Introduction

Over the course of the last years, this book has taken on a more political character than originally intended. What started off as a book with the aim to analyze the constitutional and sociocultural implications of legal protections for LGBTQ+[1] in the United States has now become a larger argument for law's role in and for queer emancipation. This shift is influenced by many political and legal factors. The 2020s saw an unusually volatile development of legal protections for LGBTQ+ people as well as a politically charged struggle over the personal set-up of the Supreme Court, the highest court in the United States. The process of appointing two of the Trump-nominated justices to the Supreme Court, Brett M. Kavanaugh replacing Antonin Scalia in 2018 and Amy Coney-Barrett replacing Ruth Bader Ginsburg in 2020, has become a highly medialized event. The announced retirement of Stephan G. Breyer in the summer 2022 enabled then-president Joseph Biden to put Ketanji Brown Jackson on the bench.[2] The decision to nominate a Black female justice, the first of her kind, adds to the Court's diversity and picks up on the development of U.S. presidents aiming to get justices on the Supreme Court who are in line with the sitting government's political beliefs.

1 LGBTQ+ refers to anyone who identifies as lesbian, gay, bisexual, trans, queer. Varying gender identities and/or sexual orientations, including those considering themselves as questioning, inter, asexual, pansexual and/or something other, are implicitly included by the use of the plus; their omission does not reflect exclusion. While this acronym is in constant development and negotiation, the use of LGBTQ+ has been chosen for this book to provide more readability. This footnote hopefully brings across that sexual and gender identities are, similar to the ways of referring to them, in constant flux and evolution.

2 While the president gets to nominate a candidate, it is the senate's task to confirm them – an equally politicized, and by now also medialized, event.

The development of queer rights discourse follows this highly polarized pattern of fighting over political power. This is most visible in the discrepancies between federal and state-level decision-making: With 2020's *Bostock v. Clayton County* being the most current one, the U.S. Supreme Court issued several landmark decisions in favor of LGBTQ+ rights in the past decades. This contrasts the individual states' processes of re-negotiating sociocultural and political hegemonies by targeting sexual minorities, particularly trans, queer, and non-binary youth with ever rising numbers of hostile laws since 2020. So, what happened?

2015's legalization of same-sex marriage in the Supreme Court's *Obergefell v. Hodges* was considered to be a queer victory – at least from a heteronormative point of view. At this time, several states had already recognized same-sex marriage but only since the Supreme Court's decision are all states required to do so. The discourse about marriage equality became synonymous with progressive judicial decision-making and legislative policies. *Obergefell* has come to be seen as an indicator of a tolerant and inclusive U.S. society over which a non-biased Supreme Court watches. To some, the legal possibility of same-sex marriage even heralded a new era, one that was post-homophobia.

This view, however desirable it may seem, neglects the sociocultural and legal diversity of the U.S.'s federal system – or, in other words, the powerful fragmentation of state laws. For instance, while in 2003 the City of New York had already introduced the *Sexual Orientation Non-Discrimination Act* (*SONDA*) which "prohibits discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodation, education, credit, and the exercise of civil rights" (Schneiderman), recently introduced anti-queer legislation such as Florida's House Bill 1557 'Parental Rights in Education,' also being referred to as a 'Don't Say Gay' bill, "prohibit[s] classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner" (1). These stark contrasts show that U.S. American law is a heterogenous

and ambiguous system in which LGBTQ+ individuals have to face an almost non-navigable patchwork.[3]

Despite its revolutionary outlook, marriage equality has not bettered this situation. In fact, the high number of nationwide legal discrimination cases[4] and the current political backlash concerning pro-LGBTQ+ measures[5] rather indicate that the general sociocultural acceptance of sexual minorities is not improving. To put it more bluntly: *Obergefell*, being considered a fundamental victory for those fighting for sexual minorities' rights, appears to be anesthetizing rather than curing the symptoms of discrimination.

This development could have been prevented by the Supreme Court's reasoning. Instead of only resolving the question of whether same-sex partners are legally allowed to marry,[6] the justices should have included the question of whether discrimination based upon sexual orientation[7] is constitutional. Yet, with their focus on the right to marry, the justices in *Obergefell* have failed to add much needed anti-discrimination protections to LGBTQ+ individuals in areas other than the private institution of marriage.

