COLONIZING QUEERNESS

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This Article investigates how and why the cultural script of inequality persists for queer identities despite major legal advancements such as marriage, anti-discrimination, and employment protections. By regarding LGBTQ legal advancements as part of the American settler colonial project, I conclude that such victories are not liberatory or empowering but are attempts at colonizing queer identities. American settler colonialism's structural promotion of a normative sexuality illustrates how our settler colonialist legacy is not just a race project (as settler colonialism is most widely studied) but also a race-gender-sexuality project. Even in apparent strokes of progress, American settler colonialism's eliminationist motives continually privilege White heteropatriarchal structures that dominate non-heteronormative sexualities.

By placing covert demands upon queer identities to assimilate with the status quo, such settler colonialist motivations are traceable to the way Supreme Court gay rights advancements have facilitated a conditional but normative path to mainstream citizenship for queer identities. By employing concepts from critical race theory, queer studies, and settler colonial theory, this Article illuminates how the Court's cases are indeed part of American settler colonialism's sexuality project and answers why such legal advancements always

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appear monumental but ultimately remain in the control of a discriminatory status quo. Only if queer legal advancements are accompanied by essential shifts from the normative structures of White settler heteropatriarchy will such victories live up to their liberatory claims. Otherwise, such apparent progress will continually attempt to marginalize—indeed, colonize—queerness.

INTRODUCTION

Despite mainstream validations of queer lived experiences,[1] considerable anti-queer bias still perpetuates.[2] Aptly, French writer Jean-Baptiste Alphonse Karr's notion that "the more things change, the more they stay the same" encapsulates modern queer politics.[3] In American constitutional criticism, Reva Siegel provides an equally reflexive term: *preservation through transformation*.[4] More than a half-decade since *Obergefell v. Hodges*,[5] and despite some legal protections that have been touted as transformative,[6] state legislatures are still

1. For this work's critical lens, I prefer to use terms, "queer identities," "queer sexualities," "sexual minorities," and "LGBTQ identities," rather than terms such as "gay" or "lesbian." Also, I only use the term "homosexual" in the context of decisions or works that use this term. Where possible, I do observe the distinctions between "queer" and "LGBTQ" as well. Although "queer" is historically pejorative, its reclamation in recent decades also invests the term with agency and subversive power.

2. *See, e.g.*, Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80, 103 (2022) (noting that "in a post-*Obergefell* world, homophobic federal laws and policies in realms like public health continue to discriminate against gay and bisexual men by projecting them as HIV positive" and "[t]hus, to fully access and enjoy the privileges of formal recognition, LGBTQ individuals are constrained in their expression of queer identity, sexuality, and relationship forms") (referencing Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 234 (2018)).

3. Jean-Baptiste Alphonse Karr, LES GUÊPES [THE WASPS], Jan. 1849 ("Plus ça change, plus c'est la même chose.").

4. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996); *see also* 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, 68 (2018) (noting "the rhetorical tactics" used by religious conservatives to maintain LGBT people as second-class citizens despite advances in antidiscrimination law as "achiev[ing]" preservation-through-transformation).

5. 576 U.S. 644 (2015).

6. *See, e.g.*, Ian Milliser, *The Supreme Court's New Decision Could Sink Trump's Anti-LGBTQ Agenda*, VOX.COM (June 16, 2020), https://www.vox.com/2020/6/16/21291846/supreme-court-bostock-clayton-county-trump-administration-health-care-education [https://perma.cc/KK6G-LNPP] (observing that *Bostock v. Clayton County*'s Title VII protection "is a potentially transformative victory for LGBTQ rights").

