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Article

The Nineteenth Amendment as a Generative Tool for Defeating LGBT Religious Exemptions

Kyle C. Velte[†]

INTRODUCTION

In the summer of 1920, women gained the right to be free from discrimination in voting when the Nineteenth Amendment was ratified.¹ One hundred years later, in the summer of 2020, LGBT people gained the right to be free from discrimination in the workplace when the U.S. Supreme Court ruled in *Bostock v. Clayton County* that sexual orientation and gender identity (SOGI) discrimination is discrimination “because of . . . sex”² under Title VII.³ Yet, LGBT people continue to face discrimination in many contexts, a prominent example of

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1. See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 975 (2002). While the Nineteenth Amendment often is characterized as “giving” women the right to vote, it did not. In fact, by the time the Amendment was ratified nearly every state permitted women to vote in some form. See Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right To Vote and Congress's Power To Enforce It*, 108 GEO. L.J. (SPECIAL ED.) 27, 44–45 (2020) (“Many of the senators voting in favor of the Amendment did so because of the support in their states for women’s suffrage, as demonstrated by earlier state-enfranchisement efforts.”). Moreover, the language of the Amendment’s first clause is framed as a prohibition rather than as the affirmative grant of a right: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. CONST. amend. XIX. The Amendment’s second clause, however, is an affirmative grant—a grant of power to Congress to enforce the Amendment’s first clause: “Congress shall have power to enforce this article by appropriate legislation.” *Id.*

2. 42 U.S.C. § 2000e-2.

3. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

which is the national campaign by Christian business owners to obtain religious exemptions from state public accommodations laws. In these instances, Christian business owners, often wedding vendors,⁴ claim that they are exempt from complying with a state's public accommodations law because to apply that law to them—to force them to sell, for example, a wedding cake for a same-sex wedding—would violate their First Amendment rights to free speech and to the free exercise of religion.⁵ What does women's suffrage have to do with today's religious exemption debates? This Article contends that there is a through-line from a radical, antisubordination strand of the history of the Nineteenth Amendment to today's fight over religious exemptions from SOGI antidiscrimination laws.

The antisubordination history of the Nineteenth Amendment was promoted by a subset of suffrage proponents who intended women's suffrage to be about more than just the right to cast a ballot. This capacious view of the Nineteenth Amendment—as a means of dismantling sex-based hierarchies and thus ensuring full citizenship rights regardless of sex—would allow women to engage in all aspects of life, both political and civic. This antisubordination intent of some pro-suffrage leaders has been largely forgotten over the past century as most courts interpreted the Nineteenth Amendment narrowly.⁶

Between the ratification of the Nineteenth Amendment and today's battles over SOGI religious exemptions stands 100 years of sex discrimination law. That era saw state legislatures build upon women's political rights by enacting public accommodations laws that prohibited sex discrimination in the public square; these laws extended to women the right of civic engagement and thus full citizenship. Today, all forty-five states that have a public accommodations law include "sex" as a protected class.⁷ The body of sex discrimination

4. See, e.g., *id.* (discussing a wedding cake baker); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (regarding wedding videographers); *303 Creative, LLC v. Elenis*, 746 F. App'x 709 (10th Cir. 2018) (discussing designers of wedding websites); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (concerning a custom wedding invitation designer); *State v. Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019) (concerning a florist). These cases have also arisen when faith-based adoption and foster care agencies have policies to turn away LGBT parents. See, e.g., *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

5. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

6. See generally Siegel, *supra* note 1.

7. See *State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATORS (Apr. 8, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/2GFG-4GZ4>]. The five states without a

law that emerged in this era included the Court's 1984 decision in *Roberts v. United States Jaycees*,⁸ which involved a challenge to one such law. The *Jaycees* Court upheld a public accommodations law against a claim that enforcement of the law—which would compel the Jaycees organization to admit women as full members—would violate the Jaycees' First Amendment free speech rights. In rejecting this request for a First Amendment exemption from the state law, the Court reasoned that states have a compelling interest in eradicating sex discrimination in public.⁹ *Jaycees* expands the reach of the equality-enhancing aspect of the suffrage movement. It embodies the antisubordination strand of the women's suffrage movement and stitches it into the fabric of the legal doctrine governing sex discrimination.

In today's religious exemption cases, the Religious Right¹⁰ argues that although the state has a compelling interest in eradicating race

public accommodations law are Alabama, Georgia, Mississippi, North Carolina, and Texas.

8. 468 U.S. 609, 623–24 (1984).

9. *Id.* at 623.

10. I use the term “Religious Right” to describe the “network of political actors, religious organizations, and political pressure groups” that arose in the 1960s, rose to prominence in the 1970s, and today is a leading voice of the anti-LGBT rights movement in the United States. See Michael J. McVicar, *The Religious Right in America*, OXFORD RSCH. ENCYCLOPEDIA (Mar. 3, 2016), <https://doi.org/10.1093/acrefore/9780199340378.013.97> [<https://perma.cc/JZ8Z-LLXX>]; Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAG. (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133> [<https://perma.cc/TPA4-23X5>]. Its goal is to stop and reverse LGBT civil rights, which has “long been at the core of Religious Right fundraising and organizing efforts”; it has become a prominent influence within the Republican Party. See *Anti-Gay Politics and the Religious Right*, PEOPLE FOR AM. WAY (Aug. 2002), <https://www.pfaw.org/report/anti-gay-politics-and-the-religious-right> [<https://perma.cc/NYU4-6YPY>]; Kimberly Charles, *Sexism Is a “Family Value,”* 9 CARDOZO WOMEN'S L.J. 255, 258–59 (2003). I use this phrase as an umbrella term to describe organizations seeking to stop and reverse LGBT civil rights victories, such as Focus on the Family, the Alliance Defending Freedom, the Beckett Fund for Religious Liberty, the Liberty Counsel, the Freedom of Conscience Defense Fund, the American Center for Law and Justice, the United States Conference of Catholic Bishops, the Family Research Council, Concerned Women for America, the Faith & Freedom Coalition, the Council for National Policy, and the Liberty Institute. See generally FREDERICK CLARKSON, POL. RSCH. ASSOCS., *WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT* 10–12 (2016), <https://www.politicalresearch.org/2016/01/12/when-exemption-is-the-rule-the-religious-freedom-strategy-of-the-christian-right> [<https://perma.cc/3YJQ-SMWX>]. For example, the Alliance Defending Freedom (ADF), formed in 1994, is a

legal advocacy and training group that has supported the recriminalization of sexual acts between consenting LGBTQ adults in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has contended that LGBTQ people are more likely to engage in

discrimination in the public square, it does not have a compelling interest in eradicating SOGI discrimination. This distinction, it is argued, dictates that a First Amendment exemption be granted vis-à-vis SOGI discrimination, even though such an exemption would be rejected vis-à-vis race discrimination. *Bostock* is the contemporary bridge that connects *Jaycees* to the SOGI religious exemption cases. *Jaycees*, in turn is the bridge back to the radical strand of the Nineteenth Amendment's history: the Nineteenth Amendment was generative not simply of the right to vote, but of a commitment to full citizenship rights regardless of sex. Suffrage was intended to achieve political rights for women, which in turn would create greater equality in the public sphere. That equality was formalized in state public accommodations laws, which *Jaycees* teaches serve a compelling state interest. *Bostock*, when coupled with *Jaycees*, directs the same conclusion for public accommodations laws that prohibit SOGI discrimination, namely that such laws serve a compelling state interest that defeats claims for religious exemptions.

This Article thus argues that the normative legacy of the Nineteenth Amendment's radical strand of history, reflected in the black-letter law of sex discrimination law of the late twentieth century, together provide an analytical frame in which to consider today's religious exemption cases, and that *Bostock* connects this analytical frame to today's disputes. The Article's claims are thus both normative and doctrinal. The antistatutory history of the women's suffrage movement—the intent of some suffragists that the Amendment would dismantle sex-based hierarchies *beyond the vote*—does the normative work. Centering the often forgotten or neglected radical vision that the Nineteenth Amendment was not simply about the right to vote but was a commitment to full citizenship rights regardless of sex is generative of an antistatutory equality norm that ought to be overlaid onto today's religious exemption claims. It is the norm-generative potential of the Nineteenth Amendment's history, rather than the black-

pedophilia; and claims that a 'homosexual agenda' will destroy Christianity and society.

Alliance Defending Freedom, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> [<https://perma.cc/PQ2S-RAT6>]. The ADF works to establish "legislation and case law that will allow the denial of goods and services to LGBTQ people on the basis of religion" and has been the driving force behind the national, coordinated campaign seeking religious exemptions from state public accommodations laws. *Id.* The Religious Right, of course, is not the only model for Christianity in the United States; many people who identify as Christian also support LGBT rights. *See, e.g.*, Daniel Redman, "Where All Belong: Religion and the Fight for LGBT Equality in Alabama," 21 BERKELEY J. GENDER L. & JUST. 195, 197-98 (2006).

letter law of the Amendment itself, which the Article suggests should be leveraged in the religious exemption cases. The holdings of *Jaycees* and *Bostock*, both of which reflect the Nineteenth Amendment's anti-subordination history, do the doctrinal work of defeating parts of today's SOGI religious exemption claims.

Part I provides an overview of the competing views of the reach and meaning of the Nineteenth Amendment. It concludes that elevating the lesser-known radical strand of the Nineteenth Amendment's history—which considered it a tool of antisubordination beyond the vote—is important because it may inform and guide courts considering contemporary sex discrimination issues, including discrimination based on SOGI. Part II transitions from the constitutional issue of the franchise to *statutory* prohibitions against sex discrimination. As Part II demonstrates, the history of the enactment of state public accommodations laws prohibiting sex discrimination in the public square largely tracks the antisubordination strand of the Nineteenth Amendment's history, thus revealing a through-line from the Nineteenth Amendment to contemporary public accommodations laws—both of which fundamentally embrace an antisubordination lens. Part III explains the Religious Right's current efforts to obtain religious exemptions from state public accommodations laws. Part IV connects two U.S. Supreme Court cases separated by thirty-six years—*Jaycees* and *Bostock*—to support the argument that these claims must fail. Part V circles back to the Nineteenth Amendment and uses it as a lens to both consider and understand what is at stake in today's contests over SOGI religious exemptions. The Article concludes with thoughts about the importance of viewing the Nineteenth Amendment as a generative tool that's largely forgotten radical history should be centered, embraced, and deployed as a foundational frame for resolving the contemporary battles over religious exemptions for SOGI discrimination.

I. THE NINETEENTH AMENDMENT AS A TOOL OF ANTISUBORDINATION

The celebration of the centennial of the Nineteenth Amendment has created opportunities for a new generation of law students, lawyers, and legal academics to engage with both the history and legacy of the suffrage Amendment. As pertinent to this Article, the most important opportunity created by the centennial is to revisit—or, for some, to learn for the first time—that strand of the Amendment's radical and transformative history that intended the Amendment to be

much more than the mere right to vote.¹¹ Rather, these pro-suffrage advocates envisioned the Nineteenth Amendment as a tool to dismantle unequal, sex-based hierarchies in both the domestic and civil spheres.¹² This Part provides a brief summary of this radical thread of that history.

In her seminal article *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, Reva B. Siegel delves into the over fifty-year history surrounding the ratification of the Nineteenth Amendment, with the related goals of critiquing the constitutional canon of Fourteenth Amendment sex discrimination law and proposing a “doctrinal reconstruction” built upon a synthetic reading¹³ of the Nineteenth and Fourteenth Amendments that would transform how we collectively comprehend the notion of equal citizenship for all sexes.¹⁴ This Part relies on Siegel’s deep historical work to lay the historical foundation for the Article’s arguments.

The Nineteenth Amendment’s history began in the late 1860s during the debates over the Reconstruction Amendments.¹⁵ In particular, women’s suffrage activists unsuccessfully lobbied for universal suffrage to be included in the Fourteenth Amendment; the result was the first insertion of gender distinctions in the U.S. Constitution.¹⁶ The debate over women’s citizenship continued for more than fifty years, until the ratification of the Nineteenth Amendment in 1920. I contend that these multi-generational debates about women’s place in the family and the polity are helpful in framing how we understand state

11. See, e.g., Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 STAN. J.C.R. & C.L. 349, 360 (2020) (noting that the early suffragists, such as Elizabeth Cady Stanton, “embrac[ed] both women’s rights—civil legal rights to vote, property, education, and employment—and women’s emancipation from gender-based stereotypes and oppression, the first woman’s movement sought a transformative change of the status quo”).

12. See, e.g., *id.* at 350 (noting that the “nearly century-long movement for suffrage . . . was never just about the vote. It originated as part of a comprehensive plan for women’s equality as proclaimed at Seneca Falls in the women’s *Declaration of Sentiments*. . . . [The] first-wave movement envisioned a full-scale reform of law and society to bring about women’s freedom and equal opportunity.” (footnotes omitted)).

13. Siegel, *supra* note 1, at 951. Siegel describes this interpretive approach as one that “endeavors to interpret one clause or provision in light of another—attending especially to relations among different parts of the Constitution as they are interpreted or amended over time.” *Id.* at 966.

14. *Id.* at 950–51. While Siegel’s project focuses on revealing the family as a site of historic and contemporary subordination of women, *id.* at 952, this Article extends her project and applies it to the current debate concerning religious exemptions from SOGI antidiscrimination laws.

15. *Id.* at 964.

16. *Id.*

public accommodations laws that prohibit sex discrimination in the marketplace.¹⁷

A. THE ANTISUBORDINATION INTENT OF PRO-SUFFRAGE ACTIVISTS

That many suffrage activists¹⁸ intended the Nineteenth Amendment to have an expansive reach is evidenced by its origins at Seneca Falls, the first women's rights convention in 1848. The Seneca Falls convention produced the Declaration of Sentiments—modeled after the Declaration of Independence—which articulated the goal of complete equality between men and women.¹⁹

The Nineteenth Amendment upended the then-conventional, gendered assumption that women's only proper place was the domestic sphere. Upending this gendered assumption sent ripples through the institution of the family as defined and regulated through the law of coverture—the legal subordination of a wife to her husband.²⁰ But it did more than that; it also sent a message about the place of women both in and out of the home. Thus, with the ratification of the Nineteenth Amendment, the idea of women's subordination to men, which had been ingrained in both law and society, receded. What followed was women's newfound ability to “represent themselves in public as well as hold a more prominent place in the public sphere”²¹ that

17. I thus build on Siegel's contention that these multi-generational debates “are plainly relevant to understanding how the Fourteenth Amendment's guarantee of equal citizenship applies to women.” *Id.* at 968.

18. There was no singular, unified ideology behind the movement for women's suffrage. Rather, different factions of the movement had various ideological visions about what the Amendment meant and therefore what work it could—or could not—do in dismantling sex-based status hierarchies beyond the right to vote. See Sarah B. Lawsky, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 *YALE L.J.* 783, 787–88 (2000). This Article focuses on just one segment of the suffrage movement, which intended the Nineteenth Amendment to embody an antisubordination ideal and thus reach beyond the franchise to all sex-based inequalities in American society. As a result, it highlights the historical public debates that centered on gender norms and expectations for white, cisgender, straight women (and men) at the time. This particular focus is not intended to erase the facts that some nineteenth and early twentieth century suffragists conceptualized sex and gender more broadly, approached suffrage as an intersectional issue (i.e., implicating race, sexual orientation, and sex), and/or were LGBT.

19. See Elizabeth M. Yang, *Looking at the Nineteenth Amendment Through a Twenty-First Century Lens*, 45 *HUM. RTS.* 8, 9 (2020).

20. Siegel, *supra* note 1, at 977–78.

21. Shima Baradaran-Robison, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Mothers*, 2003 *BYU L. REV.* 227, 261–63.

“provided women with an independent identity and autonomy in the public realm.”²²

That opponents of the Nineteenth Amendment recognized its potential to transform gender relations beyond the vote is apparent from their arguments in opposition to the Amendment. As pertinent here, opponents of women’s suffrage argued it would erase distinctions between male and female, which in turn would democratize the family by demoting the husband from his head of the household role to one in which husband and wife were equals.²³ This argument was scaffolded by the predominant view at the time that men and women occupied “separate spheres” of the private home (women) and the public sphere (men); this separate spheres ideology dictated strict gender roles and norms.²⁴

Two subsidiary arguments bolstered the family-based opposition to women’s suffrage. The first, virtual representation, alleged that the franchise was unnecessary for women because their husbands would represent them at the ballot box.²⁵ The second, founded on marital unity, connected the public and private spheres, asserting that “granting women the right to vote would introduce domestic discord into the marital relation and distract women from their primary duties as wives and mothers.”²⁶

The fact that opponents of suffrage articulated these “threats”—women’s political agency outside of her relationship with her husband and women’s political equality equalizing the marriage and thus blurring (if not destroying) the line between the “separate spheres”—alone illustrates the transformative potential of the Nineteenth Amendment beyond the ballot box. These opponents feared that significant structural changes within the family—historically a site of women’s subordination—would be a consequence of ratifying the Nineteenth Amendment; these changes likely would have spillover effects in the public world of politics and the marketplace.

22. *Id.*

23. Siegel, *supra* note 1, at 978.

24. *Id.* at 979 (noting that the “prospect of women voting thus threatened femininity and the family”). Notably, there are parallels between this argument in the suffrage context and the legal fight for same-sex marriage. In both contexts, opponents argued that the right sought—the franchise and same-sex marriage—was a threat to the institution of marriage. Compare *id.*, with *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1294–95 (N.D. Okla. 2014) (noting opponent’s argument that same-sex marriage is a “threat” to the institution of marriage as a whole).

25. Siegel, *supra* note 1, at 981. This argument was grounded in the notion that “the family was a site of governance—male governance.” *Id.*

26. *Id.*

One faction of pro-suffrage activists explicitly embraced the transformational potential of ratification of the suffrage Amendment, which they intended to reach beyond the ballot box. Mary Putnam Jacobi, a supporter of the revolutionary view of women's suffrage—that women would become their own agents in self-governance, free from the bonds of coverture—openly acknowledged this goal: “[c]onfessedly, . . . we do introduce a change. . . . In this essentially modern conception, women also are brought into direct relations with the State, independent of their ‘mates’ or their ‘brood.’”²⁷ These activists harnessed the nation's revolutionary history of breaking with a ruler that forbade self-representation; this hearkening back, however, promoted “a provocative—and in some respects quite radical—reinterpretation of gender relations in the family and in the state. Male superordination was not benign, but tyrannical and fundamentally unjust.”²⁸ Advocates of suffrage laid bare their subordination not just in the home, but also in the market, by protesting “the sex-based restrictions on employment and compensation that impoverished women and drove them into marriage” as well as the exclusion of women from jury service.²⁹

27. *Id.* at 987 (quoting MARY PUTNAM JACOBI, “COMMON SENSE” APPLIED TO WOMAN SUFFRAGE 138 (1894)).

28. *Id.* at 988.

