BUSTING BOSTOCK:
The CRT Critique

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About the Author

J.D., UCLA School of Law; B.A., Stanford University. First and foremost, I would like to thank Professor Laura Gómez, my fantastic advisor whose classes first exposed me to the power of Critical Race Theory. I deeply appreciate Professor Gregory Davis for his guidance throughout my time in law school, as well as Professor Emmanuel Mauleón for pushing me to sharpen my critical thinking. I am extremely grateful for the entire Dukeminier Awards Journal team—especially Christy Mallory, Brandon Giovanni, Will Tentindo, and Isabel Lafky—who saw value in this Note and helped get it across the finish line. Finally, my deepest gratitude to Joe Kim and Nicole Powell for their laughter and invaluable support during all of those late nights on Zoom.

Table of Contents

Introduction

On June 15, 2020, the Supreme Court issued the groundbreaking decision *Bostock v. Clayton County*,[1] which dramatically expanded workplace protections based on "sex" discrimination to sexual orientation and gender identity. The decision involved three consolidated cases: two in which gay men were fired, and one where a transgender woman lost her job after disclosing her trans identity her to employer.[2] Despite *Bostock's* celebrated achievements, the logic underlying Justice Gorsuch's *Bostock* opinion impacts queer people of color in a nuanced intersectional way. The *Bostock* holding rectifies some of the key deficiencies in the mainstream LGBT movement's platform towards queer people of color. At the same time, the opinion's textualist logic also reifies support for colorblindness and the perpetrator perspective in anti-discrimination law. Understanding how *Bostock* interacts with the preexisting marginalization of queer and trans people of color is necessary to advance liberatory policies for a population that–as a function of their placement in the multidimensional intersection of race, sexuality, gender identity, and class–remains disproportionately criminalized, policed, and neglected by the state.[3]

The first section of this Note explores the mainstream LGBT movement's role in racializing "gay identity" as White. It then argues that the strategic decision to center policy goals of military inclusion and marriage equality further marginalized queer people of color and undermined a full comprehension of the interlocking dimensions of heterosexism and racism. Additionally, this section highlights how gay rights proponents' arguments for symbolic inclusion and access to benefits via assimilation into heterosexist ideals around marriage and masculinity display the mainstream LGBT movement's commitment to respectability politics that ostracized queer people of color. I argue that landmark developments in the mainstream LGBT movement like *Obergefell*[4] largely served those in closest proximity to Whiteness and economic privilege: cisgender White gays and lesbians.

The second section examines some of the central lessons from Critical Race Theory ("CRT") by looking to the Black antiracist movement's history. Specifically, I explore Crenshaw's theory of intersectionality and the historic

1. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020).

** This Note was written and accepted for publication before the Supreme Court issued rulings in a variety of decisive cases in its most recent terms, including *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) and *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). As a result, it must be acknowledged that some arguments presented in this Note's critique are no longer applicable given the Court's recent jurisprudence.

2. *Id.* at 1737–38.

3. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* Critical Race Theory: The Key Writings that Formed the Movement 357, 360 (Kimberlé Crenshaw et al. eds., 1995).

4. See *Obergefell v. Hodges*, 576 U.S. 644 (2015), which held that same-sex couples may exercise the fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

intersectional marginalization of Black queer people within the Black antiracist movement. Next, I explore CRT's theories of colorblindness and the perpetrator perspective within modern anti-discrimination law in order to provide sufficient intellectual footing to generate a fruitful CRT critique of *Bostock* and its impact on historically marginalized queer people of color.

The third section applies the historical context and key CRT concepts gleaned from the previous sections to present a grounded CRT critique of *Bostock*. Beneficial aspects of the decision include normative wins such as empowering queer and trans people to express their authentic identities in professional environments, thereby eliminating the need to "pass"[5] as heterosexual or gender normative for employment. In this sense, *Bostock* gets closer to the root of economic insecurity than previous LGBT decisions like *Obergefell*. Additionally, the opinion's textualistic logic around the meaning of "sex" has the potential to spread beyond Title VII, offering hope that interpretations of other statutes will similarly become more inclusive. However, *Bostock*'s liberatory potential is seriously limited by Gorsuch's semantic textualism and the opinion's reification of colorblindness and the perpetrator perspective within anti-discrimination law. *Bostock*'s failure to examine *why* heterosexist subordination is harmful and necessitates protection for marginalized queer people[6] hinders the opinion's usefulness for many queer and trans people of color.

I. The Mainstream LGBT Movement Paradigm

Tireless advocacy and strategic impact litigation helped the mainstream LGBT movement achieve some of the most rapid advancements in civil rights law in recent history, shifting from the Supreme Court upholding the constitutionality of sodomy statutes in its 1986 decision *Bowers v. Hardwick*[7] to the Court legalizing same-sex marriages in 2015's *Obergefell v. Hodges*[8] decision. But what were the costs of these inspiring achievements, and at whose expense? Elite White gays and lesbians have often been criticized for deploying respectability politics and assimilation as strategies to obtain acceptance within a greater heterosexist American society. Scholars like Dean Spade argue that these tactics were central to advocacy efforts that secured anti-discrimination protections, military inclusion, and marriage rights – none of which inherently provide meaningful relief to the most marginalized queer people impacted by socio-economic inequality, structural racism, the growing

5. *See* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993) (defining "passing" as a feature of racial subordination in white supremacist societies that ensures greater economic and political security for an individual, a concept that also applies to SOGI oppression under heteropatriarchal societies).

6. *See* Deepa Das Acevedo, *(Im)Mutable Race?*, 116 Nw. U. L. Rev. Online (2021–2022) (outlining alternative reasoning that reach the same conclusion in *Bostock* without relying on "immutability" and textualism, including the sex-stereotyping logic developed in *Price Waterhouse v. Hopkins*).

7. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

8. *Obergefell*, 576 U.S. 644 (2015).

criminalization of poverty, mass incarceration, and immigration enforcement.[9] Consequently, Spade asserts that gay and lesbian rights work has embraced neoliberalism, which operates through the cooption and incorporation of resistance movements' values to recast them as legitimizing tools for White supremacist, capitalist, and patriarchal agendas.[10] This Note's first section complicates the arc of progress narrative supported by the mainstream LGBT movement that begins with the Stonewall uprisings and culminates in today's supposed equality.[11] I start by exploring the normative White racialization of the mainstream LGBT movement, and then proceed to use the campaign against the military's *Don't Ask, Don't Tell* policy and the push for marriage equality as case studies in the marginalization of people of color within the mainstream LGBT movement. Understanding the failure of the mainstream LGBT movement to incorporate and protect the interests of queer people of color is key to deconstructing the racialized impact of *Bostock*.

A. *White Normativity and the Racialization of the LGBT Movement*

The queer community is comprised of individuals representing every dimension of identity, including but not limited to race, class, gender identity, religion, and ability status. However, scholars like Devon Carbado note that the normative conception of queerness for many is synonymous with Whiteness; this is by design.[12] Beginning with early gay rights organizations like the Mattachine Society, the mainstream LGBT movement largely adopted an assimilationist strategy that presented an archetypical "but for" White gay man who, "but for" his sexual orientation, is just like everybody else, or rather every other White heterosexual person.[13] This choice represents what Carbado describes as "race-based pragmatism," where White gays and lesbians shed politically "radical" or sexually "deviant" representations of queerness in order to present a gay identity characterized by respectability.[14] The crux of this pragmatism is the plea of *sameness* to mainstream America, where the victimization of gays and lesbians—particularly White gays[15]—was represented by the selection of White plaintiffs whose all-American backgrounds put a palatable face to the social, economic, and psychological costs of queer

9. Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 34 (2015).

10. *Id.*

11. Eric Stanley, *Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance*, *in* Captive Genders Trans Embodiment and the Prison Industrial Complex 3 (A. Stanley & Nat Smith, eds., 2011).

12. Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. Rev. 1467, 1472 (2000).

13. *Id.* at 1472 (2000).

14. See *Id.* at 1506.

15. *See* Kenji Yoshino, Covering, 111 Yale L.J. 769, 772 (2002). Yoshino argues that White gays are generally better positioned to successfully assimilate in more ways than either racial minorities or women as a function of having access to *passing* and *covering*. Distinct from *passing*, Yoshino posits that *covering* in the process in which the underlying identity is neither altered nor hidden, but rather it is known and downplayed.

discrimination.[16] In essence, this plea of sameness constitutes a form of White racial bonding,[17] where "but for" White gays and lesbians with close proximity to White America seek assimilation into the hegemonic in-group at the expense of queer people of color, who remain in the out-group due to racism and anti-Blackness.[18]

This White-centric strategy extended into policy and doctrinal arguments advanced by the mainstream LGBT movement. In particular, demands for "formal equality" exemplify a civil rights orientation rooted in racial and class privilege. For example, despite early intracommunity debates about which legal strategies would most effectively lead to queer liberation, the widespread elevation of marriage equality by well-resourced White gays to the forefront of queer activism reveals a preference for formal equality's ability to confer dignity over a more transformative model of challenging heteropatriarchal institutions themselves. Prominent gay rights leaders like Tom Stoddard viewed more flexible alternatives to marriage like domestic partnerships, civil unions, and prohibitions on marital status discrimination as only capable of achieving partial equality.[19] He argued that gay relationships will continue to be "accorded a subsidiary status until the day that gay couples have *exactly the same rights* as their heterosexual counterparts."[20] Though formal equality—especially in the context of dignity for queer relationships—is a powerful symbolic and organizing tool, the push for formal equality within a legal framework privileges White gays and lesbians who can more readily access the benefits of formal equality. This paradigm embodies trickle down social reform, where marginalized queer people gain little immediate relief due to racism and class stratification erecting barriers that prevent queer people of color from accessing formal equality's advantages, including marital benefits.[21] Furthermore, the formal equality secured by *Obergefell* has in fact led some states to cease offering civil unions and domestic partnerships, thus limiting available options for couples that seek some legal protections but not marriage's all-or-nothing bundle of state-regulated rights. For example, domestic partnership registration in Oregon fell by around 80 percent after the state allowed same-sex couples to marry.