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3 As the Movement Advancement Project succinctly puts it in their 2010–2020 report, "[a]s of January 1, 2020, the overall LGBTQ policy landscape across the country varies greatly from state to state and region to region. What's more, there are significant differences in the landscape for laws related to sexual orientation and the landscape for laws related to gender identity. These findings … illustrate how an LGBTQ person's legal rights and protections can change dramatically across state lines and depending on where they call home, even in 2020" ("Mapping" 4).

4 Discrimination cases which, among others, see same-sex partners being declined a wedding cake at a bakery (see *Masterpiece Cakeshop v. Colorado*) and employers being fired for mentioning their husband (see *Altitude Express, Inc. v. Zarda*) indicate that the right to same-sex marriage does not equal the sociocultural acceptance of such.

5 For instances of the Trump's administration's efforts to roll back LGBTQ+ rights see, e.g., *Karnoski v. Trump*.

6 Technically, *Obergefell* did not even this. The Court ruled in its decision that the right to marry is a fundamental right, not that same-sex marriages are constitutional; the latter only follows out of the former and makes the decision a decidedly liberal-rights-based instead of "group-based equality jurisprudence" (Yoshino 754).

7 Sexual orientation here refers to non-normative, i.e., non-heterosexual, sexual orientations if not indicated otherwise. As heterosexuality is the sociocultural norm in U.S. America as in most Western societies, discrimination cannot occur against the majority. Heterosexual orientation refers to sexual attraction towards the 'opposite' sex following a dualistic understanding of biological sex, i.e., biologically, there only exist men and women. The rather clinical term sexual orientation follows legal nomenclature.

Obergefell may thus serve as a gateway for further considerations about sexual orientation's legal protection in general; yet it left sexual orientation still highly susceptible to laws and practices which limit or reverse LGBTQ+ rights. These challenges to a holistic anti-discrimination policy, meaning one that would protect queer persons[8] unequivocally across state borders and make them immune to volatile mood shifts of state legislatures and the judiciary, mirror the U.S.'s legal patchwork, and underline the need for a coherent federal regulation.

This need is also backed when looking at *Bostock v. Clayton County*: In 2020, the Court ruled that Title VII of the Civil Rights Act of 1964 extends to sexual orientation, making discrimination against gays, lesbians, bisexuals or anyone else because of their sexual orientation in employment unconstitutional. *Bostock* filled a significant legal lag *Obergefell* left wide open: the newly heightened visibility and thus vulnerability of queers who were allowed to marry but who were still subjected to discrimination in other areas of their everyday lives. Stating that "an LGBT person could get married on Saturday, post photos of their wedding on Sunday, and get fired from their job or thrown out of their apartment on Monday" ("Cicilline"), the Democratic politician David N. Cicilline captures the gist of post-*Obergefell* discrimination. Being allowed to marry without protection in all other areas of life such as housing or workplace discrimination effectively makes married queers more susceptible to unequal treatment.[9]

Both landmark cases were depicted as highly progressive, even revolutionary rulings by a growingly conservative Supreme Court, decided amidst a conservative, right-wing government.[10] What is often not part of the public consciousness is that *Obergefell* did not decide on the equality of same-sex mar-

8 The term queer is used synonymously with LGBTQ+. While I acknowledge that queer may serve as a distinct identity category for many, and that not all who identify as part of the LGBTQ+ community may identify as queer, its usage has been chosen because of readability.

9 As of July 2021, 26 states and the District of Columbia prohibited employment discrimination based on one's sexual orientation (Hentze and Tyus). This includes firing, hiring, and discrimination in the workplace. Further, only twenty-two states and the District of Columbia had anti-discrimination laws for housing, including eviction and the owners' refusal to rent or, based on one's sexual orientation as of February 2016 (Mallory and Sears 1).

10 The political implications of these decisions and the philosophies of those on the Court's bench are subject to closer analysis in Chapter III.

riage, and that *Bostock* did not explicitly decide that sexual orientation should be protected in employment contexts. Although both cases' outcomes do impact queer lives, arguably for the better, they were neither framed nor understood as *a priori* pro-LGBTQ+ decisions from a constitutional perspective.

Obergefell aimed at the recognition of the fundamental right to marry, thereby implicitly involving same-sex couples but explicitly avoiding to make concessions to the queer community. The fundamental right to marry, as a universalizing rights claim, thus works to continue discrimination and to foster invisibilization of the demands of sexual minorities while appearing progressive. *Obergefell* can therefore be regarded as not only a legal decision but also an important political positioning of the Supreme Court.

