impact Claims

One of the most tantalizing aspects of the Court's analysis in *Obergefell* is its willingness to discuss the subordinating *impact*[378] that same-sex marriage bans have on gay people absent any proof that state governments *intended* to harm gay people.[379] *Obergefell* in fact builds significantly on the kind of impact analysis that *United States v. Windsor* arguably revived in 2013.[380]

Since the Court's much maligned decision[381] in *Washington v. Davis*,[382] a basic tenet of constitutional scrutiny is that "a law having a discriminatory impact, but devoid of any facial classification, will be subject only to rational basis review, regardless of the group affected by the discrimination."[383] Discriminatory intent, however, is notoriously

376. 515 U.S. at 243 (Stevens, J., dissenting).

377. *Id.* at 245.

378. Exclusion from marriage "has the effect" of demeaning gays and lesbians. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2602 (2015).

379. *See* Yoshino, *supra* note 103, at 174–75.

380. Siegel, *supra* note 73, at 93 (explaining that, although *Windsor* found DOMA to be motivated by animus (discriminatory intent), it "radiate[s] with significance" because it also considers "the law's meaning and impact with attention to the perspectives of the historically excluded").

381. *See, e.g.*, Haney-López, *supra* note 70, at 1813 ("[b]y making a showing of intent a necessary prerequisite for establishing unconstitutionality," *Washington v. Davis*, 426 U.S. 229 (1976) closed off "equal protection as a means of challenging structural harms to non-Whites").

382. 426 U.S. 229 (1976).

383. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 897 (2012).

difficult to prove,[384] and its status as the hallmark of constitutional equality law has long frustrated civil rights advocates who point to disparate impact as the better tool for dismantling structural discrimination.[385] The Court's two most recent gay rights cases thus offer some promise that evidence of disparate impact might come to displace a singular search for discriminatory intent, or that disparate impact might at least play a larger role in the future.[386]

If lesbian, gay, and bisexual individuals could challenge facially neutral governmental policies—i.e., those that do not bestow benefits or burdens on the explicit basis of sexual orientation—under a disparate impact theory, which policies could they challenge? Michael Boucai discusses some theoretical possibilities based on LGBTQ activists' political rhetoric in the wake of *Obergefell*: facially neutral policies that make it difficult for gays, lesbians, and bisexuals to access assisted reproductive technologies (ART) and adopt children.[387] Given the non-traditional methods that many gay, lesbian, and bisexual people might require to become parents, policies that could support an LGBTQ disparate impact claim include: laws that ban surrogacy contracts; laws that permit gametes to be donated but not sold; laws that limit the availability of anonymous sperm donations; and laws that require expensive and invasive screening procedures prior to adoption approvals.[388] Other scholars have suggested different possible LGBTQ disparate impact targets regarding public "employee benefits plans tied to marriage."[389] What else? What about statutes criminalizing BDSM

384. The Supreme Court has itself noted this difficulty in *Palmer v. Thompson*, 403 U.S. 217, 224 (1971), where it rejected the argument that "a legislative act may violate equal protection solely because of the motivations of the men who voted for it." The Court rejected this argument largely due to the difficulty and futility in determining the motivations of a large group of legislators. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108 (1989).

385. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1141–42 (1997) (noting the irony of the current heightened scrutiny framework: facially neutral policies that disparately impact women and people of color are largely insulated, but explicit race classifications that benefit people of color in employment and higher education are highly vulnerable under the Court's evaluative use of strict scrutiny).

386. Professor Laurence H. Tribe makes a similar observation, suggesting in his analysis of *Obergefell* that it "may well have laid the foundation for reexamining a longstanding but always controversial doctrinal obstacle" in equal protection jurisprudence that requires proof of discriminatory intent. Tribe, *supra* note 17, at 19.

387. Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1077–80.

388. *See id.* at 1108–15.

389. J. Banning Jasiunus, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529,

and public sex—conduct that queer theorist Pat Califia argues is uniquely important to the LGBTQ community?[390] What about public employer dress and grooming codes that prohibit men from wearing nail polish?[391]

The list of disparate impact litigation possibilities articulated above suggests that LGBTQ people might engage in certain conduct (ART, non-marital relationships, kinky sex, and colorful male accessorizing) statistically more often than straight people. Some of these claims may offend individual members of the LGBTQ community, particularly when the statistical correlation between conduct and group status is not that strong. All disparate impact claims, however, inherently pose some risk of statistical stereotyping because the challenged policy will not affect every individual group member negatively, and in fact some group members may support the policy or find it personally beneficial. The Supreme Court in a plurality opinion recently acknowledged, to unfortunate effect, the stereotyping risk of disparate impact claims in *Schuette v. Coalition to Defend Affirmative Action*.[392]

In *Schuette*, various organizations argued that a popularly enacted amendment to the Michigan Constitution that prohibited affirmative action in public education, employment, and contracting is unlawful race discrimination under the Equal Protection Clause.[393] The plaintiffs did not raise a disparate impact claim per se, but instead relied on precedent that arguably required courts to "determine and declare which political policies serve the 'interest' of a group defined in racial terms."[394] The Court rejected this reading of relevant precedent, explaining that such an inquiry would involve "impermissible racial stereotypes" and specifically the assumption that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."[395] "Were courts to embark upon this

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1551–52 (2000); *see also* A. Nicole Kwapisz, *Classification of Homosexuals Under the Equal Protection Clause: Forward-Looking Disparate Impact Test*, 5 DEPAUL J. FOR SOC. JUST. 71, 123–24 (2011).