In addition to demands for formal equality, the mainstream LGBT movement reified White normativity by its appropriation of Black civil rights language. Outside of relying on legal precedent like *Loving v. Virginia*,[22] which ended prohibitions on interracial marriages, many gay rights activists additionally made rhetorical comparisons between their mainstream LGBT movement

16. Carbado, *supra* note 12, at 1515.

17. *Id.* at 1501–03.

18. *Id.*

19. Carlos A. Ball, *Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage*, Rutgers L. Rev. 493, 499 (2008–2009).

20. *Id.*

21. Darren Lenard Hutchinson, *Gay Rights for Gay Whites: Race, Sexual Identity, and Equal Protection Discourse*, 85 Cornell L. Rev. 1358, 1369 (1999).

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

and the 1960's Black civil rights movement with slogans like "Gay is the new Black." This analogy was especially prominent in debates surrounding queer military exclusion, where gay advocates asserted an equivalency between race-based exclusions and those in *Don't Ask, Don't Tell*.[23] Looking past the facial similarities, these analogies had the deleterious effect of obscuring important Black civil rights history and casting racial inequality as settled history, thereby setting the stage for the mainstream LGBT movement's platform to overlook ongoing racial justice issues.[24] Furthermore, this "discourse of equivalents," or arguments that gays are *like* Blacks, falsely disaggregated race and sexuality to define queerness and Blackness as mutually exclusive.[25] Consequently, the intersectional existence of Black queer people was largely erased from the public debate over military inclusion. Whiteness was further enshrined as the unarticulated racial default for the expression of "gay identity," bolstering a gay civil rights framework that centered White masculinity.[26] This normative erasure of Black queer people was so prevalent that homophobic groups weaponized it in their campaigns against marriage equality, positioning gay culture as a wedge issue to stunt coalition building between the mainstream LGBT movement and the Black community.[27] Christian media campaigns attempting to stoke racial tensions released videos juxtaposing images of White gay men dressed in stereotypically homosexual leather and S&M garb with the overlaid audio recording of Dr. Martin Luther King's "I Have a Dream" speech, a blatant attempt to appeal to homophobia in the Black community.[28]

Additionally, White normativity impacts the ability of queer people of color to authentically connect with canonical "gay identity." As Carbado articulates with his general conceptualization of "colorblind intersectionality," Whiteness helps to produce, and is intrinsically part of, a cognizable social category—in this case, the "gay identity"—but is unarticulated as an intersectional subject position.[29] In other words, Whiteness becomes the neutral default. For instance, Black men with cultural or political identities that challenge Whiteness exist outside of the normative "gay identity" and outside the scope of assimilationist legal arguments advanced by the mainstream LGBT movement. Scholars like Russell Robinson suggest that certain nuanced considerations faced by people of color comprise cultural differences that separate queer people of color from White gay normativity, including gay men of color balancing their interest in "coming out" with the possibility of losing racially-organized community networks that support individuals facing racial

23. Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 811, 827 (2013).

24. *Id.* at 835.

25. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1485.

26. Carbado, *Colorblind Intersectionality*, *supra* note 23, at 827.

27. Kenyon Farrow, *Is Gay Marriage Anti-Black*, COLORS OF RESISTANCE ARCHIVE (Apr. 4, 2016), https://melaninandhoneydotcom.files.wordpress.com/2016/07/colours-of-resistance-archive-is-gay-marriage-anti-black.pdf.

28. Hutchinson, *supra* note 21, at 1375.

29. Carbado, *Colorblind Intersectionality*, *supra* note 23.

discrimination and violence.[30] As a result, Russell asserts that Black men are less likely to live in gay enclaves like West Hollywood or Hell's Kitchen, join gay-related organizations, identify as gay, or consume gay media.[31]

Furthermore, the racialization of gender and sexuality leads to further ostracization of queer people of color within gay spaces. For example, Carbardo writes that Black men are often perceived as either "too masculine to be authentically gay" or too effeminate to be included into the normative "gay identity," subjecting effeminate Black gay men to be "commodified and voyeuristically included in our culture but always as a sign of nonnormativity."[32] These conceptions of Black male sexuality as either hypersexualized and dangerous or infantile and effeminate trace their roots to slavery ideology, which perceived Black male sexuality as a threat White masculinity and the sanctity of White womanhood.[33] These tropes around Black masculinity persist today, impacting how both straight and gay culture perceive men who are not publicly open about their sexuality. Black men are often presumed to be "on the down low," a status that connotes a predatory desire to deceive straight women and harm gay men by secretly and pathologically having sex with men while presenting as heterosexual. In contrast, White men are presumed to be "in the closet," a more sympathetic and victimized position that implies a desire for truthful relationships with other men that is outweighed by external pressure to be straight.[34]

Finally, sexual racism, or the specific form of racial prejudice occurring in the context of sex and dating,[35] propels a racialized market of attraction that fetishizes queer people of color and limits their sexual expression. Studies suggest that gay men across different races use race as a proxy for sexual roles, often labelling someone as a "top" or a "bottom" based on racialized sexual stereotypes.[36] Black gay men are routinely expected to perform the penetrative "top" role often associated with aggression and masculinity, whereas Asian gay men are often racialized as the receptive "bottom" role commonly associated with passive femininity. In contrast, White normativity grants White gay men greater agency to assert the role of their choice—top, bottom, or "versatile"—without racial stereotypes prescribing their sexual expression.[37] Along with racialized sexual performance expectations, sexual racism also manifests in explicit racially motivated sexual ostracization. For example, some Asian men have noted that they often experience either fetishization or general disinterest

30. Russell Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Calif. L. Rev. 1309, 1373 (2011).

31. *Id.* at 1376.

32. Carbado, *Colorblind Intersectionality*, *supra* note 23, at 832–33.

33. *Id.* at 830

34. *Id.* at 832–33.

35. Russell Robinson & David Frost, *LGBT Equality and Sexual Racism*, 86 Fordham L. Rev. 2739, 2742 (2017–2018.

36. *Id.* at 2745.

37. *Id.*

in gay spaces.[38] Sexual racism is yet another factor that gatekeeps the canonical and racialized "gay identity" advanced by the mainstream LGBT movement, contributing to the erasure of queer people of color.

B. *Don't Say "Racism" Around Don't Ask, Don't Tell*

The mainstream LGBT movement's focus on the repeal of *Don't Ask, Don't Tell* is a poignant case study for the movement's assimilationist strategy rooted in White normativity. 1993's *Don't Ask, Don't Tell* policy, or Defense Directive 1304.26, excluded "out" gays and lesbians from military service. It was issued by the Clinton administration as a compromise after its attempt to remove an existing homosexual military exclusion policy was met with strong resistance from military and Congressional leaders.[39] *Don't Ask, Don't Tell* did little to eradicate homophobia or notions of gay inferiority from the military; instead, it led to at least 12,500 service members—many of whom had distinguished records and specialized expertise—to be discharged.[40] The policy undoubtably inflicted harm to gays and lesbians, however, the mainstream LGBT movement's prioritization of acceptance within the military—a state institution with a notoriously White heterosexist culture and intimate ties to the neoliberal military-industrial complex—over more pressing issues for marginalized queer people of color like housing and employment discrimination implicates the movement's White normativity. The movement's reliance on assimilation into heteronormativity and traditional forms of masculinity further concretized Whiteness into the normative "gay identity" that the movement advanced.[41] Military manhood's historical connection to racism, sexism, and heterosexism, in addition to the military's influence on dominant social constructions of American masculinity,[42] positions the goal of acceptance into the military as a powerful symbolic intervention that most benefits "but for" White gays with the closest proximity to military heteronormativity.

Additionally, the mainstream movement's reliance on ideal White plaintiffs to represent the harms of *Don't Ask, Don't Tell* reifies White normativity. The story of Perry Watkins, the first openly gay (and Black) serviceman to challenge the military's homophobic discriminatory policies,[43] highlights the strategic decision by movement leaders to design the repeal campaign around portraying victims as respectable White gays. According to Watkins, movement leaders never solicited his advice, invited him to participate in their legal or organizing efforts, or highlighted his inspirational story to advance pro-gay

38. *Id.* at 2747

39. *The Damage of Don't Ask, Don't Tell*, N.Y. Times (Oct. 3, 2009), https://www.nytimes.com/2009/10/04/opinion/04sun2.html.

40. *Id.*

41. Carbado, *Colorblind Intersectionality*, *supra* note 23, at 836

42. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1491.

43. David W. Dunlap, *Perry Watkins, 48, Gay Sergeant Won Court Battle With Army*, N.Y. Times (Mar. 21, 1996), https://www.nytimes.com/1996/03/21/nyregion/perry-watkins-48-gay-sergeant-won-court-battle-with-army.html.

rights discourse.[44] Prominent gay leaders like Tom Stoddard, the White gay lawyer who directed the Campaign for Military Service, justified the omission by citing a "public relations problem" with Watkins' counter-culture image stemming from his nose ring and participation in drag performance art. However, scholars like Carbado argue that the real public relations problem was likely Watkins' Blackness.[45] If movement leaders were committed to uplifting Watkins' remarkable story to humanize the injustices of the military's discrimination, they could have made Watkins' public image more palatable to the heteronormative American public by simply removing his nose ring, concealing his connection to drag, or dressing him in a suit. In this regard, Carbado notes that "closeting Watkins' identity provided gay rights activists with the material space to present, and the discursive space to articulate, gay as white."[46] The movement's White victimization strategy is even more evident in light of the repeal campaign failing to present Black women as primary victims of the military's discrimination despite Black women being discharged from the Marine Corps for homosexuality at twice the rate of White men.[47]

In addition to centering White plaintiffs, the mainstream LGBT movement deployed equivalency arguments in the military debate that further marginalized Black queer people. As noted earlier, arguments comparing language used in the military's racial segregationist policies and the exclusionary language in *Don't Ask, Don't Tell* flattened the distinctive contours of racism and homophobia to obscure the different discriminatory logics. A powerful comparison exists at first glance in the government's use of the military necessity rationale to exclude Blackness and homosexuality from the ranks, both of which were argued to threaten military discipline, organization, morale, and readiness.[48] However, a critical examination of the nuances of anti-Blackness and homophobia reveals the fallibility of substituting the world "homosexual" for "Negro" in segregationist military policies.[49] Among other things, homosexuality was claimed to threaten heterosexual military manhood by the hypersexual "gay gaze" and gay bodies tempting immoral sexual conduct, whereas Blackness and Black bodies threatened to contaminate the military's prestige and racial purity as a function of Black inferiority.[50] The military's use of segregationist logic, advanced in *Plessy v. Ferguson*[51] and further entrenched during Jim Crow, has a deep history of Black subordination that deserves careful recognition. Despite the existence of basic linguistic similarities, the

44. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1506.