passing anti-LGBTQ bills.[7] Transgender youth cannot enter high school athletic competitions without controversy.[8] Mainstream films such as "Love, Simon" might positively affirm LGBTQ high school coming out experiences, but stories about the suppression of queer experiences in schools still emerge.[9] At the close of 2022, in the same weeks that Congress passed the *Respect for Marriage Act*,[10] a gunman terrorized a gay nightclub in Colorado.[11] And despite Congressional attempts to protect marriage, 2022 was a year in which an overwhelming number of anti-LGBTQ bills appeared in legislatures across the country as part of the recent American culture war over identity politics.[12] This plethora of anti-LGBTQ bills often targeted sexual minorities in common aspects of daily life, for instance, from health care access[13] to education[14] to accurate self-identification on public documents.[15] Such legislative backlash has continued into 2023.[16] During the summer of 2023, the Missouri

7. The American Civil Liberties Union keeps a comprehensive list of anti-LGTBQ bills. *See Legislation Affecting LGBTQ Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country.

8. *See, e.g.*, David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), https://www.nytimes.com/article/transgender-athlete-ban.html [https://perma.cc/5ZR3-7XB2].

9. *Compare* LOVE, SIMON (20th Century Fox 2018), *with* Valerie Strauss, *Told Not to Say "Gay" in Graduation Speech, He Made His Point Anyway*, WASH. POST (May 24, 2022), https://www.washingtonpost.com/education/2022/05/24/he-couldnt-say-gay-graduation-speech [https://perma.cc/Q9EQ-BR3K].

10. RESPECT FOR MARRIAGE ACT, Pub. L. No. 117-228, 136 Stat. 2305 (2022); *see also* Annie Karni, *Bill to Protect Same-Sex Marriage Rights Clears Congress*, N.Y. TIMES (Dec. 8, 2022), https://www.nytimes.com/2022/12/08/us/politics/same-sex-marriage-congress.html [https://perma.cc/W24A-YGP6].

11. Marc Fisher, Michelle Boorstein, & Molly Hennessy-Fiske, *How the Colorado Mass Shooting Unfolded—And Ended—Inside Club Q*, WASH. POST (Nov. 21, 2022), https://www.washingtonpost.com/nation/2022/11/21/colorado-springs-clubq-shooting-what-happened [https://perma.cc/MYS8-LUUB].

12. Jo Yurcaba, *Less than 10% of 2022's Anti-LGBTQ State Bills Became Law, Report Finds*, NBC NEWS (Jan. 26, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/less-10-2022s-anti-lgbtq-state-bills-became-law-report-finds [https://perma.cc/U26R-78NR].

13. *E.g.*, H.B. 747, 2022 Reg. Sess. (Fla. 2022) (protecting health care providers and payers from declining health care services based on their conscience).

14. *E.g.*, H.B. 6306, 101st Leg., Reg. Sess. (Mich. 2022) (prohibiting drag events at public schools from pre-kindergarten to high school levels).

15. *E.g.*, S.B. 1100, 58th Leg., 2d Sess. (Okla. 2022) (enacted) (restricting designation on birth certificates to biological male/female sex categories and prohibiting nonbinary designation).

16. Susan Miller, *"War" on LGBTQ Existence: 8 Ways the Record Onslaught of 650 Bills Targets the Community*, USA TODAY (Mar. 31, 2023), https://www.usatoday.com/story/news/nation/2023/03/31/650-anti-lgbtq-bills-introduced-us [https://perma.cc/83TB-REUA].

legislature passed a ban on gender-affirming care for transgender individuals and a ban on transgender students at both public and private schools from participating on girls' and women's sports teams.[17] Despite each celebratory turn, anti-queer sentiments still persist from enshrined heteronormative status quo frameworks that compromise change.

