III. Neither Force nor Will?
The Supreme Court's Politics

III.1. Seeing the Supreme Court Through a Cultural-Legal Lens

Any interest in the highest court in the U.S., the Supreme Court, necessitates a readiness to engage with the United States' legal, cultural, and political history. The Supreme Court as we know it today would not have been possible, nor thinkable, without the British king George III.'s tax system. The feeling of being unfairly taxed was one of the reasons for the American Revolution, which in turn led Americans to draft and ratify the Declaration of Independence and the U.S. Constitution. The latter then signed into law the system of federalism with the three governmental branches of the judiciary, legislative and executive. Admittingly rather rudimental, this historic causation illustrates that the Supreme Court's existence has been constructed along the lines of a legal institution with limited power but high authority, balanced and checked on by the two other branches.

The Supreme Court was an institution designed as counterpart to what Americans experienced under British rule; a system perceived to be unjust and not accessible to the average citizen. A high court in the Americans' understanding would be all that British law was not to them: impartial, representative, and regularly checked on by the other governmental branches (see Madison "The Federalist No. 49"). By necessity, the Supreme Court is tied to the very political and legal beginnings of the United States as well as to their cultural foundations.

By wide reading Supreme Court landmark cases of the twenty-first century which deal with sexual minorities and scrutinizing the justices' modes of constitutional interpretation, this chapter stresses that suspect classification is the most promising option for securing queer rights. For doing so, the first part contextualizes the discussion about the Supreme Court's role for queer rights

discourses by tracing back its historical origins, and commenting on its political dimensions. This subchapter argues that the Supreme Court is functioning as a political player in the discourse about sexual orientation's constitutional protection, and continues to become more politicized, publicly contested, and abusive in wielding its power. Part two (Chapter III.1) rudimentarily explains the differences between dominant modes of constitutional interpretation. It analyzes the ways allegedly neutral, or "*neutralizing*" (Lemos 851; emphasis in original), modes of interpretation do indeed carry political implications, and how covert ideological beliefs pave their way into these supposedly apolitical methodological divides.[1]

The case studies in part three then apply these findings to an analysis of the cultural and legal implications of the Court's most important decisions concerning sexual minorities in the twenty-first century. The Supreme Court cases these subchapters look at are those carrying the most weight with regard to sexual orientation's constitutional protection, i.e., only those which deal with sexual minorities and sexual politics (*Lawrence v. Texas* [2003]; *U.S. v. Windsor* [2013]; *Obergefell v. Hodges* [2015]; *Masterpiece Cakeshop v. Colorado Civil Rights Commission* [2018]; *Bostock v. Clayton County* [2020]). The case studies also illustrate how these decisions work to constitute and maintain sociocultural imaginaries, and establish that the Supreme Court functions as a political player.

The Supreme Court: Now and Then

The 2020s have already shaped U.S. America sustainably. Be it the Covid-19 pandemic, backlash against governmental measures trying to respond to the pandemic, protests for racial justice following the murder of George Floyd, the death of Supreme Court Justice Ruth Bader Ginsburg, – and the subsequent nomination of Justice Amy Coney Barrett, – and the U.S. American elections – they all share their emphasis on the judiciary. Most notably the Supreme Court but also lower courts serve as vital players in deciding whose voices prevail. This becomes obvious in matters of re-counting electoral ballots, preserving individual freedom vs. protecting the collective, and allowing questions about the (il)legitimacy of police action. Also, the Supreme Court was itself reviewed with strict scrutiny as in the question of who follows in Justice Bader Ginsburg's footsteps.

1 See Lemos for more on the connection between textualism and statutory interpretation.

This development has gained more momentum in the summer of 2022 when the U.S. American politics magazine *Politico* leaked draft opinion for a pending case, *Dobbs v. Jackson Women's Health Organization*, to the public. This incident was extraordinary because of the strict rules the justices and their law clerks are to follow,[2] and because of its content: The opinion argued for the overturning of *Roe v. Wade* (1973), which would make abortion a state matter again and resolve its de-criminalization on a federal level. As a result of this highly controversial opinion, the Court's justices faced increased media attention and needed more protection. The security measures for the Supreme Court building and the nine justices were increased, including 24/7 surveillance of their private homes (Breuninger "U.S. Marshals"), fencing off the Supreme Court building (Breuninger "AG Garland"), and proposed bills to fund higher security measures (Diaz). Even more, in trying to find out who leaked the draft, the Supreme Court initiated an "unprecedented probe to uncover who leaked the decision" which included that "authorities have demanded phone records, signed affidavits, and law clerks' devices" (Cahn). Foreshadowing the demise of abortion rights, the exploitation of digital and privacy rights, and ever more forceful demonstrations of power, these developments indicate the beginning of a new era in which the Supreme Court's politization, ongoing for several decades, now becomes publicly more visible and contested.

All of these matters share an inherently political character in how the public relates and responds to social hierarchies of power. As this chapter argues, the Supreme Court is not only an arena for (re-)negotiating power but also an institution which gatekeeps, accumulates, (re-)distributes, and longs for political power. As such, the Court is evidently political.

Ironically, the Supreme Court of the United States is apolitical qua definition and history. The highest part of the judiciary (Latin *iudicare* means to administer justice; to judge) is responsible for deciding legal cases according to the Separation of Powers doctrine. Together with the legislative, which establishes laws, and the executive, which executes laws, the judiciary is part of the

2 Constitutional policy analyst Ian Millhiser states that "There may be no modern precedent for a leak of this magnitude. The Court normally operates under a strict code of silence until the moment a decision is released. Supreme Court law clerks even have a special dining room in the Court's cafeteria, where they can discuss cases over lunch without risking anyone overhearing those conversations. … I'm aware of no precedent for an entire draft opinion being published before the decision is final" ("4 Things").

so-called *trias politica* that ensures that power within governments is equally distributed and that each branch checks and balances the other two. This system goes back to antiquity and has influenced Western law traditions and cultural conceptions of democracy. The Separation of Powers doctrine and the system of checks and balances is meant to prevent accumulation of political power in one institution or person. In the beginnings of the United States, this way of separating responsibilities and duties between different branches of government was perceived as particularly well-organized.[3]

Both official documents and statements by justices invoke and try to manifest this apolitical character. Chief Justice Roberts made several public statements over the last years in which he stresses that the Supreme Court is no political entity.[4] Likewise, the government informs visitors on their website that

> [j]udges and Justices serve no fixed term — they serve until their death, retirement, or conviction by the Senate. By design, this insulates them from the temporary passions of the public, and allows them to apply the law with only justice in mind, and not electoral or political concerns. … Since Justices do not have to run or campaign for re-election, they are thought to be insulated from political pressure when deciding cases. ("Judicial Branch")

These instances of officials re-assuring the U.S. American public about the impartiality of the Court as well as the historical origin of the judiciary illustrate that the Supreme Court ought to be apolitical. Consequently, the idea that there exist political implications of how to interpret legal cases, so-called modes of interpretation, may appear as a paradox for the non-legal reader: How can the institution of the Supreme Court which is based on the very idea of impartiality, claimed objectivity, and unpolitical character be political at all? This chapter establishes that the paradoxical part about the Court's

3 In 1835, French philosopher Alexis de Tocqueville already praised the U.S. American system of decentralized power in his seminal *Democracy in America* (107–10).

4 In 2019, Roberts said during an interview at Temple Emanu-El: "When you live in a politically polarized environment, people tend to see everything in those terms. … That's not how we at the court function and the results in our cases do not suggest otherwise." (Bump). In 2020, Roberts responded to a statement by Democrat Chuck Schumer by stating that "Justices know that criticism comes with the territory. … But threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous." (Millhiser "Controversy").

entanglements is not their political character but the general idea that this politization should not and thus does not exist.

The Politics of the Supreme Court

I argue that the Supreme Court is political in three major ways. In the process of nominating justices, in the justices themselves, both with regard to how they are being positioned by the media and to how they position themselves, and in methodological approaches to constitutional interpretation.[5] As legal scholars have noted,[6] the ongoing polarization of U.S. American politics has impacted the Court, too. In the election year of 2020, legal commentators have praised SCOTUS for deciding cases in a rather progressive manner, most notably in *Bostock v. Clayton County* (2020). With a conservative majority on the bench, commentators expected the Court to rule that discrimination based on one's sexual orientation is not covered by Title VII of the Civil Rights Act of 1964. The fact that the Court decided in favor of such a discrimination and that Chief Justice Roberts, a conservative centrist, joined the majority opinion, was considered as proof for an apolitical Court that decides based on facts and not sentiments, and which is able to generate trust in governmental institutions in highly politicized times. Acting as an impartial institution, the Court stands out as unbiased mediator between different political agendas in these times. Ironically, it is exactly this maneuvering of the Court that makes it inherently political as pointed out by jurists Dahlia Lithwick and Mark Joseph Stern:

> The irony of Roberts' endless maneuvering is that preventing the court from appearing political requires him to act politically. Brokering compromises behind the scenes, manipulating the docket to keep hot-button cases far away from the court, forecasting the impact of each decision on

5 Geoffrey R. Stone identifies "1) the politicization of the confirmation process; 2) the polarization and apparent politicization of the justices; and 3) the Court's current approach to constitutional interpretation" as three "possible reasons for the decline in public respect for the Supreme Court" ("The Supreme Court" 37). While agreeing that these three factors play a major role in the assessment of the Court's political character, I disagree with Stone's view that these aspects are the reasons for a negative shift in the Court's public perception. Rather, I would argue that a changing sociocultural climate of holding those in positions of power responsible influences how the public approaches the Court's legitimacy in recent years and how such power abuses are visibilized, perceived, and responded to.

6 See, among others, Stone "The Supreme Court" 38.

> the election—these are inherently political acts undertaken to convince public that the court is apolitical. They are not the traditional duties of a jurist. But Roberts is the exceedingly rare judge who understands politics, not just party politics, but also how to behave politically. And he recognizes that, as Americans lose faith in the other two branches of government, he has the power, and perhaps the responsibility, to cultivate more trust in the court.