45. *Id.* at 1510.

46. *Id.* at 1512.

47. *See* Sarah Schulman, My American History: Lesbian and Gay Life During the Reagan/Bush Years 269 (1994).

48. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1487.

49. *See* H.G. Reza, *Blacks' Battle in Military Likened to Gays'*, L.A. Times (June 14, 1993, 12:00 AM), https://www.latimes.com/archives/la-xpm-1993–06–14-mn-3035-story.html.

50. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1492.

51. *See* Plessy *v. Ferguson*, 163 U.S. 537 (1896).

mainstream LGBT movement's equivalency arguments lacked an appreciation for the history of violently enforced racial hierarchy unique to Black people. As Carbado articulates, the mainstream LGBT movement advanced equivalency arguments wherein "Blackness is relevant . . . only to the extent that it supports a narrow conception of gay rights."[52] Consequently, the intersectional histories and experiences of Black queer people were a blind spot in theories of liberation springing from the mainstream movement led by White gays.

C. *Wed to White Privilege: The Marriage Equality Critique*

Marriage equality, the twin to military inclusion in the early gay rights platform, offers further insight into the mainstream LGBT movement's assimilationist strategy. The build-up to the groundbreaking *Obergefell* decision in 2015 was a period marked by intense intracommunity debate over competing visions for liberation. Advocates of marriage equality eventually won, in part due to developments which signaled to skeptics that marriage equality was not a naïvely unrealistic goal.[53] For example, in 1993 the Supreme Court of Hawai'i struck down same-sex marriage prohibitions in the pivotal *Baehr v. Lewin* decision.[54] In 2003, the U.S. Supreme Court declared sodomy statutes unconstitutional in *Lawrence v. Texas*,[55] with Justice Kennedy's majority opinion notably including the language "intimate conduct with another person . . . can be but one element in a personal bond that is more enduring."[56] Almost immediately after, states like Massachusetts began striking down marriage prohibitions[57] while others outright legalized same-sex marriage via state legislation.

These historic developments set the stage for movement leaders to elevate marriage equality to the forefront of the national platform. Proponents like Tom Stoddard argued that same-sex marriage conferred practical rights and benefits that the government exclusively offers married couples, including spousal privilege, citizenship, insurance benefits, social security benefits, and tax liability reductions.[58] Alongside assertions that marriage unlocks a wide array of economic advantages, marriage equality proponents argued that same-sex marriage could enrich the normative *status* of gays and lesbians. They reasoned that formal recognition by the institution of marriage, a "keystone to our social order"[59] as Kennedy later wrote in *Obergefell*, could improve the dignity of queer people by eliminating their "othered," outsider status from traditional American social institutions.

52. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1498.
53. Ball, *supra* note 19, at 499
54. *See* Baehr v. Lewin, 74 Haw. 530 (1993).
55. Lawrence v. Texas, 539 U.S. 558 (2003).
56. *Id.* at 567.
57. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
58. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry, in* We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics 753 (Mark Blasius & Shane Phelan, eds. 1997).
59. Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

Despite these salient arguments for marriage equality, more marginalized queer people of color and gender nonconforming individuals were deeply critical of the movement's focus on marriage. On a normative level, critics raised concerns that marriage equality would incentivize the gay rights movement—led by affluent White gays and lesbians—to mimic heterosexual marriage and intimacy dynamics instead of committing to more liberatory politics around sexuality.[60] Critics argued that gaining access to marriage required queer people to water down the radical potential of queerness to demonstrate their assimilability into patriarchal norms around heterosexual marriage, a notable sacrifice given the social implications of marriage's legal origins in coverture.[61] Scholars like Katherine Franke argue that marriage laws enshrine gender inequities and sex stereotyping, including, for example, mandatory spousal support rules that govern the distribution of assets upon divorce being designed to account for status quo structural gender inequality.[62]

Other critics point to the fixation on the *relationship* component in marriage equality—the core of the "personal *bond* that is more enduring" language in *Obergefell*[63]—and how it sanitizes queer sex to make it more palatable to heteronormativity.[64] The mainstream LGBT movement aimed to portray gay men as domesticated; assimilable people who subscribed to heteronormative ideals around marital relationships like exclusivity, fidelity, longevity, and privacy. This positioning stood oppositional to more subversive and queer ideals around sex, including non-procreative sex, eroticism, promiscuity, temporality, public sex, and political sexual expression.[65] Libby Adler posits that modeling heteropatriarchal domesticity reinforced the mainstream LGBT movement's acceptance of heterosexist beliefs around social citizenship as characterized by full-time wage work in the public sphere, and traditional marriage and family life located separately in the private sphere.[66] Rather than blazing a path to sexual liberation where expressions of queerness can exist in the political public sphere, marriage equality hides more transformative aspects of queerness by constructing a familiar "gay identity" that fits within existing institutions and relegates sexuality to the private sphere.

Finally, critics argue that the movement's prioritization of marriage equality highlights class and racial privilege. The largest beneficiaries of same-sex marriage were affluent White gays and lesbians, a predictable outcome

60. Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum L. Rev. 1399, 1410 (2004).

61. *Id.*

62. Katherine Franke, *What Marriage Equality Teaches Us About Gender and Sex*, *in* Wedlocked: The Perils of Marriage Equality 207, 215 (Ann Pellegrini et al., eds. 2015).

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

64. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

65. Franke, *What Marriage Equality Teaches Us About Gender and Sex, supra* note 62.

66. Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 L. & Contemp. Probs. 37, 47 (2009).

given that data demonstrated heterosexual people of color marry at far lower rates than White heterosexuals.[67] As Paula Ettelbrick stated in her retort to marriage equality proponents, "[T]hose closer to the norm or to power in this country are more likely to see marriage as a principle of freedom or equality. Those who are more acceptable to the mainstream because of race, gender, and economic status are more likely to want the right to marry."[68] Given racialized class inequality in America, affluent White gays and lesbians can benefit from high-paying jobs and financial security that often remain inaccessible to more marginalized queer people, such as women of color who disproportionately work low-paying jobs with no healthcare benefits.[69] Same-sex marriage does little to alleviate the racialized impact of American society allocating benefits based on employment status and class. Furthermore, critics argued that marriage equality does not offer any protection against racialized state violence; in fact, marriage as an institution exposes queer people to heightened state regulation and supervision in exchange for marital rights. This trade off deserves further attention given the complicated history of state supervision of Black bodies. For example, Katherine Franke notes how the enforcement of marriage laws was used as a tool to police newly freed slaves after the enactment of the Thirteenth Amendment, constituting a "new way for criminal law to insinuate itself into freed people's lives."[70] Given the reality of racialized economic inequality and state violence in America, the mainstream LGBT movement's decision to center marriage equality signals its commitment to assimilation and White normativity.

D. *Slaying the Single Oppression Model*

Gay activists' adoption of White normativity and assimilationist policies runs the risk of centering all of the movement's politics solely around sexuality, thereby missing out on the power of incorporating intersectionality (discussed in Part II) and other minority perspectives.[71] As Cathy Cohen articulates in her "single oppression model," this limited focus creates binary conceptions around sexuality and power that deeply limit the mainstream LGBT movement's ability to harness the transformative potential of queer politics.[72] Cohen argues that queer people of color are much broader in their understanding of liberatory politics as a function of not being represented in the political orientation of the mainstream LGBT movement.[73] Without nuanced understandings of racial hierarchy and power, the mainstream movement risks continuing to

67. Hutchinson, *supra* note 21, at 1371.

68. Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation*?, 6 Out/Look 14 (1989).

69. Ball, *supra* note 19, at 502.

70. Franke, *What Marriage Equality Teaches Us About Gender and Sex, supra* note 62, at 208.

71. Cathy Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: A J. Lesbian & Gay Rts. 437, 440 (1997).

72. *Id.* at 447.

73. *Id.* at 448.

advance policies with unintentionally harmful impacts on the most marginalized people in the queer community. For example, calls for the proliferation of LGBTQ+ hate crime enhancement laws without any critical examination of abolitionist critiques on the expansion of policing capabilities or investment in the criminal justice system's infrastructure ignores such policy's repercussions for many transgender and queer people of color. Dean Spade argues that because "trans people and people of color are frequent targets of criminal punishment systems and face severe violence and the hands of police and in prisons every day, investment in such a system for solving safety issues actually stands to increase harm and violence."[74]

In addition to creating policy blind spots, the erasure of queer people of color in the mainstream LGBT movement's single oppression model also has doctrinal ramifications. For example, the movement's decision to model "gay identity" around "but for" White gay men has already been weaponized to advance arguments that homosexuals do not constitute a class worthy of heightened judicial scrutiny in Fourteenth Amendment Equal Protection jurisprudence.[75] Specifically, the stereotype of gay people predominantly being wealthy White men with enormous cultural and political influence has led some courts, such as the Ninth Circuit in *High Tech Gays v. Defense Industrial Security Clearing Office*[76] and Justice Scalia in his *Romer v. Evans*[77] dissent, to characterize homosexuals as a disproportionately powerful minority group underserving of any "special rights" conferred by heightened protections given to "politically unpopular groups" under the *Frontiero* analysis.[78] Thus, the benefits of incorporating intersectional identities and policy agendas into the mainstream LGBT movement go beyond basic calls for representation: they have material implications on the application of existing civil rights doctrinal frameworks.

II. Critical Race Theory & the Racial Justice Paradigm

Several key concepts from Critical Race Theory ("CRT") are essential to my eventual presentation of a CRT critique of *Bostock* in Part III. Given the opinion's structure and Justice Gorsuch's theory of textualist judicial interpretation, the most relevant CRT teachings discussed in this section include intersectionality, colorblindness, and the dominant perpetrator perspective within anti-discrimination law.