29. *Id.* at 992. Of course, the radical promise of the suffrage movement was pushed not just by white, (presumably) heterosexual, (presumably) cisgender women such as Jacobi. That radical promise was also being pushed by feminists of color like Sojourner Truth and Ida B. Wells. *See, e.g.*, Lolita Buckner Inniss, *While the Water Is Stirring: Sojourner Truth as Proto-Agonist in the Fight for (Black) Women's Rights*, 100 B.U. L. REV. 1637, 1639 (2020) (“Though the Nineteenth Amendment failed to deliver on its promise of suffrage for black women immediately after its enactment, black women were stalwarts in the fight for the Amendment and for women's rights well before the ratification of the Amendment and for many years after its passage.”); Willie J. Epps Jr. & Jonathan M. Warren, *Sheroes: The Struggle of Black Suffragists*, 59 JUDGES' J. 10, 12 (2020) (noting that Ida B. Wells, an African American woman who “championed an anti-lynching campaign aimed at the South” was a prominent supporter of the Nineteenth Amendment: she founded a suffrage organization focused exclusively on voting rights for Black women and refused to march in the rear of a suffrage parade organized by white women suffragists). Thus, white, cisgender, straight women suffragists' vision of the Nineteenth Amendment was not and is not the only authoritative voice. *See, e.g.*, Inniss, *supra*, at 1639–40 (“In the middle and late nineteenth century, the rights of women generally and black women in particular—specifically, their legal, political, and economic rights—were greatly shaped by the efforts of black women activists. The work of these women was critical to the reshaping of cultural dynamics that ultimately make sustained legal change possible. Social movement activism by black women and others outside of the white mainstream (which largely consisted of white men) helped to create the conditions for change” (footnote omitted)); *id.* at 1658 (describing Truth as a “womanist,” which is “an expression of black feminism that is both race and gender conscious”). The work of these radical white, straight,

That today these challenges may not seem revolutionary does not diminish their radical nature when made in the 1880s. These challenges and demands explicitly sought to disrupt and dismantle male subordination of women across all areas of life. It is this revolutionary and radical history of the story of the Nineteenth Amendment that has faded from our collective memory and from the lens through which we consider sex-based discrimination.³⁰ Siegel advocates for a broad reading of the Nineteenth Amendment as a constitutional norm that shifted sex roles and the structure of the family and, as a result, has “structural significance.”³¹

Although some suffragists intended, and some scholars urge, a capacious reading of the suffrage Amendment, most courts have not taken that tack.³² Not long after ratification, courts “moved to repress

cisgender women thus happened within a larger push for eradicating sex discrimination throughout American society; that context should be considered when making sense of the Nineteenth Amendment today because discrimination is multiaxial. *See generally, e.g.,* M. Margaret McKeown, *My Mother Made Me Do It: A Short History of the Nineteenth Amendment*, 46 LITIGATION 23, 26 (2019) (“Unlike their white counterparts, who viewed suffrage as a means to rectify the oppression in their marriages and domestic lives, African American women saw it as a means to empower the black community. . . . [I]f white women needed the vote to protect their rights, then black women, as victims of racism as well as sexism, needed the ballot even more.”); Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 363 (2019) (proposing a constitutional Equality Amendment, noting that “[h]istorical disempowerment of women of color by some women’s suffrage organizers and entities contributed to a demobilization that has undermined their full participation in the political process, and thus real democracy, today” and accordingly proposing an amendment “predicated on recognizing the full interconnection between race- and gender-based subordination and . . . designed to deinstitutionalize it in all of its forms”).

30. While the arguments in support of suffrage changed in “focus and character” to mute its more revolutionary aspects, this Article focuses on the thread of suffragist history that centered radical revisioning of the institutions that created sex-based status hierarchies. *See* Siegel, *supra* note 1, at 993 (noting that the pro-suffrage arguments changed to ones focused on “social housekeeping,” i.e., that granting women the right to vote would “enable women to participate in decisions about new ways government might provide for the health and welfare of families living in America’s growing cities”).

31. *Id.* at 1012.

32. Siegel notes that post-ratification debates “shaped reception of the Nineteenth Amendment itself.” *Id.* While some courts, as well as Congress, treated the suffrage Amendment as “changing the foundational understandings of the American legal system” and as a constitutional amendment “with normative implications for diverse bodies of law,” *id.*, this trend was short-lived, *id.* at 1012–17 (discussing *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), in which the Court “approached the Nineteenth Amendment as embodying a sex equality norm that had implications for constitutional questions other than voting”); *id.* at 1014 (noting that the *Adkins* Court struck down a sex-based wage law and did so “on sex equality grounds”); *id.* at 1017–18 (describing

the structural significance of women's enfranchisement, by reading the Nineteenth Amendment as a rule concerning voting that had no normative significance for matters other than the franchise."³³

Nevertheless, the text of the Nineteenth Amendment itself suggests that the capacious reading envisioned by suffragists and scholars is warranted. The Amendment's plain language reveals that it does more than protect women's affirmative right to vote. It states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation."³⁴ The broad remedial language in the second clause supports a "thick" reading of the Amendment, one that

recognizes that the Constitution protects against the perpetuation of political-power disparities on the basis of gender. The thick reading is gender-conscious . . . , and it recognizes that the main purpose of the Amendment was originally and should continue to be read as protective against the subordination of women in U.S. politics.³⁵

That the Amendment's substantive provision is followed by a grant of congressional enforcement power is significant because it suggests that the antisubordination strand of the suffrage movement might be realized through Congress's enactment of "generally applicable

Congress's enactment of the Cable Act, which permitted women who married some non-U.S. citizens to keep their U.S. citizenship).

33. *Id.* at 1012. *But see* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL'Y 235, 259–60 (2020) (observing that in the 1996 case of *United States v. Virginia*, holding that exclusion of women from the Virginia Military Institute was unconstitutional sex discrimination under the equal protection clause, the majority opinion incorporated the antisubordination ethic of the Nineteenth Amendment by mentioning its ratification in 1920 and reasoning that sex-based classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women" (emphasis omitted) (quoting *United States v. Virginia*, 518 U.S. 515, 533–34 (1996))); *id.* at 260 ("[R]eading the Equal Protection Clause in light of the Nineteenth Amendment helps judges and other interpreters to discern which sex classifications are problematic and which are not. Part of Justice Ginsburg's point in *Virginia* is that not all sex lines are equally suspect; the constitutionally troubling classifications reflect or reinforce women's subordination in the family or, relatedly, their exclusion from public life. Instructing judges and other interpreters to ask whether a given sex classification is being used 'to create or perpetuate the legal, social, and economic inferiority of women' provides a great deal more interpretive guidance. And that anti-subordination analytic is coming substantially from the pre- and post-ratification history of the Nineteenth Amendment.").

34. U.S. CONST. amend. XIX.

35. Hasen & Litman, *supra* note 1, at 33; *see also id.* ("The text and history of the Nineteenth Amendment and the broader struggle over voting rights and women's equality for the last 150 years support this thick reading.").

legislation promoting political equality regardless of gender.”³⁶ Finally, the Amendment’s broad remedial language also suggests that courts have unduly weakened the breadth of the Amendment’s reach over time.

B. LESSONS FOR TODAY’S DEBATE REGARDING RELIGIOUS EXEMPTIONS

Important lessons about democracy and citizenship emerge from this antistatutory thread of the Nineteenth Amendment’s history. First, a dynamic and just democracy requires that all citizens have full equality of opportunity to engage in every level of the political process.³⁷ Second, the political process is more than just the right to vote; it also includes, as pertinent here, the provision of full and equal opportunities to participate in the economic life of the republic.³⁸ Third, although courts fairly quickly “domesticated”³⁹ the Nineteenth Amendment by interpreting it narrowly as only about the right to vote, the Amendment nonetheless and indisputably possesses “deep structural and symbolic significance that for generations had been imputed to this constitutional reform.”⁴⁰ Fourth, the debate surrounding the “Nineteenth Amendment tied the justice of gender restrictions on the franchise to many other gender-organized institutions and practices, . . . [including] to the prospect of women’s emancipation from laws and customs that restricted women’s roles in marriage and the market.”⁴¹

The lessons of this history are salient to many contemporary questions touching on sex equality, including the question of religious exemptions from SOGI antidiscrimination laws. Centering and building upon these lessons when resolving the religious exemption cases provides a helpful doctrinal lens, reinvigorates the largely forgotten

36. *Id.* at 50, 60–62 (arguing that a “thick” reading of the Nineteenth Amendment, as well as a synthetic reading with the Fourteenth Amendment, supports congressional action to eliminate barriers to women’s political equality, such as public funding of elections, prohibiting pay inequality in employment, prohibiting pregnancy discrimination, mandating sex-stereotyping trainings, and mandating the construction of nursing rooms in courthouses so that women who are breastfeeding will not be turned away from jury service; and contending that the synthetic reading with the Fourteenth Amendment “solidifies Congress’s power to dismantle gender hierarchies outside the specific context of voting because the Fourteenth Amendment is not limited to issues of political equality—it encompasses social equality and civic equality as well”).

37. Yang, *supra* note 19.

38. *Id.* (noting that other key dimensions of full political participation include “educational attainment, health and survival, and political representation”).

39. Siegel, *supra* note 1, at 1012.

40. *Id.*

41. *Id.* at 1035.

antisubordination roots of the suffrage Amendment, and honors the legacy of suffrage activists who dedicated their lives to the ratification of an amendment that they intended would cause “systemically explosive reform.”⁴²

At bottom, the intent of these suffrage leaders was to effect “a major change in the terms of women’s citizenship.”⁴³ This commitment to dismantling sex-based status hierarchies may be read to also encompass the related idea of equal citizenship regardless of sex—a concept that embraces the more contemporary and expansive notion of sex and gender that, as noted below, includes sexual orientation, gender identity, and non-binary gender identity. The Nineteenth Amendment’s intent to realize the promise of equal citizenship regardless of sex, then, is the guiding principle and normative framework on which the arguments presented below are built.

II. FROM LIBERATION IN THE HOME TO MARKET PARTICIPANTS: WOMEN AS CONSUMERS AND STATE PUBLIC ACCOMMODATIONS LAWS

Liberating women from subordination in the family allowed women to become public citizens who participated as consumers in the marketplace.⁴⁴ As women emerged from their domestic sphere and became market participants, the country once again grappled with the meaning of sex equality, and that national conversation was informed by the debates that had surrounded the Nineteenth Amendment. The country’s deliberations about “sex in public”⁴⁵ resulted in the enactment of public accommodations laws, in all but five states, prohibiting sex-based discrimination in the provisions of goods and services.⁴⁶ The trajectory of these enactments reveals a connection to that strand of Nineteenth Amendment history that intended suffrage to disrupt established gender status hierarchies.⁴⁷

As an initial matter, public accommodations generally are defined as private entities that impact commerce; they are open to the public

42. *Id.* at 1012.

43. *Id.* at 1016.

44. *Id.* at 1035.

45. Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 *YALE L.J.* 78 (2019).

46. See *State Public Accommodation Laws*, *supra* note 7.

47. See Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 *GEO. L.J.* 73, 99 (2020) (“[T]he Amendment’s adoption in 1920 validated both the new political subjectivity of women and the growing acceptance that women had a social and economic existence outside the family. . . . Even the most conservative or transactional interpretation of the Nineteenth Amendment implicitly rebutted the discourse of domesticity . . .”).

and offer goods and services of all kinds.⁴⁸ Although early common law contained a general prohibition on the refusal of goods and services, most states chose to enact detailed statutory schemes that specifically enumerate a number of protected classes.⁴⁹ Since Massachusetts became the first state to codify a public accommodations law in 1865,⁵⁰ state legislatures continued to expand the kinds of businesses subject to these laws as well as the groups that are protected.⁵¹ Today, forty-five states and the District of Columbia have public accommodations laws that prohibit discrimination in the marketplace based on race, ancestry, sex, and religion.⁵² These laws prevent consumers from “being unfairly refused service, denied entry to, or otherwise discriminated against in public places”⁵³ because of their membership in one of the protected classes enumerated in the statute.⁵⁴

A. “SEX IN PUBLIC”: PUBLIC ACCOMMODATIONS LAWS AS A TOOL OF SEX-BASED ANTISUBORDINATION

In making the choice to prohibit sex discrimination in public accommodations, states embraced (whether knowingly or not) the legacy of that strand of the women’s suffrage movement that was committed to securing equal citizenship for women through the

48. See generally *id.* at 80 (describing public accommodations as “the legal term for public-facing entities other than the workplace”); Sepper & Dinner, *supra* note 45, at 81 (“As a general principle, public accommodations laws apply to any entity that enters commerce and opens to the world at large.”). The language of public accommodations laws differs among the states: “a representative statute references any ‘business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.’” Sepper & Dinner, *supra* note 45, at 81 (quoting MINN. STAT. ANN. § 363A.03(34) (West 2019)).

49. See, e.g., *Romer v. Evans*, 517 U.S. 620, 628–29 (1995) (discussing Colorado’s state and local laws).

50. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 571 (1995).

51. *Id.* at 571–72.

52. See *State Public Accommodation Laws*, *supra* note 7.

53. *Nondiscrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations [<https://perma.cc/NJ9G-LKYH>] (Feb. 23, 2021).

54. Title II of the Civil Rights Act of 1964 is a federal law that prohibits discrimination in public accommodations “on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a(a). Notably absent from the enumeration of protected classes is sex. *Id.* As a result, those who experience sex-based discrimination in public accommodations must look to state law for any relief.

ratification of the Nineteenth Amendment.⁵⁵ That some suffrage activists of the 1860s–1920s, on the one hand, and the advocates of public accommodations laws prohibiting sex-based discrimination in the marketplace in the 1970s on the other hand, shared a commitment to an antisubordination vision of sex equality is made clear in Elizabeth Sepper and Deborah Dinner’s recent article *Sex in Public*.⁵⁶ Their article recounts the history of discrimination against women in public spaces and the campaign for the inclusion of “sex” in public accommodations laws, which they describe as “sex in public.”⁵⁷

As women engaged more in public life in the 1960s they faced unchecked discrimination “in commerce, leisure, and civic life.”⁵⁸ From diners to bars, from commercial airline travel to banks, and from professional organizations to Little League baseball, women were categorically excluded from public accommodations touching on civic, professional, and economic life.⁵⁹ Women’s rights groups advocated in courthouses, statehouses, and the public square in an effort to gain statutory protection from “discrimination in public accommodations.”⁶⁰ They were largely successful: by the close of the 1970s,

55. See generally Siegel, *supra* note 1, at 1031.

56. Sepper & Dinner, *supra* note 45.

57. *Id.* at 83–86.

58. *Id.* at 81.

59. *Id.* (“The kinds of commercial spaces where the *Mad Men* of the business world congregated refused to open their doors to women. Bars and diners hung signs: ‘No unescorted women.’ Professional organizations often confined women to second-class membership. Credit institutions would not lend married women money in their own names. Civic institutions from Little League baseball to the Junior Chamber of Commerce excluded girls and women. United Air Lines even flew ‘Executive Flights’ reserved for male customers.”). The harms caused by these exclusionary practices were magnified for women of color. *Id.* at 116 (noting that the 1970s practice of credit agencies ignoring a wife’s wages based on an assumption that she may leave the workforce at any time “disproportionately harmed African Americans, who were more likely than white couples to form dual-earner marriages with relatively commensurate salaries”).

60. *Id.* at 81. Adding prohibitions against sex discrimination to public accommodations laws was not the only sex equality campaign of the 1970s. See Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 *YALE L.J.F.* 349, 356 (2015) (“In 1970, on the fiftieth anniversary of the ratification of the Nineteenth Amendment, a ‘second wave’ feminist movement organized a national ‘Strike for Equality’ in which it argued that equal citizenship required not only equal suffrage and the ratification of an Equal Rights Amendment, but also laws changing the work and family arrangements in which women bear and rear children.”); see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1990 (2003) (noting the significance of the decision to launch the Strike for Equality during the fiftieth anniversary of the Nineteenth Amendment: “In an era when the Court had not yet recognized sex

numerous cities and thirty-one states had outlawed sex discrimination in public accommodations.⁶¹

It is the story behind this success, one that is rife with controversy, contestation, and strife about the place of women in society, that reveals a link to the past—the debates surrounding suffrage—as well as provides a framework for contemporary debates about religious exemptions from these same public accommodations laws when it comes to SOGI discrimination.

Sex-based discrimination in the marketplace sent messages about women's place in society much like the messages that had been sent by denying women the franchise, namely by acting "as a vivid symbol of women's subordination and second-class citizenship."⁶² Thus, the feminists of the 1970s and some suffrage activists of the late 1800s and early 1900s shared a common antisubordination intention as they chased their goals of equal treatment in the marketplace and the vote, respectively: "[s]ex integration [into public accommodations], its supporters hoped and its opponents feared, would transform institutions central to dominant masculinity, from baseball fields to bathrooms,"⁶³ while securing the franchise had been seen as "breaking with understandings of the family that had organized public and private law and defined the position of the sexes since the founding of the republic."⁶⁴

In ways starkly reminiscent of the debates surrounding women's suffrage in the 1880s and early 1900s, the sex segregation of public spaces in the 1960s and 1970s resulted from three sets of norms or ideologies:

[T]he separate-spheres ideology of the mid-nineteenth century . . . ; heterosexual norms that emphasized the sexual vulnerability of respectable white women while simultaneously constructing other women as sources of sexual

discrimination claims under the Fourteenth Amendment, or accorded constitutional protections to the abortion right, the strikers invoked the Nineteenth Amendment to assert that women had a constitutional right to equal citizenship with men."); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1375 (2006) ("Strike organizers shaped these performative enactments of women's second-class citizenship into ironic commentary on the meaning of the Nineteenth Amendment's ratification.").

61. Sepper & Dinner, *supra* note 45, at 81. As noted previously, today all forty-five states with public accommodations laws, as well as the District of Columbia, include "sex" as a protected class in their public accommodations laws. See *State Public Accommodation Laws*, *supra* note 7.

62. Sepper & Dinner, *supra* note 45, at 84.

63. *Id.* at 82.

64. Siegel, *supra* note 1, at 951.

disorder; and defensive impulses to preserve dominant masculinity in male-only spaces such as gyms and barber shops.⁶⁵

Of course, the separate spheres ideology had framed the suffrage debate itself.⁶⁶ Thus, the “sex in public” campaign of the 1970s was at least in part the continuation of the legacy of the suffragists in its emphasis on the dignitary and citizenship interests attendant to women’s full participation in society.⁶⁷ Like the suffragists who understood that gaining the franchise meant the dismantling of subordinating gender norms,⁶⁸ the feminists of the 1970s understood that access to places of public accommodation meant “the right to human dignity, the right to be free from humiliation and insult, and the right to refuse to wear a badge of inferiority at any time or place.”⁶⁹ As the struggle for women’s suffrage taught us “that equal citizenship for women includes freedom from subordination in or through the family,”⁷⁰ the inclusion of sex discrimination in public accommodations laws “literally grew out of debates over the scope of an individual’s civil rights as a citizen.”⁷¹

Put another way, to permit sex discrimination in the marketplace would have expressive significance (in addition to causing economic and dignitary harms); it would send a message that “activities of females can and should be regulated by others, because . . . females . . . have and always will be secondary to men.”⁷² Where the opposition to women’s suffrage was, at least in part, about “preserving the arrangements that make men men and women women,”⁷³ those opposed to

65. Sepper & Dinner, *supra* note 45, at 83.

66. *Id.* at 88; *see also* Siegel, *supra* note 1, at 979–80 (discussing prevalence of the “separate spheres” argument in the women’s suffrage debate).