To better conceptualize this continuing anti-queer marginalization despite progress, I argue here that contemporary LGBTQ legal advancements are actually moments where the status quo attempts to colonize queerness. As much as racial and gender subordination in this country has been noted as systemic and structural,[18] inequality targeted against non-heteronormative sexualities also stems from structural roots—and invariably, *the same roots*—of American settler colonialism. Because settler colonialism is the structure that buttresses institutionalized bias against racial minorities and promotes misogyny, this structure also retains a deeply seated queerphobia as part of its ongoing project. By mapping the attempts to colonize queer identities within Supreme Court gay rights cases, I will show how LGBTQ legal advancements—despite their apparent progress—seem to exist conditionally off the same structure that defines normative sexualities within the American settler state. Such examination will not lead us to mainstream liberatory validations of queer identities that catchy slogans, such as "#LoveWins" and rainbow flags in storefronts during Pride month, might invoke. Rather, such inquiry reveals that while legal victories bring much recognition for queer identities in the mainstream, these advancements often miss recalibrating our underlying values and norms toward notions of true and substantive equality. These advances, instead, colonize queerness.

Queer subordination is colonially systemic. Recognizing queer lived experiences within American settler colonialism

17. Summer Ballentine & John Hanna, *Missouri Lawmakers Ban Gender-Affirming Car, Trans Athletes; Kansas City Moves to Defy State*, AP NEWS (May 10, 2023), https://apnews.com/article/transgender-nonbinary-hormone-puberty-missouri-lawmakers [https://perma.cc/3MMH-W87H]; *see also* S.B. 49, 236 & 164, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023) (enacted) (gender-affirming care ban); S.B. 39, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023) (enacted) (anti-transgender athletic sports ban).

18. *See, e.g.*, Palma Joy Strand, *American Dreamin': Law's Limitations and the Promise of Civity*, 61 WASHBURN L.J. 509, 518 (2022) (noting that "the American Dream obscures deep systemic injustices of race, gender, and class that are inextricably intertwined with economic inequality today").

enables a fuller, more exacting reflection of the state of LGBTQ rights politics in the United States. Such recognition aligns with scholarly observations that the narrative of subordinating non-heteronormative sexualities and gender expressions in the United States is systemically and historically entangled with the racialized othering of Indigenous peoples, enslaved Africans, and non-Anglo foreigners traceable to the pre-industrialized era of American colonialism.[19] Indeed, subordination was not merely racial but intersectional.[20] Also, the juxtaposition created by the placement of the LGBTQ movement's recent pro-gay developments within the narrative of settler colonialism illuminates the temporality of modern queer rights advancements.[21] Ultimately, an expressed alignment of both queer and settler colonial legacies draws a more incisive and nuanced interpretation of the major recent developments within LGBTQ politics. After all, the theoretical and substantive resemblances between both the frameworks of queer and postcolonial studies reside in each discourse's focus on hegemonic subordination and on resisting supremacist notions of "normality."[22] Realizing this connection allows us to interrogate how deeply LGBTQ advances exist within that

19. *See* JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 1–9 (2011) (discussing how sexuality and gender was a component of the racialized marginalization of Indigenous peoples, enslaved Blacks, and immigrants in the American colonial period).

20. WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 9–10 (2013) ("Constructions, hierarchies, and inclusions and exclusions pertaining to race, class, gender, religion, and nation enable settler communities to cohere. Often these constructions are comingled and mutually reinforcing. The settler community and nation define themselves, expand and police their borders, and project their power into colonial space on the basis of these constructed hierarchies and exclusions. In constructing identity, exclusion of 'the other' closes off their narratives and discourses while privileging their own.") (footnotes omitted); Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. OF RACE & ETHNICITY 52, 53 (2015) (observing intersectional aspects of decolonial theory, particularly "one that recognizes gender, sexuality, and race as co-constituted by settler colonial projects").

21. *See generally* Alissa Macoun & Elizabeth Strakosch, *The Vanishing Endpoint of Settler Colonialism*, 37/38 ARENA J. 40 (2012) (observing that the narrative of settler colonial discourse as not having a point of decolonization as compared to other classical models of colonialism and that such "vanishing endpoint" is the teleological timeline of settler colonialism).

22. *See* Josh C. Hawley, *Introduction*, *in* POSTCOLONIAL, QUEER 1–7 (2001) (noting the similarities of queer theory and postcolonial theory).

systemic subordination rather than to take for granted that these advances transcend such subordination.