390. *See generally* PAT CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX (2d ed. 2000).

391. *See* Boso, *supra* note 174, at 623 n.229 (discussing a gay man's discrimination lawsuit stemming from an employer's grooming and dress code policy, directed only at men, which reads in part: "please keep excessive makeup and nail polish to a minimum gentlemen. The only acceptable time for gentlemen to wear makeup or nail polish will be for Sunday Brunch during Haus of Mimosa").

392. 572 U.S. __, 134 S. Ct. 1623 (2014).

393. *Id.* at 1629–30.

394. *Id.* at 1634.

395. *Id.*

venture," the Court went on to explain, "it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes."[396]

The Court is not wrong, of course, in reasoning that not all members of a group think alike. But the very nature of group identity means that some groups share certain interests in common and engage in certain conduct more often than other groups. As Russell Robinson argues, "[t]o find that an affirmative action ban has a racial focus and imposes special burdens on racial minorities, one need not conclude that all blacks endorse affirmative action. Surveys have consistently found that a majority of African Americans support affirmative action, and the Court could have simply said that" without implying anything "about the normative question as to whether blacks *should* support such policies."[397]

In other words, the existence of a disparate impact claim does not necessarily define the group for all members. One of the key values supporting disparate impact claims is the belief that facially neutral policies can have the effect of subordinating groups by keeping most individual groups members locked in an oppressive social hierarchy. While taking statistical stereotypes into consideration for disparate impact claims might deny some individuals the *absolute* liberty of "self-determination and self-conception," on balance, the conjunctive anti-subordination principle of equal dignity can and should "protect conduct that is widely viewed as group-identified while accepting that some group members may still choose to live differently."[398]

CONCLUSION

Conventional constitutional wisdom suggests that the government violates the Equal Protection Clause whenever it has the purpose or effect of perpetuating stereotypes, especially those based on race and sex. In recent years, some federal courts have extended the anti-stereotyping doctrine to state actions regarding sexual orientation.[399] This conventional wisdom is not entirely correct. For example, some courts permit the government to rely on certain normative and statistical

396. *Id.* at 1635.

397. Robinson, *supra* note 295, at 218.

398. Herz, *supra* note 21, at 151–52.

399. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 826 (2014) (noting that there "is now a substantial body of case law holding that state action that perpetuates anti-gay stereotypes . . . is inconsistent with equal protection").

stereotypes about group conduct and interests to *protect* individuals from discrimination. Stereotyping is thus not wrong in and of itself; how the government uses stereotypes should determine whether state action violates the Equal Protection Clause. The Court's wedding of individual liberty and group equality in *Obergefell* offers one anchoring theory that helps explain when governmental stereotyping is a constitutional wrong: when it denies equal dignity.

Governmental stereotyping denies equal dignity when it has the purpose or effect of subordinating a group by sending a message of group inferiority (most often exemplified by policies that deny a benefit or exclude individuals based on their group status), and when it unequally denies individuals the liberty to form and express their identities. For example, the government should not take adverse actions against individuals—like firing, hiring, or harassing individuals in school or at work—because of its reliance on normative stereotypes about how that individual should behave based on their group identity. Nor should the government deny individuals opportunities to attend the school of their choice or engage in civic functions because of statistical stereotypes about a group's capabilities, biases, or talents.

The government may sometimes take normative and statistical stereotypes into account to prevent individual disparate treatment or wholesale group exclusion from opportunities and civic functions. For example, acknowledging that most Latinos speak Spanish is a permissible use of statistical stereotypes to prevent the government from using Spanish-speaking as a proxy for race and a reason to exclude. As a reason to decriminalize sodomy, acknowledging that most LGBTQ people engage in oral or anal sex is a permissible use of statistical stereotypes because the purpose and effect is to eradicate rather than enforce a formal caste system in which queer but not straight people are criminalized for their sexual conduct. While considering stereotypes like these may affect the meanings of group identity in ways that offend some individual group members, the government's failure to consider them could result in group subordination.

In these and other perhaps counter-intuitive ways, "stereotyping" broadly defined can sometimes promote rather than deny equal dignity. An absolute stereotyping prohibition would exacerbate certain forms of race, sex, and sexual orientation blindness. Groups are important, and the government requires some flexibility to address group-based needs.