Roberts is considered an 'institutionalist,' someone who is trying to preserve the legitimacy of the institution, the Court, by appealing to the public. For doing so, deciding cases in a rather progressive manner during an election year evokes the impression that governmental pressure does not impact the Court's decisions and that it is thus impartial and unbiased. Consequently, the Court aims to remain in a position of power and respect within the public so as not to risk potential criticism in highly politicized times. Achieving higher public ratings for the Court is a strategic way to maintain power and a political act in itself. This is all the more relevant at a time when only 40% of the U.S. American public approves of the Supreme Court, marking a historical low in the twenty-first century (Jones). These numbers affirm the pressure the Court is under to legitimate its actions.

Apart from these political tactics to preserve the institutional legitimacy of the Court, other recent examples of the politization of the Court are the nomination processes of Justice Brett M. Kavanaugh in 2018, and Justice Amy Coney Barrett in 2020. Kavanaugh was confirmed by the Senate with a vote of 50–48 with 49 Republicans voting in favor of and 46 Democrats against him.[7] In addition to the political salience of this nomination process, the public reaction to Kavanaugh's hearing included protests in front of the U.S. Capitol,[8] extensive (social) media coverage, and a revival of questioning the impartiality of the judiciary, which is feared to become unbalanced and conservative. The strong focus on this particular nomination was influenced by the fact that Kavanaugh had to respond to allegations of sexual assault voiced by psychology professor Christine Blasey Ford and several other women as part of his confirmation hearing. While these allegations may not have had a consequence

7 The Senate Judiciary Committee forwarded the nomination to the full Senate with a vote of 11–10 along party-lines with all Republicans voting in favor of Kavanaugh, all Democrats voting against his nomination ("Nomination").

8 See, for instance, Rosenblatt, and "In Photos." On the 6th of October 2018, the day Kavanaugh was sworn in as justice, more than 300 protestors were arrested.

for Kavanaugh's confirmation, their implications for what it means to have the U.S. Senate let an accused sex offender serve on the highest court in the nation influences discourses about sexual politics, so-called 'culture wars,' and imagined entitlements as discussed in Chapter II.

Concerns about an ideologically unified Court became also apparent in the process of nominating conservative judge Amy Coney Barrett. Barrett replaced the liberal and bipartisan respected Justice Ruth Bader Ginsburg, who passed away in 2020. Barrett's nomination became the arena of a political scramble for Supreme Court hegemony. With Barrett on the bench, conservative justices now make up six of the nine seats, with the two other Trump-nominated justices Neil Gorsuch and Brett Kavanaugh in addition to Bush-nominated justices Clarence Thomas, Samuel Alito and John Roberts. Arguably, the political salience of Barrett's nomination was even stronger than Kavanaugh's. Firstly, it happened in an election year and thus Democrats felt Republicans would not only take unfair advantage of their majority in Senate, but also betray what was once considered the 'Biden rule.'[9] Secondly, social tensions and 'culture wars' were fueled by dissatisfaction and outright anger about governmental measures to counteract the Covid-19 pandemic, the still prevalent issue of police brutality, and three years of presidential Trumpism. For those who did not support Trumpian politics, the nomination of Amy Coney Barrett invoked fears about a continuation of Trump's influence on U.S. politics and the lives of Americans regardless of the outcome of the elections. More specifically, her nomination triggered fears about using a conservative majority to review and potentially overturn the *Patient Protection and Affordable Care Act* ('Obamacare')[10] and Supreme Court cases which provided civil rights to minorities, legalized

9 Named after Joseph R. Biden, then chairman of the Senate Judiciary Committee and thus responsible for considering judicial nominations and passing them on for confirmation to the Senate. Biden gave a speech in 1992 in which he stated that, given a Supreme Court vacancy should arise during an election year, the sitting president should not "name a nominee until after the November election is completed" (Sherman). Republicans quoted this unofficial rule when they refused to consider Democratic nominee Merrick Garland's nomination by then President Barrack Obama in 2016.

10 It is important to note that curling back the *Affordable Care Act* (*ACA*) would also be a backlash for the LGBTQ+ community. Members of the community are statistically more prone to substance abuse and psychological distress while simultaneously being economically disadvantaged and thus in need of low-income health care. Further, before *ACA*, health care providers were allowed to discriminate against trans people by refusing to insure them and, as a non-cis gender identity was considered 'a pre-ex-

abortion (*Roe v. Wade*) and ruled same-sex marriage (*Obergefell v. Hodges*) constitutional. From today's perspective, these fears were justified as can be seen in the overturn of *Roe* in 2022's *Dobbs v. Jackson Women's Health Organization*.

From a European perspective, interest in the personal set-up of the highest court in the country may seem irritating as most justices in EU countries are not appointed for life[11] and thus, their powers to shape laws, society, and culture are temporally limited. Arguably, the limited time of service makes non-U.S. constitutional courts less political in that questions of who serves on the bench are not as person-centered and not as politically charged as in the U.S. However, decisions of constitutional courts are as politically loaded in Europe as they are in the United States, which is shown in, e.g., the case of stricter abortion laws, decided by the Polish supreme court *Trybunał Konstytucyjny* in 2021, or the amendment of the Hungarian constitution to redefine family as "based on marriage and the parent-child relation. The mother is a woman, the father a man" (Dunai and Komuves).[12] One may argue that the set-up of the court is equally important there, yet it is not so much focused on individual justices but on the judiciary's general affinity to the ruling government's politics and ideology.

In the U.S., this relevance of personnel decisions offers not only a different legal landscape but also one that is culturally distinct. Since constitutional courts arguably deal with a country's most controversial legal cases, and deciding these cases falls in the responsibility of only a selected few, interest in these few, including their respective moral and political beliefs feeds more into a society's consciousness than in other Western countries such as in Germany, France, or Spain. Consequently, cultural imaginaries about 'the' legal system, including the imagined entitlement and necessity of having one's *Rechtsgefühle*

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isting condition,' providers were not required to cover any medical treatment related to being trans, including hormone therapy and gender reassignment surgeries.

11 For instance, justices at the highest court in Germany, the *Bundesverfassungsgericht*, are appointed for 12-year-tenures with no possibility of re-election, and they are to retire after the age of 68; the French *Conseil constitutionnel* and the Spanish *Tribunal Constitucional* appoint its justices for a regular term of 9 years with no possibility of re-election.

12 While this amendment was initiated by Hungarian prime minister Viktor Orbán and his party, the Hungarian constitutional court has been transformed to fit the political agenda of Orbán, with the election of Zsolt András Varga as chief justice in 2021 securing future pro-nationalist and anti-LGBTQ+ decisions by the court; see Kazai and Kovács.

represented and accounted for in laws, legal decisions, and the legislative and judiciary, are more closely connected to concrete people than to a nation's highest court as an opaque legal block.[13]

This U.S. focus on individual people in the legal system mirrors and reinforces the American ideal of individualism. While having some people decide on matters for an entire collective may seem to contradict individualism's core "vision of free individuals directing their own lives according to their own judgment" (Daniels 70), the cultural praxis of de-reifying the Court evokes the impression that 'the law' is dependent on individuals instead of having a life of its own. This emphasis on the people on the Court makes this institution more relatable and allegedly more transparent. Unlike at times impenetrable bureaucratic and political processes of decision-making, putting faces, names, and opinions to justices evokes the impression that one knows who is in charge. This alleged transparency, in addition to the constant re-assurance that SCOTUS is apolitical, contributes to the invisibilization of political processes within the Court.

The structure of the Court thus moves beyond merely providing organizational information or offering a politico-legal framework for decision-making to shaping cultural notions about legal personhood. Zooming in on the Court's nine individual justices with their individual moral and political beliefs, – for instance by reporting on individual justice's lines of argumentation, their religious beliefs, or the practice of lifetime appointments, – emphasizes the legal agency of the individual, personal responsibility for one's actions, and, by extension, a cultural self-efficiency which feeds on the idea of individual moral sovereignty and exceptionalism. The nine justices represent 'the' U.S. American as such, including legal citizens and those who feel belonging to the U.S., and act as guardians of the collective's constitution. The fact that of all nine justices, all are cis, four are women, only two are Black, one is Hispanic, and none are not heterosexual further complicates the Supreme Court's function as political representation of American citizens as such, and its implicit commentary on who is legally agentic.

13 I would argue that in Germany, associations with 'the' legal system are more closely related to governmental actors, including parties, than to courts or justices and judges. This perception became most obvious in discussions about the appropriateness of measures to counteract the spreading of Covid-19 in 2020 when debates in the *Bundestag* were often depicted as divided between the ruling governmental parties and the opposition.

III.2. A Dogmatic Historization of the Supreme Court's Modes of Interpretation in the Twenty-First Century

Although European constitutional courts are organized differently, the historic roots of constitutional courts' competencies to declare statutes unconstitutional goes back to the U.S. landmark decision *Marbury v. Madison*. This 1803 case established the U.S. Constitution's legal importance and the Supreme Court's authority to apply it. More specifically, *Marbury* laid down the Court's power to judicially review whether federal governmental actions are in line with what the Constitution says. This newly established task of judicial review was then also instructive for European constitutional courts.

Judicial review includes interpretation of the Constitution, a highly controversial endeavor. For the most parts, the Constitution uses a language which is not unambiguously clear to its readers,[14] and the last 220 years have created constellations which the Constitution's ratifiers could not have included simply because they were unforeseeable at the time. For instance, technological developments such as the invention of VCRs were most probably not part of the imagination of the Constitution's ratifiers, yet in the 1984's *Sony of America v. Universal City Studios* case, the Supreme Court had to decide on whether these devices violate copyright claims (Grossman).

The question that arises in these cases is then "What does the Constitution say?", or, for matters on which the Constitution is silent or not explicit, "Is there any hint what the Constitution might say about this?". For these gaps of meaning or ambiguous parts which require some clarity, justices have adopted different modes of how to read and interpret the words of the Constitution. While attorney Brandon Murrill has identified eight modes of constitutional interpretation for the Congressional Research Service (CRS),[15] other legal scholars consider different numbers of modes as dominant.[16]

Although there is no coherent canon and some modes are similar to others, constitutional interpretation can be observed along some rather clear lines,

14 Notable exceptions of straightforward constitutional language are the specific age requirements for public office, e.g., Art. II sec. 1 clause 5, which states that only those U.S. citizens are eligible for becoming president who are older than 35.