Beyond this Introduction, Part I summarizes settler colonialism and its eliminationist drive, and then it examines how the early settler status quo "queered" non-heteronormative sexualities to reproduce normative settler structures. Parts II and III map the settler colonialization of queerness by re-examining major Supreme Court cases—with Part II exploring queer colonization through gay assimilation in the sodomy and marriage cases, and Part III examining the Court's recent Title VII precedent as an example of the colonization of modern queer workers. Such exploration will show how contemporary legal victories that brought LGBTQ identities into the mainstream also further the American settler colonial project, which consequently undercut the transformative potential of these victories. Before this Article concludes, Part IV raises normative considerations for confronting settler colonialism's structural influences. In conclusion, unless changes in law accompany shifts away from underlying values that privilege a discriminatory settler status quo, modern queer advancements will always remain colonially restrained.

I. SETTLER SOVEREIGNTY & QUEERNESS

Imperialism dominates the present narrative of the modern world.[23] Indelibly, the United States is included in that global story, although its colonial legacy stands apart from other imperialist projects because of its settler legacy.[24] Whereas

23. *See* ROBERT J. C. YOUNG, POSTCOLONIALISM: A HISTORICAL INTRODUCTION 5 (2001) ("To sweep colonialism under the carpet of modernity; however, is too convenient a deflection. To begin with, its history was extraordinary in its global dimension, not only in relation to the comprehensiveness of colonization by the time of the high imperial period in the late nineteenth century, but also because the effect of the globalization of western imperial power was to fuse many societies with different historical traditions into a history which, apart from the period of centrally controlled command economies, obliged them to follow the same general economic path. The entire world now operates within the economic system primarily developed and controlled by the west, and it is the continued dominance of the west, in terms of political, economic, military and cultural power, that gives this history a continuing significance. Political liberation did not bring economic liberation—and without economic liberation, there can be no political liberation.").

24. As Natsu Taylor Saito puts it,

> [w]hile the United States has maintained external colonies, it is first and foremost a settler society. In other words, the early colonists of North

colonial projects elsewhere have involved incidents of foreign political occupation and extraction of resources and human labor, paired eventually with formal decolonization, American settler colonialism entails physical invasion by European settlers coupled with their continuing occupation over already inhabited land. Importantly, this difference means decolonization has never occurred in the United States.[25] This distinction illuminates the nuances of subordination in America. In many postcolonial states, despite their decolonization, Western imperialist political forces and Eurocentric norms drive the continued subjugation of former colonies. Because "[r]acism remained an important force with murderous effects in ugly colonial wars and rigidly unyielding polities," Edward Said, one of the founders of postcolonial studies,[26] has suggested that, even despite the decolonization of former European colonies, "[t]here was, however, a continuing colonial presence of Western powers in various parts of Africa and Asia, many of whose territories had largely attained independence in the period around World War II."[27] In this way, "[t]he experience of being

> America came not simply to exploit its land, labor, or natural resources and then return to their "mother country," but to settle permanently and, as part of that process, to exercise sovereignty over the territories they occupied.

Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 20–21 (2014) [hereinafter Saito, *Tales of Color*] (citing HIXSON, *supra* note 20, at 1–2).

25. *See id.*; *see also id.* at 25 (noting that "the global movement for decolonization had so little effect on settler colonial regimes, and why analyses of internal colonialism that rely on models of classic colonial relations have been inadequate to explain racialized domination and subordination in the United States").

26. *See generally* Edward W. Said, ORIENTALISM (1978); *see also Professor Edward W. Said, 67, Dies*, WASH. POST (Sept. 26, 2003), https://www.washingtonpost.com/archive/local/2003/09/26/professor-edward-w-said-67-dies [https://perma.cc/UG7T-8RTR] ("His 1978 book, 'Orientalism,' was considered a seminal examination of the way the West perceives the Islamic world. It was translated into 26 languages and helped establish an academic field of post-Colonial studies. In 1999, he became president of the Modern Language Association, the professional association of college and university teachers of literature and languages.").