A. *What's the Tea with Intersectionality?*

Kimberlé Crenshaw's theory of intersectionality is an important intervention into how political movements, anti-discrimination law, and culture

74. Spade, *supra* note 9, at 36.
75. Hutchinson, *supra* note 21, at 1372–73.
76. *See* High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 569 (9th Cir. 1990).
77. Romer v. Evans, 517 U.S. 620, 652 (1996).
78. Hutchinson, *supra* note 21, at 1372–73.

more broadly view people who inhabit the nexus of multiple groups with different histories of subordination. Crenshaw's influential theory arose out of the intersection of Black womanhood and originally articulated the conflicting political agendas of male-dominated Black activism and White-dominated feminist activism.[79] In particular, Crenshaw describes statements from Black men claiming that feminist concerns are divisive and unproductive in the context of anti-racism, leading those men to argue against Black women speaking out against domestic violence. Among other things, their arguments responded to the high risk of violent police interactions during domestic violence interventions and widespread American stereotypes of Black criminality.[80] Crenshaw wrote that "the racial context in which Black women find themselves makes the creation of a political consciousness that is oppositional to Black men difficult."[81] On the other hand, Black women are also ostracized by the mainstream White feminist political orientation. Sticking to domestic violence, White feminism is premised on the assumption that domestic violence is an issue primarily experienced by racial minorities and poor people, evidenced by White women making statements like "I wasn't supposed to be a battered wife."[82] In this regard, intersectionality describes the competing interests that members of different subordinated groups must weigh when supporting the public political orientations of each identity group while also challenging intracommunity power hierarchies. This "political dilemma" that Black women face because of feminism's failure to critique race, and anti-racism's failure to critique patriarchy, results in a collective failure to articulate the full dimensions of either racism or sexism.[83]

Understanding how anti-racist politics similarly erased queer people of color is crucial for the *Bostock* critique. It must be stressed that Blackness is not inherently oppositional to queerness, nor do I argue that Black politics are inherently any more homophobic or transphobic than those of other racial groups. Instead, this paper relies on the rich scholarship investigating the intersection of queerness and Blackness to show how anti-racist political projects have failed to incorporate intersectional analysis throughout history and isolated racism from heterosexism. Examining the arguments put forth by some Black anti-racist advocates against analogizing between race and sexual orientation helps highlight how, as Carbado describes, "homosexuality is obscured, denied, or pathologized in some black antiracist discourses."[84]

The first of these arguments was that homosexuality is "unblack," a notion rooted in Black respectability politics which dictate, as Cohen describes, that

79. Crenshaw, *supra* note 3, at 360.

80. *Id.* at 362.

81. 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, 200 (1989).

82. Crenshaw, *supra* note 3, at 363.

83. *Id.* at 360.

84. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1471.

"attempts at incorporation, integration, and assimilation on the part of black people generally include some degree of proving ourselves to be 'just as nice as those white folks.'" [85] In response to White supremacist claims of Black cultural inferiority – for example the narrative of Black familial dysfunctionality proposed by former Assistant Secretary of Labor Daniel Moynihan in his report *The Negro Family: The Case for National Action*[86] – many Black people felt the need to demonstrate their adherence to heteronormativity, traditional religious and family values, and cultural conceptions of positive Black masculinity.[87] Because of the normative association of Blackness with straight Black men, scholars like Russell Robinson argue that gay Black men were often perceived as failing to live up to the "Black head of household" role expected of them, similar to the presumed moral failings of drug users or Black men in interracial marriages.[88] As a result, gays were seen by some as being anti-Black. This erasure of Black queerness occurred in the broader Civil Rights movement. For instance, some Black leaders supported Bayard Rustin's public disassociation from his monumental orchestration of the 1963 March on Washington because they perceived Rustin's homosexuality to be a political liability.[89] This erasure created a political dilemma for Black queer people, where assimilation into White gay norms risked alienating Black queer people from the Black community.[90] Their "(in)authenticity as a black person," Carbado writes, was "linked to, among other things, one's (homo)sexual identity."[91] The resulting intersectional marginalization of Black queer people continues to persist. For example, the racialization of "gay identity" as White led some Black leaders to ask questions like "Where did these [gay] people drink water during the days of segregation?" throughout the debates over *Don't Ask, Don't Tell*, contributing to the erasure of Black queer people from conceptions of Blackness.[92] As Carbardo writes,

> being out as a black gay or lesbian in the black community is race negating. To the extent that it is not, black gays and lesbians are required to prioritize or fragment aspects of their identity. They have to decide whether, first and foremost, they want to be black *or* gay.[93]

Another primary argument that ostracized Black queer people is that race is biologically determined, whereas homosexuality—unlike race—is

85. Cathy J. Cohen, *Contested Membership: Black Gay Identities and the Politics of AIDS*, *in* Queer Theory/Sociology 362, 376 (Steven Sidman, ed. 1996).

86. *See* Daniel Moynihan, Off. Pol'y Plan. & Rsch.: U.S. Dept Lab., The Negro Family: The Case for National Action (1965).

87. Carbado, *Black Rights, Gay Rights, Civil Rights*, *supra* note 12, at 1477.

88. Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. Rev. 1809, 1821 (2007).

89. Henry Louis Gates, Jr., *Blacklash?*, New Yorker (May 17, 1993), https://www.newyorker.com/magazine/1993/05/17/blacklash.

90. Robinson, *supra* note 30, at 1370.

91. Carbado, *supra* note 12, at 1477.

92. *Id.* at 1480.

93. *Id.* at 1478.

freely chosen. For example, a prominent Black military sociologist said the following in support of *Don't Ask, Don't Tell*:

> Comparing homosexuals to blacks is comparing a lifestyle with a race: an achieved characteristic with one that is ascribed; a choice in expressed lifestyle with one that is by and large not a choice. . . . Certainly there is more choice about one's sexuality than about one's race.[94]

Former Secretary of State Colin Powell echoed the same race/identity versus sexuality/behavior dichotomy when attempting to distinguish the military's history of racial segregation from *Don't Ask, Don't Tell*, writing "[s]kin color is a benign, nonbehavioral characteristic, while sexual orientation is perhaps the most profound of human behavioral characteristics."[95]

Implicit in this dichotomy argument is a CRT concept offered by Ian Haney López: the social construction of race. Haney López writes that "race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions."[96] In this regard, racial identity is not completely immutable and is instead subject to some fluidity, for example the shifting legal definitions of Whiteness in *Ozawa*[97] and *Thind,*[98] or how some people can choose to "pass" in certain social contexts. Haney López describes choices regarding how to racially present occurring on both "mundane and epic levels, for example in terms of what to wear or when to fight; they are made by individuals and groups, such as people deciding to pass or movements deciding to protest; and the effects are often minor though sometimes profound, for instance, slightly altering a person's affiliation or radically remaking a community's identity."[99]

Consequently, greater nuance is needed for "mutability" arguments which propose that heterosexism cannot fit within the existing civil rights framework because the subordination of queer people is less severe as a result of them choosing their oppressed status – in contrast to racial groups – and their ability to conceal their subordinated identity by "passing." This logic depends upon the invisibility of queer people of color.[100] Furthermore, these arguments presuppose that queer people can "pass" in heterosexist environments, a proposition that ignores the realities of many queer, transgender, and non-binary people who cannot "pass" under common sex stereotypes. Important differences exist in the operation of homophobia and racism, but the blanket atomization of racism and heterosexism marginalizes queer people of color at the intersection.

94. *Id.* at 1481.

95. *See* Yoshino, *supra* note 15, at 769.

96. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 7 (1994).

97. *See* Ozawa v. United States, 260 U.S. 178 (1922).

98. *See* United States v. Thind, 261 U.S. 204 (1923).

99. Haney Lopez, *supra* note 96, at 47.

100. Hutchinson, *supra* note 21, at 1377.

The final key aspect of intersectionality for the purposes of my *Bostock* critique are calls for its theoretical expansion to become explicitly inclusive of sexual orientation and gender identity. Hutchinson's intervention of "multidimensionality" responds to such calls, because he asserts that a fuller encapsulation of the "instability of both privilege and subordination" within movements is achieved by further "examining a variety of sources of subordination and extending the notion of complex oppression to all marginalized persons."[101] Incorporating more identity axes helps safeguard against the repeated exclusion of marginalized populations, such as queer people of color, in a more rudimentary intersectional analysis. Complicating intersectional analysis also begets a deeper comprehension of how heterosexism, White supremacy, and capitalism interact. For example, Hutchinson articulates that

> if heterosexual status, typically a privileged category, has not shielded people of color from a legacy of sexualized racism and has, in fact, helped to justify and facilitate their domination, then homosexual identity and practice, which are socially stigmatized, can also serve (perhaps more potently) as instruments of racial domination.[102]

B. *The Corrosive Rise of Colorblindness*

CRT's conceptualization of colorblindness is also highly relevant for the *Bostock* critique. The spirit of colorblindness is reflected by Justice Scalia's statement, "In the eyes of government, we are just one race here. It is American."[103] As Yoshino notes, Scalia's statement highlights the rhetorical foundation used to justify the end of race-conscious remedies by public actors, characterized by the "idea that we should set aside the racial identifications that divide us—black, white, Asian, Latino—and embrace the Americanness that unites us all."[104] This colorblind framework reduces race and complex legacies of racial subjugation to a socially insignificant biological attribute, similar to height or eye color, and thus renders race presumptively irrelevant under the law."[105] Neil Gotanda describes this phenomenon, where colorblindness:

> . . . limits the concept of racism to those individuals who maintain irrational personal prejudices against people of color, making racism irrational because race is seen as unconnected from social reality, a concept that describes nothing more than a person's physical appearance . . . These extremely individualized views of racism exclude an understanding of the fact that race has institutional or structural dimensions beyond the formal racial classification.[106]

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101. *Id.* at 1367.

102. *Id.*

103. Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

104. Yoshino, *supra* note 15, at 771.

105. Cheryl I. Harris, Critical Race Studies: An Introduction, 49 UCLA L. Rev. 1215, 1229 (2002).

106. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, *in* Critical Race Theory: The Key Writings that Formed the Movement 257, 265 (Kimberlé Crenshaw et al.

