Texas Law Review Online

Volume 96

Article

Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination

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To help pay for school, Jameka Evans took a job as a security guard at Georgia Regional Hospital in Savannah.[1] Evans is a lesbian but never spoke about her sexuality at work.[2] Her silence did not conceal her identity, however. Evans' masculine clothing and hairstyles telegraphed her sexual orientation to colleagues.[3] Evans claims she was harassed and penalized at work because of her masculine characteristics and sexual orientation.[4] The hostile work environment, she alleged, arose from her failing to comport with her supervisor's expectations that she act in a "traditional woman[ly] manner."[5] Evans quit and filed a Title VII claim alleging she was discriminated against because of her sex. Specifically, Evans proffered the adverse treatment arose from her gender non-conformity.[6]

Title VII forbids employers from discriminating against employees on

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1. Evans v. Georgia Regional Hospital, 2017 WL 943925, at *2 (11th Cir. Mar. 10, 2017).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

the basis of sex.[7] In 1989, the Supreme Court's plurality opinion in *Price Waterhouse v. Hopkins* reasoned that under Title VII "gender must be irrelevant to employment decisions" and that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[8] Thus, employees who demonstrate gender nonconforming characteristics are protected under Title VII. As the Seventh Circuit ably summarized it, "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."[9]

In Jameka Evans' case, a magistrate judge issued a report and recommendation to dismiss the suit.[10] The judge concluded that Title VII's sex-based discrimination prohibition "was not intended to cover discrimination against homosexuals."[11] The judge further reasoned that Evans' gender non-conformity was an attempt to impermissibly bootstrap sexual orientation claims "just another way to claim discrimination based on sexual orientation."[12] The Eleventh Circuit Court of Appeals affirmed the dismissal, 2-1, citing a 1979 decision as binding precedent. That case, Blum v. Oil Gulf Oil Corporation, noted in a throwaway line devoid of real analysis that "[d]ischarge for homosexuality is not prohibited by Title VII."[13] Thus, Evans could only prevail in a decision from the circuit court sitting en banc.

The majority opinion was not remarkable. While Blum's perfunctory analysis of sex discrimination relationship to sexual orientation is arguably dicta, that the panel proffered revisiting Blum was the province of the full court is not extraordinary. Judge Pryor authored a concurring opinion that views sexual orientation in a way inconsistent with both scientific understandings of LGB persons and Supreme Court precedent. The Pryor

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

8. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

9. Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997).

10. Evans v. Georgia Reg'l Hosp., No. CV415-103, 2015 WL 5316694, at *2 (S.D. Ga. Sept. 10, 2015), *report and recommendation adopted,* No. CV415-103, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015).

11. *Id*.

12. *Id*. at *3.

13. Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th. Cir. 1979). Congress created the Court of Appeals for the Eleventh Circuit by splitting the Fifth Circuit into two courts. Fifth Circuit decisions handed down before October 1, 1981 are treated as binding precedent in the Eleventh. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1206 (11th Cir. 1981) ("We hold that the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

concurrence relies on a nonsensical conduct-status dichotomy— that a distinction can be drawn between the status of a person's sexual orientation and a person's decision to have relationships with same-sex partners. As Title VII sexual orientation claims percolate in the courts, judges must emphatically reject this dangerous, fringe theory when deliberating the ambit of Title VII's protections for gay, lesbian, and bisexual persons.

I. Sexual Orientation Discrimination is Sex Discrimination

Until the Seventh Circuit Court of Appeal's ruling in Hively v. Ivy Tech,[14] courts erroneously interpreted Title VII's ban on sex discrimination as being silent on discrimination motivated by sexual orientation for decades.[15] However, sexual orientation discrimination fits cleanly within the Supreme Court's "simple" test for what constitutes sex discrimination under Title VII— "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[16]

This concept is perhaps easiest to discern when an adverse employment action arises from an employer's disapproval or unequal treatment of an employee's same-sex relationship.[17] If an employer mistreats a female worker because she has an intimate relationship with another woman, but the employer would not mistreat the employee if she had a substantially similar relationship with a man, the "but for" causation of that discrimination is sex.