67. *See* Sepper & Dinner, *supra* note 45, at 110–11.

68. *See, e.g.,* Siegel, *supra* note 1, at 990–91 (“‘No bill of attainder shall be passed.’ ‘No title of nobility granted.’ So says the Constitution; and yet you have passed bills of attainder in every State of the Union making sex a disqualification for citizenship. You have granted titles of nobility to every male voter, making all men rulers, governors, sovereigns, over all women.” (quoting *Arguments of the Woman-Suffrage Delegates Before the Senate Comm. on the Judiciary*, S. MISC. DOC. NO. 47-74, at 5 (1880) (statement of Elizabeth Cady Stanton))).

69. Sepper & Dinner, *supra* note 45, at 111 (citation omitted).

70. Siegel, *supra* note 1, at 951.

71. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1620 (2001).

72. Sepper & Dinner, *supra* note 45, at 112–13 (citation omitted); *see also id.* at 114 (“[Advocates of inclusive public laws] understood exclusion and segregation to constitute a harm, even when they had other places to eat and to socialize. Nothing less than full and equal citizenship as workers and consumers was on the line. Such citizenship would involve not only access but also freedom in public . . .”).

73. Siegel, *supra* note 1, at 977.

including sex within the protection of public accommodations laws were skeptical about proponents' use of such laws "to destabilize prevailing understandings of bodily sex difference, to challenge assumptions about the need for sexual privacy, and to reconfigure institutions ranging from athletic fields to bathrooms. Business owners, politicians, and courts all struggled with the implications of sex integration for masculinity."⁷⁴ Ratification of the Nineteenth Amendment, then, did important expressive work (in addition to doing the substantive work of granting women the franchise): it sent the message that women are *not* second-class citizens; that women *can* and *should* be public citizens. "Expressive considerations matter because of the social meanings they convey to Americans about the character and destiny of America, as well as about their own status and the status of others in the national political community."⁷⁵ The Nineteenth Amendment's radical history was thus generative of the claims of 1970s feminists about the dignitary interests at stake in the debates over sex in public.

During debates over women's suffrage, men explicitly based their opposition in their male privilege.⁷⁶ History repeated itself in the debates over sex-based protections in public accommodations law, throughout which some men explicitly clung to their male privilege as a basis for opposition.⁷⁷

74. Sepper & Dinner, *supra* note 45, at 84.

75. Siegel, *supra* note 33, at 239.

76. See, e.g., Siegel, *supra* note 1, at 978 ("This fungus growth upon the body of modern civilization is no such modest thing as the mere privilege of voting, by any means. . . . The demand is for the abolition of all distinctions between men and women, proceeding upon the hypothesis that men and women are all the same. . . . Gentlemen ought to know what is the great and inevitable tendency of this modern heresy" (citation omitted) (quoting an 1878 statement made by a representative to the California Constitutional Convention)).

77. Sepper & Dinner, *supra* note 45, at 109–10 ("As feminists sought full access to commerce, business owners and some members of the public sought to barricade the doors. Resistance to sex integration of professional forums and meeting places often acknowledged their significance for economic and political life. Journalist Jack Kofoed expressed his resentment of the 'lassies' whose protest of the Roosevelt Hotel 'came a little closer to home,' threatening his professional privilege of 'drop[ping] into the men's bar' at 'five in the evening' whenever he 'wanted to catch somebody in the publishing, advertising, public relations or related fields.' When in a 'most prominent victory,' the exclusively male National Press Club voted to admit women in 1971, the bartender Harry Kelly served cocktails to female journalists for the first time: 'Here you are, and I hope you choke on it.'" (citations omitted)); see also *id.* at 113 ("Legislative retrenchment of some forms of public accommodations discrimination frequently aimed to safeguard space for men. Massachusetts's passage of a public accommodations law in 1971, for example, triggered considerable cultural anxiety. The *Boston Globe* reported that when '[t]ippling in taverns becomes a women's right,' it

This kind of resistance reveals that legislatures contemplating adding sex discrimination protections to public accommodations laws understood that such protections would dismantle binary gender roles and norms.⁷⁸ Feminists of the 1970s made their message loud and clear: the denial of sex equality in the public square was a “vivid symbol of women’s subordination and second-class citizenship,”⁷⁹ much as their suffragist sisters engaged in debates that “memorialize the nation’s decision to repudiate traditional conceptions of the family that have shaped women’s status in public as well as private law and that are inconsistent with equal citizenship in a democratic polity.”⁸⁰ Moreover, just as some suffragists intended the Nineteenth Amendment to transform institutions beyond the franchise itself, so too did public accommodations laws that prohibited sex discrimination have “the potential to transform institutions through sex integration.”⁸¹ Conceptualizing both the Nineteenth Amendment and public accommodations laws as different ways of ensuring equal citizenship regardless of sex is central to the argument that follows in the remainder of this Article.

But first: The expansive prohibition on sex discrimination in public accommodations that emerged by the end of the 1970s⁸² was not universally embraced.⁸³ Instead, this sea-change in sex discrimination law—and its normative impact vis-à-vis the place of women in society—illustrated the principle that “moments of major social reform

‘jeopardize[s] 330 all-male sanctuaries across the state.’ *Globe* editors queried ‘why the ladies would even want to invade,’ suggesting that sex-segregated spaces in public as in the home, where men’s ‘dens’ and women’s ‘sewing rooms’ preserved ‘domestic felicity,’ were a social necessity.” (citations omitted)).

78. *Id.* at 144 (“[D]uring the period when ‘sex’ was added to public accommodations statutes, advocates, legislators, and courts understood sex equality to entail not only the same treatment of the sexes but also an end to the regulation of sexuality and gender performance. Through their efforts to enter and freely enjoy public space through public accommodations law, feminists successfully challenged heteronormative sexual norms, in arenas ranging from bars to credit lending.”).

79. *Id.* at 84.

80. Siegel, *supra* note 1, at 948. The 1970s feminists’ most prominent analogy, however, was an analogy to the racial civil rights movement. *See generally* Sepper & Dinner, *supra* note 45, at 81, 99 (“Feminists highlighted the injustice of sex segregation in public places by invoking racial segregation of the trains and restaurants in the South.”).

81. Sepper & Dinner, *supra* note 45, at 84.

82. *Id.* at 104 (“By the end of the 1970s, thirty-one out of thirty-nine state statutes banned sex discrimination in public accommodations.”).

83. *See, e.g., id.* at 84 (“Not everyone easily accepted the laws, however, and their precise meaning was up for grabs.”).

precipitate diverse forms of containment and backlash.”⁸⁴ In particular, some organizations sought to be exempt from complying with the sex discrimination prohibitions contained in these laws.⁸⁵ Like today’s SOGI discrimination exemption seekers, the sex discrimination exemption seekers of the 1980s based their claims on the First Amendment. The seminal case on this issue, *Roberts v. United States Jaycees*,⁸⁶ is discussed next.

B. *ROBERTS V. UNITED STATES JAYCEES*

Resistance to the dismantling of sex-based status hierarchies (the goal of public accommodations laws) was manifested in requests for exemptions from such laws. That resistance is exemplified by *Roberts v. United States Jaycees*.

The United States Jaycees was founded in 1920—the same year that the Nineteenth Amendment was ratified.⁸⁷ It is a non-profit membership organization; at the time of the litigation in the 1980s, its bylaws described its purpose as the pursuit of “such educational and charitable purposes as will promote and foster the growth and development of young men’s civic organizations in the United States,”⁸⁸ as well as to “inculcate . . . civic interest”⁸⁹ and provide “opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.”⁹⁰ The organizational structure consisted of local chapters, as well as state organizations and a national Jaycees organization.⁹¹ The bylaws established seven classes of membership, with “regular” membership limited to men aged 18 to 35.⁹² Women (and older men) could join as “associate” members, who paid reduced dues.⁹³ Associate membership—to which women were categorically relegated—lacked many of the key benefits of regular membership; women could not hold office or participate in certain award or

84. Siegel, *supra* note 1, at 1009.

85. *Id.*

86. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984).

87. *Id.* at 612.

88. *Id.* (citation omitted).

89. *Id.* at 612–13 (citation omitted).

90. *Id.* at 613 (citation omitted).

91. *Id.* at 609.

92. *Id.*

93. *Id.*

training programs.⁹⁴ And in a striking parallel to the suffrage movement, women associate members in the Jaycees could not vote.⁹⁵

Two chapters in Minnesota (Minneapolis and St. Paul) broke ranks with the national Jaycees organization when, in 1974 and 1975, they started to allow women to join as regular members.⁹⁶ Because this action violated the national bylaws, the national Jaycees imposed several sanctions on the Minneapolis and St. Paul chapters, “including denying their members eligibility for state or national office or awards programs, and refusing to count their membership in computing votes at national conventions.”⁹⁷ In addition, the national organization threatened to revoke the charters of these two chapters.⁹⁸ The chapters responded that compliance with the national organization’s bylaws would violate Minnesota’s public accommodations law, which prohibited discrimination based on sex.⁹⁹ The national organization, in turn, contended that to enforce the public accommodations law would “violate the male members’ constitutional rights of free speech and association.”¹⁰⁰ In short, the national Jaycees sought a First Amendment exemption from compliance with Minnesota’s public accommodations law with regard to its prohibition against sex discrimination. As described in Part III, today’s exemption seekers also seek a First Amendment exemption from compliance with state public accommodations laws with regard to their prohibition against SOGI discrimination.¹⁰¹

The Court rejected the First Amendment claims for an exemption. With regard to the free speech claim,¹⁰² the Court characterized it as a

94. *Id.*

95. *Id.*

96. *Id.* at 614.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 615.

101. The national Jaycees organization and today’s exemption seekers both assert a First Amendment free speech claim. Both exemption seekers present a second First Amendment claim: the national Jaycees organization asserted a free association claim, while today’s exemption seekers assert a free exercise of religion claim. *See infra* Part III.

102. I do not address the Court’s rejection of the freedom of association claim here because that issue is not implicated in most of the current religious exemption cases. It was implicated in *Jaycees* because the Jaycees is a membership-based organization; such organizations sometimes—depending on their “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent”—are afforded special protection under the First Amendment. *Jaycees*, 468 U.S. at 620. In today’s religious exemption cases there typically is no contention made that the vendors claiming the exemptions—bakers, photographers, and the like—are an “association” as was argued by the Jaycees.

claim of “freedom of expressive association.”¹⁰³ After noting that the First Amendment protects against government interference with “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances,”¹⁰⁴ it went on to state that it had “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹⁰⁵ It was this right of association expression that was implicated in the application of the Minnesota public accommodations law to the national Jaycees organization.¹⁰⁶

The Court reasoned that by requiring that the Jaycees admit women as regular members, the Minnesota public accommodations law infringed on the Jaycees First Amendment freedom of expressive association by interfering with the “internal organization or affairs of the group.”¹⁰⁷ The Court characterized the infringement as occurring when women were admitted as regular members, which in turn “impair[ed] the ability of the original [male] members to express only those views that brought them together.”¹⁰⁸

It is the Court’s next analytical step that is critical to the argument made in this Article. After recognizing the national Jaycees organization’s right to expressive association and acknowledging that such right may be infringed by application of the Minnesota public accommodations law, the Court also recognized that First Amendment speech right “is not, however, absolute.”¹⁰⁹ Rather, infringements on First Amendment speech rights are justified if the regulation enforced by the state—there, the Minnesota public accommodations law prohibiting sex discrimination—was enacted “to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive.”¹¹⁰

Applying this strict scrutiny test to the application of the Minnesota public accommodations law to the national Jaycees organization,

103. *Id.* at 621–22 (“We turn . . . to consider the extent to which application of the Minnesota statute to compel the Jaycees to accept women infringes the group’s freedom of expressive association.”).

104. *Id.* at 622.

105. *Id.*

106. *Id.* (“In view of the various protected activities in which the Jaycees engages . . . that right is plainly implicated in this case.” (citation omitted)).

107. *Id.* at 623.

108. *Id.*

109. *Id.*

110. *Id.*

the Court held that “Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”¹¹¹ It noted that Minnesota’s goal of “eliminating discrimination and assuring its citizens equal access to publicly available goods and services” was unrelated to the suppression of speech and “plainly serves compelling state interests of the highest order.”¹¹² At bottom, and as pertinent to the argument made herein, the Court articulated a rule that eradicating sex discrimination in public accommodations *is* a compelling state interest—one “of the highest order.”¹¹³

After finding that public accommodations statutes prohibiting sex discrimination serve a compelling state interest, the Court held that such statutes are the least restrictive means by which to achieve that interest.¹¹⁴ The Court further held that even if the Minnesota law caused “some incidental abridgment of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish”¹¹⁵ the state’s interest, noting that “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent.”¹¹⁶ Having found that the Minnesota law survived the strict scrutiny analysis required by the First Amendment, the Court rejected the national Jaycees’ request for an exemption.¹¹⁷

111. *Id.*

112. *Id.* at 624. The Court also found that the Minnesota statute did not engage in viewpoint discrimination and that it did “not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.” *Id.* at 623.

113. *Id.* at 624; *see also id.* at 626 (“Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.”); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“[T]he State’s compelling interest in assuring equal access to women extends to the acquisition of . . . tangible goods and services.”).

114. *Jaycees*, 468 U.S. at 626. The Court also found no evidence that admitting women as regular members would impede or burden the organization’s ability to disseminate its preferred views or engage in protected activities. *Id.* at 627. It rejected the Jaycees’ argument on this front, at least in part, because the Jaycees relied on sex stereotypes about what beliefs women hold on issues of civic importance. *Id.* at 628 (“In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee’s contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization’s speech.”).

115. *Id.* at 628.

116. *Id.*

117. *See id.* at 630–31.

As pertinent here, on the way to its ultimate decision to deny a First Amendment exemption to the Jaycees, the Court recognized that public accommodations laws did more than simply guarantee access to goods and services, and in so doing echoed the antisubordination intention of the suffragists and the advocates for inclusion of sex in state public accommodations laws. For example, the Court noted that states began prohibiting race discrimination in public accommodations in the 1870s, which “provided the primary means for protecting the civil rights of historically disadvantaged groups” until the late 1950s, when federal government enacted antidiscrimination laws.¹¹⁸ This reference to the “civil rights of historically disadvantaged groups” parallels the language of antisubordination used by suffragists in the late 1800s and early 1900s and the feminists of the 1970s. The Court then described the trajectory of these state public accommodations laws over time, such as expanding the types of businesses included in the laws’ scope and the classes of people protected by the laws.¹¹⁹

The Court next turned to the harms that such public accommodations laws are intended to redress. It framed this discussion of harms by reference to the Fourteenth Amendment’s Equal Protection Clause:

In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.¹²⁰

The Court recognized that public accommodations laws’ prohibition of sex discrimination similarly “protects the State’s citizenry from a number of serious social and personal harms.”¹²¹ The Court opined that the vindication of personal dignity (and its attendant eradication of the stigmatic harm of exclusion) was a “fundamental object” of the federal public accommodations law prohibiting race discrimination; it extended this logic and reasoning to the prohibition on sex discrimination in state public accommodations laws.¹²² The Court next recognized “the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including

118. *Id.* at 624.

119. *Id.*

120. *Id.* at 625.

121. *Id.*

122. *Id.*

women.”¹²³ This awareness that sex-based exclusions from the public square lead to both individual dignitary harm and to societal harm that result from a homogeneous class of market participants mirrors the harms that both suffragists and the feminists of the 1970s sought to address and redress in their respective legal campaigns; so too does the Court’s framing of public accommodations laws as instruments through which to dismantle sex-based status hierarchies (“removing barriers to economic advancement and political and social integration”) that subordinate based on sex (“historically plagued certain disadvantaged groups, including women”).¹²⁴

The through-line from the Nineteenth Amendment, to the addition of sex to state public accommodations laws, to the Court’s holding in *Jaycees* continues into today’s controversies surrounding religious exemptions vis-à-vis SOGI discrimination. The link from the

123. *Id.* at 626.

124. Amicus briefs filed in *Jaycees* also used language reminiscent of the women’s suffrage debates—language of antisubordination and of dismantling sex-based status hierarchies. For example, amici the States of New York and California argued that the “systematic exclusion of women from business, professional and community service organizations has been an historical impediment to the full participation of women in our society.” Amicus Curiae Brief of the State of New York, Joined by the State of California in Support of Reversal at *4, *Gomez-Bethke v. U.S. Jaycees*, 464 U.S. 1037 (1984) (No. 83-724). Amici the ACLU described the policy of the national Jaycees organization as “relegating” its women members “to an inferior position within the organization.” Brief Amicus Curiae of American Civil Liberties Union & Minnesota Civil Liberties Union in Support of Appellants at *3, *Gomez-Bethke*, 464 U.S. 1037 (No. 83-724). It further described the Eighth Circuit’s finding in favor of the Jaycees as “indulging in forbidden sex stereotyping” and “impermissibly refashion[ing] the traditional shield of freedom of association into a sword against excluded or subordinated groups,” *id.* at *6–7, a concept that the ACLU asserted “cannot be impermissibly converted into a license to subordinate,” *id.* at *7; *see also, e.g.*, Brief Amicus Curiae of the National Organization for Women et al. in Support of Reversal at 27–28, *Gomez-Bethke*, 464 U.S. 1037 (No. 83-724) (“Denying women the right to exercise membership privileges such as voting, holding office or receiving awards creates a ‘together but unequal’ environment with many serious disadvantages to the second-class participants. Relegating women to such secondary citizenship in organizations such as the Jaycees denies them the substantially greater leadership training and contacts development . . . , creates feelings of inferiority in women, and reinforces the handmaiden mentality in men -- the notion that women are always the Women’s Auxiliary, there to serve without praise or pay. Moreover, to deny women leadership positions and awards in an organization like the Jaycees, which focuses so intensely on competition and honors to spur members’ achievement, is to deny women recognition in every sense of the word.”); Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Petitioner at *12, *Gomez-Bethke*, 464 U.S. 1037 (No. 83-724) (arguing that the national Jaycees’ exclusion of women as full members “reinforces notions that business is a man’s world and lends substance to harmful prejudices” as well as “inhibits women’s ability to function in business”).

Nineteenth Amendment and *Jaycees* to the claims asserted by today's exemption seekers is *Bostock*, to which this Article turns next.

III. SEEKING THE RIGHT TO DISCRIMINATE AGAINST LGBT CONSUMERS: THE RELIGIOUS RIGHT'S CAMPAIGN FOR RELIGIOUS EXEMPTIONS

While sex discrimination in public accommodations is largely settled as a normative and legal matter, the same cannot be said of SOGI discrimination in public accommodations. This Part explores the current-day debate over religious exemptions for SOGI discrimination in the marketplace.

