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## The First Queer Right

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# THE FIRST QUEER RIGHT

Scott Skinner-Thompson\*

THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY. By *Carlos A. Ball*. Cambridge and London: Harvard University Press. 2017. Pp. 284. \$39.95.

## INTRODUCTION

Contemporary discussions about lesbian, gay, bisexual, transgender, and queer rights often center around the need for equality for LGBTQ individuals.<sup>1</sup> If one is a Justice Anthony Kennedy acolyte, then perhaps dignity too.<sup>2</sup> On the other hand, current legal disputes may lead one to believe that the greatest threat to LGBTQ rights is the First Amendment's protections for speech, association, and religion, which are currently being mustered to challenge LGBTQ antidiscrimination protections.<sup>3</sup> But underappreciated today is the role of free speech and free association in advancing the well-being of LGBTQ individuals in American society, as explained in Professor Carlos

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\* Associate Professor, University of Colorado Law School. I am grateful for the opportunity to have discussed Professor Carlos Ball's book, *The First Amendment and LGBT Equality*, with him at a book event at the New York University Bookstore on April 27, 2017, and more broadly for the mentorship Professor Ball has provided. Thanks to James Castle and Matthew Simonsen for tremendous research assistance that helped inform this Review, and to Michael Boucai, Charlie Gerstein, Ben Levin, Kate Levine, Helen Norton, Russell Robinson, and Carlos Ball himself for penetrating feedback.

1. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief, *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 1:16-cv-236) (asserting equal protection and constitutional informational privacy claims against North Carolina's HB2 targeting transgender individuals).

2. Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CALIF. L. REV. CIR. 117, 117 (2015), [http://www.californialawreview.org/wp-content/uploads/2015/11/Joshi\\_Respectable\\_Dignity.pdf](http://www.californialawreview.org/wp-content/uploads/2015/11/Joshi_Respectable_Dignity.pdf) [<https://perma.cc/25ZJ-NC26>] (tracing the importance of dignity to Justice Kennedy's constitutional rights jurisprudence).

3. See, e.g., *Pickup v. Brown*, 740 F.3d 1208, 1229–30 (9th Cir. 2014) (determining whether law prohibiting the provision of gay conversion therapy to minors by state-licensed mental health professionals regulated protected speech or conduct); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (determining whether Colorado's antidiscrimination law compelled a cake baker to speak by requiring him to bake a cake for a same-sex wedding), *cert. granted sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (mem); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (evaluating whether New Mexico's public accommodation protections based on sexual orientation infringed on a wedding photographer's First Amendment free speech and free exercise rights).

Ball's important new book, *The First Amendment and LGBT Equality: A Contentious History*.<sup>4</sup>

As methodically detailed by Ball, in many ways the First Amendment's protections for free expression and association operated as what I label "the first queer right." Decades before the Supreme Court would recognize the importance of equal treatment of same-sex relationships<sup>5</sup> or the privacy harms implicated by criminal bars to same-sex intimacy,<sup>6</sup> the Court protected the ability of queer people to espouse explanations of their identities and permitted them leeway to gather together to further explore and elaborate those identities.<sup>7</sup> In this way, the First Amendment served an important incubating function for the articulation of equality and privacy arguments in favor of LGBTQ individuals while it simultaneously created space for greater visibility of queer people in American society.<sup>8</sup> As we now know, social contact or exposure to stigmatized identities plays a major role in helping destabilize and correct prejudicial attitudes.<sup>9</sup>

According to Ball, it is critical to bear in mind the First Amendment's historical pedigree in advancing LGBTQ rights when confronting current

4. Distinguished Professor of Law and Judge Frederick Lacey Scholar, Rutgers University School of Law.

5. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (declaring unconstitutional state bans on same-sex marriage as violating equal protection); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (overturning portions of the Defense of Marriage Act as violating equal protection).

6. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (deeming criminal sodomy statutes unconstitutional invasions of privacy and liberty).

7. See, e.g., *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (summarily reversing lower court ruling that had upheld the Post Office's refusal to distribute a gay political and literary magazine), *rev'g* 241 F.2d 772 (9th Cir. 1957).

8. As Nan Hunter has uncovered, the relationship between expression- and identity-based claims is an intimate one—and the two theories of legal protection can work in tandem, rather than in conflict. Cf. Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671 (2000). To properly balance expressive and equality interests, Hunter has encouraged us to understand queer rights cases as often asserting what she labels "expressive-identity" claims on behalf of queer people. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 1 (2000). By recognizing that queer people's expressive and identity interests are implicated by efforts to exclude queer individuals, the "expressive-identity" framework proffered by Hunter suggests that antidiscrimination laws protecting queer people should be enforced notwithstanding a purported competing expressive interest *in exclusion* when an identity's expressive force derives from the same processes of social construction as the identity itself, unless forced inclusion would also jeopardize the identity of the group seeking to exclude. *Id.* at 20.

9. See GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY* 508 (2017) (arguing that the most important factor in the Supreme Court's changing attitudes "was the profound change in the visibility of gays and lesbians in American society"); Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 134 (2016), <http://columbiawlawreview.org/wp-content/uploads/2016/12/Skinner-Thompson.pdf> [<https://perma.cc/6AK2-SKSU>] (explaining that visibility of gay and lesbian people on popular media programs had a "softening effect" on negative attitudes towards LGBTQ people).

controversies over whether certain religious adherents should be able to assert expressive, associational, or religious objections to employing or serving LGBTQ individuals in the marketplace. As Ball rightly observes, America has been down this road before—those resistant to racial equality raised similar arguments in opposition to federal antidiscrimination laws.<sup>10</sup> Courts and legislatures were able to strike an appropriate balance that ensured race could not be used to discriminate—even by religious individuals who objected to integration.<sup>11</sup> But religious organizations were still permitted to discriminate in favor of their religious devotees when it came to employment decisions, preserving their associational and religious rights.<sup>12</sup> For Ball, more or less the same balance should be struck when adjudicating (or legislatively resolving) the current controversies over, for example, whether a florist or baker who happens to have a religious objection to same-sex marriage should be able to refuse service to a same-sex couple for their wedding.<sup>13</sup> In a nutshell, private citizens and corporations in the marketplace should not be able to discriminate,<sup>14</sup> but not-for-profit religious organizations should be granted more space to exercise First Amendment values.<sup>15</sup> This Review largely agrees with Ball’s proposed balance between antidiscrimination and First Amendment values. And Ball’s careful explanation of the First Amendment’s historical role in protecting marginalized groups is critical context

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10. See, e.g., chapter 5. And the First Amendment similarly enabled advocacy for those race-based antidiscrimination laws. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (protecting membership list of NAACP under freedom of association); HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 96–97 (Jamie Kalven ed., 1988) (describing First Amendment challenges brought by civil rights activists).

11. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (describing as “patently frivolous” the argument that under Title II of the Civil Rights Act of 1964 a public accommodation could refuse service to black patrons based on the defendant’s religious objections); cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (holding that Title II is a valid exercise of congressional power under the Commerce Clause of the Constitution).

12. 42 U.S.C. § 2000e-1(a) (2012) (exempting from Title VII’s coverage any “religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”).

13. See, e.g., *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 568 (Wash. 2017) (holding, in a unanimous opinion, that a state antidiscrimination law requiring public accommodations not to discriminate on the basis of sexual orientation did not infringe on the speech, exercise, or association rights of a florist who wanted to refuse service for a same-sex wedding), *petition for cert. filed*, No. 17-108 (U.S. July 21, 2017).

14. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2585 (2015) (explaining that complicity-based conscience claims, such as those by merchants seeking to refuse service to couples for same-sex marriages, impose material and dignitary harms on the third-party customers and undermine pluralism values).

15. This truly is a “nutshell,” and Ball’s prescription for how to balance LGBTQ equality claims with the First Amendment interests of religious objectors to LGBTQ rights, comprehensively outlined in Part II of his book, is much more nuanced and draws from Ball’s identification of five characteristics that American antidiscrimination law has historically used to successfully balance religious freedom and antidiscrimination laws. Pp. 250–66.

for understanding the current (purported) tension between LGBTQ rights and First Amendment rights.