14. Hively v. Ivy Tech Community College, 2017 WL 1230393, at *1 (7th Cir. Apr. 4, 2017) ("For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.").

15. *See, e.g.,* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751–52 (4th Cir. 1996); U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

16. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (citation omitted).

17. The EEOC offered a useful hypothetical for this proposition in its 2015 determination that sexual orientation discrimination claims are actionable under Title VII:

For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male.

Baldwin v. Foxx, EEOC DOC 0120133080, 2015 WL 4397641, at *5 (July 16, 2015).

Such was the case in *Hall v. BSNF Railway Company*, where an employer denied healthcare benefits to married same-sex couples otherwise provided to married opposite-sex couples.[18] The company moved to dismiss the Title VII sex discrimination claim arguing that the thrust of the plaintiff's case was really about sexual orientation discrimination, which is not expressly proscribed by federal law.[19] The court denied the motion to dismiss noting that "Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."[20]

The Hall court's reading of Title VII importantly mirrors the analysis used by a handful of courts considering constitutional challenges to anti-marriage equality laws. The first state courts[21] and the first federal courts[22] to deal blows to state same-sex marriage prohibitions did so under the rationale that anti-gay marriage laws constituted sex discrimination.[23] Another federal court struck down the Defense of Marriage Act, which

18. Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014).

19. *Id*. at *2 ("Defendant argues that this claim fails as a matter of law because [the plaintiff] is really alleging a claim of discrimination based on his sexual orientation, not his sex, which cannot be maintained under Title VII.").

20. *Id*. at *3.

21. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (noting that "the prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender"); Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, 59 (1993) (plurality) (proffering that a ban on same-sex marriage "on its face, discriminates based on sex").

22. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206–07 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014) (finding Utah's same-sex marriage ban subject to "the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex. . . . and unable to satisfy the more rigorous standard of demonstrating an "exceedingly persuasive" justification for its prohibition against same-sex marriage."); Perry v. Schwarzenegger, 704 F.Supp.2d 921, 996 (N.D.Cal.2010) ("Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), *aff'd sub nom*., Perry v. Brown, 671 F.3d 1052 (9th Cir.2012), *vacated and remanded sub nom*., Hollingsworth v. Perry, —— U.S. ——, 133 S.Ct. 2652 (2013). A later 2014 federal court held Missouri's same-sex marriage ban was a form of sex discrimination. Lawson v. Kelly, 14–0622–CV–W–ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification.").

23. A handful of powerful concurring and dissenting opinions in same-sex marriage litigation also acknowledged blockades against marriage equality were sex-discrimination. Latta v. Otter, 771 F.3d 456, 480-96 (9th Cir. 2014) (Berzon, J., concurring); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971-73 (Mass. 2003) (Greaney, J., concurring); Hernandez v. Robles, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting); Baker v. State, 744 A.2d 864, 905-07 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); Andersen v. King Cnty., 138 P.3d 963, 1037-39 (Wash. 2006) (en banc) (Bridge, J., concurring in dissent).

blocked federal recognition of lawfully married same-sex couples, under a sex discrimination rationale.[24] While a minority approach,[25] the successful application of sex discrimination analyses to dismantle anti-gay marriage laws buttresses the reasonability of the proposition that sexual orientation discrimination claims are colorable under Title VII's existing framework. These marriage rulings are further significant in light of Title VII's "main purpose" which is "to extend the constitutional prohibition against discrimination from public to private action."[26]

Trickier questions arise, however, in the context of an employer who harbors anti-LGB animus and takes hostile action against a person because of their sexual orientation without any direct connection to a same-sex relationship. What if a bisexual female worker in an opposite-sex relationship is fired because of her sexual orientation?[27] What if a single, hyper-masculine, gay male employee is denied a promotion because of his sexual orientation? Does *Price Waterhouse*'s sex stereotyping theory apply to LGB persons across the board like these, or is that impermissible bootstrapping?[28] Chief Judge Katzmann's concurrence in a recent Second Circuit sexual orientation Title VII case, *Christiansen v. Omicom*, astutely

24. Golinski v. U.S. Office of Pers. Mgmt., 824 F.Supp.2d 968, 982 n. 4 (N.D.Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied,* 680 F.3d 1104 (9th Cir. 2012) *and appeal dismissed,* 724 F.3d 1048 (9th Cir. 2013).