A. A BRIEF HISTORY OF THE LGBT CIVIL RIGHTS MOVEMENT

The following brief overview of the history of the LGBT civil rights movement is provided to frame the central argument of this Article.

1. The Early Years

Like other civil rights movements, the trajectory of the LGBT civil rights movement in the United States has been a tumultuous one, marked by successes and backlash.¹²⁵ When a fledgling gay rights movement began its public campaign for federal employment protections in the 1950s, the government called it a "Lavender Scare" and terminated five thousand known or suspected LGBT employees.¹²⁶ The United States began excluding transgender people from the military in 1963.¹²⁷ Overall, opponents of LGBT equality during the 1950s through the 1970s deployed an explicitly homophobic, attacking

125. See generally Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 LAW & INEQ. 67, 71–83 (2018) (describing four eras of the LGBT civil rights movement).

126. *Id.* at 72. The 1950s also saw President Eisenhower banning LGBT people from federal government employment, *id.*, and the American Psychiatric Association's designation of homosexuality as a "sociopathic personality disturbance," see AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38–39 (1952). The APA did not remove this language until 1973. See *Panelists Recount Events Leading to Deleting Homosexuality as a Psychiatric Disorder from DSM*, PSYCHIATRIC NEWS, <http://www.psychiatricnews.org/pnews/98-07-17/dsm.html> [<https://perma.cc/EH39-LDWC>].

127. See, e.g., Louie Swanson, *Implications of the Ban on Open Service by Transgender Individuals in the United States Military*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 135 (2020) (citing Army Regulation 40-501, at 6-32(b) (May 17, 1963)).

rhetoric, one that cast homosexuals as prone to child molestation, pedophilia, and as mentally ill.¹²⁸

The uprisings at the Compton Cafeteria in 1966 and the Stonewall Inn in 1969, both of which were largely instigated and led by transgender individuals, launched the modern LGBT rights movement.¹²⁹ The community's very public embrace of its pride, coupled with its demand for dignity and civil rights, led to backlash from the Religious Right.¹³⁰ For example, when Dade County, Florida, became one of the first U.S. municipalities to enact an ordinance prohibiting sexual orientation discrimination, the Religious Right acted swiftly to overturn it—and was successful.¹³¹ Always in the background of the struggles for LGBT civil rights from the 1950s through the 1990s were sodomy laws. Up until the 1950s, sodomy was a crime in all fifty states.¹³² Although several states had repealed these laws by the 1980s, the fact that many states continued to criminalize the conduct associated with LGBT people bolstered the Religious Right's narrative that homosexuality was unhealthy, immoral, and deviant.¹³³

2. The Sodomy Years

The year 1986 saw a devastating blow to the LGBT civil rights movement when the U.S. Supreme Court issued its opinion in *Bowers*

128. See Velte, *supra* note 125, at 72 (citing DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 47–48, 76–78 (1997)).

129. *Id.* at 73; see also Delaney Hiebert, *Patchwork Protections in Kansas: The Rise of Religious Exemption Laws Demands State-Level LGBTQ+ Antidiscrimination Protections*, 30 KAN. J.L. & PUB. POL'Y 128, 134 (2020) (stating that these two events were “explosive” and “marked a turning point in the LGBTQ+ civil rights movement”).

130. Velte, *supra* note 125, at 72–73. For example, the Religious Right embarked on a national campaign to bar LGBT people from serving as teachers, which it supported with the false claim that the “gay agenda” of the LGBT civil rights movement included indoctrinating schoolchildren into the homosexual “lifestyle.” *Id.* at 73.

131. *Id.* at 73. It was successful because it deployed an attacking, anti-LGBT rhetoric, asserting that gay people intended to recruit children into the movement and then molest them. *Id.* The backlash against LGBT rights extended beyond Dade County. Just days after the Save Our Children campaign was successful in repealing the ordinance, the governor of Florida signed into law a bill that banned LGBT people from adopting children. *Id.* (citing Rebecca M. Solokar, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 FLA. INT'L U. L. REV. 473, 477–78 (2009)). See generally FLA. STAT. § 63.042(3) (2006) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”), *invalidated by* Fla. Dep't of Child. & Fams. v. X.X.G., 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).

132. Velte, *supra* note 125, at 73.

133. *Id.* (citing WILLIAMS INST., *DOCUMENTING DISCRIMINATION IN STATE EMPLOYMENT*, at 5-12 to 5-13 (2009)).

v. Hardwick.¹³⁴ The Court upheld Georgia's sodomy law, thus constitutionalizing homophobia. This holding remained good law for seventeen years until the Court overruled it in *Lawrence v. Texas* in 2003.¹³⁵

For the LGBT community, the consequences of the *Bowers* holding were devastating during the seventeen years that it remained binding precedent. Although it was a criminal law case, opponents of LGBT equality leveraged it in many civil cases. More specifically, opponents harnessed *Bowers* to defeat attempts by LGBT people to secure protection from discrimination in employment,¹³⁶ housing,¹³⁷ parenting,¹³⁸ and the military.¹³⁹ These opponents of LGBT equality argued that if the state could legally criminalize LGBT people's conduct, it was certainly legitimate to deny them status-based protections from discrimination in the areas of family law, employment law, and public accommodations law.¹⁴⁰

Bowers thus created the "bedrock of legal discrimination against gay men and lesbians."¹⁴¹ As pertinent here, it informed the debate over the applicable level of equal protection scrutiny to be given to

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

135. *Lawrence v. Texas*, 539 U.S. 558 (2003). Transgender individuals saw an important victory in this timeframe: the U.S. Supreme Court held that Dee Farmer, a Black, transgender woman, could pursue her case against prison officials in which she alleged a violation of the Eighth Amendment based on assaults she suffered while in prison. *Farmer v. Brennan*, 511 U.S. 825 (1994); see also Chase Strangio, *Dee's Triumph: One of the Most Important Trans Victories You Never Heard of*, ACLU (June 6, 2014), <https://www.aclu.org/blog/smart-justice/mass-incarceration/dees-triumph-one-most-important-trans-victories-you-never> [https://perma.cc/5D2T-U3J3].

136. See WILLIAMS INST., DOCUMENTING DISCRIMINATION IN STATE EMPLOYMENT, at 5-36 (2009).

137. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1588 (1993) ("So long as gay men and lesbians were presumed to engage in acts of criminal sodomy . . . landlords could argue that they should not be forced to rent to criminals." (citing *Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (noting how homosexuals "suffer discrimination in housing, employment and other areas"))).

138. See *id.* at 1624-25 (noting a case in which the court denied a lesbian mother custody based on a presumption that she would engage in criminal conduct).

139. The Pentagon launched its "don't ask, don't tell" policy in 1993, which directed that members of the military would not be asked about their sexual orientation and would not be discharged simply because they were gay; however, engaging in same-sex sexual conduct would be grounds for discharge. *Id.* at 1623 n.385. The policy "pushe[d] the [status-conduct] dichotomy further than any court." *Id.* at 1623. It was repealed in 2011. See Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html> [https://perma.cc/U2NT-2FRH].

140. See WILLIAMS INST., *supra* note 136, at 5-2.

141. Cain, *supra* note 137, at 1587.

SOGI. The Court has held that race-based classifications are subject to the most stringent of reviews: strict scrutiny.¹⁴² That level of review demands that a state show that it has a compelling interest in the classification and that the classification or regulation is narrowly tailored to meet that compelling state interest.¹⁴³ The Court has also held that sex-based classifications or regulations are subject to intermediate scrutiny, also known as heightened scrutiny.¹⁴⁴ Under this standard of review, the state must offer an “exceedingly persuasive”¹⁴⁵ justification for sex-based classifications or regulations; this requires a showing by the state that the challenged regulation serves an important government interest, “and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁴⁶ Race and sex are thus considered “suspect” classifications under the Equal Protection Clause because regulations that classify based on these two attributes trigger some form of heightened scrutiny.¹⁴⁷

All other classifications are subject to rational basis review, the most deferential level of equal protection review. Under rational basis review, a classification or regulation will be upheld if it is rationally related to a legitimate government interest.¹⁴⁸ While the Court has not explicitly stated the level of scrutiny properly afforded to laws or regulations that classify based on SOGI, it has purportedly¹⁴⁹ applied the

142. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995) (applying strict scrutiny to a race-based classification). Strict scrutiny also applies to classifications based on national origin, religion, and alienage, as well as to regulations that infringe on a fundamental right. See, e.g., *Protection of Fundamental Rights; Strict Scrutiny Test*, 16A AM. JUR. 2D *Constitutional Law* § 402 (2021).

143. See Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 WM. & MARY J. WOMEN & L. 323, 325–27 (2000) (describing the strict scrutiny standard).

144. See *United States v. Virginia*, 518 U.S. 515, 531–33 (1996).

145. *Id.* at 533.

146. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citation omitted).

147. See Velte, *supra* note 143.

148. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

149. There is scholarly debate about whether the Court is saying that it is applying a rational basis inquiry but, in reality, applying a higher level of review. See, e.g., Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769 (2005); Velte, *supra* note 143, at 354 (noting that “scholars and commentators are uncertain after *Romer* about the state of equal protection law in the context of sexual orientation” (citation omitted)); see also Caren G. Dubnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 *LAW & INEQ.* 275 (1997); Katherine M. Hamill, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v.*

rational basis standard of review to such laws.¹⁵⁰ LGBT rights advocates have argued for many years for heightened scrutiny for SOGI;¹⁵¹ recently, some lower courts have agreed.¹⁵² Whether it is characterized as a dispute or as an open question, the issue of the level of equal protection scrutiny afforded to SOGI is a central driver in an argument made by today's exemption seekers, as described below.¹⁵³ And, as discussed in Part IV, the Court's recent decision in *Bostock* strongly suggests that SOGI discrimination is subject to intermediate scrutiny, just as sex discrimination is.¹⁵⁴

3. The Marriage Years

More recently, of course, the LGBT civil rights movement won a series of rapid legal victories, which many would say culminated in the *Obergefell v. Hodges* decision in 2015 holding that same-sex couples share in the fundamental right to marry.¹⁵⁵ As pertinent here, the marriage equality victory is relevant for the backlash it created: the current national campaign for religious exemptions to state public accommodations laws that prohibit SOGI discrimination, to which I now turn.

Hardwick, 77 B.U. L. REV. 655 (1997); Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997); William M. Wilson, III, *Romer v. Evans: "Terminal Silliness," or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891 (1997).

150. See, e.g., *Romer*, 517 U.S. 620.

151. See, e.g., Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Velte, *supra* note 143, at 378; Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEXUALITY 195 (1994); Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001); Isaac Sidel-Goley, *Romer v. Evans and House Bill 2: Déjà Vu All Over Again*, 38 WOMEN'S RTS. L. REP. 23 (2016); Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493 (2015).

152. See, e.g., *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (concluding that "something more than rational basis but less than strict scrutiny" applied to the 2018 policy banning openly transgender individuals from military service); *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014) (concluding that "heightened scrutiny" was appropriate since the laws at issue discriminated on the basis of sexual orientation); *SmithKline Beecham Corp. v. Abbott Lab's*, 740 F.3d 471, 474 (9th Cir. 2014) (holding that classifications based on sexual orientation are subject to heightened scrutiny, and striking down discrimination based on sexual orientation in jury selection); *Windsor v. United States*, 699 F.3d 169, 180–85 (2d Cir. 2012) (concluding that review of the Defense of Marriage Act required heightened scrutiny since it discriminated based on sexual orientation).

153. See *infra* Part III.B.2.

154. See *infra* Part IV.

155. 576 U.S. 644, 670–74 (2015).

B. THE FIGHT TODAY: THE RELIGIOUS RIGHT'S NATIONAL CAMPAIGN FOR RELIGIOUS EXEMPTIONS

While *Obergefell* certainly was a watershed moment for LGBT equality, it was not a panacea. This Section describes one aspect of the backlash to marriage equality: the Religious Right's coordinated, national campaign for religious exemptions from state public accommodations law that prohibit SOGI discrimination. It then centers one particular aspect of this campaign for deeper analysis, namely exemption seekers' argument that states do not have a compelling interest in eradicating SOGI discrimination in the public square.

1. Marriage Equality Backlash, Public Accommodations Laws, and SOGI Protections

Marriage equality was met with prompt and fierce backlash by the Religious Right.¹⁵⁶ Arguably, the most sweeping campaign¹⁵⁷

156. See Velte, *supra* note 125; Kyle C. Velte, *Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory*, 82 BROOK. L. REV. 1109, 1110–11 (2017) (“This backlash is occurring when for-profit businesses, such as photographers, bakers, and florists, assert that they should be exempt from complying with these antidiscrimination laws based on the business owners’ religious beliefs about LGBT people and same-sex marriage.”); Velte, *Fueling the Terrorist Fires*, *supra*, at 1110 (“[S]ince *Obergefell*, a wave of explicitly anti-LGBT laws have been proposed or passed in several states—these laws include ‘bathroom bills’ that target transgender people and bills that expressly allow for-profit businesses to discriminate against LGBT people based on religious beliefs.”); Kyle C. Velte, *All Fall Down: A Comprehensive Approach To Defeating the Religious Right’s Challenge to Anti-discrimination Statutes*, 49 CONN. L. REV. 1, 5 (2016) [hereinafter Velte, *All Fall Down*] (“[I]n those states that do include [SOGI] protections [in their public accommodations laws], marriage equality—ironically, and perhaps counterintuitively—has strengthened the backlash against LGBT equality. This deeper backlash occurs when for-profit businesses, such as photographers, bakers, and florists, argue that they should be exempt—based on religious beliefs about homosexuality, bisexuality, transgenderism, and marriage for same-sex couples—from complying with such antidiscrimination laws.”).

157. These cases are not ones in which an individual baker or photographer, for example, decide, on their own, to file suit. Rather, these cases are all connected through the Religious Right's coordinated, national campaign to create quasi-theocratic zones of exemption. See Velte, *supra* note 125, at 68. The ADF, a prominent legal advocacy group for the Religious Right, was founded to resist LGBT civil rights; it has trained thousands of attorneys in its Christ-based legal philosophy, lobbies for anti-LGBT legislation, represents wedding vendors in religious exemption cases, and created and implemented a plan to flood the state and federal benches with judges trained in its philosophy. See Kyle C. Velte, *Postponement as Precedent*, 29 S. CAL. REV. L. & SOC. JUST. 1, 11–14 (2019). The Southern Poverty Law Center has labeled the ADF a hate group. See *Alliance Defending Freedom*, *supra* note 10 (noting that the ADF “supported the re-criminalization of [homosexuality] in the U.S.” and “works to develop ‘religious liberty’ legislation and case law that will allow the denial of goods and services to LGBTQ

initiated by the Religious Right in response to marriage equality is the one for religious exemptions from state public accommodations laws. Notably, similar to today's exemption seekers, opponents of women's equality in public spaces in the late nineteenth century—with its attendant message that women were inferior to men—“rooted [their opposition] in religious teachings and practices.”¹⁵⁸

Twenty-six states and the District of Columbia have public accommodations laws that prohibit, among other things, discrimination based on sexual orientation and/or gender identity in the public square; one other prohibits discrimination based on sexual orientation but not gender identity.¹⁵⁹ It is in these states where religious exemption cases have arisen. That is because, at least until the recent *Bostock* decision,¹⁶⁰ in states without a public accommodations law that explicitly includes SOGI protections, wedding vendors could legally turn away LGBT customers for any reason at all,¹⁶¹ including that the vendor's religious views teach that homosexuality is a sin or that marriage is only between one man and one woman.¹⁶² The U.S. Supreme Court addressed claims for religious exemptions in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹⁶³ in which a Colorado baker argued that his refusal to make a wedding cake for a same-sex couple was justified by his religious beliefs, which exempted him from complying with Colorado's public accommodations law under the First Amendment's free speech and free exercise clauses.¹⁶⁴

These religious exemption cases generally arise as follows: a same-sex couple enters a wedding vendor's business (or interacts

people on the basis of religion”).

158. Thomas, *supra* note 11, at 367; *see also id.* at 368 (“[E]arly feminist criticisms acknowledged the large role of the church in creating norms of women's inferiority.”).

159. *See Nondiscrimination Laws: Public Accommodations*, *supra* note 53. Of the twenty-six states, twenty-one and the District of Columbia expressly prohibit SOGI discrimination in public accommodations, while five had found that their states' prohibition on sex discrimination in public accommodations includes SOGI. *Id.*

160. After *Bostock*, it is arguably the case that in the forty-five states that have a public accommodations law that prohibits sex discrimination, those laws now must be construed to also prohibit SOGI discrimination, even if the public accommodations law does not explicitly enumerate SOGI as a protected class. *See infra* Part IV.

161. Of course, a different result may adhere for customers with intersecting marginalized identities. For example, if a wedding vendor turned away an African American same-sex couple in one of these states without explicit SOGI protections, the vendor would not be liable for sexual orientation discrimination. However, if there were evidence that the vendor also discriminated based on the couple's race, that action would be prohibited by state and/or federal law.

162. *See Velte, All Fall Down*, *supra* note 156, at 20.

163. 138 S. Ct. 1719 (2018).

164. *Id.*

with such business online), such as a baker, photographer, calligrapher, florist, or videographer, and seeks to engage the vendor's services or purchase the vendor's goods for their wedding.¹⁶⁵ Once it becomes apparent to the wedding vendor that the customers are LGBT and seeking goods or services for a same-sex wedding, the vendor declines such goods or services.¹⁶⁶ The couple that was denied goods or services then files a complaint of discrimination under the state's public accommodations law.¹⁶⁷ In their defense, the wedding vendor asserts that they need not comply with the public accommodations law—that they are exempt from that law—under two different provisions of the First Amendment. First, they argue that the First Amendment's free speech clause exempts them from complying with the public accommodations law because, if they were compelled to provide the good or service, that would amount to compelled speech.¹⁶⁸ For example, the baker in *Masterpiece Cakeshop* argued that compliance with Colorado's public accommodations law "would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed."¹⁶⁹ Second, these vendors argue that creating an item, or providing a service, for a same-sex wedding would violate the First Amendment right to free exercise of religion based on their religious beliefs that same-sex marriage is improper.¹⁷⁰

165. See, e.g., *id.* (concerning a wedding cake baker); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (concerning wedding videographers); *303 Creative, LLC v. Elenis*, 746 F. App'x 709 (10th Cir. 2018) (concerning designers of wedding websites); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (concerning a custom wedding invitation designer); *State v. Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019) (concerning a florist). These cases have also arisen when faith-based adoption and foster care agencies have policies to turn away LGBT parents. See, e.g., *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

166. See, e.g., *Masterpiece Cakeshop*, 138 S. Ct. at 1723 ("[A] same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages . . .").

167. Often, these laws require exhaustion of administrative remedies before filing a case in state court. See, e.g., *id.* at 1725–26 (describing plaintiffs' exhaustion of administrative remedies and filing in state court).