15 This enumeration does not represent an exhaustive taxonomy but merely refers to the most prominent styles of interpretation as defined by Murrill. Among them are textualism, originalism, strict constructionalism, judicial precedent, pragmatism, moral reasoning, national identity/ethos, structuralism, and historical practices.

16 For instance, legal scholar R. Randall Kelso identifies four main modes (126).

both legally and politically. In each case, the way a justice construes the text of a statue, law, or the Constitution is based on a philosophical and legal understanding rather than on a case-to-case basis.[17] Beyond these "politics of methodology" (Lemos 855), i.e., the discipline-specific considerations on the design of legal theories, the different methodologies of judicial interpretation are political themselves – or have at least been associated with specific political affiliations.

Understanding the process of reviewing the words of a legal document as more than a simply preference of one's legal approach, namely a question of how to understand the functions of the judiciary in general, makes the modes of judicial interpretation evidently political. Depending on what a justice believes to be the 'correct' approach, they would argue for an understanding which focusses on what has been written or intended by the framers of the legal text in question (*originalism* and *textualism*), or for an organic understanding which takes into account historical, political, and sociocultural developments since the respective legal passage's passing (*living constitution*/*organic*/*evolutionist*).[18] This distinction seems rather simplistic given the amount of theories some scholars identify, yet it is at the core of the theoretical divides among scholars.[19]

Distinguishing between originalist and evolutionist approaches is important for determining the scope of a justice's interpretation, a matter of whether their decisions scratch on legislative terrain or whether they remain in judicial territory. Deciding on a certain mode of interpretation is thus connected to one's understanding of the scope of the separation of powers, and therefore also to one's understanding of one of the U.S.'s cultural-legal pillars. Those who perceive law's meaning as text-inherent, meaning as able to fill gaps of meaning by itself, via examining the wording of legal norms and the legal norms in themselves, advocate for a jurisprudence which relies on what is written instead of referring to those interpreting it (Dregger 38;

17 While some legal scholars and justices believe that judicial interpretation is based on a philosophical mindset, others prefer to "remain agnostic on methodology, as most judges do" (Lemos 854).

18 My use of the term 'organic' is influenced by Ritchie's, who understands organic "in a more metaphorical sense" in that it is "inextricably linked to the social context in which it is situated" (2).

19 The overlappings of textualism, strict constructionalism, original meaning, as well as the entanglements of structuralism, judicial restraint and judicial activism speak in favor of such a simplified characterization for the purpose of this book.

Baer *Rechtssoziologie* 29).[20] This understanding emphasizes the power of the legislative while de-emphasizing the judiciary's power. Contrary to that, understanding law's gap-yness as in need of judges' and justices' interpretation, including taking into account non-textual, social, political, cultural realities, emphasizes the judiciary's influence and power. Textualism is thus connected to judicial restraint, while living constitutionalism is connected to judicial activism, which is a rather pejorative term in jurisprudence as it goes against the idea of an impartial judiciary which is staying in its lane and not acting legislatively.

Whenever the Supreme Court reviews a case, the questions whether justices are 'legislating from the bench,' or sticking to a formalist understanding of a legal text becomes of legal, political, and sociocultural importance, especially for cases involving minority groups. Since these groups are historically underrepresented, and thus often disadvantaged in contributing to public discourses, endeavors to prove their constitutional protection are tricky. The historical invisibility of these underrepresented groups and their sociocultural stigmatization, already in reciprocity to each other, create a legal situation which sees discriminatory laws against these groups (e.g., laws criminalizing homosexual activity) in correlation to precedents that confirm the constitutionality of these laws (e.g., 'sodomy'[21] laws and decisions affirming these laws such as *Bowers v. Hardwick*). Consequently, contemporary prejudice which has found its way into legal precedent continues to meander into subsequent cultural discourses. Cultural narratives and imaginaries about the protect-ability and -worthiness of these stigmatized groups then fed on legal norms, and legal norms contribute to the genesis of such narratives and imaginaries. In order to grasp the full extent of this claim, the followings paragraphs introduce the arguably most important modes of constitutional interpretation.[22]

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20 See also Haferkamp for more on Georg Friedrich Puchta's "Begriffsjurisprudenz," which influenced this law-inherent approach.

21 'Sodomy' is put in quotation marks because it is an outdated, derogatory, and harmful term. It is only used to refer to the language used at that time and to situate this chapter's discussion in the respective legal discourse.

22 Analyses and definitions of these modes compile a research field on their own. The definitions offered here are meant to serve as an introduction into this field and to equip the reader with sufficient knowledge to follow this chapter's line of argumentation; they are by no means exhaustive nor are they meant to be.

Textualism and Originalism

Textualism refers to a mode which zooms in on the formal meaning of a legal text, i.e., the specific wording of a law without taking into account historical context or the intentions of the people ratifying it. Similar to New Criticism's textual analysis in literary studies, legal textualism searches for meaning within a text in the form of a close reading which is largely concerned with itself and leaves social context aside. Legal textualism, unlike a poststructuralist literary textual analysis, believes in the dominance and objective certainty of one textual interpretation over a multitude of equally possible and subjective ones.[23]

Closely related to textualism, originalism construes of a legal text by referring back to what its ratifiers originally had in mind (*original intent*; an interpretivist approach) or, a view most originalist Supreme Court justices hold, to what ordinary people living at the time of ratification would have understood (*original meaning*; a formalist approach). Both of these originalism theories trace a legal document's meaning back to the time of its ratification. Textualists and originalists agree that turning to the framers and ratifiers of the Constitution reduces the chance of the application of a justice's subjective legal opinions; their understanding of the Separation of Powers doctrine places the judiciary in a non-activist, restraint position.

Conservative politicians tend to prefer originalist legal philosophies because they draw on sociocultural narratives and fuel sociocultural imaginaries as exemplified by former President Donald Trump: "Both Justice Kennedy and Justice Scalia were appointed by a President [sic] who understood that the best defense of our liberty and a judicial branch immune from political prejudice where [sic] judges that apply the Constitution as written. That President [sic] happened to be Ronald Reagan" ("Remarks"). In this understanding, the exceptionally just legal system in the U.S. and its equally superior sociocultural orders (see Chapter II.4) do not need adjustments but rather objective jurists who simply read the Constitution as it was intended by its framers. This view both shields the legal system and its judges and justices from the suspicion of bias and imagines a legal and sociocultural order which is already equally

23 This perspective on texts follows a strictly pre-poststructuralist understanding, eschewing a close reading in Roland Barthes' and other poststructuralists' understanding which takes into account external information. Interestingly, Justice Antonin Scalia's father, a Romance languages professor, was strongly affected by New Criticism, see also "Textualism's Mistake."

protecting (all of) individuals. Any further calls for minority protection or expansion of civil rights to marginalized groups appear as never sated demands. Thus, justices who appear to be apolitical guardians of the Constitution emphasize cultural narratives of the equal protection of the laws and due process as eternally valid promises. Imagining justices as impartial actors who merely act on the Constitution's instructions blends out forms of contemporary prejudice these justices may have adopted as a result of their being part of the society and culture they live in. Plus, historically, this perspective shields off unwanted interferences by higher authorities reminiscent of pre-Independence British rule.

By framing them as those who are merely "applying the Constitution as written," justices are not only imagined as apolitical but also as beyond contemporary prejudice. These justices are imagined as infallible since they only carry out what the Constitution states. As doubting them would imply doubting the Constitution, the violent injustice of Supreme Court cases such as *Plessy v. Ferguson* (1896) or *Bowers v. Hardwick* (1986) even reinforces the contemporary prejudice it established. Framing originalists as particularly unbiased, originalist interpreters of cases add a historical legitimacy to decisions. What these justices find to be true is what the 'Founding Fathers' would have found true, too. Consequently, originalist approaches lend from the Constitution's authority to generate the Supreme Court's. Instrumentalized like this, decisions which affirm the unequal treatment of minorities naturalize the rightfulness of such a treatment by establishing a pseudo-ahistorical perspective. Further, if the Constitution agrees with this treatment, minority concerns may simply not be part of U.S. culture, which then again adds meaning and cultural legitimacy to those instances of unequal treatment.

What is particularly interesting with regard to textualism's and originalism's strong reference to democratic, and by extension U.S. American, values is that Amy Coney Barrett, Neil Gorsuch, and Brett Kavanaugh, all outspoken conservatives and textualists/originalists, were appointed by an undemocratically elected president. Trump was the first president to have lost the popular vote, namely by more than 2.8 million votes (Millhiser "Anti-Democratic"), and had, for instance, Coney Barrett confirmed by a majority in the Senate. However, as Ian Millhiser states,

> while pro-Barrett senators control a majority of the Senate, they represent nowhere near a majority of the entire nation. Indeed, the senators who voted against Barrett represent 13,524,906 more people than the senators

> who voted for her. … These two numbers — 2,865,075 and 13,524,906 — should inform how we view the actions Barrett will take now that she is one of the nine most powerful judges in the country. Barrett owes her new job to two of our Constitution's anti-democratic pathologies. ("Anti-Democratic")

These justices are now serving a life-time appointment to the highest court of the U.S. But they have neither been elected by a majority nor by representatives of a majority of the U.S. American people. Arguments for textualism and originalism as in line with 'the will of the people' seem therefore all the more hypocritical.