27. Edward W. Said, *Representing the Colonized: Anthropology's Interlocutors*, 15 CRITICAL INQUIRY 205, 206 (1989); *see also* Ruth Maclean, *"Down with France": Former Colonies in Africa Demand a Reset*, N.Y. TIMES (Apr. 14, 2022), https://www.nytimes.com/2022/04/14/world/africa/france-macron-africa-colonies.html [https://perma.cc/R52Z-V7G8] ("Over the past few years there has been a sharp rise in criticism of France across its former colonies in Africa, rooted in a feeling that colonialist practices and paternalistic attitudes never really ended, and propelled

colonized therefore signified a great deal to regions and peoples of the world whose experience as dependents, subalterns, and subjects of the West did not end."[28] Cultural freedom does not correspond neatly with political liberation. "To have been colonized was a fate with lasting, indeed grotesquely unfair results," as Said has put it, "especially after national independence had been achieved."[29] He lists "[p]overty, dependency, underdevelopment, various pathologies of power and corruption, plus of course notable achievements in war, literacy, economic development" as a systemic "mix of characteristics" that "designated the colonized people who had freed themselves on one level but who remained victims of their past on another."[30]

Said mostly associates these issues with colonial racial subordination.[31] Similarly, in terms of advancing queer rights globally within the postcolonial condition, Western epistemologies of normative sexuality also oppress and even dominate within projects that attempt to resolve queerphobia in former colonies.[32] Thus, even postcolonially, compared to Western sexualities, "all Other forms of sexuality and sexual practices are marginalized and cast as 'pre-modern', 'barbaric',

by a tide of social media posts, radio shows, demonstrations and conversations on the street.").

28. Said, *supra* note 27, at 207.

29. *Id.*

30. *Id.*

31. *Id.*

32. In sociologist Muna-Udbi Abdulkadir Ali's critique of the International Lesbian, Gay, Bisexual, Trans and Intersex Association's ("ILGA") annual reporting on lesbian and gay rights advancements worldwide, Ali has found that the ILGA frames international lesbian and gay rights progress through a Western self-reflexive lens of progressive normative sexuality:

> The [Western] lesbian and/or gay subject engaging in international development wants to produce a world in its own image, one wherein its sexual categories and desires are safe from being questioned or dismissed. This is evident in ILGA's insistence on enforcing a sexuality grounded in Western ways of understanding sexuality, sexual practices, gender, and identity. In addition, ILGA's report and objectives reflect the goals, struggles, and desires of the homonational subject rather than addressing the needs of all the diverse communities.

Muna-Udbi Abdulkadir Ali, *Un-Mapping Gay Imperialism: A Postcolonial Approach to Sexual Orientation-Based Development*, 5 RECONSIDERING DEV. 1, 10 (Dec. 12, 2017). In this way, "[a]s a product of homonationalism, ILGA works to 'save' Third World lesbian and gay people from themselves, their culture and their states." *Id.* at 11.

'savage' and 'unliberated.'"[33] Such epistemologies revive and perpetuate Orientalist discourses that undergird the racialized colonial relationships between the colonizer and the formerly colonized.[34] What results is homonationalism—or the idea of a "national homosexuality"—that "operates as a regulatory script for normative gayness or homonormativity, and the racial and national norms that reinforce this (homo)national subject."[35] Again, subaltern cultural freedom is still conditional in the postcolonial world.