25. *See* David S. Cohen, *Same-Sex Marriage Bans: A form of Sex Discrimination*, SLATE (Jan. 17, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/same_sex_marriage_bans_courts_should_strike_them_down_as_sex_discrimination.html (noting the majority approach in same-sex marriage cases was to consider marriage bans as sexual orientation discrimination).

26. George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 470 (1988). *See also* Hively, 2017 WL 1230393, at *8 (7th Cir. Apr. 4, 2017) (noting that recognizing sexual orientation claims' viability under Title VII "must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the [constitutional law] area of broader discrimination on the basis of sexual orientation.").

27. One court raised this very hypothetical: "Imagine . . . [a] female employee is bisexual. She is married to a man, and her co-worker—who we will assume is heterosexual—is married to a woman. Each keeps a picture of their spouse on their desk. The female employee is suspended not for displaying a photo of her spouse, but rather for *being* bisexual. . . . this hypothetical does not allow for a tidy resolution by switching the parties' genders." Winstead v. Lafayette Cty. Bd. of Cty. Commissioners, 197 F. Supp. 3d 1334, 1344 (N.D. Fla. 2016).

28. *See, e.g.,* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) ("The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.").

answers this question:

> [To wall off a person's sexual orientation from their demeanor and conduct is] an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender. More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.[29]

Judge Katzmann's opinion reflects society's evolving understanding that sexual orientation discrimination is sex discrimination because "homosexuality is the ultimate gender non–conformity, the prototypical sex stereotyping animus."[30] *Properly framed, the question of whether sexual orientation discrimination claims are colorable under Price Waterhouse must turn on whether the root of the animus harbored against sexual minorities stems from sex-stereotypes— not whether all sexual minorities uniformly manifest a set of gender non-conforming characteristics*.[31] This construction of the issue undergirds Chief Judge Katzmann's sound articulation of the relationship between *Price Waterhouse* and sexual orientation discrimination.

Opting to focus instead on the inconsistent manifestation of non-

29. Christiansen v. Omicom, No. 16-748, 2017 WL 1130183, at *7 (2nd Cir. Mar. 27, 2017) (Katzmann, J., concurring). Other courts have echoed this idea. *See* Hively v. Ivy Tech Cmty. Coll., S. Bend, 830 F.3d 698, 705 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016) (explaining that "almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity."); EEOC v. Scott Med. Health Ctr., P.C., No. CV 16-225, 2016 WL 6569233, at *6 (W.D. Pa. Nov. 4, 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."). *See also* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (criticizing the workability of courts trying to distinguish sexual orientation discrimination claims and sex stereotyping) ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, *save as a lingering and faulty judicial construct*.") (emphasis added).

30. Boutillier v. Hartford Pub. Sch., No. 3:13–CV–01303–WWE, 2016 WL 6818348 (D. Conn. Nov. 17, 2016).

31. Structuring the question in this fashion helps to resolve the "extravagant legal fiction" where "the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals." Hamm v. Weyauwega Milk Prod., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring). *See also,* Ellingsworth v. Hartford Fire Ins. Co., No. CV 16-3187, 2017 WL 1092341, at *5 (E.D. Pa. Mar. 23, 2017) ("Calling a female employee a "dyke," ridiculing her publicly for "dressing like a dyke," and forcing her to peel back her clothing to show her coworkers her "lesbian tattoo" is not only offensive and inappropriate—it is prohibited by Title VII. This is the case regardless of whether or not [Plaintiff] is or is not actually gay.").

conforming traits, Judge Pryor offers an untenable theoretical framework of pure judicial fantasy. Parsing individuals' sexual orientation from LGB persons' relationships and traits is a hollow distinction. It relieves judges from the need to pierce the veil masking the motivation behind bad actors' homophobic misdeeds. As this Essay further explains, there is no shortage of good reasons why courts must avoid the grave jurisprudential blunder of adopting a status-conduct analysis in sexual orientation Title VII claims.