Judicial Precedent / *Stare Decisis*

Referring to prior decisions when the circumstances of a case are similar to previous ones is known as judicial precedent or *stare decisis*. According to Murrill, this mode is particular appealing because

> following the principle of stare decisis and rendering decisions grounded in earlier cases supports the Court's role as a neutral, impartial, and consistent decisionmaker. Reliance on precedent in constitutional interpretation is said to provide more predictability, consistency, and stability in the law for judges, legislators, lawyers, and political branches, prevent the Court from overruling all but the most misguided decisions, and allow constitutional norms to evolve slowly over time. (11–12)

Stare decisis is a preferred mode of interpretation because of its perceived "predictability, consistency, and stability in the law" (Murrill 11), often conceived of as impartiality of justices.[24] Although these considerations certainly speak for following precedent in constitutional interpretation, the Supreme Court's history shows that overturning decisions, even those considered landmarks, is not uncommon. Deciding which preceding decisions are "the most misguided" (Murrill 12) again puts the justices in an (judicially) activist position, calling on their respective moral and political beliefs. For instance, while conservative Justices Clarence Thomas and Samuel A. Alito Jr. regard *Obergefell v. Hodges* as an undemocratically made decision which needs review,[25] LGBTQ+ legal schol-

24 See *Payne v. Tennessee* at 827 (1991); Vasquez v. Hillery at 265–6 (1986).

25 See Alito's and Thomas' statement about *Obergefell* with regard to *Davis v. Ermold* in October 2020.

ars and activists have fought for same-sex marriage for decades and would rather call for larger protections. Admittingly, Thomas and Alito argue from a textualist perspective and would cite procedural flaws in *Obergefell* without openly criticizing the sociocultural importance of this decision.

Another aspect of judicial precedents' flawed logic is that the Court "must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained" (*Burnet v. Coronado Oil & Gas Co*. at 412 [1932]). In the context of sexual minorities' rights, one questions why research by queer theorists such as Jonathan Katz, Eve Kosofsky Sedgwick, or William Eskridge is not part of such newly ascertained facts, which would then influence future decisions.[26] Judicial precedents imagine an objectivity in both the Supreme Court as such and in its past decisions. While there certainly are cases which made use of new facts and thus changed existing legal norms, the heteronormative gaze of the law and of those interpreting it has to acknowledge its own limitedness and bias before there can be a queering of the "straight path of *stare decisis*" (*Vasquez* at 266; emphasis in original).

Living Constitutionalism/Organic/Evolutionist Perspective

An evolutionist perspective of interpretation considers the Constitution as organic, which means that it is understood to evolve over time and to transform due to social, cultural, and political changes without needing amendments. Also known as living Constitutionalism or loose constructionism, this approach is considered the opposite of originalism, vaguer, and less methodologically strict. Instead of relying on what the Constitution's framers might have had in mind during the time of ratification, evolutionists read the text from a contemporary perspective and apply current understandings to the case at hand. Originalists criticize this method as judicially activistic because it relies on one's own perceptions of society and not on a supposedly authoritative entity like the Constitution's framers.

Organists stress that the framers had a constitution in mind which is able to adapt. This is why the 'Founding Fathers' did not define the concepts used more specifically, i.e., equality, liberty, freedom are not accompanied by explanations. This mode is typically associated with more progressive judges and

26 Admittingly, Eskridge and other queer theorists are quoted by Courts, see for instance *Lawrence v. Texas*. Interestingly, in this instance, Justice Scalia uses Eskridge's findings in his *Lawrence* dissent to depict the majority opinion as flawed see *Lawrence* at 598.

justices, while conservatives would reject this mode because of its judicial activism. As already mentioned, textualism is far from being an objective constitutional approach, yet textualists consider an organic approach as too subjective, risking a flawed application of the Constitution's cultural values. This cultural essentialism inherent in textualist readings is juxtaposed to an organic understanding of culture as socioculturally and discursively constructed and thus subject to transformations the law needs to respond to.

Modes of Interpretation and Their Relation to the Politics of the Supreme Court

While the different modes of constitutional interpretation are associated with specific political convictions, traditionally conservative modes do not always lead to conservative rulings. For instance, following the wording of the Fourteenth Amendment, i.e., that "no State shall deny the equal protection of the laws to any person within its jurisdiction," does "any person" involve *any* person (*textualist*), including women, or only those who were originally covered by this wording, i.e., African-Americans and slaves (*original intent*)?[27][28] Using this example, the closeness of the different approaches becomes apparent. While in the twenty-first century the legal personhood of women is part of Western societies' legal systems, textualism makes this assumption based on the wording and not on account of sociocultural transformations. Although including women in the interpretation of 'any' person may seem progressive in this particular instance, it is simply a formalist understanding of the written text.

Following these logics of constitutional interpretation, namely that conservative modes of interpretation may disguise themselves as (reliable) producers of sometimes also progressive interpretations, the dangers of conceiving of justices and their legal theories in binary pairs becomes apparent. Strictly adhering to a conservative mode of constitutional interpretation may over time result in some progressive opinions. Likewise, progressive modes may also produce conservative outcomes. However, the U.S.'s specific medial focus

27 The Fourteenth Amendment was passed in 1868 as part of the so-called Reconstruction Amendments. These amendments to the Constitution were part of legally anchoring and culturally negotiating the role of freed persons, who were no longer enslaved after the Civil War ended in 1865 and the North abolished slavery in all states.

28 The 1971 Supreme Court decision *Reed v. Reed* ruled that discrimination based on sex violates the Equal Protection Clause and is thus unconstitutional. In 1976, the Court's *Craig v. Borden* decision elevated gender-based discrimination to the status of quasi-suspect classification by using intermediate (or heightened) scrutiny.

on the justices and the politico-cultural status of the Supreme Court is prone to evaluate these instances as 'judicial turns' which change the Court's ideological leanings substantially, or as evidence that the Court is not politically motivated but impartial.

The different outcomes of modes of constitutional interpretation cannot be accessed by only judging the progressiveness of one opinion. This could evoke the impression that conservative justices have had progressive epiphanies and are now joining the ranks of social justice warriors. A recent example of this trend, discussed in detail in Chapter III.3, includes Chief Justice John Roberts whose vote in *Bostock* was publicly labeled as proof of the Court's independence from the Trump administration and mirror of his consciousness about social justice (Lithwick). Interestingly, those conservative actors who disagreed with the progressive decision condemned its judicial activism, which let the Court's justices "invoke 'textualism' and 'originalism' in order to reach their preferred outcome" (Hawley). Here, conservative commentators condemned textualism and originalism as too progressive, simply because they were discontent with the decision's outcome.

In a more critical reading, the framing of this decision was also a political strategy to convince the U.S. American public of the objectivity of a Supreme Court during highly polarized political times. Indeed, landmark decisions such as *Bostock* receive heightened media coverage and its outcomes contribute to the public discourse about the Court and the legal system. As discussed in Chapter II.4, the cultural-constitutional imaginary of a SCOTUS which is beyond prejudice is fed by such framings, and the Court continues to be added with cultural authority.

However, the logics of constitutional interpretation go beyond a simple equation that identifies certain modes as more harmful for sexual minorities as others; they illustrate that the politization of the Court and its justices puts the lives of minorities in the hands of people who are as entangled in sociocultural and political processes as any other person within the legal system, yet way more privileged and powerful. Higher constitutional protections which are not dependent on who sits on the bench are needed for LGBTQ+ in order to become independent of judges' and justices' understanding of legal philosophy and constitutional and cultural values. Using legal scholar Peter Nicolas' words, "the closest substitute [to having a permanent, pro-queer rights deciding vote on the Supreme Court; lb] would be a clear, class-based equal protection decision declaring sexual orientation a suspect or quasi-suspect classification" ("Squandered" 138).

The next chapter goes further than dogmatically historicizing Supreme Court decisions, examining their implementation and effect on a cultural level, and analyzing five landmark decisions' lines of argumentation. It argues that the Supreme Court's decisions concerning sexual orientation in the twenty-first century may not be consistently conservative with regard to their specific ruling, yet their legal and cultural consequences are. Apparently liberal decisions are only opposing the political character of the Roberts Court, – considered even more conservative than the preceding Rehnquist Court, – on the surface while narcotizing and silencing the overall movement of sexual orientation's constitutional protection. The tool of suspect classification would effectively resolve the question of higher protection on both a cultural and legal level.

III.3. Case Studies

Trying to pin down the political and legal alignment of the Supreme Court would assume an *a priori* political will of the judiciary in general, or at least of the Court as an entity. This view would ignore the changing personnel of the Court as well as the unpredictability of decisions based on the justices' respective legal philosophies. However, it is exactly this dogmatic adherence to legal theory which separates justices from each other, and allows a historization of decisions along the lines of modes of interpretation. Since justices base their reasoning on their respective legal-theoretical beliefs, and are outspoken about what these are, their written opinions are mostly consistent with regard to their underlying theory of interpretation. As the following part shows, this does not result in similar rulings but in similar argumentations.

This section analyzes the Supreme Court's most important decisions for sexual orientation's constitutional protection in the twenty-first century. By doing so, I establish a connection between legal philosophy and political beliefs, examine the political character of legal theories, and lay down how U.S. landmark decisions about sexual orientation have developed along these legally dogmatic lines. As only the most prominent opinions are close read, this historization is by necessity only a small segment of the Court's *modus operandi* and stance on sexual minorities. However, by uncovering and analyzing the most important concepts employed in these cases, i.e., privacy and equality, this chapter's findings may be applied to other case studies as well.

As the Supreme Court's set-up changes over time, it is not possible to refer to 'the' Court but rather to different forms of this highest arm of the judiciary depending on its personnel. In the twenty-first century, William H. Rehnquist served as Chief Justice from 1986 until 2005, and John G. Roberts Jr. from 2005 until today. Their respective Courts, i.e., the Rehnquist Court and the Roberts Court, had each five retirements and five appointments during their time as well as two deaths for the Roberts Court.[29] Since Supreme Court justices are not elected by the American people but nominated by the president who is in office when one of the permanent nine seats becomes vacant,[30] the choice of personnel becomes a political one.

Although judges and justices must officially be impartial, which also includes not supporting a political party, the way they decide their cases and the arguments they use while doing so makes it impossible for them to be apolitical. For instance, it is unlikely that a conservative Republican president appoints a judge which is known for their liberal stance on trans individuals' access to health care or adoption rights for LGBTQ+ parents, or that a justice known for their pro-choice views will write an opinion which celebrates anti-abortion laws.