Implicit in this framing is the myth of a new American racial order after *Brown v. Board*[107] struck down school segregation: one in which racism is plausibly deniable."[108] Colorblindness operates in this post-racial fantasy and adopts the more limited anti-classification interpretation of *Brown* – the formal equality interpretation – instead of the more transformative anti-subordination interpretation that understands *Brown* to permit policies that advance racial equity. The anti-classification model is encapsulated by Chief Justice Roberts's remarkable statement, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[109] In contrast, Justice Sotomayor's powerful dissent in *Schuette v. Coalition to Defend Affirmative Action* outlines the contours of the anti-subordination approach.

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.[110]

Because colorblindness inhibits the law's ability to distinguish between racial groups, even for remedial purposes, colorblindness stunts the elimination of White supremacy because the law cannot recognize racial subordination in order to correct it.[111] As a result, a doctrinal tension arises between policies that advance equality as a *process* and those seeking equality as a *result*;[112] in other words, colorblindness creates a conflict between race-conscious policies designed to achieve *formal equality* instead of *equity*. The former undercuts a policy's reparative potential because colorblindness prevents the law from addressing correlations between racial minority groups and supposedly distinct problems."[113] Consequently, racial class hierarchies are further codified because colorblindness turns a blind eye to facially neutral racial discrimination and injury.[114] Additionally, colorblindness reinforces the myth of equal opportunity in America by characterizing any socio-economic inequality as

eds., 1995).

107. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

108. Linda Greene, *Race in the Twenty-First Century: Equality Through Law?*, *in* Critical Race Theory: The Key Writings that Formed the Movement 292, 300 (Kimberlé Crenshaw et al. eds., 1995).

109. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

110. Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 381 (2014).

111. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* Critical Race Theory: The Key Writings that Formed the Movement 103, 105 (Kimberlé Crenshaw et al. eds., 1995).

112. *Id.*

113. Gotanda, *supra* note 106, at 266.

114. Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 111, at 116.

a function of cultural inferiority, for example, by bolstering racialized tropes about Black welfare queens. This allows those with privilege to avoid "questioning the basic legitimacy of the free market" and to assert that "those who should logically be on the bottom are on the bottom."[115] This unchecked belief in equal opportunity has gained traction as the Supreme Court has increasingly adopted colorblindness, thereby treating workplace segregation practices as neutral and rejecting racial pluralism as a favorable and necessary development in the workforce.[116] Thus, the Court's embrace of colorblindness has set a trajectory of gutting the impact of Title VII of the Civil Rights Act of 1964.

C. *Preventing the Total Package: The Perpetrator Perspective*

Alan Freeman's articulation of the "perpetrator perspective" is the final relevant CRT concept for this *Bostock* critique. The perpetrator perspective defines discrimination as a set of specific actions done by a perpetrator which harm victims, largely ignoring the overall life situation of the victim class.[117] This paradigm assumes that individual actions exist outside of the broader social fabric and without historical continuity.[118] It also perceives discriminatory conduct to be aberrational, where perpetrators are outliers in an otherwise equitable and stagnant equilibrium. As a result, the perpetrator perspective's anti-discrimination legal framework is geared towards isolating blameworthy individuals who violate the collective normative commitment to equality.[119]

Freeman intervenes by offering his description of the victim perspective, an alternative paradigm rooted in the premise that racial discrimination cannot be solved until conditions associated with racism are eliminated. Freeman's victim perspective is concerned with the wholistic social existence of the individual victim and the victim class by, for example, recognizing important context around racialized housing and financial insecurity.[120] The victim perspective furthermore acknowledges the lack of individuality that victims of discrimination possess as a result of their grouping within the victim class,[121] thus challenging anti-discrimination law's pattern of individualizing discriminatory conduct and blaming aberrational bad actors instead of pervasive inequitable social conditions.

Since the passage of the Civil Rights Act of 1964, anti-discrimination law has largely adopted the perpetrator perspective. The focus on individual and aberrational culpability under this perspective supports notions of White innocence, where White people feel unfairly burdened and excluded by

115. *Id.*

116. Greene, *supra* note 108, at 294.

117. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* Critical Race Theory: The Key Writings that Formed the Movement 29, 29 (Kimberlé Crenshaw et al. eds., 1995).

118. *Id.*

119. *Id.* at 30.

120. *Id.*

121. *Id.*

race-conscious remedial policies aimed at rectifying racialized social injustices that they did not individually create. The perpetrator perspective thus supports attacks on race-conscious remedies by legitimizing the view that racism is individualized rather than systemic.[122]

Furthermore, the perpetrator perspective erects barriers to plaintiffs by requiring them to prove the perpetrator's intent before racial discrimination can even be acknowledged.[123] The evolution of the intent requirement within anti-discrimination law demonstrates this trend. Shortly after Congress passed the Civil Rights Act of 1964, the Supreme Court held in *Griggs v. Duke Power* that under Title VII, a plaintiff's showing of a racially disparate impact shifts the burden of proof to the employer to establish a business necessity for policies that act as "built in headwinds for minority groups" to create racially disparate impacts but are nevertheless unrelated to job performance.[124] *Griggs'* paradigm was closer to the victim perspective, which focuses on a policy's ultimate result and requires that any program which yields a discriminatory impact be backed by a strong business rationale.[125]

Despite this early victim-oriented decision, the Court then changed course with *Washington v. Davis*[126] which stopped recognizing disparate impact claims under the Fourteenth Amendment Equal Protection doctrine. In a major doctrinal departure from *Griggs*, *Wards Cove Packing Co. v. Antonio*[127] followed in the footsteps of *Washington v. Davis* by undermining the disparate impact theory in the Title VII context, thereby disavowing the Ninth Circuit's approval of using statistical evidence of racial inequality to establish an actionable disparate impact. The Supreme Court used formalistic logic to hold that racial could "just as likely by due to dearth of qualified nonwhite," thus declaring that statistical evidence establishing "racial imbalance" is alone insufficient.[128] The Court in *Wards Cove* also articulated that an employer's pol-icy which produces workplace segregation needs to only serve "legitimate employment goals" instead of meeting *Griggs*' elevated "business necessity" standard,[129] thereby granting greater deference to employers and increasing the difficulty for plaintiffs to successfully bring actionable Title VII workplace racial discrimination claims.

CRT scholars have noted the normative repercussions of heightened evidentiary barriers to establishing racial discrimination via legal doctrines like the discriminatory intent requirement. For example, Charles R. Lawrence III points out the false dichotomy of facially neutral actions being either (1)

122. Charles R. Lawrence III, *The Id, The Ego, and Unequal Protection Reckoning with Unconscious Racism*, *in* Critical Race Theory: The Key Writings that Formed the Movement 235, 239 (Kimberlé Crenshaw et al. eds., 1995).

123. *Id.*

124. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

125. Freeman, *supra* note 117, at 39.

126. Washington v. Davis, 426 U.S. 229 (1976).

127. Wards Cove Packing v. Atonio, 490 U.S. 642 (1989).

128. *Wards Cove*, 490 U.S. at 651.

129. *Wards Cove*, 490 U.S. at 659.

intentional and unconstitutional, or (2) unintentional and constitutional. He argues that racism does not conform to this intent dichotomy in reality, but rather that personal decisions are influenced by beliefs, stereotypes, desires, and attitudes outside the scope of cognitive intentionality.[130] His theory posits that culture transmits beliefs and preferences that are subconsciously absorbed into an individual's perception of the world.[131] Challenging the intent dichotomy, Lawrence suggests that racial discrimination could alternatively be proven by showing a connection between unconscious racism and the presence of racialized cultural symbols. This framework, or "stigma theory," better reflects *Brown's* anti-subordinationist interpretation, which prohibits actions that reinforce conceptions of racial inferiority.[132] Though stigma theory originates from the racial discrimination context, its underlying principles can be expanded to sexual orientation and gender identity. For example, in regards to bathroom bills and their contribution to the stigmatization and degradation of transgender individuals. Ian F. Haney López similarly writes that "racism is action arising out of racial common sense and enforcing racial hierarchy."[133] This racial "common sense" influences all forms of racism and describes how group interactions often normalize White supremacy and render it invisible,[134] adding to problems with upholding the discriminatory intent requirement.

Finally, the Supreme Court's use of formalistic reasoning as a tool furthering the perpetrator perspective is relevant for the *Bostock* critique. The Court often relies on formalistic and hyper technical reasoning to strategically avoid deeper analysis that might challenge the Court's view of racial discrimination as being aberrational and plausibly deniable.[135] By narrowing legal questions to limit the scope of redress for racial injustice, the Court impedes efforts to change the status quo.[136] In practice, judicial opinions under the perpetrator perspective often strategically erase important contextual descriptions of the conditions and underlying factors that led to the dispute.[137] One example of this legal formalism is "segmentation," a technique where the Court splits legal issues in order to avoid addressing difficult legal issues or topics like the internment of Japanese Americans in *Hirabayashi v. United States*.[138]

III. Deconstructing Bostock

Armed with historical context and a CRT theoretical framework, this Note will now transition to unpacking the groundbreaking 2020 Supreme

130. Lawrence III, *supra* note 122, at 239.
131. *Id.*
132. *Id.* at 244.
133. Ian F. Haney López, Racism on Trial the Chicano Fight for Justice 127 (2003).
134. *Id.*
135. Greene, *supra* note 108, at 292.
136. Greene, *supra* note 108, at 292.
137. *Id.*
138. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. Rev. 993, 944 (2004).

Court decision *Bostock v. Clayton*, which interpreted Title VII employment "sex" discrimination protections to include sexual orientation and gender identity.[139] This Note argues that CRT analysis adds important nuance to the discourse around *Bostock*'s ramifications, both positive and negative. This section first provides a brief overview of how the opinion is structured and applies Justice Gorsuch's school of textualism to ultimately include queer people within Title VII's scope. Next, the analysis explores *Bostock*'s advantages relative to gay civil rights jurisprudence up to this point. Finally, this section critiques *Bostock* using CRT concepts in order to offer an intervention that highlights the structural limitations of the newfound Title VII recognition post-*Bostock*, and amplifies intersectional insights coming from marginalized queer people of color.