But at the same time, the story Ball paints of the First Amendment as “the first queer right” somewhat elides the rhetorical impact the initial focus on the First Amendment had on how queer identities were conceptualized and framed. Ball provides little in the way of comparative analysis discussing how LGBTQ identities were portrayed to take advantage of the First Amendment relative to how they were later portrayed when trying to take advantage of the Equal Protection Clause (though he does examine why, doctrinally, the First Amendment was initially more fertile ground for lesbian, gay, and bisexual people than equal protection). In short, an argument can be made that when LGBTQ rights were being pursued under the First Amendment, litigants crafted a broader, more comprehensive and diverse tableau of queer identity. This was in part because plaintiffs were not encouraged to place themselves within a particular socially constructed category (e.g., gay or lesbian) or contend that they were the “same” as straight people in order to obtain equal treatment, as arguably required by equal protection doctrine.<sup>16</sup>

In other words, the First Amendment not only provided the first doctrinal foothold for LGBTQ individuals, as Ball artfully highlights, but also may have facilitated a more robust and wide-ranging articulation of queer identity than the more vaunted equality claims that followed. One unfortunate side effect of transitioning from First Amendment claims to equality-based claims was the narrower, straighter picture of queer such claims presented.<sup>17</sup> Like the doctrinal history chronicled by Ball, the narrative history of how LGBTQ rights were framed and conceptualized under the First Amendment is important to contemporary debates about LGBTQ rights because it suggests that the First Amendment may yet have important work to do on behalf of LGBTQ rights—it could still be used as a means to further expand social understandings of sexuality and gender identity.<sup>18</sup> This is not to suggest that the doctrinal shift from First Amendment to equal protection wholly explains the more static picture of queer identity that emerged as the

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16. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) (“[S]ame-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage . . .”), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom.* *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

17. Cf. Cynthia Godsoe, *Perfect Plaintiffs*, 125 *YALE L.J.F.* 136, 141, 153 (2015), <https://www.yalelawjournal.org/forum/perfect-plaintiffs> [<https://perma.cc/8X7A-QJB7>] (explaining that the thirty individual plaintiffs involved in the *Obergefell* Supreme Court case largely reflected “heteronormative and traditional characteristics” instead of centering “diverse and complex” kinds of queer families).

18. See, e.g., *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Ct. Oct. 11, 2000) (holding that a transgender female student’s desire to dress in female clothes was protected expressive conduct likely to be understood by others because “by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender” and that the “plaintiff’s expression is not merely a personal preference but a necessary symbol of her very identity”).

movement evolved; a host of factors likely contributed to that change.<sup>19</sup> Rather, the doctrinal change may have, at the very least, facilitated and reinforced the more traditional trajectory of the movement. This in turn suggests that the First Amendment may prove to be a more nimble and dynamic instrument for exploring queer identity going forward.

The Review expands this argument in three Parts. Part I provides a condensed account of the history unearthed by Ball, highlighting the First Amendment's formative role in establishing legal protections for LGBTQ individuals. Simultaneously, Part I foregrounds how First Amendment legal frameworks, particularly free expression doctrine, enabled a relatively capacious understanding of different queer identities and the sexual and political conduct that may accompany them.

Part II contrasts the narratives and themes employed by the early free expression cases with the more circumspect and traditional narratives advanced on behalf of LGBTQ people in the equality jurisprudence that followed. This Part offers original research, examining the complaints in roughly ninety same-sex marriage cases, involving around 600 plaintiffs, pending in the months before the Supreme Court's decision in *Obergefell* made same-sex marriage the law of the land.<sup>20</sup>

Finally, Part III suggests that the First Amendment still has important, affirmative work to do on behalf of LGBTQ individuals. In particular, because of the shift away from expression and toward equality, some of the labor that the First Amendment could have done to protect queer sexuality and gender remains unfinished. I suggest that renewed attention on the First Amendment as a means of advancing LGBTQ rights may be warranted.

#### I. THE FIRST AMENDMENT AS FORMATIVE

Before queer people could make any claims to equality, they had to have the right to make claims at all. They also needed the ability to associate and organize. And so, as Ball diligently narrates, litigation during the 1950s, 1960s, and 1970s under the First Amendment proved to be a critical first order of business under what Justice Antonin Scalia would later deem "the homosexual agenda."<sup>21</sup> Put differently by Ball, the First Amendment and subsequent equality guarantees are "inextricably linked," with the First

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19. See Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 *YALE J.L. & HUMAN.* 1, 80–81 (2015) (gesturing toward manifold political, social, and economic explanations for the more conservative trajectory of marriage advocacy, including increased reticence in response to antigay backlash, the impact of the AIDS epidemic, and the growth of elite-funded organizations, among many others).

20. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

21. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (decrying the majority opinion decriminalizing same-sex sexual conduct as "the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct").

Amendment “laying the groundwork for the initial articulation of equality claims and the later attainment of equality objectives.”<sup>22</sup>

Ball analyzes three principal categories of LGBTQ First Amendment litigation. The first centers on free speech challenges to obscenity law. Indeed, as Ball explores, the first two LGBTQ cases to ever be considered by the Supreme Court were challenges to government efforts to censor publications discussing gay and lesbian subject matter as violating obscenity laws (pp. 36–41). In *One, Inc. v. Olesen*,<sup>23</sup> the Court summarily reversed censorship imposed by the Postmaster of Los Angeles, who refused to distribute “One, The Homosexual Magazine,” which was dedicated to “dealing primarily with homosexuality from the scientific, historical and critical point of view.”<sup>24</sup> The volume at issue contained, among other items, a story of a lesbian successfully attempting to court another woman and a poem discussing sex between males at public toilets.<sup>25</sup>

Then, in *Manual Enterprises, Inc. v. Day*, the Court held that the publication of nude or near-nude male models in so-called “physique magazines” targeted toward gay male audiences could not be regulated as obscene even though they appealed to gay men’s prurient interest because they were not patently offensive.<sup>26</sup> After these two cases, “the government could not censor a publication dedicated to exploring the place of sexual minorities in society,” nor could it punish publication of gay erotic material that did not meet the general definition of obscenity.<sup>27</sup>

The second category centers on freedom of association. In cases ranging from prohibitions on gay bars to refusal to recognize queer student groups, from the 1950s to 1970s, courts began to recognize the right of LGBTQ people to congregate, socialize, and organize for the purpose of expressing their opinions (pp. 62–82). Importantly, often the opinions being expressed were in opposition to laws criminalizing same-sex sexual conduct.<sup>28</sup> And

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22. Pp. 4–5; see also Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993) (explaining that, as of 1993, “the First Amendment has provided the most reliable path to success of any of the doctrinal claims utilized by lesbian and gay rights lawyers”); cf. RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 68 (2013) (explaining that First Amendment claims offered a more robust form of challenging gendered clothing regulations in the 1970s).

23. 355 U.S. 371 (1958).

24. *One, Inc. v. Olesen*, 241 F.2d 772, 777 (9th Cir. 1957), *rev’d per curiam*, 355 U.S. 371 (1958).

25. *Id.*

26. 370 U.S. 478, 489–91 (1962).

27. Pp. 38–45; see also *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966) (overturning lower court conclusion that erotic novel *Fanny Hill*, which included depictions of some same-sex sexual activity, was obscene); *Gay Men’s Health Crisis v. Sullivan*, 792 F. Supp. 278, 292 (S.D.N.Y. 1992) (striking the CDC’s restrictions on grant funds toward “offensive” AIDS-related educational materials as unconstitutionally vague).

28. See, e.g., *Gay All. of Students v. Matthews*, 544 F.2d 162, 164 (4th Cir. 1976) (describing the gay student organization as a “political organization advocating a liberalization of legal restrictions against the practice of homosexuality”).

sometimes mere demands for the right to socialize were challenged by the state as leading, inexorably, to same-sex sexual contact and then conduct, which was still illegal in many jurisdictions.<sup>29</sup> But, as Ball insightfully notes, courts often relied on the paper-thin distinction between status and conduct<sup>30</sup> to uphold the rights of queer people to both gather together socially and gather together to oppose antisodomy laws notwithstanding that sexual conduct was still prohibited (p. 81). Despite in some ways problematically reifying the status-conduct distinction, the free association cases nevertheless provided queer communities further opportunity to orient courts and society to their sexualities and their (desired) sexual conduct.<sup>31</sup>

For example, in one of the cases discussed by Ball, *Gay Alliance of Students v. Matthews*, the Fourth Circuit Court of Appeals seemed to accept that the school's recognition of the gay student organization would facilitate both opposition to laws criminalizing same-sex sexual conduct and, potentially, through dances and other social events, subsequent sexual conduct.<sup>32</sup> But, to the court, refusal to recognize the student group was "overkill" above and beyond the then-permissible criminalization of the actual sexual conduct.<sup>33</sup> In short, the court was forced to consider the likelihood that homosexuals are inclined to, in fact, act on their sexuality, but nevertheless it protected the First Amendment rights of queer students to come together.