Even if justices can be characterized as being conservative or progressive in terms of their opinions on a case's circumstances, their decisions are not always in line with these labels. For instance, Chief Justice Roberts dissented in *Obergefell v. Hodges*, repeatedly evoking Western-centric, biologistic ideas of

29 For the Rehnquist Court, these were: William J. Brennan Jr. retired in 1990 and was followed by David Souter; Byron White retired in 1993 and was followed by Ruth Bader Ginsburg; Thurgood Marshall retired in 1991 and was followed by Clarence Thomas; Harry A. Blackmun retired in 1994 and was followed by Stephen Breyer; Lewis F. Powell retired in 1994 and was followed by Anthony Kennedy. For the Roberts Court, these were: John Paul Stevens retired in 2010 and was followed by Elena Kagan; Sandra Day O'Connor retired in 2006 and was followed by Samuel Alito; Antonin Scalia died in 2016 and was followed by Neil Gorsuch; Anthony Kennedy retired in 2018 and was followed by Brett Kavanaugh; David Souter retired in 2009 and was followed by Sonia Sotomayor; Ruth Bader Ginsburg died in 2020 and was followed by Amy Coney Barrett; Stephen Breyer retired in 2022 and was followed by Kentanji Brown Jackson.

30 During the process of nominating a candidate for the Supreme Court, the president needs to consult the U.S. Senate according to Article II Section 2 of the Constitution. The Senate Judiciary Committee is then responsible for vetting and questioning the candidate with, among other intelligence sources, the help of the FBI. After a vote by the Judiciary Committee, the nomination will go through a Senate debate, after which the U.S. Senate then votes on the candidate.

universal cultural concepts such as family, reproduction, and marriage,[31] but joined the majority opinion in *Bostock v. Clayton County*, which argued that sexual orientation and gender identity are protected by existing employment laws, more specifically by Title VIII of the Civil Rights Act 1964. Roberts, generally considered a conservative justice based on his views, is also an outspoken originalist and thus his decisions may appear paradox (with regard to his personal opinion) but are indeed very consistent (with his legal philosophy).

In the following, the Supreme Court's most important decisions with regard to sexual orientation are analyzed. While the Court has decided on various cases of gender identity discrimination in the past,[32] these cases are not part of the analyses as this chapter's focus is on sexual orientation decisions regardless of one's gender identity.

The arguably most important Supreme Court decisions concerning sexual orientation and politics in the twenty-first century are *Lawrence v. Texas* (2003), *U.S. v. Windsor* (2013), *Obergefell v. Hodges* (2015), *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), and *Bostock v. Clayton County* (2020). While debates about the repeal of the *Affordable Care Act* would also possibly result in life-changing conditions for LGBTQ+ individuals, this aspect is not part of the analysis as it is not distinctly about sexual politics or sexual orientation.

Human rights scholar Robert Wintemute identifies three major arguments "that a constitution of treaty contains a prima facie prohibition of sexual orientation discrimination" (17). According to Wintemute (16–20), these arguments differ in their approach to sexual orientation as one makes assumptions about its causality/origin (1), one considers its position with regard to other, potentially conflicting fundamental rights (2), and one focusses on the position of the person whose sexual orientation is looked at (3):

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31 See for instance *Obergefell* 4: "For all those millennia, across all those civilizations, 'marriage' referred to only one relationship: the union of a man and a woman;" or *Obergefell* 5: "for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond."

32 See, for instance, *Karnoski v. Trump*. Following the 2016 elections, President Trump announced via *X* (formerly *Twitter*) that trans people should no longer be able to serve in the military. *Karnoski v. Trump*, along with similar law suits, aimed at preventing this ban from going into effect. The Supreme Court decided in January 2019 to lift the stay on the order; trans people were thus no longer allowed to serve openly on the military (Jackson and Kube; Barnes and Lamothe). This ban was lifted on January 2021 by President Biden in an executive order (Biden "Enabling").

> 1. an *immutable status argument*: because many gay men and lesbian women believe that their sexual orientation (as direction of attraction) is unchosen, sexual orientation may be an 'immutable status' like race or sex.
> 2. a *fundamental choice argument*: because every person's sexual orientation (as direction of conduct) is chosen and is extremely important to their happiness, it may be a 'fundamental choice (or right or freedom)', like religion or political opinion, and come wholly or partly within a specific 'fundamental right' such as freedom of expression, association or religion, or a residual and more general 'right of privacy' or 'right to respect for private life'.
> 3. a *sex discrimination argument*: because of the acceptability of the direction of a person's emotional-sexual attraction or conduct depends on their own sex, sexual orientation discrimination may be a kind of sex discrimination, like sexual harassment or pregnancy discrimination. (Wintemute 17)

The following case studies link the modes of constitutional interpretation discussed earlier to these three arguments, and characterize most cases as using a fundamental choice argument (*Lawrence*, *Windsor*, *Masterpiece*, *Obergefell*),[33] one as using a sex discrimination argument (*Bostock*), and none of them an immutable status argument. This chapter situates these approaches according to their usefulness for today's queer rights projects and uncovers the wobbly sociocultural grounds upon which they stand. Ultimately, these case studies serve to underline the need for an anti-discrimination protection via suspect classification.

Throughout the previous chapters, the decisions in *Obergefell* and in *Bostock*, their legal dogmatic reasonings, and their importance for the LGBTQ+ community have been commented on and used as examples for why more thorough protections for queers are needed. These decisions are particularly important because they are the most recent ones and because they have resulted in fierce political and legal backlash on the state level. The following subchapters illustrate the arguments made in favor and against the respective issues at hand by offering a qualitative analysis of these decisions. By doing so, the method of analyzing the cultural frame in which these decisions are made is employed and developed further. Consequently, these analyses require and hope to strengthen its reader's cultural-legal thinking, which is considered a handy tool in every activist's tool box.

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33 *Bowers* would also fit into this pattern, yet is not part of the analyses as it has been decided in 1986.

Lawrence v. Texas (2003): Reforming Understandings of Sex and Privacy

In *Lawrence v. Texas* (2003), SCOTUS ruled that consensual homosexual acts, including anal and oral sex, are constitutional. This landmark decision overruled *Bowers v. Hardwick*, a decision from 1986 which found that consensual homosexual 'sodomy' is not protected by the Constitution. Both cases deal with two men who engaged in sexual activity in their private homes, and following the logics of *stare decisis*, *Lawrence* would have followed in *Bower*'s footsteps. However, as legal scholar Ronald Kahn argues, the Court's practice of social constructionalism made it possible to refer back to a series of decisions prior to *Lawrence* that made the reasoning in *Bowers* obsolete. Previous Supreme Court decisions such as *Griswold v. Connecticut* (1965) and *Roe* (1973) established the importance of the right of privacy, which *Lawrence* picked up upon (Kahn "Polarized" 182).[34]

Since John Lawrence and Tyron Garner had consensual sex in Lawrence's apartment, the right of one's privacy in their home protected them. In *Lawrence*, it becomes obvious that the Court followed an organic understanding of the Constitution:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. (*Lawrence* at 578–9)

Justice Kennedy, who delivered this majority opinion, explicitly refers to possible criticism from an originalist's standpoint, namely that the Constitution's framers were silent on the matter at hand and thus, justices today should restrain from imposing their own interpretation and judicial activism. By defending that the opinion follows an organic reasoning, Kennedy also stresses

34 See *Lawrence v. Texas* at 565: "After Griswold it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. … Roe recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."

that a living Constitution may be better equipped to respond to social, cultural, and political transformations. Justice Scalia's understanding of the opinion as "result-oriented" (*Lawrence* at 592) criticizes that organists do not refer to the Constitution's wordings or intentions of the framers as starting point for deciding cases – as would originalists – but take their envisaged outcome as starting point for their argumentation. Justices Rehnquist, Scalia, and Thomas, who are all outspoken originalists, dissented on the basis of the majority opinion's reasoning that criminalizing homosexual activity in one's home violates the Fourteenth Amendment's Due Process Clause. To Scalia, who wrote the dissent, overruling the precedent in *Bowers* is not the issue here but the judicial activism of the argument.[35] Since the Due Process Clause does not originally grant the fundamental right to liberty, they consider this reasoning flawed. Scalia even used his dissent to comment on *Roe*. Claiming that if the Court decides to overrule *Bowers* in *Lawrence*, it also needs to overrule *Roe*, Scalia uses constitutional arguments to bring across his dissatisfaction with granting minorities rights, and to refer to a particular, heterosexist, patriarchal condescending legal-cultural order:

> What a massive disruption of the current social order, therefore, the overruling of Bowers entails. Not so the overruling of Roe, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. (*Lawrence* at 591)

While *Lawrence* disrupts the, one might add 'natural,' social order in Scalia's perception, curling back abortion rights on a federal level would re-establish a "regime that existed for centuries," which Scalia seems to perceive as legitimate. Arguing from a legal dogmatic standpoint, Scalia frames his dissent as a matter of an objective constitutional interpretation, leaving aside his positionality as a conservative, male, cis, heterosexual, educated, able-bodied, privileged justice in the highest court of the U.S., who is not primarily affected by such regulations.

While the rich judicial and moral argumentation on both sides is certainly worth close reading, the most pivotal feature of the *Lawrence* decision is nei-

35 See *Lawrence* at 587: "I do not myself believe in rigid adherence to stare decisis in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine."

ther its distinction between organic and originalist reasoning nor its pro-LGBTQ+ outcome as such, which certainly deserves landmark status. *Lawrence* illustrates that a progressive outcome of a Supreme Court case does not equal progressive legal and cultural consequences. The implications of *Lawrence* show that SCOTUS did neither rule discrimination based on homosexual activity nor the state's intrusive regulation of one's sexual orientation in other contexts unconstitutional. It merely protected the right to liberty, mirroring neoliberal tendencies to protect one's space instead of stating that sexual orientation is constitutionally protected. Fundamental choice decisions like this operate from the socioculturally constructed ideal of 'freedom,' which is predominantly linked to one's private sphere to which the state is supposed to have no access. State intrusion into one's home and by extension one's bedroom is considered unconstitutional and thus *Lawrence* was decided in favor of its gay plaintiff. However, other legal regulations concerning one's private sphere were not considered in an extension of the logic of the privacy argument. For instance, being fired because of the gender of one's partner was only federally protected in 2020's *Bostock* as discussed below.