By contrast, in the United States, the spatial occupation and temporality of settler colonialism have not been affected by any decolonization. While settlers exploited natural resources and human labor in new spaces, their desires focused on occupying Indigenous territories to ostensibly replace Indigenous populations with a permanent self-legitimized, self-governing sovereignty, free from the governing grasps of the settlers' originating parent state or *metropole*.[36] Thus, extrapolating from anthropologist Patrick Wolfe's formative observation about settler colonialism, the condition of subordination here is not a mere event but inhabits a continuing structure.[37] Such distinctions between settler colonial and extractive colonial states aid in our understanding of inequality and subordination, specifically in the United States.

Astonishingly, in our everyday consideration of American history, we do not presume that we're still in a colonial state. We commonly presume that our colonial past stands distantly behind us as a relic of remembered (or misremembered) history—in compartmentalized lessons in middle school history texts[38] or in yearly reenactments where we focus all too

33. *Id.* at 10.

34. *Id.* at 9–11.

35. *Id.* at 10 (referencing JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007)).

36. Saito, *Tales of Color*, *supra* note 24, at 25 ("In classic colonial regimes, decisions are made and implemented by colonial administrators in pursuit of interests often defined in a distant metropolis and generally involve exploitation of the land, labor, and natural resources of territories where, for the most part, the colonists do not intend to settle permanently. By contrast, settler colonists plan not only to profit from, but also to live permanently in the lands they occupy.") (footnotes omitted).

37. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006) (asserting that one dimension of settler colonialism is that settler "invasion is a structure not an event") (footnote omitted).

38. HOLT, RINEHART & WINSTON, UNITED STATES HISTORY: INDEPENDENCE TO 1914 36–41 (Student ed. 2006).

seriously on the details of revolutionary war uniforms.[39] The word "colonial" in the American lexicon has taken up a slippery connotation—appearing historic, quaint, and unassuming as a description for architectural aesthetics;[40] a curious type of cuisine;[41] or the name of a savings and loan bank.[42] In common dictionary meanings, "colonial" describes historically "the 13 British colonies that became the original United States of America" or, more generally, "the colonial period in the United States."[43] Drive up to a New England lobster shack and you can find the word "colonial" stamped on colorful, disposable paper placemats provided to diners for catching the cracked shells of steamed shellfish and teaching us so-called "fun facts" about the proverbial good ol' days.[44] All of these references make us forget the violent disposition of American colonialism and, more perniciously, forget that we have yet to decolonize. "Colonial" is a style, a vogue, a frame of mind that has been crystallized in time, apart from what modern trends preoccupy our present tastes and sensibilities. This presumption underscores the illusion stoked by our settler colonial legacy—that somehow a proper break temporally stands between our present and our "colonial" past from which we assume to have collectively emerged and decolonized. This is why America is exceptional. But its violent memories are also tucked away behind visions of buttery lobster tails and weekend trips to Colonial Williamsburg or quaint Portland, Maine. From that vantage point, the American colonial past is prologue, and the future is now. All that is "colonial" appears ever shrinking in our communal

39. *See, e.g.*, *Clothing Guidelines for Reenactors*, WASH. CROSSING HISTORIC PARK, https://www.washingtoncrossingpark.org/cross-with-us/clothing-guidelines [https://perma.cc/Z5LE-96VB].

40. *See, e.g.*, Maggie Burch, *What You Should Know About Colonial-Style Houses*, HOUSE BEAUTIFUL (Aug. 1. 2022), https://www.housebeautiful.com/design-inspiration/a23647602/american-colonial-style-houses-facts [https://perma.cc/6TC6-ZYEM].

41. *See, e.g.*, Rina Rapuano, *5 Places to Eat and Drink like an American Colonist*, DCREFINED (April 6, 2017), https://wjla.com/dc-refined/5-places-to-eat-and-drink-like-an-american-colonist [https://perma.cc/XHK6-W7KE].

42. *See, e.g.*, Colonial Savings, *Home*, https://www.gocolonial.com [https://perma.cc/BP7K-7GFQ].

43. *Colonial*, THE AM. HERITAGE DICTIONARY, https://www.ahdictionary.com/word/search.html?q=colonial [https://perma.cc/MG5H-VMWF].