168. See generally Velte, *supra* note 157, at 9–10 (describing the two claims).

169. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

170. See *id.*

Scholarly discussion of the merits of these First Amendment claims is abundant.¹⁷¹ These primary claims are not, however, the focus of this Article. Rather, this Article hones in on a subsidiary argument being made by today's exemption seekers, namely that the state does not have a compelling interest in prohibiting SOGI discrimination in the marketplace, *unlike* the state's compelling interest in prohibiting race discrimination. A brief overview of the merits of the primary claims is necessary to situate this argument within the larger framework of the religious exemption cases and to connect the analysis of today's cases to the normative touchpoint generated by the antisubordination history of the Nineteenth Amendment.

The First Amendment claims are not similarly situated with regard to the strength of their merits. The weaker of the claims is the free exercise claim because the Court held in *Employment Division v. Smith* that one's free exercise rights are not unconstitutionally infringed upon when a neutral law of general applicability applies in a way to regulate particular conduct.¹⁷² Notably, this is a rational basis standard of review, not a strict scrutiny standard of review.¹⁷³ Because public accommodations laws are, indeed, neutral laws of general applicability that target conduct rather than speech or beliefs, the free exercise exemption claim should fail.¹⁷⁴ The free speech claim,

171. See, e.g., Daniel Koontz, *Hostile Public Accommodations Laws and the First Amendment*, 3 N.Y.U. J.L. & LIBERTY 197, 203 (2008); Caroline Mala Corbin, *Speech or Conduct?: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 293–94 (2015); Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248 (2013); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201 (2018); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781 (2017–2018); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 31 (2017).

172. 494 U.S. 872, 890 (1989).

173. Congress and many state legislatures responded to the *Smith* decision by enacting religious freedom restoration acts, which resurrect the strict scrutiny test for general laws that infringe on religious liberty. See generally Velte, *All Fall Down*, *supra* note 156, at 48 n.263.

174. See, e.g., Velte, *supra* note 157, at 9–10. This argument is bolstered by the Court's 1968 opinion in *Newman v. Piggie Park*, 390 U.S. 400 (1968). In that case, a white business owner claimed that he could turn away African American customers because his religious beliefs taught him that the races should not mix; therefore, to enforce the federal public accommodations law against him would violate his free exercise rights. *Id.* at 402. The Court soundly rejected this claim, calling it "patently frivolous." *Id.* at 402 n.5. However, the Court has been asked to reconsider the *Smith* ruling in another LGBT religious exemption case, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

which presents a more novel question, is therefore the stronger of exemption seekers' First Amendment claims, notwithstanding that many scholars nonetheless assert that the argument should fail.¹⁷⁵ In addition, the free speech claim likely triggers strict scrutiny review, such that a reviewing court will ask, like it did in *Jaycees*,¹⁷⁶ whether a state public accommodations law is a narrowly tailored method by which to achieve a compelling state interest, an issue that I turn to next.

2. The Compelling State Interest Argument

In previous work, I have analyzed the merits of exemption seekers' primary First Amendment claims and argued that both should fail.¹⁷⁷ Here, I take on the Religious Right's subsidiary compelling state interest argument; then, in Part IV, I connect this argument back to the generative potential of antisubordination history of the women's suffrage movement to support my position that the Religious Right's compelling state interest argument should be rejected.

As part of their First Amendment claims, today's exemption seekers invoke the constitutional tiers of scrutiny to argue that SOGI religious exemptions should be granted. Exemption seekers contend that because classifications based on SOGI should be subject to rational

175. There is general agreement that public accommodations laws regulate conduct rather than speech; as a result, any infringement on speech is incidental or is satisfied by the compelling interest test. *See, e.g., Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 61–63 (2006) (noting that the regulation of speech is always “incidental” to the enforcement of antidiscrimination laws); Corbin, *supra* note 171, at 293–94 (contending that antidiscrimination laws “can be characterized as regulating conduct,” thus negating any free speech challenge and arguing that even if antidiscrimination law impacts speech, it satisfies a compelling state interest in “equal citizenship and equal dignity”); Velte, *All Fall Down*, *supra* note 156, at 46 (arguing that “because anti-discrimination laws regulate non-expressive conduct in a manner that fulfills a compelling government interest, they do not impermissibly burden the free speech rights of corporations”). *But see* Koontz, *supra* note 171 (arguing that “the First Amendment protects much of the speech that hostile public accommodations law restricts”).

176. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

177. *See, e.g., Velte, All Fall Down*, *supra* note 156, at 35–52. The compelling state interest argument addressed herein is one component of the larger First Amendment claims asserted by today's exemption seekers. The Article's focus on this singular component of exemption seekers' First Amendment claims is not intended to detract or distract from the comprehensive arguments against the First Amendment claims in their entirety. The expression “can't see the forest for the trees” may be helpful to describe the goal of the Article. By focusing on the “tree” of the compelling state interest component, this Article seeks to provide a more complete and nuanced argument to address the “forest”—the overarching First Amendment claims—rather than suggest that the compelling state interest argument is the central claim made by today's exemption seekers.

basis review,¹⁷⁸ states do not have a compelling interest in protecting against SOGI discrimination in the marketplace and, thus, the religious exemption should be granted.¹⁷⁹ In contrast, exemption seekers argue that because race-based classifications are subject to strict scrutiny, states *do* have a compelling interest in protecting against racial discrimination in the marketplace, such that no religious exemptions would ever be granted for race-based discrimination in public accommodations.¹⁸⁰

178. *But see* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020) (holding that sexual orientation discrimination is sex discrimination under Title VII); *id.* at 1783 (Alito, J., dissenting). Moreover, many courts, including both the Ninth and Second Circuits, accord sexual orientation discrimination heightened scrutiny. *See* *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019); *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 473, 474 (9th Cir. 2019); *Windsor v. United States*, 699 F.3d 169, 180–85 (2d Cir. 2012).

179. *See, e.g.*, Brief for Petitioners at 15–16, *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief of Appellants at 52–53, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574).

180. *See, e.g.*, Brief of Amici Curiae Life Legal Defense Foundation et al. in Support of Petitioners at 13, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123) (“This Court’s precedents carefully distinguish between those types of discrimination that trigger strict scrutiny, such as race discrimination, and those that do not, such as discrimination based on age or disability. . . . The lower court’s failure to distinguish types of ‘discrimination’ put the weight of our nation’s commitment to atone for centuries of maltreatment of racial minorities at the service of whatever newly-minted victim class the state decides to favor this decade.”); Transcript of Oral Argument at 48, *Fulton*, 140 S. Ct. 1104 (No. 19-123) (arguing, on behalf of the U.S. government, that the city of Philadelphia could not turn away prospective adoptive parents based on their race, but may turn away prospective adoptive parents because of their SOGI, because “racial discrimination is particularly unique and compelling”); Reply Brief for Petitioners at 15, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Transcript of Oral Argument at 20–23, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief for Lawyers’ Committee for Civil Rights Under Law et al. as Amici Curiae Supporting Respondents at 18, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). The United States, appearing as amici in support of the baker, argued that “not . . . every application of a public accommodations law to protected expression will violate the Constitution. In particular, laws targeting race-based discrimination may survive heightened First Amendment scrutiny” because a state’s “‘fundamental, overriding interest’ in eliminating private racial discrimination . . . may justify even those applications of a public accommodations law that infringe on First Amendment freedoms.” Brief for the United States as Amicus Curiae Supporting Petitioners at 32, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). The United States then argued that that same public accommodations law should face a different fate when sexual orientation discrimination is at issue: “The Court has not similarly held that classifications based on sexual orientation are subject to strict scrutiny or that eradicating private individuals’ opposition to same-sex marriage is a uniquely compelling interest.” *Id.*; *see also, e.g.*, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 75–83.

Exemption seekers also argue that their First Amendment claims trigger a strict scrutiny analysis. That fact, coupled with the fact that race receives strict scrutiny, is offered as support for the contention that “race is just different.”¹⁸¹ Thus, the argument appears to be that because the First Amendment claims and race-based classifications both are subject to strict scrutiny, a public accommodations law being applied to SOGI discrimination does not survive a strict scrutiny inquiry because the state cannot meet the compelling state interest requirement.¹⁸²

Elsewhere, I have laid out a doctrinal argument for rejecting these two arguments, which I will only briefly summarize here. These arguments are out of place in a case devoid of equal protection claims; rather, these cases challenge antidiscrimination statutes that do not classify based on any particular characteristics—they apply equally to all businesses.¹⁸³ Moreover, because public accommodations laws are neutral laws of general applicability, the rational basis test applies to exemption seekers’ First Amendment free exercise claim.¹⁸⁴

Even when exemption seekers’ First Amendment free speech claims are considered, which *may* trigger strict scrutiny,¹⁸⁵ this

181. See Brief for Freedom of Speech Scholars as Amici Curiae Supporting Respondents at 16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

182. See *id.*

183. I have developed this argument in great depth in a recent article. See Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 *CARDOZO L. REV.* 67, 122 (2020) (contending that “[t]his argument turns antidiscrimination law on its head” because “[t]he Court has declared that protecting against discrimination in public accommodations is a compelling state interest”; thus, “there is necessarily a compelling state interest in enforcing the antidiscrimination statute the same way regardless of which protected individual is claiming the statute’s protection” (emphasis omitted)); see also Brief of the National Women’s Law Center & Other Groups as Amici Curiae in Support of Respondents at 29, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter NWLC Brief] (observing that the Court “has never concluded that some groups protected by democratically-enacted antidiscrimination laws are worthier of freedom from discrimination than others”); Brief of Amici Curiae Legal Scholars in Support of Equality in Support of Respondents at 23, *Fulton v. City of Philadelphia*, 139 S. Ct. 49 (2018) (No. 19-123) (“[W]hen a statute’s plain language declares that both race and sexual orientation are deserving of the protection of a public accommodations law, there is necessarily a compelling state interest in supporting every application of the antidiscrimination statute.”).

184. See *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1989); Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5127302 [hereinafter NAACP Brief].

185. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O’Connor, J., concurring) (arguing that the rational basis review standard applies to commercial free speech claims: “[T]here is only minimal constitutional protection of the freedom of commercial association.... [T]he state is free to impose any rational regulation on the

argument should fail. First, it should be rejected because the Court has held that public accommodations laws that expressly include prohibitions against SOGI discrimination “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.”¹⁸⁶ Second, and most pertinent to the argument developed herein, it should be rejected because considered together, *Jaycees* and *Bostock* form a bridge from SOGI discrimination to sex discrimination to race discrimination in ways that defeat the exemption seekers’ argument that states have a compelling interest in eradicating race-based discrimination, but not SOGI discrimination, in public accommodations. This argument is developed in Part IV.

IV. SOGI DISCRIMINATION IS SEX DISCRIMINATION: CONNECTING *BOSTOCK* AND *JAYCEES*

Over the years, many scholars have articulated that SOGI discrimination is sex discrimination.¹⁸⁷ They argue that homophobia and

commercial transaction itself.”). Justice O’Connor reasoned: “The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.” *Id.*; see also *id.* at 635 (“[G]overnmental regulation of the commercial recruitment of . . . customers . . . is valid if rationally related to the government’s ends.”); *id.* at 636 (“An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.”); *id.* at 638 (“[N]o First Amendment interest stands in the way of a State’s rational regulation of economic transactions . . .”).

186. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572 (1995).

187. See, e.g., Raelynn J. Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, 20 *GEO. J. GENDER & L.* 49 (2018); Jack B. Harrison, “*Because of Sex*,” 51 *LOY. L.A. L. REV.* 91 (2018); Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 *WAKE FOREST L. REV.* 63 (2019); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 *N.Y.U. L. REV.* 197 (1994); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 *UCLA L. REV.* 471 (2001); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 *CALIF. L. REV.* 1, 26 (1995); Kristine W. Holt, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 *TEMP. L. REV.* 283, 301 (1997) (asserting that “[b]y definition, the transgendered [sic] person literally embodies a plethora of sexual stereotypes that are contrary to her birth sex” and thus arguing that Title VII prohibits discrimination against transgender people); Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11

transphobia are a form of sexism and misogyny,¹⁸⁸ and that one cannot discriminate based on SOGI without also taking sex into account.¹⁸⁹ This argument began to gain traction with courts with the advent of the campaign for marriage equality in the mid-1990s.¹⁹⁰ Since then, it gained increasing persuasive heft with judges, though not uniformly,¹⁹¹ in particular with regard to claims of employment discrimination.¹⁹²

The women's suffrage movement itself demonstrates the link between sexism and homophobia. Anthony Michael Kreis notes that regulators' targeting of female same-sex conduct coincided with "the height of the suffragette movement and intensified calls for social equality in the workforce."¹⁹³ As Kreis notes, regulators' shift to targeting female same-sex conduct was based on a "belief that feminism was related to the masculinization of women, and the belief that the eroding passivity displayed by women in the public square was a cause of same-sex desires among women. This was particularly true of women demanding political rights in the suffragette movement."¹⁹⁴

CALIF. L. REV. ONLINE 9, 12 (2020) ("[M]isogyny fuels the discrimination that both transgender and cisgender women endure . . ."); Young, *supra*, at 24 (arguing that "misogyny is a key cause of transgender women's vulnerability" and "misogyny fuels bias against transgender women as women"); Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 584 (2016) (contending that "presumed masculine superiority and gay male misogyny play an important role in the marginalization of women, the transgender community, and effeminate gay men within the LGBT community").

188. See generally Anthony Michael Kreis, *Policing the Painted and Powdered*, 41 CARDOZO L. REV. 399 (2019); SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1997).

189. See, e.g., Eyer, *supra* note 187, at 73–74.

190. See, e.g., Baehr v. Lewin, 852 P.2d 44, 63–68 (Haw. 1993) (holding that Hawaii's marriage statute, which limited marriage to a man and a woman, was a sex-based classification subject to strict scrutiny under the Hawaii Constitution's equal protection clause).

191. Kreis, *supra* note 188, at 404 ("The arguments generally fall into two camps: sexual orientation is sex discrimination because an individual cannot discriminate against a gay, lesbian, or bisexual person without taking their sex into account or sexual orientation discrimination is not sex discrimination because sexism and homophobia are unrelated types of bias." (citations omitted)).

192. *Id.* at 403–04.

193. *Id.* at 432.

194. *Id.* The medical establishment tracked the uptick in state regulation of female same-sex conduct. In 1895, one doctor proclaimed that women seeking equal rights were either mannish or "the victim of psycho-sexual aberrancy." *Id.* (citation omitted). In 1914, another doctor reflected the sentiment, common during the suffrage movement, that while not every suffragist was a lesbian, "the very fact that women in general of today are more and more deeply invading man's sphere is indicative of a certain impelling force within them." *Id.* at 433 (citations omitted). Moreover, the iconography

Notably, the regulation of same-sex conduct in the late 1800s and early 1900s, whether it be the regulation of dress, the criminalization of intimate conduct, or the policing of queerness through public accommodations regulations, was “bound to heterosexual animus against alternative forms of gender expression”¹⁹⁵ and “a byproduct of gender policing to reaffirm the supremacy of male masculinity.”¹⁹⁶ At bottom, then, the regulation of minority sexuality has, from the beginning, been about enforcing sex-based gender stereotypes and expectations, revealing a deep connection between the histories and legal doctrines of these two movements.¹⁹⁷

Linking anti-LGBT laws and regulations to gender nonconformity continued through the sodomy era¹⁹⁸ of *Bowers* and its eventual overruling by *Lawrence*. The legacy of the sodomy era is the understanding “that constitutional law’s foundational protection for LGBTQ persons . . . [understands] sexuality as gender expressive conduct, which states criminalized for rationales deeply rooted in interlocking ambivalent sex stereotypes—including hostile sex stereotypes demanding gender conformity and benevolent sex stereotypes about the nature of family.”¹⁹⁹

Supporters and opponents of same-sex marriage alike argued from sex discrimination to bolster their position. Opponents of marriage equality contended that same-sex marriages should be banned

of the anti-suffrage movement connected “political rights for women with masculine women, gender inverts, and the emasculation of men.” *Id.* (“In 1909, New York-based lithograph company Dunston-Weiler produced a series of twelve color postcards opposing women’s suffrage. The images depicted the ‘consequences’ of granting women equal rights: men completing domestic chores, husbands caring for children, masculine female law enforcement officers policing emasculated men, gender inversion, and happily independent women.” (citations omitted)).

195. *Id.* at 434.

196. *Id.*

197. *Id.* at 436; *see also id.* at 439 (“The policing of homosexuality relied on dividing ‘men’ and ‘degenerate men,’ thus creating a sex stereotype that gender nonconforming males were most likely homosexuals.”). States continued to use gender role deviation to regulate queerness in public spaces through the 1950s and 1960s. *Id.* at 439. They did so largely by using liquor license laws to curtail the congregation of LGBT people in public spaces. *Id.* at 436–38. Law enforcement used gender nonconformity of an establishment’s patrons as a proxy for homosexuality and thus for regulation. *Id.* at 438–39 (noting that investigators’ “key to identifying a crowd of homosexuals was gender nonconformity” and this was illustrative of “how government agents (and society at large) failed to appreciate the spectrum of gender on which gay men fell, and how heterosexual men substituted that gender continuum for their own judgment that male homosexuality was fundamentally about effeminacy” (citations omitted)).

198. *See Velte, supra* note 125.

199. Kreis, *supra* note 188, at 453.

because such marriages would be “genderless”—they would lack the gender complementarity of opposite-sex marriages that is critical to raising children with appropriate models of male and female gender.²⁰⁰ These arguments hearkened back to the explicitly sex-based separate spheres ideology that was prevalent during the suffrage debates.²⁰¹ For opponents, same-sex marriages called

into question the innateness of gender roles and the natural disposition of masculine and feminine traits—striking at the heart of anti-LGBTQ attitudes dating back to the turn of the nineteenth century. So-called “genderless marriage” thus taps into deep-seated fears about the balance of power between men and women, between masculinity and femininity, in the social order²⁰²

In declaring the same-sex couples share in the fundamental right to marry, the *Obergefell* Court rejected the “genderless marriage” argument and in doing so “embrac[ed] an anti-sex stereotyping principle.”²⁰³

Supporters of marriage equality argued that denying same-sex couples the right to marry was per se sex discrimination. The argument was straightforward: “if each plaintiff was to choose a marriage partner of the opposite-sex, he or she would be permitted to marry Therefore, plaintiffs say, it is because of their sex that they cannot marry.”²⁰⁴ Chief Justice Roberts succinctly summed up this argument during the *Obergefell* oral argument: “I’m not sure it’s necessary to get into sexual orientation to resolve the case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?”²⁰⁵

200. *Id.* at 458.

201. *Id.* at 459–60.

202. *Id.* at 460 (footnote omitted); *see also id.* at 467 (“The essence of legal arguments in opposition to same-sex couples’ freedom to marry was that marriage is for ‘real men’ and ‘real women,’ and not for the enjoyment of sex-stereotyped sexual minorities who were ‘less than’ their sex.”).

203. *Id.* at 467; *Obergefell v. Hodges*, 576 U.S. 644 (2015).