A. *Traversing Gorsuch's Textualist Logic*

The Supreme Court consolidated three separate employment discrimination claims brought by two gay men and one trans woman, resulting in the *Bostock* decision, which resolved circuit disagreements over whether the meaning of "sex" discrimination in Title VII prohibits discrimination against homosexual and transgender people.[140] Writing for the majority, Justice Gorsuch answered "yes" via blunt formalistic logic that represents a potential theoretical split in textualism between those adhering to semantics, in this case Gorsuch, and those adhering to the pragmatic school of textualism articulated in Justice Kavanaugh's dissent.[141] The goal of both forms of textualism is for the judiciary to act as a "faithful agent" of Congress when determining the ordinary public meaning of a statute,[142] leading both schools to reject relying on external types of evidence like legislative history when determining the purpose of a statute.[143] However, the rival textualist schools disagree over appropriate methods for finding the ordinary meaning of a statute and how to discern between competing social and linguistic conventions.[144]

In the majority opinion, Gorsuch's semantics-oriented logic relies upon formal dictionary definitions of Title VII's key terms like "sex," as well as legal precedent for interpretations of phrases like "because of." Gorsuch concedes that legislators might not have originally anticipated that Title VII's use of "sex discrimination" would apply to homosexual and trans people, however, he nevertheless writes that "the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us

139. Bostock, 140 S. Ct.

140. Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020).

141. Sam Capparelli, Comment, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of Bostock v. Clayton County?*, 88 U. Chi. L. Rev. 1419, 1423 (2021).

142. John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 7 (2001).

143. Capparelli, *supra* note 141, at 1423.

144. *Id.* at 1429.

one answer and extratextual considerations suggest another, it's no contest."[145] With this statement, Gorsuch affirms the semantic proposal that distinct parts compositionally determine the meaning of the whole.[146] Moreover, Gorsuch asserts that relying on literal definitions found in the dictionary of the terms "sex," "discrimination," and "individual" construct a legal issue where "the answer is clear":[147] discrimination against sexual orientation and gender identity constitutes "sex" discrimination. This logic is reminiscent of that in *Baehr v. Lewin*, which stated that same-sex discrimination is on its face a form of sex discrimination under the Hawaiian constitution, leading to a similarly beneficial outcome for queer people.

In contrast, Justice Kavanaugh's dissent denounces Gorsuch's approach and argues that semantic textualism's literal interpretation does not comport with the ordinary meaning of the phrase as a whole because it fails to "account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language."[148] To Kavanaugh and pragmatic textualists, the ordinary public meaning is the "conventional meaning of the utterance" understood by "ordinary but linguistically proficient speakers at the time of the utterance."[149] Consequently, Kavanaugh asserts that the "strung-together definitions of the individual words in the phrase" that Gorsuch relies upon causes the Court to "ignore or gloss over" the plain meaning of the text of the statute.[150] For textualists like Kavanaugh, this misreading of the text is a fatal flaw that constitutes impermissible judicial overreach that violates the Constitution's separation of powers.[151] As Kavanaugh writes, "A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability."[152]After condemning Gorsuch's semantic application, Kavanaugh then offers a pragmatic textualist interpretation that relies on common parlance and common legal usage of the phrase as a whole.[153] Kavanaugh asserts that common parlance does not support the majority's holding because the plaintiffs themselves would "probably not tell their friends that they were fired because of their sex." In other words, Bostock and Zarda were fired because they are gay, not because they are men.[154]

Grappling with these competing visions of textualism, in particular Gorsuch's semantic approach, is key to understanding *Bostock's* potential

145. Bostock, 140 S. Ct. at 1737 (2020).

146. Korta Kepa & John Perry, *Pragmatics*, in Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2020), https://plato.stanford.edu/entries/pragmatics.

147. Bostock, 140 S. Ct. at 1737.

148. Bostock, 140 S. Ct. at 1826 (Kavanaugh, J., dissenting).

149. Ash McMurray, *Semantic Originalism, Moral Kinds, and the Meaning of the Constitution*, 2018 BYU L. Rev. 695, 711 (2018).

150. Bostock, 140 S. Ct. at 1827 (Kavanaugh, J., dissenting).

151. *Id.* at 1822 (Kavanaugh, J., dissenting).

152. *Id.* at 1828 (Kavanaugh, J., dissenting).

153. Capparelli, *supra* note 141, at 1439.

154. Bostock, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

impact on the Court's interpretation of Title VII's proclamation that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race*, color, religion, *sex*, or national origin [emphasis added]."[155] Relying on "roughly contemporary dictionaries," Gorsuch states that "sex" refers to the "status as either male or female [as] determined by reproductive biology."[156] Importantly, Gorsuch concretizes notions of biological sex instead of recognizing broader—and perhaps "queerer"—understandings of "sex" advanced by the plaintiffs that encompass gender roles and sex stereotyping and would consequently complicate traditional conceptions of biological sex fully determining one's status as a "man" or a "woman."[157]

Repeating the process with the term "discrimination," Gorsuch asserts that "discrimination" constitutes "a *difference in treatment* or favor (of one as compared with others) [emphasis added]."[158] He then goes on to write that "'discriminate against' a person describes treating an *individual* person worse than others who are similarly situated [emphasis added]."[159] As later discussed in the CRT critique, this literal interpretation relying on Webster's 1954 New International Dictionary seems to indicate a prohibition on any facially differential treatment. Finally, Gorsuch states that the focus of the statute "should be on individuals, not groups . . . the meaning of 'individual' was as uncontroversial in 1964 as it is today: 'A particular being as distinguished from a class, species, or collection.'"[160]

Combining the dictionary's definitions of "sex" and "discrimination," Gorsuch goes on to write:

> . . . homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.[161]

The final key component of Gorsuch's opinion for the purposes of this CRT critique is his treatment of Title VII's phrase "because of." Relying on case precedent, Gorsuch clarifies that the ordinary meaning of Title VII's phrase "because of" should be interpreted as "by reason of" or "on account of."[162] Gorsuch asserts that this interpretation incorporates the "'simple' and

155. 42 U.S.C. § 2000e-2(a)(1).

156. Bostock, 140 S. Ct. at 1739.

157. Jeremiah A. Ho, *Queering Bostock*, Am. U. J. Gender Soc. Pol'y & L. 283, 347 (2021).

158. *Bostock*, 140 S. Ct. at 1740.

159. *Id.*

160. *Id.*

161. *Id.* at 1742.

162. *Bostock*, 140 S. Ct. at 1739.

'traditional standard' of but-for causation,"[163] a test that is considered "sweeping" and permits the presence of multiple but-for-causes.[164] Gorsuch then reasons, "So long as the plaintiff's sex was *one* but-for cause of that decision, that is enough to trigger the law."[165] This simple and expansive standard accomplishes the incorporation of sex, sexual orientation, and gender identity—and their nuanced conceptual differences—into actionable but-for causation.[166]

B. Bostock*'s Advancements: The CRT Paradigm*

In the wake of *Bostock*, many surprised pro-gay commentators characterized Gorsuch's opinion as a "simple and profound victory for L.G.B.T. civil rights."[167] The opinion does in fact have strong positive qualities extending beyond the mainstream movement's single oppression paradigm. For example, *Bostock's* workplace protections directly address material economic conditions for many queer people rather than merely symbolically elevating normative conceptions of dignity and assimilation, making *Bostock* a more intersectionally inclusive win than securing marriage equality or ending *Don't Ask, Don't Tell*. Access to employment via combatting discrimination gets closer to the root of economic insecurity—a systemic problem stemming from the intersection of capitalism, heterosexism, and racism—that queer and trans people of color often face. Dean Spade writes that economic insecurity and employment discrimination are some of the central factors that lead trans people to participate in criminalized survival work, such as sex work. Survival work often leads to higher levels of criminalization and police surveillance of trans bodies.[168] *Bostock*'s potential to reduce the prevalence of employment discrimination thus has a tangible beneficial impact, particularly for queer people of color and transgender individuals. Moreover, the benefits of *Bostock*'s heightened protections can be accessed without enhancing state supervision of queer relationships, as was the case with marriage equality, or assimilating into neoliberal state institutions like the military, as was the case with ending *Don't Ask, Don't Tell*.

Bostock also has the normative potential to increase the self-worth of queer and trans people, particularly those experiencing heightened violence and marginalization, like Black trans women. *Bostock*'s formal incorporation of queer people into the workforce signals a sense of belonging, and not just to normatively White institutions like the military. Rather, the opinion signals that queer people of color have a place in the general American social fabric. Formally recognizing employment protections for queer people, specifically for more marginalized trans women of color, can help counter public

163. Capparelli, *supra* note 141, at 1435.

164. *Bostock*, 140 S. Ct. at 1739.

165. *Id.*

166. Ho, *supra* note 157, at 367.

167. Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. Times (Jun. 15, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html.

168. Dean Spade, *Keynote Address: Trans Law and Politics on a Neoliberal Landscape*, 18 Temp. Pol. & C.R. L. Rev. 353, 358 (2009).

perceptions that queer people are not entitled to the same human dignity and respect as others.[169] This is especially important given the tendency for groups to be vulnerable to "private" violence when public perceptions dictate that they are not entitled to the same human dignity and respect as others.[170] On the individual scale, queer people operating in the intersection of race, gender hierarchy, and capitalism—such as Black trans women participating in survival sex work—may view themselves and one another as objectified commodities within a stigmatized marketplace, rather than holistic humans worthy of desire and dignity.[171] Therefore, *Bostock*'s potential to create professional workplace environments for queer and trans people to live openly is deeply meaningful on a normative level.

In addition, Gorsuch's assertion that the "because of" phrase in Title VII should be interpreted in line with the expansive "but-for" causation test leads courts closer to embracing intersectionality. As some feminist scholars have already noted, Gorsuch clarifying that "because of"—or rather "but for"—goes beyond one sole cause may help support intersectional claims in which plaintiffs allege that harassment or an adverse employment action occurred because of two characteristics.[172] If a plaintiff proves that one trait is protected and is the "but for" cause of the adverse action, they should theoretically prevail.[173] Though lower courts are still processing the implications of *Bostock*, recent cases like *Frappied v Affinity Gaming Black Hawk*[174] are promising. The Tenth Circuit in *Frappied* held that Title VII prohibits sex-plus discrimination, even when the "plus" (age) is not protected, prompting the Tenth Circuit to become the first federal appellate court to acknowledge a sex-plus-age Title VII claim.[175] The court also followed EEOC guidance to assert that Title VII prohibits discrimination at the intersection of two bases (sex and age), [176] thereby elevating the concept of intersectional discrimination claims.