Similarly, in *Gay Lib v. University of Missouri*, the Eighth Circuit Court of Appeals confronted "expert" evidence proffered by the University of Missouri suggesting that formal recognition of gay student groups would "perpetuate" homosexual behavior, asserting that "wherever you have a convocation of homosexuals, [then] you are going to have increased homosexual activities which, of course includes sodomy."<sup>34</sup> The court looked these claims straight in the eye and concluded that even if the expert opinions were accepted "at face value," a prior restraint on the students' freedom of association was unwarranted.<sup>35</sup>

The third category of cases revolves around free speech challenges by public employees who had been fired for coming out of the closet

29. P. 81; *see, e.g.*, *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974).

30. *See, e.g.*, *Stoumen v. Reilly*, 234 P.2d 969, 970–71 (Cal. 1951) (holding that just because "persons of known homosexual tendencies" gathered at a restaurant, that did not necessarily mean that the restaurant was being used for same-sex sexual conduct).

31. *Bonner*, 509 F.2d at 660 (holding that a gay student organization's "efforts to organize the homosexual minority, 'educate' the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singled out for protection in the very 'core' of association cases decided by the Supreme Court").

32. Pp. 81–82; *Gay All. of Students*, 544 F.2d at 166.

33. *Gay All. of Students*, 544 F.2d at 166.

34. P. 82; *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 854 (8th Cir. 1977).

35. *Gay Lib*, 558 F.2d at 854.



(pp. 92–112). While not uniformly successful,<sup>36</sup> as Ball notes, there were nevertheless important civil servant/public employee victories (p. 100). For example, in *Acanfora v. Board of Education*, a school removed a gay school teacher from his classroom and then refused to renew his contract after he publicly acknowledged and discussed his sexual orientation with several media outlets.<sup>37</sup> The Fourth Circuit Court of Appeals ruled that the school had violated the teacher's First Amendment rights but nevertheless prevented him from being returned to the classroom, concluding that his failure to disclose on his application that he had helped found a gay student group while in college was fraud.<sup>38</sup>

Following on *Acanfora*, in *Aumiller v. University of Delaware*, a federal district court concluded that firing a professor for speaking out to local newspapers about life as a homosexual in a predominately heterosexual society ran afoul of the First Amendment.<sup>39</sup> As summarized by Ball, both the *Acanfora* and *Aumiller* decisions “rejected the view that a person's disclosure of his same-sex sexual orientation was beyond the protection of the Free Speech Clause.”<sup>40</sup>

Critically, the public employee cases reflect, at least in broad strokes, a judicial recognition of the relationship between identity, social context, and expression. That is, certain identities within a hegemonic cultural setting can, in and of themselves, take on a political expressive valiance<sup>41</sup>—one that

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36. See, e.g., *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984) (holding that a public school guidance counselor's revelation that she was bisexual was a private matter not of public concern and therefore adverse employment action against her was permissible under the First Amendment).

37. 491 F.2d 498, 499–500 (4th Cir. 1974).

38. *Acanfora*, 491 F.2d at 499.

39. 434 F. Supp. 1273 (D. Del. 1977).

40. P. 109; see also *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc) (holding that dismissal of a gay public employee who intended to address county legislative body as to why gay antidiscrimination protections should be passed violated the First Amendment). That said, there is a more recent line of decisions suggesting that government employees can be disciplined for their off-duty speech because the speech reflects poorly on the government entity. As noted by Helen Norton, such cases raise the specter that “absent any limiting principles, certain individuals may be unemployable for many government jobs purely because of their unpopular or controversial off-duty expression—for example, marching in a gay pride parade.” Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 6 (2009).

41. See *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979) (“Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to ‘come out of the closet,’ acknowledge their sexual preferences, and to associate with others in working for equal rights.”); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 905 (1997) (“The insight implicit in those [First Amendment gay rights] rulings was that, for gays and lesbians, identity speech (‘I am gay’) was both personal and political.”); Nancy J. Knauer, “*Simply So Different*”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1001 (2001) (arguing that because of heteronormative social structures, openly gay individuals' identity operates as both expressive and politicized).

may be entitled to First Amendment coverage.<sup>42</sup> As discussed in more detail in Part III, there is still opportunity for the First Amendment to deepen judicial understanding of identity and social context, providing protections to a broader variety of queer identities, including gender nonconforming and genderqueer people.

As highlighted by Ball, these three categories of cases (obscenity, school association, and public employee coming out cases) in many ways created the conditions for increased visibility of queer people in American society and paved the way for the expression of equality demands that would follow. But equally important is that they compelled, or at the very least facilitated, consideration of the *sexual* and *political* components of queer identities by courts and the American public. As the next Part discusses, in the equality claims that followed, sex and politics are largely removed from the equation, and a narrower picture of gay and lesbian identity was constructed.

## II. EQUAL PROTECTION AS RESTRICTIVE

As queer rights litigation unfolded, equal rights (with an emphasis on equal rights for same-sex *couples*)<sup>43</sup> gradually evolved into the rallying cry, supplementing (and arguably supplanting) the role of expression.<sup>44</sup> Of course, equality as a legal principle and human right has been critical to the recognition of queer people's humanity.<sup>45</sup> But perhaps in reaction to both the strictures of equal protection doctrine and conventional impact litigation wisdom regarding the need for upstanding plaintiffs,<sup>46</sup> LGBTQ-rights litigation often emphasized LGBTQ conformity, rather than queerness.

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42. This is not to say that when queer people are present, their presence automatically interferes with or alters the expression of a particular group or association, justifying exclusion of the queer person in the name of protecting the First Amendment rights of the association. In other words, the context where a group is deemed to have an organizational message that could be interfered with by the presence of a disfavored group member must be narrowly hemmed. Not every association has an organizational message on a given topic, and to hold otherwise would completely dismantle antidiscrimination law, permitting any public accommodation or employer to claim an expressive interest in excluding a group member. Put differently, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), was wrongly decided, in part, because it is far from clear that the Boy Scouts of America had an organizational message that was interfered with by the presence of Dale, a gay scout leader. See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 600–01 (2001) (arguing that the *Boy Scouts* decision reflects a flawed methodology for determining an association's expressive message).

43. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239–40 (2006) (lamenting the shift within the movement toward the primacy of the couple and legal recognition for that couple in the form of marriage rights).

44. See pp. 233–34 (observing that marriage equality emerged as a movement priority in the 1990s).

45. Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (overturning bans on same-sex marriage because they deny gay, lesbian, and bisexual people “equal dignity in the eyes of the law”).

46. Cf. RICHARD KLUGER, *SIMPLE JUSTICE* 396 (Vintage Books 2004) (1975) (discussing Oliver Brown's qualifications to be lead plaintiff in *Brown v. Board of Education* as including his “lack of militancy,” his veteran status, and his role as assistant pastor at a local church);

Judith Butler's question "Which version of lesbian or gay ought to be rendered visible, and which internal exclusions will that rendering visible institute?" was answered in a very particular way—one that may have instituted public erasures of its own.<sup>47</sup>

Augmenting Ball's history of the LGBTQ-rights movement and the shift from expression to equality (p. 1), this Part highlights research demonstrating that same-sex marriage plaintiffs were still portrayed in largely conservative terms even after the *Windsor* decision in 2013 overturned the Defense of Marriage Act, when the writing was largely on the wall for state bans on same-sex marriage.<sup>48</sup> The research centers on an examination of the roughly ninety cases (involving around 600 plaintiffs) pending in the months leading up to the *Obergefell* decision in 2015.<sup>49</sup> Time after time, plaintiffs' religion, military service, and professionalism were emphasized.<sup>50</sup> That is, rather than exploring queer difference or queer sexuality or emphasizing the ways in which queerness intersects with and magnifies other forms of marginalization, the equal protection challenges emphasized sameness, painting a circumscribed portrait of queer identity.<sup>51</sup>

The named, lead plaintiffs in the Supreme Court's two most important marriage equality decisions exemplify this trend, but they're hardly unique.<sup>52</sup> Both Edie Windsor and Jim Obergefell were white, middle- to upper-class, professionals, and widowed.<sup>53</sup> Windsor in particular has been held up by

Mary L. Bonauto, Goodridge in Context, 40 HARV. C.R.-C.L. L. REV. 1, 31–32 (2005) (discussing the critical role of plaintiff selection).

47. Judith Butler, *Imitation and Gender Insubordination*, in THE LESBIAN AND GAY STUDIES READER 307, 311 (Henry Abelove et al. eds., 1993).