204. *Wolf v. Walker*, 986 F. Supp. 2d 982, 1007 (W.D. Wis. 2014); *see also, e.g.*, *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring) (stating that same-sex marriage bans were facially sex discrimination because the bans dictated who could marry who based on the sex of the marriage participants).

205. Transcript of Oral Argument at 61–62, *Obergefell*, 576 U.S. 644 (No. 14-556). The feminist movement of the 1970s that added “sex” to state public accommodations laws also illustrates that SOGI discrimination is downstream of sex discrimination. Sepper and Dinner include SOGI discrimination in their discussion and analysis of “sex in public,” thereby making explicit the notion that SOGI discrimination is sex discrimination and that homophobia is downstream of sexism. *See Sepper & Dinner, supra* note 45, at 84 (“The advent of laws prohibiting sex discrimination in public

Finally, beginning in the 1970s, courts began hearing cases under Title VII, which prohibits employment discrimination because of sex,²⁰⁶ in which LGBT employees argued that the SOGI discrimination they experienced in the workplace constituted sex discrimination and thus fell within Title VII's protections.²⁰⁷ For decades, courts largely rejected the argument that SOGI discrimination was sex discrimination and thus dismissed Title VII cases filed by LGBT employees, reasoning that they were not protected by the statute because SOGI was not specifically enumerated.²⁰⁸ It was 2017 before an appeals court accepted this argument, holding that "discrimination on the basis of sexual orientation is a form of sex discrimination."²⁰⁹ In 2020, the U.S. Supreme Court explicitly held, for the first time, that SOGI discrimination is per se sex discrimination. That case, *Bostock v. Clayton County*, is discussed next.

A. *BOSTOCK V. CLAYTON COUNTY*

Bostock, together with two consolidated cases, presented the question of whether Title VII's prohibition on sex discrimination in employment includes SOGI.²¹⁰ Title VII prohibits covered employers from engaging in employment discrimination "because of such individual's race, color, religion, sex, or national origin."²¹¹ Advocates and scholars had for years argued that discrimination because of SOGI was per se discrimination because of sex; therefore, SOGI discrimination in employment is prohibited under Title VII's "because of . . . sex" provision, notwithstanding that Title VII does not expressly enumerate SOGI as a protected class.²¹² As with the marriage equality argument, the per se sex discrimination argument under Title VII is straightforward:

[A] lesbian who is fired for marrying a woman would not have been fired had she engaged in identical conduct as a man. So too a transgender woman who is not hired because she wore a dress to her interview, would have been hired but for her perceived sex (male). Because sexual orientation and gender identity discrimination are inextricably bound up in expectations about how men

accommodations began to deconstruct the legal architecture of compulsory heterosexuality.").

206. It also prohibits employment discrimination because of race, color, national origin, and religion. *See* 42 U.S.C. § 2000e-2(a).

207. *See* Kreis, *supra* note 188, at 467-68.

208. *Id.*

209. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017).

210. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

211. 42 U.S.C. § 2000e-2(a)(1).

212. *See, e.g., supra* note 187 and accompanying text.

and women should behave, such discrimination is always—on a straightforward “but-for” approach—“because of” sex.²¹³

Writing for a 6-3 majority, Justice Gorsuch held that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”²¹⁴ Justice Gorsuch relied on a well-established rule of statutory construction to reach this conclusion: “When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”²¹⁵

Justice Gorsuch began by looking at the ordinary public meaning of “sex” when Title VII was enacted in 1964 and concluded that it rested on the biological differences between men and women.²¹⁶ He then considered Title VII’s causation requirement—“because of”—and restated the rule laid down in prior Title VII cases, namely that it demands a showing of but-for causation.²¹⁷ Importantly, the Court reiterated that but-for causation is *not* sole but-for causation: “So long as the plaintiff’s sex was one but-for cause [of the adverse employment] decision, that is enough to trigger the law.”²¹⁸ Justice Gorsuch next turned to the final clause of the operative phrase—“an individual’s”—and determined that Title VII provides protections at the individual level rather than categorically or at a group level.²¹⁹

Having determined the meaning of the various words and phrases of the operative statutory provision—“because of an individual’s . . . sex”—Justice Gorsuch next applied it to the gay and transgender plaintiffs and concluded that discrimination because of an employee’s sexual orientation or gender identity *is* discrimination

213. Eyer, *supra* note 187, at 73–74.

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

215. *Id.*

216. *Id.* at 1738–39.

217. *Id.* at 1739.

218. *Id.*; *see also id.* (“Often, events have multiple but-for causes. . . . [A Title VII] defendant cannot escape liability just by citing some *other* factor that contributed to its challenged employment decision.”).

219. *Id.* at 1741 (“It’s no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex.”); *see also id.* (“So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. . . . Instead of avoiding Title VII exposure, this employer doubles it.”).

because of an individual's sex.²²⁰ With regard to sexual orientation, he explained: "If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleagues."²²¹ With regard to transgender employees, he concluded: "If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."²²² In both of these instances, "but-for" the individual employee's sex, the employee would not have been subjected to the adverse employment action. Justice Gorsuch reasoned that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'"²²³ Put another way, SOGI discrimination is per se sex discrimination because "[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."²²⁴

Bostock's holding that SOGI is downstream of sex and, thus, that SOGI discrimination is per se sex discrimination is consequential to the religious exemption cases. In particular, the Court's decision offers two lessons that are relevant to the arguments made by today's exemption seekers. First, its holding that SOGI discrimination is sex discrimination will have spillover effects into other statutes that prohibit discrimination because of sex. Second, *Bostock* portends the application of intermediate scrutiny to SOGI classifications in constitutional equal protection cases. As discussed below, these lessons take on added significance when considered within the historical trajectory of the antisubordination thread of the women's suffrage movement, the feminist movement of the 1970s to add "sex" to state public accommodations laws, and the sex-stereotyped rationales used to justify the criminalization of, and discrimination against, LGBT people in late nineteenth and early twentieth centuries.

220. *See id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1743 (citation omitted).

224. *Id.* at 1741.

A. CONNECTING *BOSTOCK* AND *JAYCEES* TO ANALYZE TODAY'S RELIGIOUS EXEMPTION CASES

The *Bostock* decision impacts two aspects of today's religious exemption claims. First, it likely expands antidiscrimination protections for SOGI consumers to those states that do not expressly prohibit SOGI discrimination. Second, when considered with *Jaycees*, it blunts, if not eliminates, exemption seekers' argument that the state does not have a compelling interest in prohibiting SOGI discrimination in the public square.

1. Expanding SOGI Protections in Public Accommodations

As previously noted, all forty-five states with public accommodations laws prohibit, among other things, sex discrimination in the public square.²²⁵ However, twenty-three of those states do not explicitly enumerate SOGI as a protected class in their statutes.²²⁶ Prior to *Bostock*, LGBT consumers did not have a clear path to stating a claim under these states' laws. Rather, they first needed to convince a court that SOGI discrimination is discrimination based on sex such that their claims were brought within the ambit of the statute's reach; if they succeeded in that, they next had to actually prove that prohibited discrimination had occurred.

Bostock should change the legal landscape in these twenty-three states. The language of state public accommodations laws largely tracks Title VII—these state laws, like Title VII, require a causal connection between the sex of the consumer and the denial of goods or services.²²⁷ The Court's reasoning that discrimination because of SOGI is discrimination "because of an individual's . . . sex" in the federal antidiscrimination law (Title VII) should provide persuasive grounds for states to similarly interpret their public accommodations laws, which

225. See Sepper & Dinner, *supra* note 45, at 81.

226. See *Nondiscrimination Laws: Public Accommodations*, *supra* note 53.

227. See, e.g., Kansas Acts Against Discrimination, KAN. STAT. ANN. § 44-1002(i) (2017) (defining unlawful discriminatory practices as "[a]ny discrimination against persons, by reason of their . . . sex"); Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-501 (2015) (prohibiting discrimination in public accommodations "on the grounds of . . . sex"); Montana Human Rights Act, MONT. CODE ANN. § 49-2-304 (2019) (prohibiting discrimination in public accommodations "because of sex"); Indiana Civil Rights Law, IND. CODE § 22-9-1-2 (1971) (prohibiting discrimination in public accommodations "because of . . . sex"); Oklahoma Anti-Discrimination Act, OKLA. STAT. tit. 25 § 25-1402 (2014) (prohibiting discrimination in public accommodations "because of . . . sex").

similarly prohibit discrimination “because of,” “on the grounds of,” or “by reason of” sex.²²⁸

Although the Court’s decision is not binding on state courts or state civil rights commissions interpreting state law, the parallels between Title VII and state public accommodations laws renders the *Bostock*’s reasoning compelling, particularly given many states look to Title VII precedent when interpreting their own antidiscrimination laws.²²⁹ In fact, at least one state—Kansas—recently interpreted its

228. See generally Sepper & Dinner, *supra* note 45 (arguing, in a pre-*Bostock* article, that “the history of sex in public could provide a basis for interpreting existing [public accommodations laws that prohibit sex discrimination] to reach sexual-orientation discrimination. . . . If the Supreme Court rules [in *Bostock*], however, that ‘sex’ under Title VII does not include sexual-orientation discrimination, . . . [o]ur Article provides a historical grounding for interpreting public accommodations statutes, on their own terms, to reach sexual orientation. Not only feminist activists, but also their opponents, administrative agencies, and courts understood public accommodations statutes in the early to mid-1970s to upend both the state and customary practices that imposed compulsory heterosexuality on men and women. They understood that sex equality meant freedom from the required attachment of women to men in heterosexual pairs, from sexual stereotypes related to perceived sexual vulnerability and risk, and from gendered norms of dress and decorum.”).

229. See, e.g., *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 197 (Wash. 2014) (“Even though almost all of the [Washington Law Against Discrimination’s] prohibitions predate Title VII’s, the ADA’s, and the ADEA’s, Washington courts still look to federal case law interpreting those statutes to guide our interpretation of the WLAD.”); *Lales v. Wholesale Motors Co.*, 328 P.3d 341, 356 (Haw. 2014) (“As this court has noted, ‘the federal courts’ interpretation of Title VII is useful in construing Hawai’i’s employment discrimination law.’ . . . ‘The federal courts have considerable experience in analyzing these cases, and we look to their decisions for guidance.’” (citations omitted)); *Minnis v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 55 F. Supp. 3d 864, 884–85 (M.D. La. 2014) (“Louisiana state courts routinely look to federal jurisprudence, including Title VII, to interpret Louisiana’s anti-discrimination laws.”); *Lampley v. Mo. Comm’n on Hum. Rts.*, 570 S.W.3d 16, 25 (Mo. 2019) (relying on Title VII case law to construe the Missouri Human Rights Act; holding “an employee who suffers an adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee’s sex should act can support an inference of unlawful sex discrimination. Sexual orientation is incidental and irrelevant to sex stereotyping. Sex discrimination is discrimination, it is prohibited by the Act, and an employee may demonstrate this discrimination through evidence of sexual stereotyping.”); see also *Millions of LGBT People Could Gain Additional Protections from Discrimination After Bostock*, UCLA SCH. L.: WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/press/bostock-implication-press-release> [<https://perma.cc/Q7SS-MGB6>] (“An additional 4.3 million LGBT people age 13 and older would gain protections from public accommodations discrimination under these state laws if they are interpreted consistent with *Bostock*.”); DEP’T OF INS. & FIN. SERVS., STATE OF MICH., BULL. 2020-34-INS, USE OF TERM “SEX” IN STATUTES AND RULES (2020), https://www.michigan.gov/documents/difs/Bulletin_2020-34-INS_699016_7.pdf [<https://perma.cc/2YAG-EELP>] (“The *Bostock* decision provides additional support for DIFS to affirm its interpretation of the term ‘sex’ in the statutes and

public accommodations law to include SOGI, and did so based on *Bostock*.²³⁰ The link between *Bostock* and the argument that state public accommodations laws that prohibit sex-based discrimination in public accommodations is straightforward: *Bostock* holds that SOGI discrimination is discrimination because of sex, therefore state public accommodations laws that prohibit sex discrimination also prohibit SOGI discrimination.

In his dissenting opinion in *Bostock*, Justice Alito foreshadowed this type of expansive reach of the majority's decision. He warned that it "is virtually certain to have far-reaching consequences."²³¹ In particular, he noted that there are over a hundred federal laws that prohibit sex discrimination; many of these have "terms [that] mirror Title VII's,"²³² which suggest that they, too, must now be interpreted to prohibit both sex discrimination and SOGI discrimination.²³³ By way of example, he contends that "[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review"—heightened scrutiny—under the equal protection clause.²³⁴ His prediction about the reach of *Bostock*'s rationale arguably extends to state laws that outlaw discrimination because of sex.

The debates in the 1970s about adding "sex" to state public accommodations laws reveal that such laws are about more than mere access to the marketplace; instead, they are about eliminating systems of sex-based subordination. These public accommodations laws were amended to prohibit sex discrimination in "markets where women typically had robust alternatives for dining, drinking, and relaxing."²³⁵ As a result, these laws were not amended in order to "remedy . . . monopolistic exclusion" but rather to remedy "the dignitary and material harms of less-than-full inclusion in public life."²³⁶ For those state public accommodations laws that do not explicitly prohibit SOGI

rules it administers to include sexual orientation and gender identity, and thus prohibit discrimination on those bases.").

230. See, e.g., Tim Carpenter, *Kansas Rights Commission Embracing Broader Definition of Sex Discrimination*, KAN. REFLECTOR (Aug. 21, 2020), <https://kansasreflector.com/2020/08/21/kansas-rights-commission-embracing-broader-definition-of-sex-discrimination> [<https://perma.cc/RM34-DJNH>].

231. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

232. *Id.*

233. *Id.*

234. *Id.* at 1783.

235. Sepper & Dinner, *supra* note 45, at 86.

236. *Id.*

discrimination but rather protect against such discrimination through the statute's enumeration of "sex" as a protected class, the sex-based antisubordination goal is directly applicable and should be leveraged to buttress the argument that *Bostock* compels a finding that such statutes apply equally to SOGI discrimination.

The same conclusion may be drawn for those states that explicitly protect against SOGI discrimination in the public square because the same antisubordination remedial goal, one that was generated by the radical strand of the history of the Nineteenth Amendment, adheres to *all* classes protected by public accommodations statutes; state legislatures enumerated all protected classes together, without hierarchy or exception.²³⁷ In adding SOGI to these state laws, we can presume that legislatures considered LGBT consumers to be similarly situated in the marketplace vis-à-vis their vulnerability to discrimination as the other protected classes enumerated in the law (as pertinent here, sex), and thus deserving of the same protections and included in the same remedial goal.

Thus, beyond the direct analytic and doctrinal link between *Jaycees* and *Bostock*, the antisubordination history of the Nineteenth Amendment and the campaign of the 1970s for including sex in state public accommodations laws provides an important normative frame, one that bolsters the doctrinal connection between these two cases.

2. *Bostock* + *Jaycees* = Compelling State Interest in Prohibiting SOGI Discrimination

The history of adding sex to public accommodations laws in the 1970s reveals that, at that time, "discrimination was widely understood to encompass the regulation of sexuality, the requirement of attachment to a man, and the enforcement of gendered dress"²³⁸—an understanding with a direct link to SOGI.²³⁹ The 1970s debates surrounding the addition of sex to such laws thus reinforce the notion that SOGI discrimination *is* sex discrimination. Even before the *Bostock* decision, then, this history suggested that "existing prohibitions on sex discrimination might already protect some forms of sexual identity and expression in public, from breastfeeding to sexual orientation and gender nonconformity."²⁴⁰

237. See Velte, *supra* note 183, at 98.

238. Sepper & Dinner, *supra* note 45, at 86.

239. See Kreis, *supra* note 188, at 427.

240. Sepper & Dinner, *supra* note 45, at 86.

The *Bostock* decision makes explicit what the history of “sex in public” suggested. It does so by eliminating an argument commonly made by today’s exemption seekers, summarized in Part III, that religious exemptions for SOGI discrimination are appropriate because the state does not have a compelling interest in prohibiting SOGI discrimination, while it does have a compelling interest in eradicating discrimination in public accommodations against the *other* classes enumerated in public accommodations laws, such as race.²⁴¹ For example, one consequence of applying the same equal protection heightened scrutiny standard for SOGI and sex—a likely post-*Bostock* outcome²⁴²—is that it defeats exemption seekers’ argument that states lack a compelling interest in prohibiting SOGI discrimination in the marketplace because SOGI classifications only receive rational basis review.

A more direct doctrinal link exists for defeating exemption seekers’ compelling state interest argument, and that is the clear link between *Jaycees* and *Bostock*. Specifically, *Jaycees* is the link between *Bostock* and the conclusion that states do, in fact, have a compelling interest in eradicating SOGI discrimination in the marketplace.²⁴³ The *Jaycees* Court unequivocally held that prohibiting sex discrimination in public accommodations is a compelling state interest “of the highest order”²⁴⁴—even though sex-based classifications receive only intermediate scrutiny under the equal protection clause (which SOGI should also receive after *Bostock*). In fact, in reaching its result, the *Jaycees* Court likened sex discrimination in public accommodations to race discrimination in public accommodations:

[T]his Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life. . . . These concerns are strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services. Thus, in upholding Title II of the Civil Rights Act of 1964, . . . which forbids race discrimination in public accommodations, we

241. See *supra* Part III.B.2.

242. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

243. See, e.g., Brief Amicus Curiae for Civil Rights Forum in Support of Respondents at 8, *Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111) (“[E]liminating sex discrimination has repeatedly been found to be a compelling government interest. . . . Because discrimination on the basis of sexual orientation is inherently ‘because of’ sex, its elimination constitutes a compelling government interest.”).

244. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

emphasized that its “fundamental object . . . was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” . . . That stigmatizing injury, and the denial of equal opportunities that accompanies it, *is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.*²⁴⁵

Not only did the Court situate race- and sex-based discrimination in the marketplace as equally troubling, equally redressable, and as inflicting comparable harms, it then held that “[a]ssuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.”²⁴⁶

The *Jaycees* decision, then, does work on two levels to defeat exemption seekers’ argument that religious exemptions for SOGI discrimination are proper because the state lacks a compelling state interest in eradicating this kind of discrimination. The first level is *Jaycees*’ holding that sex discrimination in the marketplace is analogous to race discrimination in the marketplace.²⁴⁷ The second level is its holding that the state has an equally compelling interest in prohibiting sex *and* race discrimination in the marketplace.²⁴⁸ Then, *Bostock* changed the legal landscape of what it means to engage in SOGI discrimination when it concluded that SOGI discrimination *is* discrimination because of sex.²⁴⁹ Overlaying the *Bostock* decision upon the two key holdings from *Jaycees* leads to the following conclusion: *Bostock* teaches that SOGI discrimination is discrimination because of sex; *Jaycees* teaches that eradicating discrimination because of sex in public accommodations, *like eradicating discrimination because of race in public accommodations*, is a compelling state interest; therefore, eradicating SOGI discrimination in public accommodations is a compelling state interest.²⁵⁰

245. *Id.* at 625 (emphasis added).

246. *Id.* at 626.