Despite textualism's popularity with conservatives, it can also yield progressive outcomes, such as the recent *McGirt v. Oklahoma* decision in which the Court held that the disputed land, which was recognized in an 1833 Treaty as belonging to the Creek Nation, remained a Creek reservation and subject to tribal criminal jurisdiction.[177] Furthermore, Gorsuch's use of semantic textualism gives *Bostoc*k's logic the advantage of being easily transmissible to other areas of the law. This logic has the potential to expand protections

169. Harris, *Theorizing Class, Gender, and the Law*, *supra* note 66, at 54.

170. *Id.*

171. *Id.*

172. *See* Ann C. McGinley et al., *Feminist Perspectives on Bostock v. Clayton County*, 53 Conn. L. Rev. Online 1, 17 (2020).

173. *Id.*

174. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–46 (10th Cit. 2020).

175. Andrea Giampetro-Meyer et al., *How Antiracist Lawyers Can Produce Power and Policy Change*, 24 J. Gender Race & Just. 237, 263 (2021).

176. *Id.*

177. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

for sexual orientation and gender identity into a variety of other contexts and thus may help address collective conditions for queer people, akin to the victim perspective.

Gorsuch's transmissible textualist logic can arguably fit within the constitutional Equal Protection framework, which could amplify calls for discrimination on the basis of sexual orientation or gender identity to receive heightened judicial scrutiny. For example, the Court of Appeals of North Carolina recently held, citing *Bostock*, that "equal protection challenges of a law based upon LGBTQ+ status are also challenges based upon 'sex' or gender and, therefore, require at least 'intermediate scrutiny.'"[178] Additionally, some note that *Bostock* could have ramifications on voting rights.[179] Given the linguistic similarities between Title VII and the Nineteenth Amendment, *Bostock*'s reading of "sex" could influence modern interpretations of the Nineteenth Amendment to extend protections to transgender and gender-nonconforming voters.[180] Furthermore, because the Nineteenth Amendment is treated as an analogue to the Fifteenth Amendment, voting regulations that uniquely burden transgender and gender-nonconforming voters—such as restrictive voter ID laws that require congruence between one's gender identity and their assigned gender at birth listed on their identification documents—should be regarded as *per se* unconstitutional under the Nineteenth Amendment.[181]

Bostock's influence could also spread to administrative law. For instance, courts have long used Title VII analysis to guide their interpretation of the Fair Housing Act ("FHA"), and *Bostock*'s transmissible textualist logic should have little trouble applying in the FHA context given the nearly identical language between the two statutes.[182] Additionally, President Biden issued an executive order on January 20, 2021, that directed federal agencies to enforce laws in a manner consistent with the decision.[183] Shortly thereafter, the U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity issued a memorandum announcing that it would begin enforcing the Fair Housing Act (FHA) to combat discrimination on the basis of sex in line with *Bostock* and Biden's executive order.[184]

Finally, *Bostock's* logic has the potential to be widely adopted by state courts and legislatures. Courts often look to Title VII case law when interpreting analogous provisions in state laws, which remain an important source of protection for queer people in certain areas, like public accommodations, where

178. M.E. v. T.J., 854 S.E.2d 74, 115 (N.C. Ct. App. 2020).

179. Michael Milov-Cordoba & Ali Stack, *Transgender and Gender-Nonconforming Voting Rights After Bostock*, 24 U. Penn. J. L. & Soc. Change 323, 339 (2021).

180. *Id.*

181. *Id.*

182. Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After* Bostock v. Clayton County, Kansas L. Rev. (forthcoming).

183. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

184. Jeanine M. Worden, U.S. Dep'y Hous. & Urb. Dev., Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf

federal law falls short. A recent report by the Williams Institute indicates that in addition to queer people formally being incorporated into federal Title VII protections, an additional 3.6 million LGBT employees would gain protections from employment discrimination if state laws prohibiting employment discrimination based on "sex" were interpreted consistent with *Bostock*.[185] Within the housing context, an additional 5.2 million LGBT adults—roughly twice the current amount—would gain protections from housing discrimination under state laws if provisions were interpreted consistent with *Bostock*.[186] Similarly, there would be an increase of roughly 66 percent in the number of LGBT people protected from public accommodations discrimination under state law, as well as an increase of roughly 76 percent in the number of LGBT adults protected from credit discrimination under state law, if those state laws were interpreted consistent with *Bostock*.[187]

C. *The CRT Critique of* Bostock

Bostock and its transferable textualist logic undoubtably entail positive implications for queer people, especially given its location in Title VII jurisprudence, which shields *Bostock* from conservative attacks[188] on Fourteenth Amendment substantive due process rights outlined in *Roe* and *Obergefell*. However, a critical examination of *Bostock* using core CRT principles reveals some of the landmark decision's limitations. First and foremost, Gorsuch's formalistic reasoning erases the complex intersectional experiences of queer people of color and upholds anti-discrimination law's perpetrator perspective. At the very beginning of the opinion, Gorsuch writes, "Few facts are needed to appreciate the legal question we face."[189] As Jeremiah Ho astutely notes, "this remark is not necessarily one of inclusion, but of delicate erasure."[190] Gorsuch offers very little context around any of the plaintiffs' lived experiences, the circumstances behind their claims, or the impact the discrimination had on their daily lives. This precludes any nuanced analysis of how homophobia or transphobia continue to operate within the workforce or American society at large, an important departure from Justice Kennedy's line of cases that emphasized the shared humanity of gays and lesbians. This blind framing is reiterated by Gorsuch's avoidance of any substantive discussion around trans identity or issues outside of a brief reference to the American Psychological Association's description of "transgender" in footnote 6 of *Bostock*.[191]

Outside of omitting key context around gender identity and sexual orientation, what else is missing? I argue race. The plaintiffs' races are never mentioned throughout the opinion, which signals that sex discrimination

185. *Id.*

186. *Id.* at 2.

187. *Id.*

188. David Leonhardt, *Roe, on the Edge*, N.Y. Times (May 3, 2022), https://www.nytimes.com/2022/05/03/briefing/roe-v-wade-scotus-overturn.html.

189. *Bostock*, 140 S. Ct. at 1737.

190. Ho, *supra* note 157, at 287.

191. *Bostock*, 140 S. Ct. at 1756.

claims – even those involving gender identity or sexual orientation – can be adequately settled without any intersectional acknowledgement of race. This racial sanitization further erases people of color, undermining challenges to the normative racialization of queerness as White and the collective ability to perceive how sex-stereotypes are also racialized.

Some allegedly pragmatic commentators may question the utility of critiquing Gorsuch's formalistic textualism and its omission of contextual analysis, arguing that *Bostock*'s scope and end result remain the same either way. Though the formal holding may be the same, Gorsuch's semantics logic in *Bostock* reinforces Freeman's perpetrator perspective and its dangerous impacts. Without any substantive discussion of heterosexism or racism, *Bostock* fails to articulate *why* protections against employment discrimination are necessary, particularly for queer people of color who experience racialized heterosexism. *Bostock* also fails to articulate *how* discriminatory policies can inflict violence against homosexual and transgender individuals, for example, how policies mandating that trans employees use bathrooms that conflict with their gender identity are harmful (in fact, Gorsuch specifically defines bathroom policies as outside the scope of the opinion).[192] In this regard, *Bostock* avoids confronting the biases inherent in discrimination around sexual orientation and gender identity.[193] Acknowledging the tenuous nature of haphazardly analogizing between race and sexuality, I nevertheless argue that traces of Haney López's description of racial "common sense," which embeds racial hierarchy and renders it invisible within the status quo, is embodied in *Bostock's* silence on the prevalence of heterosexism within the workforce. Without any deconstruction of how heterosexism manifests, "sex" discrimination becomes aberrational under *Bostock's* adoption of the perpetrator perspective. This places culpability on individual bad actors instead of broader structural violence, a dynamic highlighted in Eric Stanley's statement, "The time of LGBT inclusion is also a time of trans/queer death . . . anti-trans/queer violence is written as an outlaw practice, a random event, and an unexpected tragedy."[194]

The perpetrator perspective demonstrates how characterizing discriminatory conduct as aberrational contributes to the justification of higher intent requirements, and *Bostock* follows this pattern. In Gorsuch's discussion of the phrase "discriminate against," he proclaims that the focus of the analysis "should be on individuals, not groups,"[195] reifying the intent requirement by buttressing Title VII's negative posture towards disparate impact claims. Ho explains that Gorsuch's "textualist approach reads Title VII as covering disparate treatment cases only. Secondly, such discrimination must be intentional. Lastly, 'because of sex' discrimination is discrimination against individuals,

192. *Id.* at 1753.

193. *See* McGinley et al., *supra* note 172, at 20.

194. Eric Stanley, Atmospheres of Violence: Structuring Antagonism and the Trans/Queer Ungovernable 6 (2021).

195. Ho, *supra* note 157, at 349.

not categorically against groups."[196] This individualization of both victims and bad actors creates another false dichotomy, shifting focus from structural factors that motivate discriminatory actions—such as racism and heterosexism—to the employer's intent.[197]

Bostock's perpetrator perspective orientation represents a missed opportunity to adopt an anti-subordinating approach that explains how oppressive logics interact to harm queer people, especially queer and trans people of color. For example, connecting how employment discrimination and barriers to financial stability generate conditions that make queer people of color more susceptible to "brutal force and administrative surveillance"[198] would provide necessary context for how Title VII's protections impact queer people. Furthermore, *Bostock* includes a powerful religious exemption[199] that elevates Judeo-Christian religious values – which often advance heterosexist ideals – without any articulation of how parallel oppressive modalities like religious-based homophobia, sexism, and racism might interact at the expense of queer people of color. This leads scholars like Ho to argue that "when Justice Gorsuch invokes First Amendment religious protections, *Bostock* effectively completes the tacit preservation of heteronormativity and stereotyping already existing in its textualism."[200]

It must be noted that Gorsuch's reliance on semantic textualism devoid of social context was avoidable. Within each of their respective cases, all three plaintiffs—Aimee Stephens, Donald Zarda, and Gerald Bostock—advanced sex stereotyping theories in hopes of receiving the treatment articulated in *Price Waterhouse v. Hopkins*."[201] The Court in *Price Waterhouse* affirmed that sex-stereotyping constitutes discrimination because of sex, with Justice Brennan writing:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[202]

Despite calls by the plaintiffs and multiple amici briefs to use logic rooted in sex-stereotyping, the Court ultimately sided with textualist arguments advanced by the Second Circuit's holding in *Zarda v. Altitude Express, Inc*.[203] A number of scholars have argued that the sex-stereotyping alternative

196. *Id.* at 351.