48. Portions of this research are teased in an earlier piece. See Scott Skinner-Thompson, *The "Straight" Faces of Same-Sex Marriage*, SLATE: OUTWARD (Apr. 24, 2015, 2:19 PM), [http://www.slate.com/blogs/outward/2015/04/24/the\\_straight\\_faces\\_of\\_same\\_sex\\_marriage.html](http://www.slate.com/blogs/outward/2015/04/24/the_straight_faces_of_same_sex_marriage.html) [<https://perma.cc/B8ZD-PZHL>].

49. *Id.*

50. *Id.*

51. Cf. Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1107–24 (observing that arguments in favor of LGBT equality in family planning have emphasized access to assisted reproductive technologies at the expense of discussions regarding queer family difference).

52. Franke, *supra* note 43, at 239 (noting that the embrace of marriage equality as *the* queer rights issue after *Lawrence* has entailed the parading of "model homo families—our perfect plaintiffs—before the media" and, at times, "what feels like the deployment of children as props that attest to our normalcy"); Godsoe, *supra* note 17, at 145–51 (in a review of the pleadings for the thirty plaintiffs involved in the consolidated cases that would compromise the *Obergefell* case, finding that the plaintiffs were routinely described as all-American, asexual, accidental activists, often with children front and center); Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 33 (2010) (documenting how the first "successful same-sex marriage cases were carefully orchestrated to select plaintiffs in long-term, committed, marriage-like relationships, whose personal narratives appealed to middle America").

53. See, e.g., EDIE & THEA: A VERY LONG ENGAGEMENT (Bless Bless Productions 2009) (describing Windsor's friend group as "upper-middle class" with some "upper class"); Skinner-Thompson, *supra* note 48.

many attorneys associated with the LGBTQ-rights movement as emblematic of why gay rights matter. According to her attorney, Roberta Kaplan, “[t]here is no one individual who better personifies the concept of equal protection than my client, Edie Windsor.”<sup>54</sup> Other movement leaders echoed these sentiments.<sup>55</sup>

Undeniably, the inspirational Windsor suffered as a result of the federal government’s refusal to recognize her marriage to Thea Spyer, with whom Windsor had been partnered for over forty years upon Spyer’s death after a long battle with multiple sclerosis.<sup>56</sup> And nothing said here is meant to diminish the pain associated with the federal government’s refusal to recognize their relationship. But the concrete harm that Windsor suffered as a result of the Defense of Marriage Act was hardly representative of queer people (or America generally). Because the federal government would not recognize her marriage to Spyer, Windsor had to pay \$353,053 in estate taxes that she otherwise would not have paid when Spyer passed.<sup>57</sup> Perhaps putting Windsor’s rarefied economic status in relief, when discussing the hardships of her tax bill, Windsor lamented that she had to stop parking her car in Manhattan to save the \$4,000 a year in parking she had been paying.<sup>58</sup>

This was no accident. As Roberta Kaplan candidly recognized when recounting her discussions with movement attorneys about whether Windsor was the best plaintiff or whether, for example, a plaintiff who was going through bankruptcy might be a better vehicle for challenging DOMA, Kaplan told the other attorneys, “Really? I don’t want to be disrespectful or classist, but do you really think that people who couldn’t pay their personal debts are the best people to bring this claim?”<sup>59</sup> In other words, Kaplan, the ACLU (which served as Kaplan’s co-counsel), and eventually other movement attorneys (some of them reluctant), embraced Windsor as the chosen personification of the LGBTQ community.<sup>60</sup>

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54. *Edith Windsor Statement on Supreme Court Steps – Full Text*, *GUARDIAN* (Mar. 27, 2013, 1:58 PM), <https://www.theguardian.com/world/2013/mar/27/edith-windsor-supreme-court-statement-text> [<https://perma.cc/6HE2-6JBP>].

55. MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON* 239–40 (2014) (observing that Windsor was a “compelling plaintiff” who suffered an “unambiguous” injustice); *see also* KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* 250 (2015) (stating that Windsor’s facts “could hardly have been more sympathetic”).

56. Complaint at paras. 2–3, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435 (BSJ)) [hereinafter *Windsor Complaint*].

57. *Id.* at para. 5. A truly intersectional, social justice perspective might have foregrounded a broader injustice and critiqued the massive concentrations of wealth in the United States. Indeed, in some ways the litigation legitimized broad estate-tax exclusions rather than engaging in a class-based critique of hereditary wealth accumulation. (I’m grateful to Ben Levin for this point.)

58. Ariel Levy, *The Perfect Wife*, *NEW YORKER* (Sept. 30, 2013), <http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife> [<https://perma.cc/QG9T-FN3T>].

59. *Id.* Kaplan also claimed that Windsor’s appearance in pink lipstick and pearls made it easier for people across the country to feel that “she embodied values they could relate to.” *Id.*

60. *Id.*

In addition to promoting a plaintiff whose legal injury was admittedly unrepresentative from a class perspective, litigators also frequently took steps to de-emphasize the sexual components of same-sex relationships.<sup>61</sup> For example, while the *Windsor* complaint foregrounds her class, it downplays Windsor and Spyer's sexuality and goes to extraordinary lengths to hide the butch-femme dynamic in their relationship.<sup>62</sup> Other than emphasizing that Edie and Thea loved to dance together,<sup>63</sup> the complaint makes no mention of the couple's sexuality or sexual dynamics. In fact, Roberta Kaplan specifically instructed Windsor not to talk publicly about sex, commenting that "[a]ll I needed was Antonin Scalia reading about Edie and Thea's butch-femme escapades."<sup>64</sup> In an interview with *The New Yorker* magazine after the Supreme Court's ruling, Windsor is more forthcoming, stating that "[i]f I didn't have nice breasts, Thea and I never would have gotten together" and that "I never wanted anybody inside me till Thea. And then I wanted her inside me all the time."<sup>65</sup> As it happened, Windsor hated when others referred to Spyer as her wife because it feminized Spyer.<sup>66</sup> Windsor was the wife. But none of these dynamics were on display for the courts. They were carefully hidden. Windsor was "remade as a non-threatening little old lady."<sup>67</sup>

The fact that both Windsor and Obergefell were also widowed further enabled courts to avoid confronting their sexuality.<sup>68</sup> Indeed, as Noa Ben-

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61. Levit, *supra* note 52, at 43 ("Some of the stories in the equal protection realm seem to have succeeded in litigation by erasing sexuality."); see also Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1641 (1993) (arguing that litigators should not erase the sexual conduct from their client's stories and observing that there is a degree of "absurdity [in] making legal arguments in favor of gay and lesbian rights that ignore sex"); Teresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1166 (1996) (arguing that "a gay-rights jurisprudence that depends for its vigor on an excision of erotic conduct from sexual orientation may have harmful long-term effects" and suggesting that litigators include more discussion of same-sex sexual intimacy in their pleadings).

62. See Windsor Complaint, *supra* note 56, at paras. 21–22, 29–30 (describing how Windsor and Spyer danced together the entire night they first met and how they later bought a beach house and traveled the world).

63. *Id.* at paras. 21–22.

64. Levy, *supra* note 58. Evidently, Windsor disagreed with this strategy. See Roberta Kaplan, *Elegy for Edie*, SLATE: OUTWARD (Sept. 16, 2017, 6:29 PM), [http://www.slate.com/blogs/outward/2017/09/16/roberta\\_kaplan\\_s\\_eulogy\\_for\\_edie\\_windsor.html](http://www.slate.com/blogs/outward/2017/09/16/roberta_kaplan_s_eulogy_for_edie_windsor.html) [https://perma.cc/UL8U-UZFF] (explaining that Windsor disagreed with the prohibition on discussing sex even after learning that Justice Sotomayor had deemed it a smart strategic move).

65. Levy, *supra* note 58; see also Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 272 (2014) (documenting the desexualization of Windsor and Spyer).

66. Levy, *supra* note 58.

67. *Id.*

68. Godsoe, *supra* note 17, at 147; cf. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1644 (1993) ("[W]hen pair bonding and copulating can be, as it were, decoupled, courts generally react favorably to the pair bond and negatively to copulation. Courts accord the most

Asher has discussed, the *Windsor* decision itself does not use the words “homosexual,” “lesbian,” and “bisexual” at all to describe the couple—Windsor and Spyer are described with reference to their sex (“two women”) and not their sexuality (“two lesbians”).<sup>69</sup> Likewise, in *Obergefell*, the introductory description of three of the plaintiff groups also refrains from identifying anything about the plaintiffs’ sexuality (though there is subsequent discussion of gays and lesbians, but not bisexual people).<sup>70</sup>

Cynthia Godsoe’s important work has highlighted how the narrow, and arguably conservative, tableau of people engaged in same-sex relationships was commonplace among the thirty individuals involved in the Sixth Circuit lawsuits that would comprise the *Obergefell* Supreme Court case.<sup>71</sup> Not only were these plaintiffs stripped of their sexuality, but they were also routinely stripped of their politics—frequently depicted as “accidental activists,”<sup>72</sup> in contrast to the early First Amendment cases, which foregrounded LGBTQ groups agitating for recognition and asserting that queer identity was, itself, political.<sup>73</sup> But those trends extend well beyond the thirty *Obergefell* plaintiffs.