247. *Id.* at 625.

248. *Id.*

249. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020).

250. *See, e.g.*, Brief of the Leadership Conference on Civil & Human Rights, Lawyers’ Committee for Civil Rights Under Law, & 28 Other Organizations as Amici Curiae in Support of Respondents at 10, *Fulton v. City of Philadelphia*, No. 19-123 (Aug. 20, 2020), 2020 WL 5044629 [hereinafter LCCHR Brief] (“Particularly after this Court’s decision in *Bostock* . . . there can be no doubt that [a state’s] interest in eradicating discrimination against LGBT people is similarly a compelling one.”); NWLC Brief, *supra* note 183 (“Although this Court has subjected different forms of discrimination to different levels of scrutiny in considering challenges to duly enacted laws and other governmental action under the equal protection clause, it has never concluded that some groups protected by democratically-enacted antidiscrimination laws are worthier of freedom from discrimination than others. In the context of discrimination against

This argument and its rationale address—and should defeat—the argument by today’s exemption seekers that states do not have a compelling interest in applying or enforcing their public accommodations laws to LGBT consumers when vendors of faith seek to deny goods or services to such customers.²⁵¹

Moreover, as explored in Part V, this conclusion is further bolstered by considering the antistatutory history of two other sex equality movements: women’s suffrage and the campaign to include sex in state public accommodations laws.

V. HARNESSING THE NINETEENTH AMENDMENT’S RADICAL HISTORY TO FRAME THE SOGI RELIGIOUS EXEMPTIONS QUESTION

Siegel persuasively argues that we should reground sex discrimination law in the more than fifty-year history surrounding the ratification of the Nineteenth Amendment.²⁵² If we were to do so, and thus adopt a “thick” understanding of the Amendment, we might alter “the way we understand the constitutional guarantee of equal protection

women, this Court has specifically recognized that a state has a ‘compelling interest in eradicating discrimination against its female citizens,’ and indeed that this is an interest ‘of the highest order.’ *Jaycees*, 468 U.S. at 623, 624. The Court in *Jaycees* expressly relied upon precedents addressing racial discrimination to hold in the context of sex discrimination too that ‘acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent.’”

251. See Brief of Amici Curiae Legal Scholars in Support of Equality in Support of Respondents at 25–26, *Fulton*, No. 19-123 (Aug. 18, 2020), 2020 WL 4939184, at *26 (“Thus, to accept the exemption seekers’ argument about strict scrutiny—to analyze religious exemption claims differently depending on the individual relying on statutory protection based on an equal protection doctrine that is not implicated—is to defy the Court’s declaration that public accommodations laws serve compelling government interests, even where classes that do not receive strict scrutiny under equal protection are at issue.”); see also, e.g., LCCHR Brief, *supra* note 250 (“The government interest in eradicating discrimination is compelling in the face of a First Amendment challenge by objectors even where government discrimination against a group does not otherwise trigger strict scrutiny under the Equal Protection Clause.” (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984))). In fact, when the Court has “considered and rejected religious exemptions in the past, those precedents are not limited to the context of racial discrimination simply because they originally arose in that context.” NAACP Brief, *supra* note 184, at 16. As a result, exemption seekers’ assertion conflates a state’s compelling interest to eradicate discrimination in the marketplace with the level of scrutiny applicable in an equal protection claim. It is thus “irrelevant whether government-sponsored sexual orientation discrimination receives the same scrutiny as government-sponsored racial discrimination.” Brief for Lawyers’ Committee for Civil Rights Under Law et al. as Amici Curiae Supporting Respondents at 19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5127306.

252. Siegel, *supra* note 1, at 1030.

for women”²⁵³ as well as “understand the woman suffrage amendment as having emancipated women from historic forms of subordination in the family.”²⁵⁴ In this Part, I suggest that we may extend this thick, historically-informed understanding of the Nineteenth Amendment’s antisubordination thread beyond the family and into the public square, and beyond the Constitution to public accommodations laws, which similarly seek to promise standing to all citizens regardless of sex. The history of the 1970s campaign to add sex to public accommodations laws builds on this “thick” understanding and thus similarly provides an important frame for today’s religious exemption cases.

Part IV laid out the doctrinal bases for relying on sex discrimination precedent, from *Jaycees* to *Bostock*, to help build the case to defeat claims for religious exemptions from SOGI antidiscrimination law. This Part contends that the doctrinal bases are strengthened when framed by the radical history of the women’s suffrage movement and its normative antisubordination legacy reflected in the 1970s feminist movement’s push to enact statutory prohibitions on sex discrimination in public accommodations. Put another way, the antisubordination histories of these two movements both buttress and inform today’s debates about SOGI religious exemptions. The antisubordination intent of some suffragist to alter gender norms and roles through securing the franchise infused the feminist movement of the 1970s to ensure sex equality in the marketplace. That movement, in turn, produced black-letter law that the state has a compelling interest in eradicating sex discrimination in the marketplace. The antisubordination ethos of women’s suffrage is thus stitched into sex discrimination doctrine. Together with *Bostock*, these histories situate the current contests over SOGI religious exemptions within a long-established tradition of sex equality campaigns that center antisubordination as their foundational goal, as well as courts that have integrated that antisubordination lens as a foundational aspect of their decisions to uphold, in the face of First Amendment challenges, public accommodations laws prohibiting sex discrimination.²⁵⁵ This Part suggests one way of going about that framing as a means of buttressing that doctrinal foundation.

253. *Id.* at 968.

254. *Id.* at 1030–31.

255. Recall too that the text of the Nineteenth Amendment itself contains broad remedial language. *See supra* text accompanying notes 34–36. That text supports connecting the antisubordination history of the Amendment to the current *Bostock* moment; making that connection creates an opportunity for the Amendment’s remedial breadth to be recognized and implemented.

A. THE CONNECTIONS BETWEEN VOTING AND EQUAL CITIZENSHIP IN THE MARKETPLACE

There are concrete, substantive similarities between the right to vote and the right to be free from discrimination in the marketplace; both implicate a foundational promise of our pluralistic democracy.²⁵⁶ Just as the government must uphold the right to vote regardless of sex, so too must it treat everyone, regardless of their place in our nation's sex-based status hierarchies, as "full and equal citizens in good standing"—to act otherwise would "contravene the substantive conditions necessary for robust pluralist democracy."²⁵⁷ The radical antisubordination legacy of the women's suffrage movement informed the campaign of the 1970s to end sex discrimination in the marketplace; both embodied a commitment to dismantling unequal sex-based status hierarchies and ensuring full and equal citizenship in all facets of civil and political life regardless of sex. The legacy of these two sex equality movements, in turn, illuminated the dynamic that emerged in the early days of the LGBT civil rights movement: government and private discrimination and violence against LGBT people fueled by sex-stereotyping.

Thus, building on this sex equality precedent, which arguably is extended to SOGI through *Bostock*, "[e]ven if a supermajority of Americans were to support a law discriminating against LGBTQ individuals, such government action must be unconstitutional because it would relegate the individuals to second-class democratic citizenship."²⁵⁸ Granting religious exemptions from SOGI antidiscrimination laws would amount to such a law, one that contravenes the Constitution, the nation's commitment to a pluralistic democracy, the antisubordination legacy of the Nineteenth Amendment, and long-established sex discrimination doctrine (which after *Bostock* arguably includes SOGI).²⁵⁹ The state may not curtail the ability of LGBT citizens "to find the shops and exchanges open to [them], and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah."²⁶⁰ Put another way, if we permit LGBT consumers to be "treated as less than full and equal citizens, then democracy is

256. See generally Stephen M. Feldman, *Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights*, 9 WAKE FOREST J.L. & POL'Y 35, 49–51 (2018).

257. *Id.* at 49.

258. *Id.*

259. See *id.* at 51 ("Discriminatory conduct might not contravene democracy as overtly as does a denial of suffrage, yet such conduct still undermines the substantive conditions for democracy and should not be constitutionally protected.").

260. *Id.* (quoting JEREMY WALDRON, *THE HARM IN HATE SPEECH* 220 (2012)).

necessarily stunted.”²⁶¹ Thus, just as the vote “carried with it correlative political rights of public citizenship, such as the rights to hold office and serve as jurors,”²⁶² the evenhanded enforcement of public accommodations laws—and thus the rejection of religious exemptions claims—secures the economic and dignitary rights of public citizenship for LGBT consumers.

B. PUBLIC ACCOMMODATIONS LAWS: A COMMITMENT TO SEX-BLIND EQUAL CITIZENSHIP BORNE OF THE NINETEENTH AMENDMENT

Redefining citizenship to be sex-blind was the intention of some pro-suffrage activists at the turn of the twentieth century, just as it was the intention of 1970s feminists seeking to expand state public accommodations laws.²⁶³ It is that strand of the Nineteenth Amendment’s history that ought to be marshaled to scaffold the analysis of today’s battles over religious exemptions from SOGI antidiscrimination laws.

The Nineteenth Amendment’s history has been marshaled in this way in contemporary constitutional sex discrimination cases. One example is *United States v. Virginia*, which challenged the Virginia Military Institute’s categorical exclusion of women.²⁶⁴ Writing for the majority and holding that such exclusion constituted unconstitutional sex discrimination under the Fourteenth Amendment, Justice Ginsburg relied on the Nineteenth Amendment, along with reference to its radical history, as a generative tool to bolster her reasoning. For example, when articulating that the court analyzes sex-based classifications with “skeptical scrutiny,” she looked to history to explain why:

Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, “our Nation has had a long and unfortunate history of sex discrimination.” . . . Through a century plus three decades and more of that history, women did not count among voters composing “We the People”; not until 1920 did women gain a constitutional right to the franchise.²⁶⁵

261. *Id.*; see also *id.* at 55–56 (arguing that “if we properly understand the substantive conditions of pluralist democracy, then religion can never justify discriminatory conduct or law. In a well-functioning democracy, some issues must be off the table.” (citations omitted)).

262. Thomas, *supra* note 11, at 361.

263. See Siegel, *supra* note 1, at 949 (arguing that reading the Fourteenth and Nineteenth Amendments together reveals that women were asserting their rights until society acknowledged their equal citizenship); Sepper & Dinner, *supra* note 45, at 110–11 (describing activist views in the 1960s and 1970s).

264. 518 U.S. 515, 530 (1996).

265. *Id.* at 531 (citation omitted).

Justice Ginsburg went on to summarize the Court's sex discrimination canon as prohibiting sex-based classifications that "create or perpetuate the legal, social, and economic inferiority of women."²⁶⁶ Justice Ginsburg's characterization of the Court's canon reflects a decidedly antisubordination lens, one that has echoes of the Nineteenth Amendment within it.²⁶⁷

In debating the Nineteenth Amendment, "Americans . . . chose . . . to protect values of equality among the nation's citizens."²⁶⁸ "[I]f we continue to identify with the choice the nation made in ratifying the Nineteenth Amendment, we find . . . a basis for upholding . . . federal laws that vindicate constitutional norms of sex equality."²⁶⁹ This same reasoning extends to upholding state public accommodations laws that "vindicate constitutional norms of sex equality," which, after *Bostock* and *Jaycees*, includes the protection of LGBT consumers.

While Siegel focuses her arguments concerning the role of the history of the suffrage Amendment to understanding and construing the *constitutional* guarantee of equal citizenship,²⁷⁰ and specifically

266. *Id.* at 534.

267. See Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 486 (2020) ("The institutional history of the Nineteenth Amendment can guide the application of *Virginia's* anti-caste or anti-subordination principle: '[s]ex classifications . . . may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.'" (alterations in original) (quoting *Virginia*, 518 U.S. at 533–34)); see also Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 680 (2016) ("In *United States v. Virginia*, the Supreme Court . . . held that sex discriminatory laws must have an 'exceedingly persuasive justification' that survives 'skeptical scrutiny.' This brought the Supreme Court back to the view it expressed in *Adkins v. Children's Hospital*, where the Court had said that after the adoption of the Nineteenth Amendment differences in legal rights between men and women were practically at the 'vanishing point.');" Calabresi & Begley, *supra*, at 699 ("When the Nineteenth Amendment was ratified in 1920, any logical synthesis of these two Amendments required that laws that discriminate on the basis of sex be seen as generally forbidden.").

268. Siegel, *supra* note 1, at 1036.

269. *Id.*

270. *Id.* at 976; see also Siegel, *supra* note 267, at 451 ("A century after its ratification, we can read the Nineteenth Amendment together with the Reconstruction Amendments, informed by the voices and concerns of the disenfranchised as well as the enfranchised, as we enforce the Constitution in a wide variety of contexts."). But see Siegel, *supra* note 267, at 488–89 (arguing that "Congress can start a conversation about the reach of its authority to legislate in support of women's equal citizenship under its combined powers to enforce the Commerce Clause, the Fourteenth Amendment, and the Nineteenth Amendment by debating and enacting the Pregnant Workers Fairness Act").

within the family,²⁷¹ I contend that such history is also helpful in understanding and construing the *statutory* guarantee of equal economic citizenship contained in public accommodations laws. Indeed, the second wave feminist movement of the 1970s deployed the *constitutional* conversations about women's suffrage to urge not only the ratification of the Equal Rights Amendment but also leveraged the suffrage debates to campaign for *statutory* protections against sex discrimination.²⁷²

Moreover, the *Jaycees* Court relied on prior equal protection clause jurisprudence to establish its foundational holding that "discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities" and "thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."²⁷³ From that constitutionally-informed foundation, it held that such "concerns are strongly implicated with respect to gender discrimination in the allocation of publicly

271. See, e.g., Siegel, *supra* note 267, at 452 (contending that the predominant "thin" reading of the history and text of the Nineteenth Amendment "represses a tradition of constitutional argument, rooted in the suffrage campaign and now nearly two centuries old, that sought equal citizenship through democratic reconstruction of the family"); *id.* at 454 ("For nearly two centuries now, Americans have argued that liberty and equality of citizenship require changes in the family form.").

272. See, e.g., Post & Siegel, *supra* note 60, at 1985-90 (noting that the feminist movement of the 1970s "understood equal citizenship in terms of an antidiscrimination principle that authorized far-reaching structural change in the name of 'equal opportunity'" and grounded its demands for statutory protections in the antistatutory legacy of the Nineteenth Amendment); *id.* at 2000-01 (noting that the women's rights movement of the 1970s generated "new constitutional understanding of men and women as equal citizens" by drawing on the Nineteenth Amendment, and that they "were able to move the electorate in a way that Congress could not ignore because the movement talked about the meaning of equal citizenship concretely," which informed lawmaking efforts that resulted in "multiple kinds of statutes" touching on sex equality); *id.* at 2003 (describing the widespread assumption in the 1970s that Congress "possessed ample authority . . . to legislate a new application of equal citizenship principles to women"); see also Siegel, *supra* note 60, at 1376-77 (noting that feminists' work in the 1960s and 1970s to "re-signify . . . the memory of suffrage struggle so as to support a new understanding of the constitutional tradition," yielded "spectacular fruit. Congress responded to the movement's wide-ranging constitutional appeal by enacting the ERA, and by passing legislation directing the EEOC to enforce the sex discrimination provisions of Title VII as seriously as its race discrimination provisions, numerous civil rights laws prohibiting sex discrimination in other institutional settings, and funding and tax credits for child care programs on the universal coverage model.").

273. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

available goods and services.”²⁷⁴ Notably, in some instances constitutional principles, such as sex equality, become more deeply entrenched, accepted, and legitimate when codified in statutes rather than announced via the Court in case law.²⁷⁵

The fight to add sex to public accommodations laws was about more than simply ensuring access. Rather, “[f]eminists pursued the dignity that accompanied equal treatment in public. They understood exclusion and segregation to constitute a harm, even when they had other places to eat and to socialize. Nothing less than full and equal citizenship as workers and consumers was on the line.”²⁷⁶ This promise of full, equal citizenship is one reason why the availability of *some* public accommodations in a particular market that *will* serve women (in the 1960s and 1970s) or LGBT people (today) does not undermine the state’s compelling interest in prohibiting sex and SOGI discrimination in *all* public accommodations in that market:

The history of sex in public illuminates legal and political debates over gender, sexuality, and public accommodations today. As the feminist campaign for public accommodations law makes evident, equality in public means not only material interest but also full citizenship in social and civic institutions. Current free speech and free exercise challenges to public accommodations law . . . often characterize the governmental interest in eradicating discrimination as confined to market access for minorities. On this account, public accommodations laws fail to advance a compelling interest whenever a competitive market provides available alternatives and thus must cede to interests in free speech and religious exercise. These arguments are distinctly ahistorical. . . . [E]conomic gain was not the only, or even predominant, reason for sex equality. Instead, laws prohibiting sex discrimination in public accommodations represented a state effort to remedy the second-class status and indignity of less-than-full inclusion in public life.²⁷⁷

Equal citizenship is no less on the line when LGBT consumers are victims of discrimination in the marketplace.²⁷⁸ The antisubordination

274. *Id.*

275. See, e.g., Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) (“A Supreme Court decision reversing the conviction of the sit-in demonstrators upon the ground that the fourteenth amendment required the keepers of places of public accommodations to serve Negroes without discrimination or segregation could never have commanded the same degree of assent as the equal public accommodations title of the Civil Rights Act of 1964 In this sense, the principle of *Brown v. Board of Education* became more firmly law after its incorporation into title VI of the Civil Rights Act of 1964.”).

276. Sepper & Dinner, *supra* note 45, at 114.

277. *Id.* at 143–44 (footnotes omitted).

278. See Velte, *supra* note 157, at 56 (noting wedding vendors that “deny goods and services to LGBT consumers . . . perpetuate economic, dignitary and other harms on the LGBT community”); see also, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018) (acknowledging the “authority of a State and its

histories of “sex in public” and the Nineteenth Amendment certainly buttress the doctrinal arguments against SOGI religious exemptions by demanding an accurate historical context.²⁷⁹ These histories thus “give[] future courts a richer body of material from which to reason.”²⁸⁰

The passage of the “Nineteenth Amendment recognized that women are legally free to take part in activity outside the home.”²⁸¹ The feminists of the 1970s harnessed the Nineteenth Amendment’s liberatory principle in its campaign for equal rights in all aspects of American life. It did so by “invok[ing] the collective memory of the struggle for enfranchisement to give its equal rights claims constitutional foundation, drawing on the Nineteenth Amendment until its constitutional vision had sufficient authority to generate new forms of positive constitutional law.”²⁸² An invocation of that collective memory to frame today’s religious exemption cases similarly may generate new forms of constitutional law, namely that the First Amendment does not trump state public accommodations laws.²⁸³

governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services”); *id.* at 1727 (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.”).

279. Sepper & Dinner, *supra* note 45, at 145–46 (contending that courts “might understand one function of public accommodations law to be freeing public commerce and leisure from moral constraints; they might also connect current litigation for transgender people’s restroom access to the long history of restrooms as a site of resistance to sex equality”); *see also id.* at 144 (“[T]he history of sex in public accommodations laws provides a stronger basis for interpreting public accommodations law in ways that protect the rights of both cisgender women and LGBTQ people.”); *see also, e.g.,* Siegel, *supra* note 1, at 1031 (acknowledging that “[k]nowing this constitutional history does not compel a particular outcome” in *United States v. Morrison* “but it surely ought to inform the way we reason about the constitutional questions” that it presented).