II. Sex Discrimination and Status-Conduct Dichotomy Theory

The Pryor concurrence's tortured analysis fails to do Title VII justice and must be rejected by courts. Judge Pryor proffered that since "[t]he doctrine of gender nonconformity is, and always has been, behavior based," sexual orientation discrimination claims do not necessarily qualify as nonconformity because LGB persons do not inherently violate gender norms.[32] In other words, while sexual orientation discrimination and discrimination arising from a person's gender non-conformity may often overlap, they are distinct. Judge Pryor writes, "Deviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation."[33]

Propping up Judge Pryor's non-conformity theory is a misguided notion that one's sexual orientation is not of one's choosing, but a choice of partner is, Judge Pryor wrote, "Some gay individuals adopt what various commentators have referred to as the gay "social identity" but experience a variety of sexual desires."[34] To support this proposition, the concurrence cites[35] discredited[36] faux-science about sexual orientation reparative

32. Evans at *9.

33. *Id*. at *8. Judge Pryor went on to explain, "The unsurprising reality that some individuals who have experienced discrimination because of sexual orientation will also have experienced discrimination because of gender nonconformity by no means establishes that every gay individual who experiences discrimination because of sexual orientation has a "triable case of gender stereotyping discrimination." *Id*.

34. *Id*.

35. Judge Pryor cites the brief of same-sex attracted men who married women opposing the freedom to marry for same-sex couples. Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents, Obergefell v. Hodges, 2015 WL 1608211, *37 (U.S. 2015) ("Striking down man-woman marriage laws on the basis of constitutional discrimination would thus send a message to the same-sex attracted that there is only one choice for them, that man-woman marriage is unattainable, that they are acting against their nature for desiring it, and that pursuing it will be dangerous for them, their spouses, and their children."). He also cites a 2014 article that claims gay, lesbian, and bisexual persons "choose" to be "gay." Brandon Ambrosino, *I Wasn't Born This Way. I Choose to Be Gay.*, NEW REPUBLIC, Jan. 28, 2014, https://newrepublic.com/article/116378/macklemores-same-love-sends-wrong-message-about-

therapies and expounds that "like some heterosexuals, some gay individuals may choose not to marry or date at all or may choose a celibate lifestyle. And other gay individuals choose to enter mixed-orientation marriages."[37]

The *Evans* concurrence demonstrates a complete misunderstanding of sexual orientation by embracing a false narrative of people with same-sex attractions. Indeed, this status-conduct dichotomy fails to comport with the lived experiences of gay, lesbian, and bisexual persons. It's tortured logic does little but create "fictional gays" to justify excluding LGB people from Title VII's protections.[38] Equally damaging, the Pryor concurrence fails to square with modern LGB rights jurisprudence and Title VII precedent.

III. The Law's Rejection of Divorcing Status and Conduct

Supreme Court precedent has never made a distinction between sexual orientation as a status and the conduct of engaging in same-sex relationships. The Court expressly disapproved of divorcing status and conduct in *Christian Legal Society v. Martinez*.[39] In *Martinez*, the Christian Legal Society chapter at Hastings Law School challenged the law school's nondiscrimination policy that required any student group receiving student funding be open to all students. The CLS chapter's bylaws included a

being-gay [https://perma.cc/8P7Q-S4LV].

36. The American Psychological Association rejects the idea that a person's sexual orientation and a person's intimate relationships can be viewed as discrete aspects of an individual's life:

> Sexual orientation is commonly discussed as a characteristic of individuals, like biological sex or age. This perspective is incomplete because sexual orientation necessarily involves *relationships* with other people. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved, relative to each other. Indeed, it is only by acting with another person - or desiring to act - that individuals express their heterosexuality, homosexuality, or bisexuality. Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. It defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.

Brief of the American Psychological Association et al as Amicus Curiae, Obergefell v. Hodges, 2015 WL 1004713, *10 (U.S. Mar. 6, 2015).

37. *Evans* at *8.

38. *See* Hively, 2017 WL 1230393, at *12 (Posner, J., concurring) ("The position of a woman discriminated against on account of being a lesbian is thus analogous to a woman's being discriminated against on account of being a woman. That woman didn't choose to be a woman; the lesbian didn't choose to be a lesbian. I don't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman.").

39. Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 689 (2010).

provision that disallowed any individuals that engage in "unrepentant homosexual conduct" from becoming members.[40] CLS argued that because persons with same-sex attractions could be members provided they disavowed same-sex relations, the bylaws did not discriminate against gays, lesbians, and bisexuals.

The Court rejected CLS' attempt to disaggregate status and conduct. Writing for the majority, Justice Ginsburg emphasized that the Court's decisions on LGB discrimination "have declined to distinguish between status and conduct."[41] The landmark decision in *Lawrence v. Texas* is illustrative. When the Supreme Court invalidated anti-sodomy laws, the Court was clear that equal protection jurisprudence understood sexual orientation and same-sex sexual conduct as intertwined.[42]

Equally instructive here are the subsequent decisions from federal courts in same-sex marriage litigation. The Supreme Court's rulings striking down federal non-recognition of same-sex marriages in *United States v. Windsor*[43] and ruling against state same-sex marriage bans in *Obergefell v. Hodges*[44] reinforced the non-severability of status and conduct. In the same vein, lower courts expressly rejected the meritless argument that same-sex marriage bans did not discriminate on the basis of sexual orientation because gay men remained free to marry women and lesbians could opt to marry a man.[45]

40. *Id*. at 672.

41. *Id*. at 689. The opinion cited Lawrence v. Texas, which struck down state anti-sodomy laws, for this proposition. 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.").

42. *Id*. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.").

43. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

44. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.").

45. Indiana and Wisconsin took this position in defending state bans on same-sex marriages. Indiana argued that the marriage law said "*nothing* about sexual orientation" and that "not only [did] Indiana's marriage definition permit homosexuals to marry, but homosexuals commonly do, in fact, marry members of the opposite sex, while some homosexuals would no doubt wish never to marry at all, even if same-sex marriage were available." Baskin v. Bogan, 2014 WL 4198164 (7th. Cir.), *9. The Seventh Circuit rejected the theory. Baskin v. Bogan, 766 F.3d 648, 667 (7th Cir. 2014) (overturning same-sex marriage bans in Indiana and Wisconsin) ("Does Wisconsin want to push homosexuals to marry persons of the opposite sex because opposite-sex marriage is

IV. Avoiding Inconsistency

Not only does the Pryor theory contravene Supreme Court precedent, but it also would create inconsistencies in Title VII's application. Unlike the Equal Protection Clause's tired scrutiny approach to discrimination, "under Title VII a distinction based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions."[46] Because Title VII "on its face treats each of the enumerated categories exactly the same," any doctrinal inconsistencies between protected classes raise serious concerns.[47]

Courts have held consistently that Title VII's protections cover employees adversely treated because of their relationship with a person or persons of a race or national origin different from their own. Despite the EEOC's determination that associational claims were actionable under Title VII,[48] courts' reception to relational theory claims were mixed.[49] However, a landmark New York district court decision paved the way for these claims. The court in *Whitney v. Greater New York Corporation of Seventh*

"optimal"? Does it think that allowing same-sex marriage will cause heterosexuals to convert to homosexuality? Efforts to convert homosexuals to heterosexuality have been a bust; is the opposite conversion more feasible?").

46. Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1083–84 (1983). *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be" prohibited like racial harassment); Hively v. Ivy Tech, 2017 WL 1230393, at *7 (7th Cir. Apr. 4, 2017)("The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses . . . to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate."); Mark Seidenfeld, Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth, 21 RUTGERS L.J. 269, 299 (1990) ("With a few notable exceptions, courts have treated sex and race as equally invidious classifications and applied the same doctrinal analysis to discrimination based on either classification.").

47. Price Waterhouse, 490 U.S. at 243 n.9.

48. EEOC Decision No. 71–909, 3 FEP Cases 269 (1970) (finding Title VII applied to claim by white employee that he was discharged for fraternizing with non-white employees). *See also,* Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GENDER 209, 218 (2012) (noting courts' acknowledgement of early EEOC determinations that Title VII prohibits discrimination on the basis of interracial associations).