A broader review of same-sex marriage challenges pending in the months before the Supreme Court considered *Obergefell*, the majority of which were filed post-*Windsor* decision, reveals similar portrayals.<sup>74</sup> These challenges encompass around ninety cases and approximately 600 plaintiffs.

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favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect has perforce been removed due to the death, illness, or imprisonment of one of the members of the couple.”).

69. Ben-Asher, *supra* note 65, at 262.

70. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–96 (2015).

71. Godsoe, *supra* note 17.

72. *Id.* at 150.

73. See *supra* Part I; see also p. 140 (describing the in-your-face, confrontational protests that characterized AIDS activism under the First Amendment).

74. The cases were identified primarily through reliance on a list of pending cases compiled and made publicly available by Lambda Legal, but supplemented to the extent the author or research assistant became aware of additional cases not included in Lambda’s running list. A spreadsheet analyzing the demographics of the plaintiffs, as described in the complaints, is available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?filename=0&article=1697&context=mlr&type=additional> (on file with the *Michigan Law Review*). The spreadsheet notes where the description of plaintiffs is based on something other than the complaint itself. Where possible, amended complaints were also incorporated into the spreadsheet. The spreadsheet aims to be as accurate as possible, but as with any large-scale coding project, mistakes are inevitable.

Plaintiffs are routinely characterized as “same” or mainstream,<sup>75</sup> and otherwise depicted as “productive members of society.”<sup>76</sup> Many were members of the military or law enforcement agencies.<sup>77</sup> Plaintiffs were frequently white-collar professionals.<sup>78</sup> In reality, LGB individuals face higher rates of poverty than heterosexual people, in part as a result of the lack of uniform employment and housing discrimination protections.<sup>79</sup>

The marriage plaintiffs’ Christianity and religiosity were also often highlighted.<sup>80</sup> Moreover, the plaintiffs were disproportionately female and parents—roughly 63 percent were female and 36 percent male. In general, about 51 percent of same-sex couples are female.<sup>81</sup> Of the male plaintiffs,

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75. See, e.g., Complaint for Declaratory and Injunctive Relief at 4, *Love v. Pence*, 47 F. Supp. 3d 805 (S.D. Ind. 2014) (No. 4:14-cv-00015) (“[T]he Love Plaintiffs are no different from other Indiana couples who wish to be married.”); Complaint for Declaratory and Injunctive Relief at 12, *Zahrn v. Perry*, No. 1:13-cv-00955 (W.D. Tex. Oct. 31, 2013) (plaintiffs “are like any other typical American couple”); Complaint for Declaratory and Injunctive Relief at 15, *Harris v. Rainey*, No. 5:13-cv-00077 (W.D. Va. Aug. 1, 2013) (“Plaintiffs are residents of the Commonwealth who experience the same joys and challenges of family life as their heterosexual neighbors, co-workers, and other community members who freely may marry.”).

76. See, e.g., Complaint for Declaratory and Injunctive Relief at 6, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012) (No. 2:12-cv-00578) (“Plaintiffs are productive, contributing citizens who support their families and nurture their children . . . .”); Complaint for Declaratory and Injunctive Relief at 15, *Harris v. Rainey*, No. 5:13-cv-00077 (W.D. Va. Aug. 1, 2013) (literally describing the plaintiffs in the exact same terms: “Plaintiffs are productive, contributing citizens who support their families and nurture their children . . . .”).

77. See, e.g., Brief of Ninety-Two Plaintiffs in Marriage Cases in Alabama et al. as Amici Curiae in Support of Petitioners at 1a–21a, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (in one paragraph descriptions devoted to each couple, foregrounding plaintiffs’ veteran status from United States Air Force, Army, Navy, and National Guard and emphasizing those that work as police officers or correctional officers).

78. See, e.g., *id.* (noting that various plaintiffs “are professionals in the private financial sector,” a “Dean and professor of Spanish Literature,” a “forensic nurse,” a “small business owner,” a “CPA” that “serves as the chief financial officer,” a “pharmacist,” an “engineer,” an “endodontist,” an “attorney,” a “clinical psychologist,” etc.).

79. See M.V. LEE BADGETT ET AL., *THE WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 1–3 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [<https://perma.cc/36UY-NK5E>].

80. See, e.g., Complaint for Declaratory and Injunctive Relief at 8, *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (1:13-cv-1861) (“Deb and Susan are devout Christians and they and their children are members of and actively involved in the Christ United Methodist Church of Bethel Park. Deb is the president of the Altar Guild, which prepares the church’s communion, cares for the sanctuary and holy items, and decorates for the holidays. A.W. and K.W. are in the church choir and sing every Sunday. A.W. is also in the Youth Praise band, which sings contemporary Christian songs at church and at community performances.”); Complaint for Declaratory Judgment and Injunctive Relief at 3, *Ky. Equality Fed’n v. Beshear*, No. 13-CI-1074 (Ky. Cir. Ct. Sept. 10, 2013) (“Both men attend Church, where they have been active members of the congregation for several years. Mr. Rogers sings in the choir, helps with the care ministry, and teaches Sunday school.”).

81. GARY J. GATES, *THE WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY* 4 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [<https://perma.cc/RR3U-528S>].

about 26 percent of the couples had children, whereas, on average, a smaller percentage of male couples are raising children.<sup>82</sup>

Equally important is what same-sex couples were not. Virtually none of the complaints emphasize or mention whether any of the plaintiffs are HIV-positive, notwithstanding that in 2015 about 86 percent of new HIV diagnoses among male adults and adolescents in the United States involved transmission via male-to-male sexual contact,<sup>83</sup> and about 70 percent of all adult and adolescent diagnoses involved male-to-male sexual contact.<sup>84</sup> Put differently, gay and bisexual men make up over half of the 1.1 million people living with HIV in the United States, notwithstanding that they make up under five percent of the total population.<sup>85</sup> (Of course, while HIV disproportionately impacts men who have sex with men, more than 90 percent of men who have sex with men (MSM) are HIV-negative, and queer male identity and HIV should not be fused or conflated).<sup>86</sup> Nor is there mention

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82. *Id.* at 6 (observing that among all same-sex couples only 8 percent of the male couples are raising children under age eighteen, with only 17 percent of married male couples are raising children); see also Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NAT'L COUNCIL ON FAM. REL., <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf> [<https://perma.cc/2GCJ-WPJQ>] (noting that “[a]nalyzes of the 2008 General Social Survey suggest that 19% of gay and bisexual men” have had children).

83. See 27 CTRS. FOR DISEASE CONTROL & PREVENTION, HIV SURVEILLANCE REPORT 18 tbl.1a(2015), <https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2015-vol-27.pdf> [<https://perma.cc/V8HN-Y644>] (showing that of 32,422 male adults or adolescents, 26,376 were in the “male-to-male sexual contact” transmission category and 1,202 were in the “male-to-male sexual contact and injection drug use” category); see also W. David Hardy, *An Introduction to the Medical Aspects of HIV Disease*, in 5 AIDS AND THE LAW § 1.07[A] (Scott Skinner-Thompson ed., Supp. 2017) (“Male-to-male sexual contact is the most frequently reported mode of HIV transmission in the United States.”).

84. 27 CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 83, at 6.

85. See *HIV Among Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 27, 2017), <https://www.cdc.gov/hiv/group/msm/index.html> [<https://perma.cc/CHB6-6638>] (“More than 600,000 gay and bisexual men are living with HIV in the United States.”); *HIV in the United States: At a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 11, 2017), <https://www.cdc.gov/hiv/statistics/overview/ata glance.html> [<https://perma.cc/S9VD-H46K>] (“1.1 million people in the US are living with HIV . . .”).