Similarly, the justices interpreted Title VII in *Bostock* as extending to sexual orientation based on their specific constitutional reading: They argued that sexual orientation is connected to one's sex, and while sex is protected under Title VII and sexual orientation and sex are connected, sexual orientation should also be protected, under sex's legal umbrella. The justices' modes of constitutional interpretation have been the deciding factors in this ruling, particularly textualism, a mode which is typically associated with political conservatism.[11] Further, connecting matters of sexual orientation to biological sex, the Court's reasoning employs the heterosexual matrix of equating (binary) sex with gender and desire.

Bostock's argumentation sounds appealing on first sight, and while this strategy was presumably the best way to argue for an expanded understanding of Title VII, the implications of this decision irritate. If sex and sexual orientation are two sides of the same coin in the sense that a (cis) man would not have been fired for being in a relationship with a (cis) woman but a (cis) woman would have been fired for this, how does *Bostock* account for, for instance, intersex individuals or those in relationships with someone non-binary? *Bostock* has solved this issue by covering gender identity as well, yet it gave away the opportunity to comment on these identity categories' place in the U.S.'s legal-cultural hierarchy. By applying an informed, non-binary, non-biologistic understanding of sexual orientation and sex, the Court would have been able to move away from a medical-biological emphasis on sex, sex's sociocultural over-emphasis, and its legal over-regulation.

11 The various modes of constitutional interpretation are introduced in detail in Chapter III.

This omission seems even more unfortunate as public discourse about sexuality, gender, sexual orientation, and sexual practices becomes blurrier and more politicized. Sex still polarizes and attracts forces wishing to police, contain, and punish it in all its forms. The legal backlash on state levels following out of the *Bostock* decision speaks to this claim, as does the sociocultural response to past pro-LGBTQ+ rulings by the Supreme Court. On the federal level, claims to further sexual orientation's legal protection and the rights of the LGBTQ+ community are perceived as insatiable, and even unnecessary demands post-*Obergefell*. The very reference to same-sex couples' now legalized access to marriage licenses as 'equality' perpetuates the belief in the Court's establishment of a morally and politically tantamount status quo for non-heterosexual couples. According to associate law professor Leonore F. Carpenter, these "formal equality gains can actually encourage a false belief that a previously unfair system is now fair, which can mask the reality of discrimination" (259). Even more than covering discriminatory realities, believing in marriage equality as a measurement of a reformed legal system for LGBTQ+ individuals creates a lack of understanding, confusion, and lifted responsibilities for those confronted with post-*Obergefell* and -*Bostock* demands of the queer community.[12] Even more, the subsequent legal lag, i.e., the U.S. legislation's and judiciary's failure to adjust anti-discrimination laws to the new sociocultural environments and visibilities created by Supreme Court decisions, allows for a variety of cases involving discriminatory behavior on the basis of a person's known or suspected sexual orientation.

Thus, *Obergefell* has contributed to silencing sexual orientation on the legal landscape while not adding anti-discrimination protection in areas other than marriage until 2020. While *Bostock* was able to fill this gap for employment contexts, there is still no federal nondiscrimination law for, among oth-

12 The decision to refer to a homogenous queer community in terms of legal-political participation is elaborated in Chapter I.

ers, housing,[13] public accommodation,[14] or credit regulations.[15] Additionally, there are major differences between states when it comes to anti-discrimination regulations for criminal law,[16] religious exemption laws,[17] and laws targeting LGBTQ+ youth such as conversion 'therapies.'[18]

The constant and growing backlash on state levels, increasingly taking on moral, religious and biologistic lines of argumentation,[19] illustrates that formal equality gains do neither automatically result in sociocultural equity nor resolve the issue of discrimination for all areas of life. In order to analyze legal measures' impact on sociocultural processes of anti-discrimination, the legal measures would need to tackle discrimination as complex issue(s), emerging out of and reflecting back on sociocultural conditions and sentiments. This would involve deconstructing the essentializing modes of producing legal

13 As of June 2024, 18 states have no housing anti-discrimination laws based on sexual orientation or gender identity. These laws would "protect LGBTQ people from being unfairly evicted, denied housing, or refused ability to rent or buy housing based on their sexual orientation or gender identity" ("Equality Maps Housing").

14 As of June 2024, 21 states have no public accommodation anti-discrimination laws based on sexual orientation or gender identity. These laws would "protect LGBTQ people from being unfairly refused service, denied entry to, or otherwise discriminated against in public places based on their sexual orientation or gender identity" ("Equality Maps Accommodation").