197. Ho, *Queering Bostock*, 351.

198. Eric Stanley, Captive Genders: Trans Embodiment and the Prison Industrial Complex 2 (2011).

199. Bostock, 140 S. Ct. at 1754.

200. Ho, *supra* note 157, at 357.

201. *Id.* at 342; *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

202. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

203. See Zarda v. Altitude Express, Inc., 883 F.3d 100, 113–20 (2d Cir. 2018).

would have formed a sturdier foundation for future LGBTQ+ cases,[204] in part because discrimination based on a person's failure to live up to sex stereotypes inherently highlights the socially constructed nature of gender.[205] More focus on sex stereotypes could also spark intersectional analysis that exposes how sex stereotypes are racialized. In contrast, *Bostock's* current reasoning invests in biological sex.[206]

Colorblindness illuminates the pitfalls of Gorsuch's literal definition of "discrimination" being "a *difference in treatment* or *favor* (of one as compared with others) [emphasis added]."[207] This definition echoes calls for formal equality in which *any* differential treatment is prohibited, even if the difference is designed to account for past injustice to even the playing field. In the context of sex discrimination, this "sex-blindness" articulated in *Bostock*, where seemingly *any* differential treatment on the basis of biological sex is prohibited, concerns some feminist circles advocating for gender equity. For example, some scholars warn that this formalistic logic will be levied against affirmative action policies designed to incorporate women into historically male-dominated industries. *Bostock*'s sex-blindness thus risks overturning programs like that in *Johnson v. Transportation,*[208] which benefitted women in traditionally segregated jobs and which the Court validated so long as it did not "unnecessarily trammel" the rights of men.[209]

Outside of some feminist concerns, *Bostock*'s flattening of all gender identities and sexual orientations—without any nuanced analysis of the different intersectional challenges or stigmas that subgroups face—into the singular monolithic category of "sex" also raises concerns about sex-blindness operating in similar ways as colorblindness.[210] For example, one can imagine a hypothetical where a heterosexual person brings a Title VII sex discrimination claim because they were not hired by a gay civil rights organization with a hiring preference for LGBTQ+ community members with specialized community awareness.[211] Given the absence of context around social hierarchy and marginalization in Gorsuch's textualism, *Bostock*'s sex-blindness seriously threatens such affirmative action policies.

Given Gorsuch's semantic textualist opinion, a literal definition of "race" taken from Gorsuch's 1954 Webster's New International Dictionary—likely characterized by a similarly obsolete commitment to biological race—combined with his definition of "discrimination" would further legitimize

204. McGinley, *supra* note 172, at 14.
205. Ho, *supra* note 157, at 350.
206. McGinley, *supra* note 172, at 14.
207. *Bostock*, 140 S. Ct. at 1740.
208. *See* Johnson v. Transp. Agency, 480 U.S. 616 (1987).
209. McGinley, *supra* note 172, at 18.
210. Ho, *supra* note 157, at 358.
211. Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, New Yorker (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action.

colorblindness. If Gorsuch's textualism prohibits *any* differential treatment whenever biological sex is remotely implicated, I argue that it will likely operate similarly whenever race is involved and thus further commit anti-discrimination law to colorblind formal equality. Moreover, Gorsuch's view of "discrimination" connoting *any* differential treatment, along with his attempt to position this outcome as preordained by the statute's text, incorporates sly unstated assumptions that tilt the scales towards the anti-classification model. First, we must assume that the definition of "discrimination" that Gorsuch relied upon from Webster's New International Dictionary 745 (2d ed. 1954) is universal and did not significantly change between 1954 and Title VII's enactment in 1964. Furthermore, though Gorsuch relies upon precedent throughout other areas of the opinion, his failure to reference *Griggs*—if for no other reason than to acknowledge that his definition of "discrimination" diverges from prior Title VII jurisprudence since the enactment of the Civil Rights Act of 1964—raises concern about his use of semantic textualism.

Some may push back on the possibility of Gorsuch's semantic textualism in *Bostock* being applied to "race," noting the doctrinal differences that exist between how the law treats race and sex. After all, racial discrimination is perceived to be more illegitimate than sex discrimination, leading courts to grant strict scrutiny to race-based classifications and the lower intermediate scrutiny to sex-based classifications in constitutional law.[212] A similar dynamic exists in the Title VII context, where strict adherence to sex-blindness does not exist. The fact that racially segregated bathrooms are strictly prohibited by Title VII whereas sex-segregated bathrooms are permissible illustrates the different treatment that the law grants race versus sex. Despite these strong points, I argue that the full ramifications of *Bostock* are not yet visible because lower courts are still interpreting the decision. Furthermore, Gorsuch's semantic textualism goes even further than Kavanaugh's pragmatic textualism to disaggregate social context from statutory interpretation. Thus, I argue that *Bostock*'s treatment of "sex" will likely have a material impact on how the Court treats "race" moving forward, particularly when combined with Gorsuch's definition of "discrimination."

Finally, *Bostock*'s official scope is limited to employment and fails to address many of the structural issues facing marginalized non-normative identities. *Bostock's* protections against employment discrimination require that disproportionally at-risk queer people, especially marginalized trans women of color, secure employment in the first place. For example, Stanley notes that "employers routinely don't hire 'queeny' gay men, [or] trans women who cannot pass . . . "[213] Successfully filing a hiring discrimination claim is difficult given information asymmetries between the hiring company and the job applicant, especially under the perpetrator perspective, and many low-income queer people do not have the resources or legal knowledge to successfully adhere to

212. Yoshino, *supra* note 15, at 875.

213. Stanley, *Fugitive Flesh*, *supra* note 11, at 303.

complicated Equal Employment Opportunity Commission (EEOC) timelines in order to successfully pursue a formal Title VII claim.

In contrast to the Equality Act, the proposed amendment to the Civil Rights Act of 1964 which additionally prohibits discrimination in other areas like public accommodations,[214] *Bostock*'s tether to Title VII limits its ability to govern public environments that routinely inflict violence against queer and trans people of color: notably, jails and prisons. For instance, Transgender women of color are frequently profiled as sex workers by law enforcement and subsequently incarcerated. The New Jersey Task Force on Transgender Equality recently stated that one-third of Black transgender women who interacted with police reported that law enforcement assumed they were engaging in prostitution.[215] Recent studies also show that having a history of sex work and drug use increases one's vulnerability to violence and police misconduct, prompting Amnesty International to release the following statement:

> Black women, who are over policed, impoverished, and live in racially segregated communities, are marked as prime targets . . . When violence is committed against sex workers, police often refuse to investigate. In Los Angeles, Black sex workers were targeted for nearly three decades. Police officers responded by coding case files 'No Human Involved. [216]

Given high rates of trans women of color engaging in survival sex work and the epidemic of violence against trans and non-binary people,[217] the connections between criminalized sex work, racism, and discriminatory violence occurring in jails and prisons is of the upmost priority. But *Bostock* stays silent on these issues. Critical trans politics offer an alternative vision of liberation that demands more than simple recognition in contemporary anti-discrimination law and legal reform strategies premised on the neoliberal rejection of broad redistributive demands stemming from radical social movements.[218] This alternative suggests that we must look beyond the narrow scope of employment – and *Bostock* – to challenge barriers to gender-affirming healthcare, sex-segregated facilities, administrative barriers like ID gender markers,

214. Catie Edmondson, *House Passes Sweeping Gay and Transgender Equality Legislation*, N.Y. Times (Feb. 25, 2021), https://www.nytimes.com/2021/02/25/us/politics/house-equality-act-gay-rights.html.

215. New Jersey Task Force on Transgender Equality, Addressing Discrimination Against Transgender New Jerseyans (2019), https://d3n8a8pro7vhmx.cloudfront.net/gardenstateequality/pages/1683/attachments/original/1574265601/Transgender_Equality_Task_Force_Final.pdf.

216. Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, Amnesty Int'l (Dec. 12, 2016), https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue.

217. Spencer Garcia, *Remembrance, Resilience, and Response: Addressing An Epidemic of Violence Against Trans and Non-Binary People*, A.C.L.U. LGBT & HIV Project (Nov. 19, 2020), https://www.aclu.org/news/lgbtq-rights/remembrance-resilience-and-response-addressing-an-epidemic-of-violence-against-trans-non-binary-people.

218. Spade, Normal Life, *supra* note 9, at 34.

and abuse occurring in public spaces such as prisons, homeless shelters and residential living facilities.[219]

IV. Conclusion

Drawing upon key CRT concepts and a historical overview of the intersectional marginalization queer people of color have experienced in the mainstream LGBT and Black anti-racist movements, this critique of *Bostock* reveals that the opinion's implications for queer people of color are nuanced. *Bostock* moves one large step closer to addressing the economic material needs of marginalized queer people of color, however, Justice Gorsuch's application of semantic textualism and his definitions of key Title VII terms in the opinion buttress harmful concepts like colorblindness and the perpetrator perspective within anti-discrimination law. The opinion's glaring omission of any context around social hierarchy and structural oppression – either involving heterosexism or racism, let alone an intersectional understanding of how the two interact – renders *Bostock*'s liberatory impact incomplete. Intersectional analysis should look to critical trans politics, which offer a more urgent roadmap forward and an alternative to assimilation into neoliberal institutions and flawed anti-discrimination law. Regardless of how civil rights advocacy develops in the coming years, movements should adhere to Mari Matsuda's intervention of looking to the most marginalized people within their ranks—in this case, queer and trans people of color—as the voices of truth in matters of justice.[220]

219. Stanley, *Fugitive Flesh*, *supra* note 11.

220. *See* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).