49. *See* Ripp v. Dobbs Houses, Inc., 366 F.Supp. 205, 208 (N.D.Ala.1973) (dismissing a white male's claim alleging termination because of his association with black employees for want of a claim that he did not "suffer[] any detriment on account of *his* race.") (emphasis added); Holiday v. Belle's Rest., 409 F. Supp. 904, 907 (W.D. Pa. 1976) (denying motion to dismiss on race discrimination association claim); Clark v. Louisa Cty. Sch. Bd., 472 F. Supp. 321, 324 (E.D. Va. 1979) ("Plaintiff sufficiently alleges that she, a member of the white race, has been discriminated against because she is married to a member of the black race."); Adams v. Governor's Committee on Post-Secondary Education, 26 F.E.P. Cases 1348 (N.D.Ga.1981) (rejecting a white man's Title VII claim for unlawful discharge because of his interracial marriage).

Day Adventists permitted a white woman's Title VII claim to go forward on the theory that she was discharged because of her social involvement with a black man.[50] The court reasoned:

> Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was "[d]ischarged . . . because of [her] race."[51]

In 1988, the Eleventh Circuit considered a Title VII race discrimination claim under an associational theory in *Parr v. Woodmen of the World Life Insurance Company*.[52] Don Parr applied for an insurance salesman position but was not hired after the company became aware he was in an interracial marriage.[53] The district court granted the company's motion to dismiss because Parr was not discriminated because of his race. The circuit court reversed on appeal holding that "Title VII proscribes race-conscious discriminatory practices. It would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired."[54] The Eleventh Circuit was the first to recognize relationship-based claims under Title VII, but every circuit court to consider the associational theory followed the Eleventh Circuit's decision.[55]

More than creating a fork in Title VII doctrine for sex and race/ national origin claims, the "love the sin, hate the sinner" approach advocated by Judge Pryor radically conflicts with basic religious anti-discrimination principles. Consider religious articles of clothing, like yarmulkes. If an employer refused to hire applicants that wear yarmulkes, would that constitute discrimination against a class of persons or the targeting of applicants' behavior? If the status of being an observant Jew is severable from the conduct of yarmulke-wearing, the employer would be

50. 401 F.Supp. 1363 (S.D.N.Y.1975).

51. *Id*. at 1366.

52. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986).

53. *Id*. at 892.

54. *Id*. at 889.

55. Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998) *vacated in part on other grounds by* Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999); Drake v. 3M, 134 F.3d 878, 884 (7th Cir. 1998).

free to engage in religious discrimination with impunity.[56] This logic fails to hold water. As the Supreme Court has noted, "A tax on wearing yarmulkes is a tax on Jews."[57]

As the Seventh Circuit held and the Second Circuit wisely recognized, in the wake of *Lawrence*, *Windsor*, and *Obergefell*, persons discriminated against because of their same-sex relationships should have viable association-based Title VII actions.[58] However, the broader danger in Judge Pryor's theory is that, if adopted, it would send Title VII's sex discrimination doctrine veering off course in way that substantially departs from how Title VII treats other protected persons— and with the sole impact of isolating gay, lesbian, and bisexual persons from workplace protections. Unless Title VII is applied with varying rigor depending on the type of discrimination alleged, the validity of associational-based claims is undermined if a status-conduct dichotomy doctrine is introduced into the Civil Rights Act.

V. Conclusion

Courts should resist building Potemkin Villages into Title VII. Dreamed up distinctions that treat same-sex conduct and sexual orientation as discrete ideas only serve to smokescreen the nature of anti-LGB animus arising from sex stereotypes and improperly exclude gays, lesbians, and bisexuals from federal employment protections. As courts continue to consider the reach of Title VII, judges must avoid creating distinctions without meaning that have the effect of treating sex discrimination as a lesser evil than other forms of workplace discrimination. It has been too long in the coming, but courts must dispense with figments of judicial imagination and let Title VII protect the most vulnerable in the workforce— just as it always was intended to do.

56. "Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship." E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015).

57. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993).

58. *See Christiansen*, *supra* note ___ at *6 (Katzmann, J., concurring) (". . .it makes little sense to carve out same–sex relationships as an association to which [Title VII associational] protections do not apply, particularly where, in the constitutional context, the Supreme Court has held that same–sex couples cannot be" denied marriage rights).