15 As of June 2024, 31 states have no credit anti-discrimination laws based on sexual orientation or gender identity. These laws would "protect people from being unfairly denied credit and lending services, such as opening a bank account, taking out a loan, and more" ("Equality Maps Credit").

16 As of June 2024, 31 states have no bans on so-called gay or trans panic defenses (see "Equality Maps Bans"). In a criminal court, these defenses "seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation or gender identity" (American Bar Association 1).

17 As of June 2024, 14 states have for instance religious exemption laws for adoptions. This means that these states allow "state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBTQ people and same-sex couples, if doing so conflicts with their religious beliefs" ("Equality Maps Religious").

18 As of June 2024, 19 states have not banned so-called conversion therapies which aim at changing LGBTQIAP* youth's sexual orientation and/or gender identity ("Equality Maps Conversion").

19 These aspects are expanded on in Chapters IV and V; prominent examples of biologistic argumentations involve the fight over trans rights in the context of school sports (see Esseks; ACLU "Coordinated"); examples for religious argumentations involve religious exemption laws.

norms, especially by working with legal categories, and addressing the actors who construct and interpret them, such as the Supreme Court. Additionally, one has to take into account sociocultural conditions which may challenge the application of legal norms, such as anti-queer sentiment which results in the proposal and introduction of anti-queer state laws in response to pro-queer federal decisions.

Being aware that the legal arena of marriage rights may not be the most important one for all members of the queer community, and that employment discrimination protection is a victory but the backlash coming from the state level is fierce, this book wants to raise awareness for the diverse social, cultural, political, and legal entanglements of constitutional protection and stress their importance for queer rights discourses. Going beyond an argument that sees sexual orientation's heightened constitutional protection as the ultimate solution against discrimination and lack of acceptance, *Suspect Subjects* aims to:

a) advocate for a more prominent place of a queer theoretical, cultural study of law in research and activism, and calls for further examination of this discipline's ability to contribute to anti-discrimination projects by
b) arguing for a class-based equal protection of sexual orientation, and offering a blueprint for doing so; and
c) deconstructing legal categories, the process(es) of categorization, and cultural inkings of law in connection to sexual orientation.

These aims are bold, and the ways of getting there, including risking misrepresentation and omitting many non-normative ways of living and loving, may appear to many as not worth it. After all, law should adopt to those it governs and not the other way around. Strategic essentialism, in Gayatri Chakravorty Spivak's understanding, meaning the political strategic practice of embracing essentialism temporally as a community/group to strengthen one's position,[20] may yet be useful for gaining support from those who grant law its authority and power – our neighbors, class mates, colleagues, elected officials.

To approach these aims, it is necessary to look at the current narratives and imaginaries that are connected to constitutional processes, which is one of this book's main foci. This aspect is covered in Chapter II by conducting a

20 For Gayatri Chakravorty Spivak's understanding of the term, see her interview statements on this concept in Harasym 51, 109. For a definition of the term see Spivak 205–6.

wide reading of the Constitution's Fourteenth Amendment. Here, I put emphasis on the Equal Protection Clause and link constitutional rights to what has been labeled 'legal affects' or *Rechtsgefühle* in Rudolf von Jhering's and Greta Olson's understanding.

In this context, the constitutional principle of suspect classification sheds light on the cultural self-understanding of the U.S. While the Constitution lays down that everyone is to be treated equally under the law, suspect classification steps in whenever there are social groups which are more likely to be discriminated against than the majority. However, even if groups are more prone to suffer from unequal treatment, they need to fulfill other criteria to be granted more protections – and what these criteria involve is up to the Court to decide. The Constitution's cherished U.S. American ideal of equality is being circumvented by the legal idea of specific requirements for suspect classification. *Suspect Subjects* claims that these criteria are meant to make the application of equal protection more demanding and thus shield this right against culturally "unwanted" contenders for equal rights. Although members of these social groups may be members of American society, suspect classification's criteria serve as constitutional policing of culture and shall prevent these social groups' entering into cultural narratives and imaginaries. They remain suspect outsiders as I argue.

Taking these legal dynamics into account, this book is also interested in why a class-based equal protection is culturally relevant for sexual orientation. The assumption is that sexual orientation fulfills the criteria for suspect classification, yet the Supreme Court, which increasingly acts as a political player in U.S. American cultural-legal discourse, hesitates to make a commitment to LGBTQ+ rights. While the legal arguments against considering sexual orientation a suspect classification are void as this book shows, the Court's reluctance to do so reveals itself to be a political strategy in struggles over cultural hegemonies. Arguments against sexual orientation's suspect classification therefore appear not as constitutional hurdles but as cultural limitations of the law.