44. For instance, "[d]uring colonial days, lobsters were plentiful and were the food for the poor." *How to Eat a Lobster Placemat*, ME. LOBSTER NOW, https://www.mainelobsternow.com/supplies/how-to-eat-a-lobster-placemat [https://perma.cc/KQ98-J8P4].

rearview mirror and presumes that we have since arrived from that earlier past.

This illusory cultural script drives American settler colonialism. Our envisioned future is not now and never was. Our colonial past is still our present and future. Essentially, we are in a loop, refashioning the same tropes of colonial subordination and settler supremacy that inevitably deny us the progressive teleology that we are told is possible in the American project. We think we have progressed, but the same tropes still ensnare us. Without knowledge that we have yet to decolonize, our colonial situation resurges and regenerates continually.[45]

Our colonial history extends to the present as an ongoing legacy—one that makes settler colonialism a structure and not an event that is over and done.[46] In this fashion, Natsu Taylor Saito observes that recognizing the pattern of settler colonialism is crucial for comprehending the racialized hierarchies in America that are obscured within the domestic progress for civil rights presently:

> Understanding the structural dynamics of the United States through the lens of settler colonial theory can provide us with analytical tools that facilitate a realistic assessment not only of the conditions *currently faced* by Indigenous peoples, but also peoples brought to this country as enslaved workers, incorporated by virtue of territorial annexation, or induced to migrate without the option of being part of the settler class.[47]

For instance, consideration of the United States as a settler colonial society encourages us to tie the inequities faced by marginalized groups domestically during 2020's COVID-19 public health crisis to the strand of White supremacy originating

45. *See* Aileen Moreton-Robinson, *Introduction: Critical Indigenous Theory*, 15 CULTURAL STUD. REV. 11, 11 (2009). Under Moreton-Robison's view, "new conceptual models" of colonial studies show us that, for instance, in the United States, "colonization has not ceased to exist; it has only changed in form from that which our ancestors encountered." *Id.*

46. Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548, 550 (2019) ("U.S. settler colonialism's invasion may have started in the past, but it is a continuing structure of elimination and subordination that is happening now.") (footnote omitted).

47. Saito, *Tales of Color*, *supra* note 24, at 22.

from our colonial era.[48] Knowing about our settler legacy helps us trace the pandemic's systemic inequalities to institutionalized racism and economic disparities embedded in social policies decades in the making.[49] Expanding observations even more broadly, American settler colonial experiences do not just affect our lives domestically. Historian Walter Hixson has also proposed that our settler colonialist legacy helps explain the brutal exceptionalism of America's affairs abroad: "[T]he long and bloody history of settler colonialism laid a foundation for the history of American foreign policy—especially its penchant for righteous violence."[50] In Hixson's view, America's exceptionalism is a trope that has been reproduced by the specifically vicious brand of its settler colonial experience:

> American history is the most sweeping, most violent, and most significant example of settler colonialism in world history. American settler colonialism evolved over the course of three centuries, resulting in millions of deaths and displacements, while at the same time creating the richest, most powerful, and ultimately the most militarized nation in world history.[51]

This is our present settler colonial reality, which bankrupts the progress and ingenuity that has capitalized on America's origin story as the revolution of some plucky former British colonies into an independent national sovereignty. The specifics of the American colonial experience have always been obscured underneath a more seemingly progressive premise.

A. An Empire State of Mind

Like many Western colonial expansions, settler colonialist experiences are often rooted to some extent in capitalist enterprise. According to historian Lorenzo Veracini, "[t]he list of

48. *See generally* Monika Batra Kashyap, *U.S. Settler Colonialism, White Supremacy, and the Racially Disparate Impacts of Covid-19*, 11 CALIF. L. REV. ONLINE 517 (2020).

49. *Id.* at 518–19.