Following this fundamental choice argument and perceiving of *Lawrence* as progressive, – which it undoubtably was with regard to its outcome and consequences for queer (sex) lives, – a cultural deconstruction of the ideals of liberty and freedom is prevented. *Lawrence* does not include questioning whom 'freedom' still excludes in twenty-first century U.S. America, it does engage in questions of who is perceived as legally worthy of rights, or even right-able in the sense of having legal agency, nor does it extend the implications of preventing the state from intruding in its citizens' lives to other realms in which LGBTQ+ persons are prone to discrimination. In this sense, *Lawrence* may be considered a (consciously) wasted opportunity to protect queer lives further.

U.S. v. Windsor (2013): Ending DOMA, Continuing an Organic Approach

U.S. v. Windsor (2013) dealt with the case of a widow, Edith Windsor, who inherited the estate from her deceased spouse Thea Clara Spyer. Windsor and Spyer married in Canada in 2007 and had their marriage recognized in the U.S. by New York state law, which was one of the states that already recognized same-sex marriage. Yet federal law, in the form of the then still valid *Defense of Mar-*

riage Act (DOMA),[36] understood marriage as "a legal union between one man and one woman as husband and wife" (DOMA, sec. 3) and it defined a spouse as "a person of the opposite sex who is a husband or a wife" (DOMA, sec. 3). As a consequence, Windsor had to pay taxes after Spyer's death on the inheritance – spousal exemption was denied by DOMA's understanding of marriage and spouse. Edith Windsor saw this a violation of her rights and sued the federal government for a refund of her money.

The Court ruled in favor of Windsor by finding the third section of DOMA unconstitutional and in violation of legally married same-sex couples' right to equal protection under the Fifth Amendment. Justices Scalia, Roberts, Thomas and Alito dissented and raised important issues connected to the Supreme Court's authority and power in U.S. America.

> This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America. (Scalia 1)

Scalia criticizes that the *Windsor* Court overturned an Act passed by the legislative (DOMA), and the Court's judicial activism in doing so. To him, applying an organic approach to constitutional interpretation is misusing the Supreme Court's power. As an originalist, he is convinced that looking at what the framers of the Constitution had in mind is the better mode of interpretation as this method prevents contemporary courts from applying their own understanding and from becoming legislatively active. Taking into account sociocultural developments as the majority opinion by Justice Anthony M. Kennedy did in *Windsor* stands in contrast to how originalists like Scalia envision the Court's role, the political system in the U.S., and the Con-

36 'Valid' refers to DOMA still being enforced in 2013. While *Windsor* struck down the third section of the Act, thus making it unenforceable, *Obergefell* did so for the second section in 2015. Sec. 3 defines the terms 'marriage' and 'spouse,' while Sec. 2 lays down the states' sovereignty in deciding whether to legally recognize same-sex marriages within their jurisdiction.

stitution. Scalia's dissent also addresses the question of suspect classification by referring to the different levels of scrutiny:

> The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," ante, at 25; that it violates "basic due process" principles, ante, at 20; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment," ante, at 19. (Scalia 25)

It seems to be no coincidence that justices who follow originalist legal philosophies see no tradition in same-sex marriage being part of U.S. American culture. Scalia's dissent vividly illustrates how political conservativeness, methodological preferences, and cultural essentialism draw on each other. Scalia criticizes the majority's opinion both because of its judicial activism, which in his opinion "envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role" (Scalia 2), and for its erroneous framing of those in support of DOMA as homophobic.

Scalia's argumentation rests on the general cultural sentiment when DOMA was introduced. In 1996, as his argument goes, the members of Congress and President Bill Clinton enacted and signed this law without any discriminatory motivation – they simply wanted to provide a definitional provision which "avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage" (Scalia 19). This historical revisionist view acquits lawmakers from the accusation of bias: They merely wanted to find a common definition and codify it. This view erases the validity of LGBTQ+ discriminatory experiences and negates queer visibilities amidst the AIDS epidemic by claiming that Congress did not want to discriminate queer people – it rather wanted to protect everyone by establishing a legal regulation. After all, "the legislation is called the *Defense* of Marriage Act" (Scalia 21; emphasis added) and "to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements" (21).

This view leaves aside the privileged position of those being legally allowed to get married, which is connected to different insurance options, better tax models, and cultural appreciation of one's relationship. Labeling the need of *having* to pick other relationship forms, e.g., domestic partnerships, as "pre-

ferred" arrangements is as inaccurate as it is vicious. It also clouds the dynamics of gatekeeping by political and legal actors.

Scalia's inability – or unwillingness – to acknowledge the discriminatory nature such a heteronormatively privileged stance entails reveals his conservative adherence to an outdated worldview that considers cis, heterosexual, possibly White couples as center of the cultural concept of kinship and family. While one may argue that Scalia's dissent speaks more to his preference for an originalist mode of constitutional interpretation and less to his personal beliefs, the link between these two can be found in the associated view on American culture an originalist understanding of the Constitution brings.

In framing the issue of a marriage's and a spouse's definition as crystal-clear, Scalia offers insights into his conception of American culture as static. Further, he refuses the majority's opinion's supposedly moral judgements about opponents of DOMA's being struck down:

> All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race. (Scalia 21; emphasis in original)

In Scalia's view, condemning those who believe in the naturalness of heterosexual marriage is illegitimate and morally condescending. At the same time, rejecting a definition of marriage and spouses which takes into account socially and culturally progressed notions of family is in line with the U.S.'s cultural values. Or, in other words, there is no discrimination in doing so because a heteronormative understanding of family is essential to U.S. American culture and society. Using originalism as moral credential, Scalia's culturalism, i.e., the belief in a static U.S. American culture with inherent and unchangeable values, functions as translator for his conservative political views into constitutional decision-making.

The legal starting point of *Windsor* illustrates how state and federal laws may clash and that deciding on unified regulations is also about strengthening or cutting back the political relevance of federalism. According to legal scholar Dawn Johnsen, *Windsor* mirrors

> not only constitutional change in the direction of more expansive judicial protection of equal protection and due process, but also fidelity to a mainstream approach to interpreting the Constitution that considers a range of sources and methods and allows for the consideration of evolving social norms and constitutional understandings. (2)

Reinforcing the Court's pro-organic direction in *Windsor* places yet another landmark decision for LGBTQ+ rights dogmatically in an anti-originalist position.[37] Despite the case's progressive outcome, namely finding that DOMA "impose[s] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the … States" (majority opinion by Kennedy, *U.S. v. Windsor* at 3–4), the focus remains on the state's authority as well as general conceptions of the federal system and the concept of equality.

Windsor is all the more important for discourses about sexual orientation's legal protection as the Court decided *not* to rule on its suspect classification although the Obama administration, in favor of striking down DOMA, argued for doing so in a letter by Attorney General Eric Holder (Holder). As in *Lawrence*, the Court missed the chance to tackle the question of whether discrimination based on sexual orientation is unconstitutional.

Obergefell v. Hodges (2015): Climax of Organic Mode of Interpretation

Obergefell v. Hodges (2015) is probably the most well-known pro-LGBTQ+ rights decision in the 2010s. After striking down DOMA in *Windsor*, the Court paved the way for the federal recognition of same-sex marriage in *Obergefell* and fostered the public's opinion about the U.S.'s progressiveness in terms of acknowledging and protecting queer rights.

This perception, however, is flawed in multiple ways. Without the landmark cases *Romer v. Evans* (1996) and *Lawrence* (2003), *Windsor* and subsequently

37 These binaries are simplified characterizations of the methodological divides between justices, and the understandings of what originalism means depends on one's legal philosophy. As Johnsen points out, justices who are typically considered non-originalists such as Bader Ginsburg and Kagan have called for a pluralistic understanding of "originalisms" (4) with Kagan famously stating that "we [judges and justices; lb] are all originalists" (Kagan qtd. in "Nomination"). However, legal scholarship typically places textualist readings at a more conservative position on the originalism spectrum.

Obergefell would not have been thinkable. *Obergefell* thus may pose as progressive decision, yet it is merely the argumentatively logical and methodologically dogmatic consequence of past decisions. Thus, this decision is indicative of the dominance of modes of interpretation (organic vs. originalist and judicial precedent) and the constitutional implications of the cultural concept of liberty. It is, however, not a decidedly concession to queer demands and acknowledgement of discriminatory realities for sexual minorities.

These decisions preceding *Obergefell* – *Romer*, *Lawrence*, *Windsor* – are each dealing with discrimination based on sexual orientation, each of them has been decided with a living Constitution in mind, and each of them was authored by Justice Kennedy, who, according to legal scholar Peter Nicolas, "leave[s] behind one of the most important gay rights legacies in U.S. legal history" ("Squandered" 137). This series of Supreme Court decisions dealing with sexual minorities would have made it possible for the Court to declare sexual orientation a suspect classification. However, in Nicolas' words, the Court "squandered" this opportunity and instead left behind the nonviable promise of constitutional progressiveness for LGBTQ+ people.

Obergefell's progressive understanding of marriage equality is always only one conservative vote away from being reviewed and possibly overturned.[38] In this sense, *Obergefell* established a false constitutional protection for queer people in that it increased their visibilities, yet did not cover their vulnerabilities in areas unrelated to the fundamental right to marry. While being able to get married made same-sex partnerships legally more privileged in that they had access to more rights, and culturally more recognized by granting them equal treatment in the sphere of marriage, getting married increased queers' visibility profoundly, be it through the acknowledgement of their partnership on official documents accessible for employers, or through contact with wedding planers, register offices, or insurance companies.