Looking at these entanglements between law, culture, and LGBTQ+ realities, I am interested in making a cultural study of law relevant for a queer (rights) project from an academic perspective. Variations of 'Law and X' projects (re-)emerge and collapse, with Law and Literature, Law and Narrative, Law and the Humanities only being a small fraction of the academic sub-disciplines law touches upon. As these research areas show, in all its expressions

and iterations, is dependently situated in a cultural framework.[21] To make sense of the connections within this framework, law has to be approached and understood as a culturally contingent practice, being shaped by the narratives, norms, and groups it negotiates with. In order to access these entanglements, three analytical foci will be of particular importance for this book, 1) how the Supreme Court's functions as both a judiciary branch, a political player, and a mediator of cultural and normative values, 2) how law, sexuality, and culture are mutually constitutive of each other as reflected by legal norms aiming to protect (or police) sexual minorities, necessitating a queer cultural analysis of law, and 3) how the constitutional principle of suspect classification holds the power to grant both legal and cultural legitimacy to queer rights claims.

Supreme Court Decisions as Cultural Texts

The examples of anti-queer rights responses underline that talking about sexual minorities' rights needs to include analyses of sociocultural realities. *Obergefell* illustrates that rulings, especially by the highest court in the U.S., are not merely legal documents[22] but that they have the potential to act as catalysts for cultural developments and norms, to uncover discrepancies between an ideal the law wants to achieve and the sociocultural obstacles it does not (yet) cover. For instance, *Brown v. Board of Education*, the 1954 Supreme Court ruling that formally ended school segregation, illustrates that decisions by the highest U.S. court have the power to initiate sociocultural changes through legislative means instead of merely responding legislatively to sociocultural transformations the majority calls for. Regarding *Brown*, this contrast became obvious in the fierce backlash Black students faced when trying to enter formerly segregated high schools.

However, if one only reads the decision and the procedural points of the ruling, they cannot deduct much about its embeddedness in a society and culture.[23] A case's transcript as such gives the reader only limited information

21 See also the work by Rosemary Coombe, Robert Cover, Lawrence Rosen, Paul Kahn, Robert Weisberg, Austin Sarat, Greta Olson, and Robin West to name some of the most seminal scholars in the field.

22 Since the Supreme Court decides on constitutional matters but also on matters of statues or laws, the term legal documents, as understood here, serves as umbrella for each of these different cases unless indicated otherwise.

23 See on this aspect also Susanne Baer "Speaking Law" 275: "In particular, an interdisciplinary analysis might be interested in discovering how the ruling was arrived at. There is the wish to understand how the decision was made, which matters were con-

about why there was a need to decide it, and the text does not include observations about its reception, for instance whether it was a landmark decision or not noticed by the general public, about the groups of people affected and the reasons why they have been affected. Thus, legal cases, particularly Supreme Court cases, shape and are being shaped by the (legal) culture they are negotiating with. Only by including a discourse analysis, by looking at the contexts these texts are emerging in, can an analysis begin to understand the reasons why certain legal texts influence a collective's processes of (cultural) meaning-making. This is shown by the high degree of responsiveness certain legal cases possess. Sometimes even the name of a case, such as *Brown*, evokes associations about its sociocultural significance, and signals its importance for processes of collective cultural memory formation. Cases like *Brown* live on in the cultural consciousness due to their high sociocultural impact. They become part of the U.S.'s severely questioned cultural narrative of equality and liberty, and evoke affective responses to granting liberal rights to particular social groups. The function(s) of these legal-cultural texts stretch far beyond the legal realm and also yield affective power over those they address (or fail to address). Both in cultural and legal texts, meaning is constructed discursively and not text-inherent, stressing the need for cultural analyses of law.