86. Russell K. Robinson & David Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. (forthcoming 2018) (“[I]dentity as an MSM is also a weak proxy for being HIV positive.”); Fujie Xu et al., *Men Who Have Sex with Men in the United States: Demographic and Behavioral Characteristics and Prevalence of HIV and HSV 2 Infection, Results from National Health and Nutrition Examination Study 2001-2006*, 37 SEXUALLY TRANSMITTED DISEASES 399 (2010); Scott Skinner-Thompson, *Bad Blood: The FDA’s Donation Rule Change for Gay and Bisexual Men is Sending the Wrong Message on HIV*, NEW REPUBLIC (May 19, 2015), <https://newrepublic.com/article/121847/blood-donation-policy-change-gay-and-bisexual-men-falls-short> [<https://perma.cc/S39P-QRD8>] (explaining that the FDA’s blood donation restrictions for men who have sex with men wrongly suggest that gay and bisexual men are somehow uniquely at risk for HIV).



of any of the plaintiffs being transgender.<sup>87</sup> Bisexuality is nowhere mentioned.<sup>88</sup> And indeed, the orientation or sexuality of hundreds of the plaintiffs is not explicitly mentioned at all.

But there was nothing inevitable about these portrayals.<sup>89</sup> That is, while certain components of equal protection doctrine and conventional plaintiff-selection wisdom both militate toward conservative, conforming depictions (and in that way, reinforce each other),<sup>90</sup> there was arguably a path forward that both complied with the elements of equal protection law and depicted a broader view of the queer community. Equal protection doctrine relies in part on the creation and articulation of categories of people.<sup>91</sup> And, in many ways, the identification of queer categories (gay men, lesbians, transgender people) has served liberating functions that have helped people feel that their experiences and feelings are intelligible and legitimate.<sup>92</sup> Indeed, even Butler, who has helped us understand the risks and violence of identity categories, recognizes their instrumental, short-term political value.<sup>93</sup> But in embracing new identity categories, as the equality framework seems to

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87. Cf. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223 (2016) (documenting the many ways transgender people are excluded from and made not to exist in certain spaces and within certain discourses).

88. See Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 452 (2012) (critiquing the virtual invisibility of bisexuality from the same-sex marriage litigation and arguing that a critique of same-sex marriage bans as infringing on sexual liberty would capture the true injury of the bans, including the injury to bisexuals who are compelled and deterred into particular, restrictive relationships); Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291, 300 (2015) (discussing the “absence of (acknowledged) bisexual parties in impact litigation and a general lack of reference to bisexuals in briefs and court filings addressing LGBT rights”).

89. Indeed, as Michael Boucai has painstakingly detailed, the early, Stonewall-era gay marriage cases were part-and-parcel of more radical, transgressive, and transformative social change efforts, with a focus on liberation rather than rights. Boucai, *supra* note 19.

90. Cf. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 YALE L.J. 485 (1998) (observing that because strict scrutiny is unlikely to be granted if a particular characteristic is mutable or made invisible, equal protection doctrine encourages sameness and assimilation for groups unlikely to receive protection where their defining traits can be altered or concealed).

91. Eve Kosofsky Sedgwick, *Epistemology of the Closet*, in THE LESBIAN AND GAY STUDIES READER, *supra* note 47, at 45, 57 (noting that claims for equal protection posit homosexual persons “as a particular kind of person”—a category of people entitled to Constitutional protections).

92. *Id.* at 55 (while questioning the oppositional structure of gay and straight identities, recognizing that “substantial groups of women and men under this representational regime have found that the nominative category ‘homosexual,’ or its more recent near-synonyms, does have a real power to organize and describe their experience of their own sexuality and identity . . . . If only for this reason, the categorization commands respect”); cf. Edward Stein, *Marriage or Liberation? Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009) (suggesting that the movement may not need to choose between marriage and a more pluralistic litigation strategy).

93. Judith Butler, *Imitation and Gender Insubordination*, in THE LESBIAN AND GAY STUDIES READER, *supra* note 47, at 307, 308–09.

necessitate, was there a way within equal protection doctrine to soften the edges of those categories so that they too did not exclude?<sup>94</sup> At the very least, could the representative plaintiffs reflect different dimensions of identity within the queer community? Intrepid—and successful—litigation on behalf of incarcerated, black, female, transgender plaintiffs suggests so.<sup>95</sup> Indeed, the litigants in *Lawrence v. Texas*, who were an interracial pair (one black, one white), both had criminal records.<sup>96</sup> They nevertheless succeeded in having bans on sodomy declared unconstitutional at the Supreme Court. (That said, the movement lawyers downplayed many of the purportedly less “respectable” elements of John Lawrence and Tyron Garner’s lives and their relationship).<sup>97</sup>

As Ball notes, equal protection jurisprudence also encourages plaintiffs subject to a suspect classification to show that they are otherwise similarly situated to others outside of the suspect class.<sup>98</sup> Relatedly, there is authority suggesting that a plaintiff must demonstrate that the suspect characteristic

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94. As Dean Spade has explained,

The invention of various categories of proper and improper subjects is a key feature of disciplinary power that pervades society. The creation and maintenance of such categories of people (e.g., the homosexual, the criminal, the welfare dependent mother, the productive citizen, the gifted child, the psychopath) establish guidelines and norms. . . . These norms and codes of behavior reach into the most minute details of our bodies, thoughts, and behaviors. The labels and categories generated through our disciplined behavior keep us in our places and help us know how to be ourselves properly.

DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 54 (Duke Univ. Press 2015) (2009); see also MAGGIE NELSON, *THE ARGONAUTS* 86 (2015) (“Visibility makes possible, but it also disciplines: disciplines gender, disciplines genre.”).

95. See *Settlement Reached in SPLC Case That Highlighted Plight of Transgender Prisoners*, S. POVERTY L. CTR. (Feb. 12, 2016), <https://www.splcenter.org/news/2016/02/12/settlement-reached-splc-case-highlighted-plight-transgender-prisoners> [<https://perma.cc/GNH2-D9KY>] (documenting successful litigation on behalf of Ashley Diamond that resulted in Georgia changing its “freeze frame” policy that prevented many transgender inmates from accessing needed hormone therapy).

96. David Oshinsky, *Strange Justice: The Story of Lawrence v. Texas*, by Dale Carpenter, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html> (on file with the *Michigan Law Review*) (observing that “[t]o some, Garner and Lawrence seemed a risky choice for this role” because “[b]oth men had criminal records, and their ‘relationship’ added a racial element to the mix”).

97. See SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* 78–79 (2011); Robinson & Frost, *supra* note 86.

98. Pp. 88–90. According to Ball, until recently most courts were unwilling to accept that sexual minorities were, in fact, “‘similarly situated’ to heterosexuals in their abilities, characters and contributions to society,” preventing successful equality claims. P. 88. In contrast, the First Amendment requires neutrality with regard to expressive content. P. 89.

does not impair their ability to contribute to society.<sup>99</sup> However, the necessity of that requirement is hardly black-letter law.<sup>100</sup> Nor was same-sex couples' ability to contribute routinely disputed by those who opposed same-sex marriage.<sup>101</sup> Even had it been a central issue, there are ways of demonstrating that premise without, time and again, imprisoning gay people behind a picket fence with the bedroom door slammed shut, shades drawn.<sup>102</sup> Put differently, nothing in equal protection doctrine suggests that in order to be deemed capable of contributing to society and entitled to equal protection, one needs to be, by way of example, a Christian military member with children. The category of gayness need not have been so narrowly and conservatively constructed. As civil rights leader Iván Espinoza-Madrigal has put it,

There are many ways to approach the law. You can approach the law from an academic or theoretical perspective. I approach the law through the lens of survival . . . . Maybe it's because I know from my own experience that poverty, marginalization, and oppression can be messy. I know that the struggle is real. And I would like to think that our rights and our equality don't have to wait for picture-perfect plaintiffs and clients.<sup>103</sup>

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99. Cf. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) ("Because illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society,' official discriminations resting on that characteristic are also subject to somewhat heightened review." (quoting *Matthews v. Lucas*, 427 U.S. 485, 505 (1976))). The better view of the *Cleburne* line of cases is not that an equal protection plaintiff needs to demonstrate that they can contribute to society, but only that the particular characteristic at issue did not justify different treatment.

100. See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (considering whether the group had been subject to a history of discrimination, exhibited obvious or immutable characteristics, and were politically powerless, but not considering their ability to contribute to society in determining whether a suspect classification existed); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 700 (5th ed. 2015) (notably not listing ability to contribute to society as one of the requirements for obtaining strict scrutiny review of a suspect classification); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1755 (1996) (same).

101. See, e.g., *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012) (noting that "[w]e do not understand BLAG to argue otherwise" with regard to same-sex couples' ability to contribute to society), *aff'd*, 133 S. Ct. 2675 (2013); Brief for Respondent, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (nowhere arguing that same-sex couples lack the ability to contribute to society).