280. Sepper & Dinner, *supra* note 45, at 145.

281. Post & Siegel, *supra* note 60, at 1991 n.145 (quoting First Amended Complaint at 6–7, *Women of R.I. v. Israel*, No. 4605 (D.R.I. June 22, 1971) (challenging abortion restrictions)).

282. *Id.* at 1997.

283. *See generally* Siegel, *supra* note 1, at 1042 (“The constitutional decisions of past generations form a crucial part of our collective identity as a nation and so shape the manner in which we decide constitutional questions in the present.”).

More specifically, *Bostock* teaches that SOGI discrimination in public accommodations is discrimination because of sex.²⁸⁴ The result of this conclusion is the incorporation of the history and legacy of the sex equality movement, including women’s suffrage and the push for sex-inclusive public accommodations laws. Thus, regardless of one’s sex, whether the traditional notion of gender or the understanding of SOGI discrimination as sex discrimination, the right to engage equally in the marketplace is a basic right of citizenship. Public accommodations laws recognize and protect this “basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. [That freedom includes t]he ability to enter public places, to shop, to dine, to move about unfettered by bigotry.”²⁸⁵ Thus, just as the Nineteenth Amendment’s history may be generative of an antisubordination approach to sex equality in the constitutional arena and to the enactment of public accommodations laws prohibiting sex discrimination,²⁸⁶ so too may it be generative of a similar antisubordination approach to SOGI discrimination in today’s religious exemption cases.²⁸⁷ The connected histories of sex discrimination and SOGI discrimination,²⁸⁸ together with *Bostock*’s holding that SOGI discrimination is discrimination

284. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision . . .”).

285. Klein, 34 BOLI Orders 102 (Or. Bureau of Lab. & Indus. 2015), 2015 WL 4868796.

286. Siegel refers to this approach as a “synthetic” reading of the Fourteenth and Nineteenth Amendments. See Siegel, *supra* note 1, at 949; see also Calabresi & Begley, *supra* note 267, at 652–53 (“We recognize, of course, that the Fourteenth Amendment did not clearly bar sex discrimination—or its cousin sexual orientation discrimination—as a form of caste until the passage of the Nineteenth Amendment in 1920. That Amendment made clear that for political rights, sex discrimination was just as unconstitutional as race discrimination. . . . [W]e believe that under the Fourteenth Amendment—which bans systems of caste or of class-based lawmaking—women are guaranteed equal civil rights as well as political rights. Otherwise, they would be second-class citizens. We thus think that the Nineteenth Amendment changed the way in which American legal scholars and judges ought to think about the Fourteenth Amendment. The Constitution is a holistic document and the Nineteenth Amendment altered everything that went before it including the meaning of the ‘no discrimination’ guarantee in the Fourteenth Amendment.”).

287. See, e.g., Siegel, *supra* note 1, at 1039 (“[I]f we read the Nineteenth Amendment in light of the normative concerns that prompted its passage — for example, as the Court now reads the Eleventh Amendment — we would recognize that the Nineteenth Amendment has implications for practices other than voting.” (footnote omitted)).

288. See generally Sepper & Dinner, *supra* note 45; Kreis, *supra* note 188.

because of sex²⁸⁹ and *Jaycees*'s holding that states have a compelling interest in prohibiting sex discrimination in public accommodations²⁹⁰—create this through-line.²⁹¹

Harnessing the radical history of the Nineteenth Amendment to frame today's battles over religious exemptions has positive, generative potential; by attending to this history, connecting it to today's contests, LGBT rights advocates may ensure that courts do not approach the religious exemption questions through an ahistorical lens. Rather, this history generates a powerful and consistent analytical frame that may, in turn, lead courts to reach outcomes that produce a cohesive body of antidiscrimination law. In other words, without this historical context, courts may be unaware of the through-line from the suffragists of the late 1800s and early 1900s, to the feminists of the 1970s, to the LGBT-rights activists during the marriage equality campaign, to the claims made by today's exemption seekers. *Bostock* brings these connections between the past and present into sharp relief. Making these connections legible to courts may thus generate doctrinal coherence, which is necessary to avoid LGBT exceptionalism.²⁹²

In sum, understanding the fight for women's suffrage as "part of a struggle to democratize the institutions of our constitutional republic"²⁹³ allows us to see the connections between the antistatutory

289. See *Bostock*, 140 S. Ct. at 1743.

290. See *supra* text accompanying note 244.

291. See Siegel, *supra* note 1, at 948 ("The debates over woman suffrage that began with the drafting of the Fourteenth Amendment and concluded with the ratification of the Nineteenth Amendment are plainly relevant to understanding how the guarantee of equal citizenship applies to women."). Even President Nixon recognized the generative character of the Nineteenth Amendment's antistatutory ethic. See Post & Siegel, *supra* note 60, at 1993 n.148 (citing Proclamation No. 4147, 8 WEEKLY COMP. PRES. DOC. 1286, 1286-87 (Aug. 28, 1972)). He issued a presidential proclamation on August 26, 1972—the fifty-second anniversary of the declaration by the Secretary of State proclaiming the addition of the Nineteenth Amendment to the U.S. Constitution—which noted, in pertinent part: "As significant as the ratification of the Nineteenth Amendment was, it was not cause for ending women's efforts to achieve their full rights in our society. Rather, it brought an increased awareness of other rights not yet realized." *Id.*

292. See Velte, *supra* note 157, at 56 (arguing that one risk of the *Masterpiece Cakeshop*'s failure to address the merits of the religious exemptions claim "sends the message that the Court might one day bless such discrimination as a matter of constitutional law, either by upending decades of well-settled frameworks to resolve claims for religious exemptions from antidiscrimination law or by adopting an exceptionalism frame—one that deems LGBT discrimination 'special' or 'different' from gender and race discrimination, such that those well-worn frameworks simply will not be applied in the LGBT context").

293. Siegel, *supra* note 267, at 457.

ethic of the Nineteenth Amendment and what is at stake in the current-day fight over religious exemptions. The marketplace *is* one of the institutions of our constitutional republic. For generations, it was an institution open only to men. In granting women the franchise, the Nineteenth Amendment broke down that gender barrier in a practical way—it would require them to physically leave the domestic sphere and enter the public sphere in order to cast a vote—but also broke that barrier on an ideological level through its message of equal citizenship regardless of sex. The feminists of the 1970s added to this history of antisubordination in their fight to add sex to public accommodations laws. Full and equal access to the marketplace regardless of sex and, after *Bostock*, sexual orientation²⁹⁴—a promise of public accommodations laws—is thus a legacy of the Nineteenth Amendment and the campaign to add sex to public accommodations laws that followed.²⁹⁵

CONCLUSION

The ways in which we conceptualize and “understand sex discrimination in turn shape[] judgments about its gravity and about our collective commitment to its eradication.”²⁹⁶ The *Bostock* Court transformed the law’s understanding of sex discrimination in holding that SOGI discrimination is discrimination because of sex.²⁹⁷ In so doing, it added a contemporary understanding of sex discrimination tethered to and informed by the radical antisubordination history of the Nineteenth Amendment. As a result, framing the current disputes over religious exemptions from SOGI antidiscrimination laws with a thick understanding of the antisubordination history of the suffrage Amendment provides a normative argument that bolsters the legal argument that such exemptions ought to be denied; it does so by re-centering, with “sociohistorical particularity,”²⁹⁸ the “master concept of ‘equal citizenship’”²⁹⁹ regardless of one’s sex.

294. See *supra* Part IV.A.

295. See, e.g., Thomas, *supra* note 11, at 352 (arguing that “women’s rights activists utilized the demand for the vote as a proxy for a greater comprehensive agenda of both equality and emancipation from oppression” and that the radical faction of the suffrage movement “came to represent full citizenship rights, defined as full equality in civil rights and emancipation from oppressive social and religious norms”).

296. Siegel, *supra* note 1, at 959.

297. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020).

298. Siegel, *supra* note 1, at 949.

299. *Id.*

Denial of the franchise to women, exclusion of women from the marketplace, and the Religious Right's quest for SOGI religious exemptions from public accommodations laws share at least one important characteristic: all reflect attempts to impose "regulations of social status"³⁰⁰—the social status built around sex. Viewing these three legal and normative battles—spanning over 150 years—as attempts to enforce sex-based status hierarchies unifies them in our collective consciousness, allows us to identify a through-line from the Nineteenth Amendment to today's battle over SOGI religious exemptions; this, in turn, allows us to understand the contemporary debate about SOGI religious exemptions for what it is: exceptionalism.

Viewing the campaign for SOGI religious exemption as the latest in a generations-long attempt to subordinate some citizens based on their sex leads us to analyze these claims consistent with—rather than seeing them as exceptions to—the ways in which *Jaycees* rejected the request for a First Amendment exemption³⁰¹ and the way in which ratification of the Nineteenth Amendment was a "crucial means of combatting the social subordination of women to men in the family and in public life."³⁰² Viewing the campaign by today's exemption seekers as "like" the campaign to exclude women from the public marketplace in the 1960s and 1970s³⁰³ and as "like" the campaign to deny women the franchise³⁰⁴ will result in doctrinal coherence and normative consistency. Simply put, this through-line from suffrage to today's battle over SOGI religious exemptions both supports and reflects the capacious reading of the Nineteenth Amendment proposed by Siegel and others—a "non-stingy"³⁰⁵ reading of the suffrage Amendment in which the reference to the vote is "understood to illustrate, but not to exhaust, the meaning and implications of the Amendment."³⁰⁶ This "structural"³⁰⁷ reading considers the intrinsic and fundamental purpose of the Amendment—freeing women from subordination in both private and public spheres. It transcends the narrow right contained in that Amendment (the vote) and thus serves as a meaningful lens through which to consider, evaluate, and resolve contemporary legal

300. Siegel, *supra* note 33, at 251.

301. See *supra* notes 102–06 and accompanying text.

302. Siegel, *supra* note 33, at 252.

303. See *supra* Part II.A.

304. See *supra* Part I.A.

305. Siegel, *supra* note 33, at 252.

306. *Id.*

307. See *id.* at 254–55; see also *id.* at 258 (“[I]t does not make much historical sense to read the Constitution as protecting women’s political equality but not their civil equality . . .”).

and normative debates about sex-based hierarchies, including SOGI religious exemptions.

Since the ratification of the Nineteenth Amendment, advocates of sex equality have built upon and harnessed the intent of those suffragists who viewed the Amendment as much more than securing the right to vote and rather as a wide-reaching commitment to reveal and then dismantle sex-based status hierarchies. From contraception³⁰⁸ and abortion,³⁰⁹ to work³¹⁰ and family life,³¹¹ to public accommodations laws,³¹² to marriage,³¹³ to equal pay,³¹⁴ to the #MeToo

308. See, e.g., Siegel & Siegel, *supra* note 60, at 355–56 (“[E]ffective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions. Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.” (quoting Brief for the American Civil Liberties Union & the Connecticut Civil Liberties Union as Amici Curiae at 16, *Griswold v. Connecticut*, 381 U.S. 479 (1964) (No. 496))).

309. See, e.g., Post & Siegel, *supra* note 60, at 1991 n.145 (describing a 1971 lawsuit challenging abortion restrictions, in which the complaint alleged: “[T]he Nineteenth Amendment sought to reverse the previous inferior social and political position of women: denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life. The Nineteenth Amendment recognized that women are legally free to take part in activity outside the home. But the abortion laws imprison women in the home without free individual choice. The abortion laws, in their real practical effects, deny the liberty, and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment.” (quoting First Amended Complaint at 6–7, *Women of R.I. v. Israel*, No. 4605 (D.R.I. June 22, 1971))); Siegel, *supra* note 33, at 266 (tying the Nineteenth Amendment to the contemporary issue of employers’ religious or moral objections to providing contraceptives).

310. See, e.g., Siegel, *supra* note 60, at 1375 (noting that the 1970 Strike for Equality “sought three reforms that would realize the Nineteenth Amendment’s promise of equal citizenship: equal opportunity in jobs and education, free abortion on demand, and free twenty-four-hour childcare centers” in addition to demanding the ratification of the Equal Rights Amendment).

311. See, e.g., Siegel & Siegel, *supra* note 60, at 356; Post & Siegel, *supra* note 60, at 1991.

312. See *supra* notes 180–86 and accompanying text.

313. See Hunter, *supra* note 47, at 104.

314. See Siegel, *supra* note 267, at 478 (“Few know that the chants of ‘Equal Pay!’ that broke out at the World Cup championship can be traced to the dawn of the suffrage movement, where they began as a critique of laws enforcing women’s economic dependency on men in marriage.”).

movement,³¹⁵ to the place of women in contemporary politics,³¹⁶ to voter ID laws that disenfranchise transgender and other voters,³¹⁷ to

315. See *id.* at 488 (“The history of the Nineteenth Amendment offers a rich account of the ways in which the national government has intervened in state regulation of the household to secure the citizenship rights of women, as I have argued in criticizing *United States v. Morrison*. This decision demands renewed attention in light of #MeToo. *Morrison*’s claim that Congress lacks power under the Commerce Clause and the Reconstruction Amendments to address gender-motivated violence preserves in amber the Constitution of Coverture that Justice Bradley celebrated in *Bradwell*. *Morrison* aligns the Constitution with the beliefs about family that men held at the Founding — making no mention of the freedom and equality claims of generations of Americans who challenged state laws empowering men over women through the family — or of the role that federal constitutional law played in recognizing their claims. In so doing, the *Morrison* decision perpetuates the legacy of women’s disenfranchisement as it denies Congress its power to legislate under many sources of law: the Commerce Clause, and the Thirteenth, Fourteenth, and Nineteenth Amendments.” (footnotes omitted)).

316. See, e.g., Paula A. Monopoli, *The Constitutional Development of the Nineteenth Amendment in the Decade Following Ratification*, 11 CONLAWNOW 61, 63 (2019); Paula A. Monopoli, *Women, Democracy, and the Nineteenth Amendment*, 100 B.U. L. REV. 1727, 1736–37 (2020).

317. See, e.g., Adam P. Romero, *The Nineteenth Amendment and Gender Identity Discrimination*, 46 LITIGATION 48, 52 (2020) (“When transgender people are obstructed in voting, the Nineteenth Amendment could possibly provide a remedy. And application of the Nineteenth Amendment to support the voting rights and equality more broadly of transgender people would build on the amendment’s roots in emancipating women—and men—from traditional gender and family roles, norms that are often used today to justify mistreatment of transgender people.”); *id.* at 49 (“If the Court holds that gender identity discrimination is a form of sex discrimination under Title VII, it would reflect an array of decisions under the Equal Protection Clause that discrimination against transgender people should be reviewed under heightened judicial scrutiny as a form of, or akin to, sex discrimination. Taken together, these decisions would support reading the Nineteenth Amendment to protect transgender voters.”); Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 514, 528–29, 564–67 (2016) (describing “a host of legislative and administrative matters present barriers to the ballot,” some of which affect transgender voters and many of which “may impact women significantly more than men” and arguing that the Nineteenth Amendment’s enforcement clause may be used to counter them); Hasen & Litman, *supra* note 1, at 33, 50 (explaining that a “thick reading” of the Nineteenth Amendment “protects voting rights holistically rather than in a piecemeal fashion” and arguing that such a thick reading “could justify broad federal voting rights legislation as well as more generally applicable legislation promoting political equality regardless of gender”); Michael Gentithes, *Felony Disenfranchisement & the Nineteenth Amendment*, 53 AKRON L. REV. 431, 434 (2019) (“Today’s arguments in support of felony disenfranchisement laws bear striking similarities to the arguments of anti-suffragists more than a century earlier. Both suggest that a traditionally subordinated class of citizens is inherently incapable of bearing the responsibility that the right to vote entails. Both argue that some potential votes are somehow less worthy than others, and thus the authors of those votes ought to be excluded from the marketplace of political ideas. And both assert a distinction between the votes of some citizens thought to be of higher political value, and those thought unworthy of having their voices counted in the political arena.”).

military service and jury service,³¹⁸ the radical antisubordination legacy of the Nineteenth Amendment is a thread that connects the many issues of the contemporary campaign for sex equality.³¹⁹ Allowing the “erasure” of the antisubordination history of the suffrage Amendment risks “weaken[ing] guarantees of equal citizenship for women.”³²⁰

Invoking history in this way is “a familiar part of our ordinary interpretive practice.”³²¹ Appealing to the “experience and concerns of past generations . . . shapes the claims we make on each other about the Constitution’s meaning in the present. It is through the past that we make pragmatic judgments about the ways we can best realize constitutional commitments and values in the present . . .”³²² This Article has argued that the radical antisubordination legacy of the Nineteenth Amendment can, and should, be harnessed as a normative framework in which to consider and resolve the current debates over SOGI religious exemptions. A capacious reading of the history of the Nineteenth Amendment holds generative potential to provide a normative frame to analyze demands for religious exemptions—as antithetical to the promise that all within it are a “community of equals.”³²³ The fact that the Nineteenth Amendment “remains up for grabs in important respects”³²⁴ even a century after its ratification empowers advocates and courts alike to embrace the through-line framework

318. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1202–03 (1991) (contending the Nineteenth Amendment’s sex-equality principle might apply to political rights and thus implicate military and jury service); Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 471–72 (1995) (arguing that the Nineteenth Amendment supports “full rights of political participation” for women, not merely voting rights); Lawsby, *supra* note 18, at 786 (arguing that the Violence Against Women Act was valid legislation under the Nineteenth Amendment).

319. See Siegel, *supra* note 267, at 455 (arguing that “an intersectional understanding of suffrage struggle could change the way courts approach cases concerning the regulation of pregnancy, contraception, sexual violence, and federalism”).

320. Siegel, *supra* note 1, at 953.

321. *Id.* at 1032.

322. *Id.*; see also Siegel, *supra* note 267, at 494 (“The long quest for suffrage features audacious dreamers who dared to claim new, more egalitarian forms of citizenship, family, and constitutional community that we are still struggling to realize today. Whether or not these constitutional architects of our present could vote in their day, we surely can recognize and honor them in our own.”).

323. Jennifer K. Brown, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2175 (1993); see also *id.* at 2177 (“The durable vitality of this broad vision argues for continued recourse to it as we seek a deeper understanding of what the Nineteenth Amendment means for women’s equality.”).

324. Hasen & Litman, *supra* note 1, at 33 (supporting this assertion in light of “the paucity of judicial interpretations and scholarly writings on the scope of the Nineteenth Amendment”).

suggested in this Article. The sex discrimination law inspired by the Nineteenth Amendment's antisubordination history provides the doctrinal basis—that states have a compelling state interest in eradicating sex discrimination (*Jaycees*)³²⁵ and SOGI discrimination (*Bostock*)³²⁶—for defeating these claims for SOGI religious exemptions.

325. *See supra* Part II.B.

326. *See supra* Part IV.A.