What's Law Got to Do with It? Towards a Queer Cultural Analysis of Law

Legal topics are still marginalized within Cultural Studies while law evolves around seemingly naturalized cultural concepts, including sexuality in all its iterations. Siding with queer theorists such as Gayle Rubin and Michel Foucault, the misunderstanding that sex is "a natural force that exists prior to social life and shapes institutions" (Rubin 146) is at the core of the Western cultural belief in sexual essentialism. Sex, in this view, is "eternally unchanging, asocial, and transhistorical," (146) meaning it is equally important in every society, every culture, and to every individual. With such essentialized and essentializing notions of a socioculturally constructed concept like sex, Rubin's 1982 assertion that "in Western culture, sex is taken all too seriously" (181) still seems valid today. What is more, cultural preoccupations with sex have come to encompass not just sex as a bodily activity but sexuality as a complex, which

sidered significant, and which not. Yet the text of the decision offers limited information about these matters, and this represents a methodological challenge. The type and amount of information given in a decision is also not only limited, it also differs in relation to the legal culture in which it is written."

includes biological sex, gender, gender identities, sexual orientation, sexual practices, and desires. This complex shapes and is being shaped by legal attempts of containing, controlling, and policing what Rubin identifies as "the sexual value system," which establishes a hierarchy of those sexualities that are "'good,' 'normal,' and 'natural'" and those that are "'bad,' 'abnormal,' or 'unnatural'" (151).

As concepts of sexuality become more differentiated, their distinctions and respective boundaries are becoming more difficult to distinguish in the sociocultural imagination and consciousness. Equating, for instance, gender identities with sexual orientations, sexual orientations with sexual practices, and gender identity with sexual desires not only blurs what each of these categories refers to, but it also loads these concepts with sociocultural meaning. This way, trans identities are becoming falsely associated with sexually abusive behaviors,[24] gays are stigmatized as sexual perpetrators who prey on those too young to give consent,[25] and those differing from the cisgender norm have to explain their ways of experiencing attraction to those already incapable of grasping the implications of not identifying with the gender having been assigned to their biological sex.

All of these connections between law, culture, and sexuality need to be deconstructed in order to fully understand how to arrive at a more equal antidiscrimination law. Queer Theory serves as useful tool in this endeavor. Its disruptive and disrupting force of questioning the normative and troubling those who normativize can be made fruitful for academic and activist purposes.

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24 For a detailed overview of anti-trans stereotypes and how they have been picked up and perpetuated in popular culture, see Sam Feder's *Disclosure*. For an overview of how anti-trans and anti-non-binary stereotypes come to shape legal decisions and influence legal discourse, see Alex Sharpe, "Criminalising Sexual Intimacy", and Sharpe's *Sexual Intimacy and Gender Identity 'Fraud;'* also Florence Ashley as well as Talia Mae Bettcher.

25 For a historic contextualization of connecting gay men with child molesters, see Rubin 140. For more on the vicious stereotypes of homosexuality as threatening to children, see also Kite and Whitley 464: "Vestiges of the idea that gay men and lesbians are deviant remain in common stereotypes, however, such as the belief that gays and lesbians are cross-dressers and are child molesters." See Kosofsky Sedgwick on the plot of Oscar Wilde's *Dorian Gray*, which "seems to replicate the discursive eclipse in this period of the Classically based, pederastic assumption that male-male bonds of any duration must be structured around some diacritical difference – old/young, for example, or active/passive – whose binarizing cultural power would be at least comparable to that of gender" (160).

It is thus with a queer theoretical lens that I propose a heightened legal protection for LGBTQ+ individuals through judicial decision-making rather than legislative changes. The power of constitutional decisions, as compared to legislative action, is analyzed in Chapter II, which offers an argument for the affective and imaginative force of the Constitution, what I call 'constitutional imaginaries.' Qualitative analyses of the most important U.S. Supreme Court decisions concerning sexual orientation in the twenty-first century in Chapter III strengthen this claim of the affective primacy of judicial decision-making. Wide reading the cases affecting sexual minorities is then supplemented by an analysis of cultural narratives found in the U.S. Constitution.

It is important to note that this book advocates for taking law seriously without venerating it. Law is already a rather serious discipline, given its dogmatic rules and how it may affect its subjects' lives. Yet law's seriousness is often misinterpreted as having to blindly stand in awe before it. This reverence does a disservice to taking law seriously in all its capabilities and possibilities of affecting queer realities positively by making one shy away from engaging in its critique.

Taking a stroll through the most important research on queer legal theory, Law and the Humanities, and Law and Culture, I clearly agree with, among others, Rosemary Coombe, William Eskridge, H.L.A Hart, Lawrence Rosen, Tamsin Wilton, and Chase Strangio that legal and (socio)cultural phenomena are closely related and that (queer) rights are equally dependent on progressive legal decisions as they are on cultural developments. In other words, how we narrate, regulate, and imagine queer identities and realities is connected to how law protects or fails to protect these spheres.