102. *Levit*, *supra* note 52, at 23 ("Even if an equal protection challenge depends on substantial similarity to a benefitted group, and even if lawyers want to architect the best possible case, there may be ways to weave in compelling stories of more members of the community than simply the 'white picket fence' plaintiffs.").

103. *Iván Espinoza-Madrigal '05, OUTLaw's Alumnus of the Year, Discusses Civil Rights Work*, N.Y.U. L. (Feb. 11, 2016), <http://www.law.nyu.edu/news/ivan-espinoza-madrigal-out-law-immigration-lgbt-rights> [<https://perma.cc/ZCV8-FWLE>].

And yet, as documented above, for better or worse, the emphasis on sameness and conformity began to dominate the equality discourse of queer rights litigation—even after the landmark *Windsor* decision in 2013.<sup>104</sup>

While, in my view, there was opportunity even within the conformist equal protection framework for more comprehensive depictions of queer identity, in the next Part I analyze whether, in any event, the First Amendment provides a more liberating advocacy framework.

### III. THE FIRST AMENDMENT'S UNFINISHED BUSINESS

In this final Part, I explore whether the First Amendment can pick up where the equality litigation has left off and whether it has further work to do in expanding—and deconstructing—society's understanding of queer identities. It builds off Ball's important cautionary note that, in contesting First Amendment challenges to LGBTQ antidiscrimination protections, movement advocates must not erode the First Amendment safeguards that protected LGBTQ identities in the first place,<sup>105</sup> by articulating exactly how the First Amendment might continue to play a positive role for queer communities. In particular, this Part explores the First Amendment's potential to help advance the rights of nonnormative queer identities—including the rights of genderqueer, gender nonconforming, transgender, and intersexed people (among others)—and understand the importance of gender expression to the constitution of gender norms and sexual and gender identities more broadly.

Identities—including sexual and gender identities—are dynamic.<sup>106</sup> And our “sexed” bodies are similarly dynamic—the product of biology and genetics, yes, but also social forces that shape and construct our bodies and

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104. GILREATH, *supra* note 97, at 70 (“[T]he sameness/difference approach requires targeted minorities to become ‘like’ the majority in order to be seen as worthy of equal treatment, often to such an extreme that the identity of the minority is completely blotted out by the analysis.”).

105. P. 281. And there is a way to do so. As Tobias Wolff has explained, even assuming that merchants may engage in expressive mediums, they themselves do not design the particular message requested by the customer. No reasonable person imputes the message on a wedding photograph to the photographer, the icing message to the baker, or the billboard message to the advertising company. It is rightly imputed to the person with control over the message—the customer who paid for the message. Indeed, why would a customer pay a merchant to spread the merchant's own message? So understood, cases challenging LGBTQ antidiscrimination laws on expressive grounds are quite distinct from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, because in that case the organizers of a privately arranged parade—an inherently politically expressive activity—were required to include a group that would alter their message. 515 U.S. 557, 572–73 (1995). But importantly, it was *their* message to control from the outset. In the merchant cases, merchants are not being forced to alter their speech but are simply facilitating the customer's. See Tobias Barrington Wolff, *Symposium: Anti-Discrimination Laws Do Not Compel Commercial-Merchant Speech*, SCOTUSBLOG (Sept. 14, 2017, 10:25 AM), <http://www.scotusblog.com/2017/09/symposium-anti-discrimination-laws-not-compel-commercial-merchant-speech/> [<https://perma.cc/U86H-KPV5>].

106. See JUDITH BUTLER, *BODIES THAT MATTER 1* (Routledge Classics 2011) (1993) (“Sexual difference, however, is never simply a function of material differences which are not in

identities.<sup>107</sup> In turn, our outward facing identities contribute to the social tableau and shape others' identities. In the end, our identities say something.<sup>108</sup> They say something personal, and often political.<sup>109</sup> They are individually expressive—even if partially (largely?) the product of social forces.<sup>110</sup>

My contention is that the First Amendment can help society, and courts, better understand these dynamics and the didactic relationship between personal identity and social context, particularly as it relates to queer identities. A look at a few examples of First Amendment litigation challenging the regulation of queer identity shows how. While this litigation often receives less attention than the equality-based marriage litigation or efforts to protect

some way both marked and formed by discursive practices. Further, to claim that sexual differences are indissociable from discursive demarcations is not the same as claiming that discourse causes sexual difference. The category of 'sex' is, from the start, normative; it is what Foucault has called a 'regulatory ideal.' In this sense, then, 'sex' not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs . . ."); EVE KOSOFSKY SEDGWICK, *Queer and Now*, in TENDENCIES 1, 7 n.6 (1993) ("[N]o matter what cultural construction, women and men are more like each other than chalk is like cheese . . ."); cf. *One Mississippi: Kiss Me and Smile for Me* (Amazon online broadcast Sept. 8, 2017).

107. The categories of "man" and "woman" are, at bottom, "political categories and not natural givens." Monique Wittig, *One Is Not Born a Woman*, in THE LESBIAN AND GAY STUDIES READER, *supra* note 47, at 103, 105. And "our bodies as well as our minds are the product of this [culturally imagined] manipulation." *Id.* at 103.

108. Put differently by Butler, social construction is a "temporal process which operates through the reiteration of norms" but "sex is both produced and destabilized in the course of this reiteration." BUTLER, *supra* note 106, at 10. That is, as a result of the reiteration of norms and identities, "gaps and fissures" open up that permit destabilization of the norms. *Id.* And while Butler is at times skeptical of individual volunteerism, she still seems to recognize a space for subjective agency within the social grid/matrix. *Id.* at 15. Indeed, she seems hopeful of the possibility that we can "work[ ] the weakness in the norm." *Id.* at 181; see also JUDITH BUTLER, UNDOING GENDER 3 (2004) ("If I have any agency, it is opened up by the fact that I am constituted by a social world I never chose. That my agency is riven with paradox does not mean it is impossible. It means only that paradox is the condition of its possibility.").

109. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 973 (1989) ("The mere disclosure of one's gay, lesbian, or bisexual identity ineluctably accumulates political significance . . ."); Bijal Shah, *Gay American "Deviance": Using International Comparative Analysis to Argue for a Free Speech and Establishment Clause Approach to Furthering Gay Marriage in the United States*, 26 WIS. INT'L L.J. 1, 48 (2008) (explaining that in the Western context, expression is often constitutive of identity).

110. As I've described elsewhere,

[A] post-structural theory of performative politics posits at least four things: (1) social performances conjure and re-inscribe normative identities and values; (2) actions (whether they be public assembly, drag, or, as I suggest, privacy demands) that deviate from prevailing performances can be expressive forms of resistance separate and apart from any linguistic utterance that may (or may not) accompany them; (3) these actions' expressive value is derived, at least in part, from the fact that they are deviating from prevailing social performances; and (4) the deviant actions' expressive power is so great that it can begin to erode, dismantle, or recraft the social structures to which they are responding.

Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1692 (2017).

LGBTQ antidiscrimination laws from First Amendment challenges, it is no less critical and, in my view, has tremendous liberating potential, warranting additional investment. Importantly, many of the cases discussed below have been initiated by movement organizations, evincing their commitment to further unpacking the First Amendment's potential.

A. *First Amendment Challenges to  
Restrictive Government Identification Policies*

Many jurisdictions have laws that greatly restrict or outright prohibit a person from changing the gender marker on their birth certificate or driver's license.<sup>111</sup> Transgender people and many gender nonconforming people are exposed to discrimination and violence because of such laws, which may out their nonnormative status to potential employers or anyone else who may need to evaluate their identification.<sup>112</sup> These laws infringe on queer people's right to informational privacy—to keep intimate information about themselves and their bodies private.<sup>113</sup> And successful informational privacy challenges against such laws have been brought.<sup>114</sup>

But beyond the instrumental privacy harm, restrictive identification laws also force—compel—people to embrace a gender and an identity that do not reflect their reality.<sup>115</sup> A recent Lambda Legal lawsuit challenging Puerto Rico's law restricting people's ability to change the gender marker on their birth certificate makes that very point (and also centers Latinx transgender clients).<sup>116</sup> While the law was also challenged on equality and privacy grounds, by arguing that compelled affiliation with a particular gender constitutes compelled speech,<sup>117</sup> the lawsuit highlights that speech and identity are often intimately linked, with self-identifying speech helping to construct

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111. See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400–01 (2013) (cataloguing jurisdictions with a surgery requirement to change gender marker on birth certificates).