From a political perspective, *Obergefell* seems confusing. The Court acted consistently in its line of argumentation, i.e., by continuing its application of the level of scrutiny and its mode of interpreting the Constitution. One could argue that slowly expanding gay rights and advancing the political queer project is a strategic way of circumventing political tensions. After all, declaring sexual orientation a suspect classification would without doubt

38 For evidence for this claim, see the statement by Alito and Thomas with regard to *Davis v. Ermold*. Justices Alito and Thomas have repeatedly voiced their disapproval of how the Court argued in *Obergefell*, and called for a review of the case.

create backlash from both within the Court and from conservative politicians. The fear of "diluting the meaning of heightened scrutiny" (Yoshino 797) has led justices to avoid expanding the list of classifications to include gender, sexual orientation, or other categories that from a queer feminist perspective warrant a stricter form of judicial review.

While these strategic considerations would arguably also be political in themselves, it is more likely that they were not intended. Reading *Obergefell* through Peter Nicolas' lens, it is unclear why the Court relied on structural arguments about the fundamentality of the right to marry when procedurally, the opportunity to make a class-based equal protection decision had been given ("Squandered" 141–2). Nicolas finds this "all the more surprising" ("Squandered" 141) when comparing the situation to other classifications' history:

> When the Court held that laws targeting African Americans were subject to strict scrutiny in *McLaughlin*, it effectively decided the constitutionality of interracial marriage, one of the most highly contested social matters of the time. *Obergefell* itself directly decided same- sex marriage, the most socially sensitive gay rights issue of this time. While other laws, such as parentage rights, targeting gays and lesbians have yet to be adjudicated by the Court, such laws do not raise issues nearly as socially sensitive as marriage—the lightning rod that generated constitutional amendments banning the practice in a supermajority of states. Accordingly, announcing heightened scrutiny in *Obergefell* would not have come close to the strong medicine that it would have been had the Court announced it earlier in *Romer* or *Lawrence*, for example. ("Squandered" 141–142)

While Nicolas's convincingly disseminates the judicial-historical and methodological levels *Obergefell* has, he fails to acknowledge the possible lack of intent for protecting sexual orientation. This is of course a rather controversial reading based on an assumed ideological or political will of the justices, which, as stated in the previous chapters, is to some scholars still a controversial claim in itself. Yet the constitutional history of minoritarian equal protection suggests that the deciding factors were not considerations about judicial activism or procedural challenges.

It is more likely that the Court hesitated to use the "strong judicial medicine" (Nicolas "Squandered" 140) of applying a class-based equal protection for sexual orientation because such an expansion of the list of suspect

classifications was, and still is, politically too charged. Even without assuming anti-queer bias of the individual justices, – a benevolent reading, – the Court as a whole acted as a protector of its own interests by not tackling sexual orientation's heightened scrutiny. Doing so would undoubtably have put the Court even more in political spotlight. In trying to circumvent such sensitive issues, however, *Obergefell* opens up political debates about cultural values.

By declaring marriage a fundamental right, the Court stressed the cultural relevance of an institution which has historically oppressed women under the cloak of heteropatriarchal care. It has not acknowledged the cultural equality of marriages between non-heterosexual persons but only queers' equal right to get married. This distinction is important to keep in mind as anyone arguing for queer rights should work towards cultural equity and legal equality, using the latter as means to achieve the former but not as an end in itself.

Justice Kennedy bases the Court's decision on three key American cultural values: individual autonomy (12),[39] freedom (7),[40] and social order (16).[41] Considering marriage a fundamental right stems from the cultural importance

39 "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. … Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. … Choices about marriage shape an individual's destiny" (*Obergefell* at 12–3).

40 "Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process" (*Obergefell* at 7).

41 "Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago: 'There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . .. [H]e afterwards carries [that image] with him into public affairs.' … In *Maynard* v. *Hill* (1888), the Court echoed de Tocqueville, explaining that marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.' Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity'" (*Obergefell* at 16).

American society puts on one's right to privacy, which the Court already used in its *Lawrence* argumentation and which now finds continuation in *Obergefell*.[42]

Privacy arguments reproduce the ideas connected to individualism, namely that the issues at hand are within one's ability and responsibility to shape and possibly to change. More explicitly, by dressing privacy as fundamental right, the Court stresses individual responsibility as fundamental duty in a society that outsources unpleasant tasks from the public to the private sphere. For instance, unpaid care work such as child-rearing or taking care of sick family members becomes delegated to private realms so as not to expect responsibility from governmental actors. At the same time, these private spaces are demarcated as sometimes the only possibility to live out one's identity without social, political, or legal restraints, e.g., post-*Lawrence* same-sex sexual conduct.

The private sphere is the locus of a freedom which ultimately is none. It is a mere spatial and also timely restriction of what an individual is allowed or supposed to do when they are not in the public:

> Relegating sexuality to the private sphere revives an element of the old "separate but equal" doctrine – the belief that the separation of one group from the world of more general social interaction is neither unequal nor stigmatizing. Withholding social recognition from the public aspects of gay personhood while "[h]eterosexual society revolves around its sexual orientation" is inherently unequal not only in its substantive restriction of gay liberties, but also in its imputation of stigma: homosexuality, like obscenity, may be tolerated only if quarantined. ("Constitutional Status" 1290–1)

This reading of the private sphere becomes all the more apparent in a post-Covid-19 society in which images of lockdowns are all too readily evoked. Doing things in the privacy of one's home is more than often a restriction than a liberty, and how you do things in your private sphere is decisive of how you are treated in public. Social control about how one lives, behaves, and loves does

42 Privacy is what Justice Kennedy subsumes under autonomy and freedom as indicated by his reference to *Griswold* (*Obergefell* at 10). *Griswold* states that "We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" (at 486).

not stop right before your doorstep and may find its way in through the permeable borders of one's space which are constantly penetrated by one's own normativized socialization, legal regulations, social media feeds, neighboring gazes or actual people. In this context, it is important to note that while sexual *conduct* and sexual *orientation* are different issues, with the former indicating sexual activity and the latter romantic and/or sexual desire; *conduct based on sexual orientation* seems to constitute yet another meaningful category of cultural-legal consideration. While the law has already dealt with the right to engage in same-sex intercourse and with the right to same-sex marriage, it does not seem to have fully digested the cultural-legal implications of feeling entitled to openly live out one's sexual orientation in ways approaching cisgender heterosexual norms.

Having '[h]eterosexual society revolv[ing] around its sexual orientation' emphasizes that there is no organic distinction between the public and the private sphere to which law merely responds to. Quite the contrary, it stresses that sexuality is more complex than sheer conduct, and engrained in one's identity. Thus, when "privacy analysis assumes a dual structure – a division between the home and the outside world – that does not adequately capture the complexity of social life" ("Constitutional Status" 1289), basing the fundamental right to marry on these grounds may seem irritating, but basing the foundation of a queer rights project on these grounds seems more than shaky. While the argument of privacy has had considerable impact on gay rights, taking it as starting point for re-thinking other aspects of queer inequalities, or for stressing its importance as fundamental right, poses the danger of giving power to a cultural ideal which is void of inherent equality.

Needing a Piece but Still Not Having it: *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)

The SCOTUS 2018 decision *Masterpiece Cakeshop v. Colorado Civil Rights Commission* further illustrates this unreliability of privacy arguments. In *Masterpiece*, a Colorado bakery was sued by a gay, married couple, Charlie Craig and David Mullins, because the owner refused to bake a wedding cake for them in 2012. Arguing that his religious beliefs prevent him from creating such a cake, and that his cakes are pieces of art, the baker Jack Phillips offered the couple to buy anything else in his shop. While Colorado did not recognize same-sex marriage in 2012, the state law provided that

> [i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation … . (Colorado State)

The explicit inclusion of sexual orientation in Colorado's Anti-Discrimination Act resulted in the winning of the case for Craig and Mullins. This outcome forced the bakery to provide their wedding cakes for same-sex weddings. However, the cake shop asked the Supreme Court to review the case, which then had to decide "[w]hether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment" (*Masterpiece* Petition for a Writ of Certiorari). In other words, the Court had to decide whether religious beliefs are protected by the First Amendment, which would outplay state regulations.

The importance of this case cannot be underestimated. In *Masterpiece*, the simmering conflict between religious and queer rights is reignited in the arena of private businesses. *Masterpiece* uses what Robert Wintemute refers to as 'fundamental choice argument' only to find religious beliefs to be more worthy of protection than sexual orientation. Culturally, this view does not surprise. After all, the right to privacy, which is often evoked in the discourse about sexual orientation, now enters the public sphere when private businesses are to serve same-sex clients. This rupture, one may argue, is especially controversial when it is done within the context of same-sex marriage – the Judeo-Christian ideal of marriage between a (cis) man and a (cis) woman has already been legally defeated by *Obergefell* but forcing individuals to serve those they disapprove of brings this conflict even closer to their lives. This difference in tolerating, – or having to, – queer emancipation in the realm of queer private lives and accepting queer legal emancipation meandering into the public sphere and ultimately affecting one own's realm evokes separate-but-equal notions and a perverted understanding of equality which limits itself at the threshold of others' liberty. The cultural overemphasis of marriage not only mars people's understanding of the status of equal rights for queers as discussed earlier, – same-sex marriage is still considered a huge victory and leads to perceiving queer rights demands as already accomplished, – but it also uncovers how the legal

right to get married does not translate into the cultural right to celebrate queer marriages equally.

Masterpiece therefore illustrates how a separate-but-equal logic finds their way into cultural and legal discourses, how religious beliefs are fundamental to U.S. American (legal) culture and arguably the U.S. public space, and which areas still suffer from legal lag in terms of protection. *Obergefell*'s heightened visibility of queer couples is still contributing to unprotected discrimination in areas of life other than marriage and adoption. Moreover, the legal right to marry seems still to be accompanied by the cultural imaginary of a married couple as heterosexual and cis.[43] Violations of this imaginary such as in the case of *Masterpiece* stress that these cultural imaginaries at work are not only descriptive but also prescriptive ones. The cultural and constitutional narrative of equality before the law and the equal protection of the laws are upheld by granting minorities certain rights while simultaneously, the cultural imaginary polices these rights' *de facto* implementation into lived equal realities for queers.