New Queer Rights with Old-Established Tools

The United States Supreme Court has the power to address discriminatory regulations concerning sexual orientation with a constitutional tool, derived from the Fourteenth Amendment's Equal Protection Clause: the so-called suspect classification. Classifying sexual orientation as a legal category against which any kind of discrimination is suspect would effectively render anti-queer legislation unconstitutional. Although there have been progressive legislative and judicative developments such as in *Obergefell* and *Bostock*, the Court has been reluctant to even tackle the question whether sexual orientation as a legal category should receive this form of constitutional protection.

The political reasons for not commenting on sexual orientation's distinctive constitutional status in the twenty-first century by such a powerful institution

as the Supreme Court are at the core of this book. However, it is equally important to grasp the procedural and constitutional implications of not deciding on this question, which to legal lay persons may appear as a seemingly rather dry, specialized issue.

Affirming that sexual orientation is indeed a category which warrants a special form of constitutional protection would signal the Court's willingness to challenge existing legal hierarchies and thus influence sociocultural orders. Such orders meander into legal discourse and manifest as legal norms (further) discriminating those who are socioculturally already stigmatized. Sociocultural orders therefore have the power of acting analogous to legal ones – this insight is central to *Suspect Subject*'s claim that overcoming discriminatory legal systems must involve challenging socioculturally naturalized perceptions.

Cultural narratives such as the guarantee of legal equality for everyone as well as constitutional imaginaries about marriage equality being indicative of a tantamount status for non-heterosexual couples contribute to a marred understanding of LGBTQ+ right claims today. Post-*Obergefell* and -*Bostock* demands for equal rights are thus met by the general public[26] with a lack of understanding and felt lifted responsibilities by mistakenly equating *de jure* equality gains with *de facto* legal, social, and cultural equality.

The interplay between cultural narratives and constitutional imaginaries becomes most obvious when it comes to sexual orientation's status in twenty-first century U.S. America. Queer rights and analyses of law and culture thus belong together and should be granted more attention in academic discourse. Taking legal norms and those who interpret them as case studies, I look at the relation between legal and cultural-legal norms and power, and thereby establish a queer hermeneutics within law. Doing so, I argue for a heightened constitutional protection for sexual orientation in the U.S. ('suspect classification') as means to challenge both legal and cultural anti-queer sentiments. Using an intersectional, feminist, and queer theoretical approach, I believe in the compatibility and entanglements of law and culture, and advocate for its expanded

26 This rather simplistic umbrella mostly includes those unaccustomed and unaffected by queer rights discourses, namely those who identify and are read as cis, heterosexual, White, monied/propertied, able-bodied persons. However, choosing not to engage in struggles for equal rights is based on individual layers of privilege, which may or may not coincide with socioculturally accepted forms of sexuality, gender, dis/ability, race, and class.

use in academic and activist contexts. Whenever possible, I try to offer alternatives to established forms of law, culture, and sexuality. Academic work on sociocultural conditions profits from activistic approaches that seek to queer, challenge, develop, abolish, and/or deconstruct the what *is* in order to arrive at a what *should be*.

However, as imagined queer legal futures are as diverse as the LGBTQ+ community, making normative claims about any ideal-typical scenario would only feed into a static prescriptiveness I want to avoid. Instead, it is my wish to sensibilize my readers for the importance of legal-cultural educational work in academia and activism, and to argue for a strengthening of democratic, anti-discriminatory structures via doing pluralistic queer legal analysis. This view is controversial. Especially queer activists, who have been subjected to institutionalized forms of violence, reject the legal system as a heteropatriarchal, sexist, classed, racist, ableist, transphobic, inherent discriminatory instrument. To some, this system was meant to disadvantage, oppress, abuse, violate, and murder those bodies who are not read as White, cis gendered, educated, wealthy, male, heterosexual, able-bodied, or those who refuse to comply with those governing over this system. And they are right to do so. As legal scholar William Eskridge Jr. notes about the double-edged character of legal norms for queers:

> The law was a chief mechanism for the 1950s *Kulturkampf*, or state-sponsored culture war, against homosexuals and other gender-benders, yet simultaneously became the hunted's chief refuge from that assault. Since 1969 the law's hostility to gay people has relented, and today the law sometimes protects gay people against private violence and discrimination. (*Gaylaw* 1)

These two sides of law are even more prevalent today. While LGBTQ+ activists advocate for legal reforms such as the *Equality Act*, conservative state Congressmembers push for ever more anti-trans and anti-queer legislation, with each year since 2021 becoming record-breaking (ACLU "Mapping;" Krishnakumar). This struggle shows how law's protective character is closely linked to those who have the power of granting or gatekeeping rights.