112. SPADE, *supra* note 94, at 80 (explaining that inaccurate identity documents can out and expose transgender people to discrimination).

113. Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. REV. 159 (2015).

114. See, e.g., *Love v. Johnson*, 146 F. Supp. 3d 848, 853 (E.D. Mich. 2015); *K.L. v. Alaska Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05341 CI, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012).

115. And, if the jurisdiction has a surgery requirement, it could compel the individual to make material changes to their body that are unnecessary or unwanted. See Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 291 (2013) (explaining that medical transition, including genital surgery, is not necessary or medically indicated for many transgender people).

116. Complaint for Declaratory and Injunctive Relief at paras. 179, 215, *Gonzalez v. Nevares*, No. 3:17-cv-01457 (D.P.R. Apr. 6, 2017).

117. *Id.* at paras. 174, 177.

queer identities and gender norms, and with compelled identification disciplining and restricting those same identities.<sup>118</sup> Moreover, to the extent such lawsuits require courts to grapple with the fact that one's gender identity and expression may be divorced from certain biological components (namely, external genitalia), these challenges have the potential to educate courts about transgender, intersex, and gender nonconforming identities, much as the early First Amendment obscenity cases forced courts to confront gay and lesbian sexuality (pp. 36–41).

B. *First Amendment Challenges to Government Dress & Association Codes*

Public school districts and government employers not infrequently impose dress codes that restrict people's ability to wear clothing that best reflects their gender or sexuality. These dress codes directly police gender and sexuality. As explained by Ruthann Robson, “[a] major weapon of the governmental maintenance of sexual hierarchies is the policing of attire.”<sup>119</sup> For example, one school punished a student and forbade him from wearing a t-shirt containing a rainbow Ichthys—known popularly as the “sign of the fish” or “Jesus fish,” a Christian symbol—and a slogan that says “Jesus Is Not A Homophobe.”<sup>120</sup> Another school prohibited a black transgender student, who had been assigned a male sex at birth, from wearing a dress to prom.<sup>121</sup> In another example, a school refused to permit a male student to bring another male to prom as his date.<sup>122</sup> Each of these instances of government regulation of clothing and association performatively reconstructing gender and sexuality norms was successfully challenged as violating the First Amendment.<sup>123</sup>

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118. Hunter, *supra* note 22, at 1718 (“Self-identifying speech does not merely reflect or communicate one’s identity; it is a major factor in constructing identity. Identity cannot exist without it.”); cf. David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 321–22 (1994) (explaining that homosexual conduct is expressive and that the expression often serves as the government’s justification for regulation).

119. ROBSON, *supra* note 22, at 60.

120. Verified Complaint at 3, *Couch v. Wayne Local Sch. Dist.*, No. 1:12-cv-00265-MRB (S.D. Ohio Apr. 3, 2012); cf. *Zamecnik v. Indian Prairie Sch. Dist.* # 204, 636 F.3d 874 (7th Cir. 2011) (forbidding school from banning “Be Happy, Not Gay” t-shirt as protected First Amendment expression).

121. Complaint, *Logan v. Gary Cmty. Sch. Dist.*, No. 2:07-cv-431 (N.D. Ind. Dec. 12, 2007).

122. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980); see also *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (holding that a school violated lesbian student’s First Amendment rights by forbidding her from bringing a female date to prom and by forbidding her from wearing a tuxedo).

123. The *Couch* and *Logan* cases settled in the plaintiffs’ favor. See Judgment, *Couch v. Wayne Local Sch. Dist.*, No. 1:12-cv-00265-MRB (S.D. Ohio May 21, 2012); Press Release, Lambda Legal Reaches Settlement Agreement with Indiana School District After Transgender Student Was Barred from Prom, (Jan. 28, 2011), [https://www.lambdalegal.org/news/in\\_20110128\\_reaches-agreement](https://www.lambdalegal.org/news/in_20110128_reaches-agreement) [<https://perma.cc/37ZT-6MXC>]. The *Fricke* claim was resolved by a court. See *Fricke*, 491 F. Supp. 381 (D.R.I. 1980). But see *Zalewska v. County of*

C. *First Amendment Challenges to School Gender Classification Policies*

In addition to clothing choices, students often have little control over how their gender identities are classified—that is, whether they are deemed “male” or “female.” Even in more open minded school settings, queer students operate under a bureaucracy of what I call “identity by committee,” meaning that students’ ability to be themselves in the educational setting is regulated by a complex system including their parents, doctors, mental health professionals, teachers, administrators, and school boards.<sup>124</sup> With each additional administrative step or hurdle, new people are incorporated into the “committee,” amplifying the risk that sensitive information about the students will be disclosed more broadly and decreasing students’ control over their identities.

Some of these barriers may, in fact, be an unintended result of the way that transgender identity has often been conceptualized—even by well-meaning advocates—in order to take advantage of equality frameworks. For example, does linking transgender identity with medicalized “gender dysphoria” that can result from the distress caused by the difference between one’s gender identity and one’s assigned gender—potentially to harness disability equality law or obtain medical benefits—lend credence to an approach where the parent and doctor, not the child, have control over the child’s transition, given legal doctrine establishing parental supremacy over medical decisions?<sup>125</sup> Similarly, pursuant to the law’s recognition of parental control over a child’s education, does an emphasis on the social aspects of transition feed a parent’s ability to regulate the child’s transition at school, even if the school and federal/state policy are supportive of the child?<sup>126</sup> Conversely, would an emphasis on “gender expression” provide the child with greater autonomy relative to their parents and the school, given law endorsing students’ speech rights.<sup>127</sup> At the very least, as with the other contexts discussed, it would seem that an emphasis on the dialectic dynamic between social context and gender expression could help schools, courts,

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Sullivan, 316 F.3d 314, 319 (2d Cir. 2003) (rejecting female public employee’s First Amendment challenge to requirement that she wear pants because wearing a skirt did not convey a particularized message).

124. ASAF ORR ET AL., *SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS* 14, 35–37, 42 (Beth Sherouse ed., 2015), <https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf> [<https://perma.cc/4XCA-GCAS>].

125. See, e.g., *In re Cassandra C.*, 112 A.3d 158, 159, 168–72 (Conn. 2015) (holding that seventeen-year-old minor is not permitted to go against doctor’s orders and refuse chemotherapy).

126. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

127. See Clifford J. Rosky, *No Promo Hetero: Children’s Right to Be Queer*, 35 *CARDOZO L. REV.* 425 (2013) (arguing that the First Amendment, along with equal protection and due process, protect children’s right to be queer); cf. Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 *N.Y.U. REV. L. & SOC. CHANGE* 89, 121–23 (2015) (suggesting that using a bathroom consistent with one’s gender identity may be protected First Amendment expression).



and society better understand the nonessentialist (e.g., nonmedical) components of our sexual and gender identities.

In each of these three contexts, nothing about the First Amendment doctrine would militate toward painting a conforming picture of the plaintiff. On the contrary, the less conforming the plaintiff the stronger the argument that the nonconforming aspect of the plaintiff's identity is expressive and therefore entitled to First Amendment coverage. The deviation from social norms is meaningful enough to communicate something external—and, in certain instances, is being read as expressive by the government regulator and regulated for that reason.<sup>128</sup> Consequently, a renewed emphasis on First Amendment litigation also has the potential to help LGBTQ movement litigation—which has historically underfocused on transgender/gender queer issues—to more prominently transgender identities.

#### CONCLUSION

Ball's wonderful history of the First Amendment comes at a critical time in the trajectory of LGBTQ citizenship and illuminates the importance of First Amendment rights to LGBTQ rights. But it also gestures towards and suggests an enduring role for the amendment in ongoing efforts for queer enfranchisement. Given the First Amendment's remaining emancipatory potential for nonnormative sexual and gender identities, this Review's demarcation of the Amendment as the first "queer" right (as opposed to gay right) is quite intentional. The First Amendment, unlike the category-reliant Equal Protection Clause, is arguably the first truly "queer" right because it has the potential to facilitate and enable legally protected articulations of noncategorized identities. And it also permits further, future contestation of those very same "queer" identities. In other words, the First Amendment, like the meaning of the word "queer" itself, begs for further discursive contestation.<sup>129</sup>

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128. See, e.g., *Fricke*, 491 F. Supp. at 383 (principal denied ability of male to bring male date fearing that it would be disruptive).

129. Cf. BUTLER, *supra* note 106, at 230 (observing that while "queer" is "necessary as a term of affiliation," it cannot "fully describe those it purports to represent," requiring that we "affirm the contingency of the term").