A New Era? *Bostock v. Clayton County* (2020)

Bostock v. Clayton County combined several similar law suits in one. *Bostock* dealt with the case of cis man Gerald Bostock, who was fired by his employer after he told people at work about his participation in a gay recreational softball league. *Bostock* also featured the case of skydiving instructor Donald Zarda, a cis man who was fired by his employer after he told a client about his husband, and funeral director Aimee Stephens, a trans woman who got fired after informing her employer that she will "live and work full-time as a woman" (*Bostock* at 1). Each case dealt with someone being fired because of their sexual orientation or gender identity, and each of these employees sued their employer for sex discrimination under Title VII of the Civil Rights Act of 1964. Title VII, which "makes it unlawful to discriminate against someone on the basis of race, color, national origin, sex … or religion" ("Laws Enforced"), protects individuals against employment discrimination, including, among others, "hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall" ("Laws Enforced").

43 This cultural imaginary and possibly idealtype of marriage would presumably also include White, able-bodied, middle-class, normatively attractive as marriage is closely connected to fantasies about proper procreation and national survival.

Bostock is remarkable in many respects. First, it is the most recent pro-LGBTQ+ decision by a growingly conservative Roberts Court, and more than that – it has been decided during the Trump presidency with two Trump-nominated, conservative justices on the bench. Given the numerous anti-queer attacks by the government from 2016–2020 and beyond, *Bostock* stands out as unexpected and celebrated victory for queer rights advocates, activists, and allies.

Second, the decision established a constitutional foundation for LGBTQ+ protections in a wide array of areas. With its implementation by the Biden administration, it also enjoys governmental support and is unlikely to be challenged by the Department of Justice.

Third, *Bostock* is the first Supreme Court decision that followed what Wintemute labels a 'sex discrimination argument.' This argument does not look at sexual orientation as such, thus refraining from any inquiries into its biological or social origins, as would an immutable status argument. It also does not consider the violation of any fundamental right(s) which may intersect with others' rights; it approaches discrimination on basis of sexual orientation from the perspective of the person whose sexual orientation is addressed, as would a fundamental choice argument. This means that the sex discrimination argument "does not require the recognition of any new fundamental right or suspect classification, but rather attempts to use, in sexual orientation discrimination cases, an existing quasi-suspect classification (i.e. sex)" (Wintemute 83–4).

While the new employment protections for sexual minorities this outcome brought are progressive and worth applauding, the mode of interpretation applied was a textualist one. As Justice Gorsuch, who delivered the majority opinion, states:

> From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to dis- charge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. (at 9)

Referring back to how the statute would have been understood at the time of its adoption (*original intent*), Gorsuch finds the cases at hand to be in clear violation of Title VII. Originalism, traditionally associated with judicial restraint, is here favored as a mode of interpretation and implies that the Supreme Court has merely applied the law instead of enlarging, bending, or re-inventing it.

Justices Thomas, Alito, and Kavanaugh dissented to this opinion. The dissent by Alito, which Thomas joined, criticizes Gorsuch's majority opinion exactly because of its judicial activism. Stating that "[t]here is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive" (dissent at 1), Alito accuses the Court to be "[u]surping the constitutional authority of the other branches" (dissent at 3). This view seems surprising because Gorsuch, as well as Alito, place their argumentation on originalist reasoning: "[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*'" (dissent at 3; emphasis in original). Alito then goes on to label Gorsuch's opinion as "a pirate ship … [which] sails under a textualist flag" (dissent at 3), denying Gorsuch's majority opinion its 'proper' textualist methodology.

Both the majority opinion and the dissent then take on textualist interpretations but conceive of them inherently oppositional based on the reading's respective outcome. Citing homosexuality's legal criminalization and the medico-biologistic pathologization of homosexuality as mental disorder according to the 1964's *DSM*-I[44] (28–9) as well as gender dysphoria's pathologization as laid out in *DSM*-III (35), Alito emphasizes that Gorsuch's textualist reading is flawed. For Alito, it is "clear as clear could be that [sex discrimination; lb] meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth" (dissent at 4). Because not "a single dictionary from that time … defined 'sex' to mean sexual orientation, gender identity, or 'transgender status'" (at 4), Gorsuch's argument follows that 'sex' in 1964 only encompassed "reproductive biology" (at 5, majority opinion) to lay out a more sophisticated reading.

Gorsuch argues that Title VII "prohibits employers from taking certain actions 'because of' sex" (at 5, majority opinion), which means something hap-

44 The *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*) is a publication series by the American Psychiatric Association (APA). The manual offers a standard catalogue for classifying mental disorders. First published in 1952, the DSM has been updated several times with its most recent publication in March 2022, DSM-5TR.

pens "'by reason of' or 'on account of'" (at 5, majority opinion) sex. This 'but-for causation' lays out that each employee would not have been fired but for their respective sex. If, for instance, Donald Zarda talked about his husband as a cis woman, he would not have been fired. Thus, his sex was the cause of his notice:

> So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII. … That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. (at 7; 10, majority opinion)[45]

As both the majority opinion by Gorsuch and the dissent by Alito refer to a textualist interpretation of Title VII, yet come up with different readings based on textualism, the subjectivity of textualist approaches becomes obvious. Claiming to use an apolitical approach which shies away from enforcing a justice's subjective view to constitutional law, namely one which leaves aside justices' moral and political convictions, Alito's and Gorsuch's differing opinions show that textualism does not offer unambiguous, judicially restrained interpretations. *Bostock* illustrates that sticking to certain modes of interpretation is indeed not objective but can be used as a strategic tool to invisibilize and hide conservative justices' political motivations and anti-queer bias.

Further, *Bostock* shows how justices' positionality influences their reading of a case. Although both Gorsuch and Alito are regarded as conservative jus-

45 Gorsuch continues to extend this argument to gender identity: "Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision" (at 10, majority opinion).

tices and both are outspoken textualists, their differing interpretations show that neither commonality of legal philosophy, shared political sides nor a combination of both result in a similar understanding of a case. Following Donna Haraway's understanding of situated knowledge (1988), *Bostock* sheds light on how the idea of 'objective' knowledge is even in a highly dogmatic and rule-driven system an imaginary which can be (mis)used for political maneuvering. Pro-queer and anti-queer readings of a legal case are therefore a matter of perspective and political will. Again, the necessity to conduct cultural analysis of law to foster queer lives is emphasized.

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As these wide readings show, the Supreme Court's approach towards protecting sexual orientation has not changed over the last three decades. While important protections for queers have been won, the underlying arguments have been decidedly neutral and at times hostile towards the LGBTQ+ community. Both the fundamental choice argument and the sex discrimination argument have proven to further cement neoliberal notions of liberty and heteronormative notions of sexuality into law. Despite the evident tremendous *de jure* improvements for queers, the Supreme Court emerges as even bigger beneficiary from these decisions. Strategically placing pro-queer outcomes amidst increasingly fierce politico-cultural tensions while sticking to *de facto* stereotypical and queer-hostile arguments, the Court validates itself in front of allies, opponents, and proponents of queer rights.

It is not surprising that of all these important LGBTQ+ decisions none is using what Wintemute refers to as 'immutable status argument.' Using this argument would mean the Court recognizes sexual orientation as an immutable criterion, affirming one of the more controversial criteria for suspect classification. Despite the danger of essentializing an individual's sexuality, it would also acknowledge that a person's sexual orientation is fundamental to their identity and experiences. This decision by the highest court in the United States would already be a concession to those fighting to have their struggles legally recognized.

Having passed on the opportunity to review sexual orientation with heightened scrutiny on multiple occasions in the course of the twenty-first century may have several reasons: One may argue that not expanding its list of suspect classifications indicates the Court's anxiety in diluting the Equal Protection Clause's impact as suggested by Kenji Yoshino and his perspective on pluralism anxiety. Similarly, one may argue that the Court could be wanting to protect its political authority and legitimacy in increasingly politicized and

polarized times, mirroring its current conservative supermajority and its justices' originalist tendencies of restraint. However, given the strong entanglements of law, culture, sexuality, and morality in the decisions analyzed here, it seems more likely that the Court above all fears losing its moral mandate and cultural authority. As seen by the analyses, the rights granted to sexual minorities in the twenty-first century always come with ideological freight and serve to ultimately strengthen the positions of those granting them and the dominant systems in which they are being negotiated. Declaring sexual orientation a suspect classification would undermine this endeavor of regulating queer rights one at a time; the Supreme Court's practice of taking case after case illustrates how legal queer liberation is still dependent on political sentiments, and that sociocultural equity is far from being accomplished. It is rather a controlled process of manipulating public sentiments and cultural imaginaries about the Court, the legal system, and U.S. moral superiority and the progressiveness of its sexual order. This gradual development allows conservative justices with anti-queer sentiment to slowly advance conservative movements' legal aims, perfect the constitutional reasoning behind curling back minority rights, and maintaining cultural authority while doing so.

The Court's unwillingness to review sexual orientation cases with heightened scrutiny serves yet another function. Granting rights to queers establishes the Court's authority and cultural legitimacy as it responds to sociocultural developments, yet refraining from making such a crucial constitutional reading of the Equal Protection Clause maintains the Constitution's and, by extension in the public imaginary, the Court's moral purity. Equal Protection jurisprudence is therefore not 'stained' by queer rights while the Court gets to keep its moral credentials by having granted the LGBTQ+ community the right to sexual freedom, the fundamental right to marry, and employment discrimination protection.

Further, these close readings stress the need for a critical cultural legal literacy in research and education. As shown, an analysis of both legal and cultural factors is needed to understand the implications of judicial decisions. Instead, what is most prominently discussed in public through media coverage of important decisions is *what* has been decided and not *why* it has been decided that way, which would include analyses of the respective argumentations and the connection to justices' modes of interpretation as well as a zooming in on cultural value systems and imaginaries. Without such an informed analysis, the legal strategies of conservative actors remain opaque and their implications

impenetrable, limiting the response options to counter and challenge such decisions.