Those skeptical of the reformability of law may reject calls for thinking about sexual orientation's constitutional protection as undesired – because the system was not designed to emancipate queers, queers should not try (or can only fail) to re-/transform it. I share this view to some degree, yet argue

that such abolitionist thought and law-inherent solutions to queer emancipation are not mutually exclusive. Using existing modes of the law to improve the lives of LGBTQ+ may seem contradictory given its long history as a tool for queer oppression. Taking law as *a priori* discriminatory, however, means misjudging its transformative power. This is why I understand law and its oppressive, discriminatory force not as separate, as Marxist critique of law's power do, but as separable, agreeing with Hart's understanding of law (xvi).

So, what *is* abolitionist about arguing for suspect classification from a queer cultural-legal perspective? First, both abolitionism and queer cultural-legal studies in this book's understanding call for holistic analyses of entangled, oppressive systems in order to arrive at legal norms which respond to queer realities in an equitable way. In this sense, abolitionist studies' aims of naming, acknowledging and seeking to dismantle oppressive structures within the U.S. are highly instructive for considerations about queer rights. Second, both abolitionism and this book's analyses draw on the importance of personal experience and emphasize positionality. Acknowledging the need for admitting non-academic and/or activist forms of knowledge production into academia, most importantly knowledge of experience, I believe that queer forms of critiquing law need to recognize their own positionality, lack of neutrality, and need to make themselves accessible to a larger, meaning non-academic, audience. Minimizing academic codes is meant to abolish gatekeeping and thus contributes to a queering of academic practice.[27]

Overview

What can be gained from a cultural studies approach to law is a deeper understanding of how the culture(s) we are surrounded by permeate and dictate legal categories, subjects, and norms. For doing so, Chapter I will introduce the methodology and theoretical framework I am working with, and survey the development of the cultural study of law. Chapter II looks at the constitutional and cultural framework of the Equal Protection Clause and its principle of suspect classification. By analyzing equal protection's legal objectives and linking them to cultural narratives, this chapter draws on Peter Häberle's research on the connection between constitutions and culture, and stresses that

27 This will not always be successful and is still conducted within rather inflexible academic structures. These structures necessitate adhering to some fixed formal requirements of 'proper' academic work in order for this book to become part of academic discourse in the first place.

both the U.S. Constitution and U.S. culture are subject to ongoing transformations and act as mirrors of a people's normative self-understanding and their shared moral concepts.

Taking the culturally transformative role of the Constitution as starting point, Chapter III looks at the Supreme Court as the institution which constantly (re-)interprets and thus shapes this cultural and legal document. The chapter offers a dogmatic historization of the Supreme Court's rulings regarding sexual orientation in the twenty-first century, thereby analyzing the justices' different forms of judicial interpretations and political affiliations over the years. The aim of this chapter is to establish whether and if, to what degree, the Supreme Court functions as political player in the discourse about sexual orientation's constitutional protection, and to determine its role in constituting and maintaining sociocultural imaginaries.

Chapters IV and V deal with the way(s) law constitutes queer subjects, and attempt to establish a queer hermeneutics of law. These chapters give insights into the cultural concept of sexual orientation in the twenty-first century, and shed light on the social norms and hierarchies associated with it. Drawing on social constructionism, queer theory, and critical legal theory, Chapter IV discusses the conceptualization of sexual orientation in constitutional discourses. In law, sexual orientation holds a specific meaning, which is shaped by cultural understandings, yet which is also distinctly legal. My claim here is that this conceptualization works to (re-)produce an essentialist matrix of sexuality which facilitates legal attempts at gaining formal equality but fails to establish substantive equality.

Chapter V analyses the Supreme Court's criteria for suspect classification from a queer theoretical standpoint, and introduces queer alternatives to legal futures. The chapter examines whether sexual orientation fulfills the classification's four criteria (history of discrimination, status as a politically powerless minority, immutability, moral neutrality) from a cultural studies of law perspective. The aim of Chapter V is to provide concrete legal guidelines for arguing sexual orientation's suspect classification while calling for a revision of the Court's criteria. Acknowledging the flaws and inconsistencies of the law, this chapter introduces potential (queer) alternatives to the current legal system. It looks at arguments for and visions of a legal system that is beyond law as we know it, something 'post' the current legal system, a more inclusive, less heteronormative, and possibly more just queer legal future.