50. HIXSON, *supra* note 20, at ix.

51. *Id.* at 1–2 (citing to ARIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 8–14 (2010)); Anders Stephanson, *An American Story? Second Thoughts on Manifest Destiny, in* MANIFEST DESTINES AND INDIGENOUS PEOPLES 21 (David Maybury-Lewis, Theodore Macdonald, Biorn Maybury-Lewis eds., 2009).

settler colonial endeavours characterised by a corporate foundation is quite extensive, and involves projects operating in a variety of frontiers at quite different times."[52] Other than a settlement seeking the Promised Land and sheltering away from religious persecution in England, the Massachusetts Bay Colony, for example, was also a joint-stock operation for grain, fish, meat, and fur trading.[53] But here is where extractive colonialism and settler colonialism diverge: "By contrast, settler colonists plan not only to profit from, but also to live permanently in the lands they occupy."[54] Radiating from this permanent residency is the eventuality of self-rule, the establishment of a body politic that recognizes an inherent sovereignty apart from the metropole's grasp: "Settler projects are recurrently born in a vacuum of empire that is intentionally sought, and in a displacement that is associated with a determination to establish unique political settings."[55] And "[settler colonialism] is the beginning of a distinct political tradition and its sovereignty."[56]

This development of independent settler sovereignty manifests in settler preoccupation with land. Wolfe describes transitively how "[l]and is life—or at least, land is necessary for life. Thus, contests for land can be—indeed, often are—contests for life."[57] If sovereignty bolsters existence, then acquiring new territories is paramount. Consequently, distilled from such notions, "[t]erritoriality is settler colonialism's specific, irreducible element."[58] Veracini argues that "[settlers] also interpret their collective efforts in terms of an inherent sovereign claim that travels with them and is ultimately, if not immediately, autonomous from the colonizing metropole."[59] In this way, settlers are "those who have come to stay, those who will not return 'home,'"[60] and the conquest of new lands, with

52. LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 59 (2010) [hereinafter VERACINI, SETTLER COLONIALISM].

53. BENJAMIN W. LABAREE, COLONIAL MASSACHUSETTS: A HISTORY 92–94 (1979); DAVID S. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA 129–32 (1972).

54. Saito, *Tales of Color*, *supra* note 24, at 25.

55. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 58.

56. *Id.* at 58–59.

57. Wolfe, *supra* note 37, at 387.

58. *Id.* at 388.

59. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 53.

60. *Id.*

the accompanying territoriality, externalize settler sovereignty.[61]

Driven to occupy new spaces and bearing a sense of potential in their hearts, American settlers envisioned the desired land invariably as *terra nullius*—"land of no one"[62]—even if such land already belonged to others.[63] Exploring settlers' Promised Land themes, activist Andrea Smith describes how "colonizers expected to find 'Eden' in the Americas," which religiously invigorates the sense of territoriality with a "colonial and patriarchal lens."[64] For settlers, this territoriality allowed them to conveniently disregard Indigenous peoples' presence in order to eliminate them and develop a collective self-legitimizing sense of belonging to captured spaces.[65] The most drastic and apparent form of elimination is, of course, genocide. As Wolfe observes, "[s]ettler colonialism destroys to replace."[66] In earlier American settler experiences, Hixson recounts that such physical annihilation arose most dynamically in the mid-eighteenth century when "the explosive growth of settler colonialism undermined the long peace, and ambivalent relations [between European settlers and Indigenous peoples] gradually gave way to indiscriminate violence and ethnic cleansing."[67] Closer dives into American history reveal many

61. *See* Mahmoud Mamdani, AC Jordan Professor of African Studies, When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa, Inaugural Lecture at University of Cape Town 1 (May 13, 1998) ("Settlers are made by conquest, not just by immigration.").

62. *Terra Nullius,* BLACK'S LAW DICTIONARY (11th ed. 2019).

63. *See* Priya S. Gupta, *Globalizing Property*, 41 U. PA. J. INT'L L. 611, 639 (2020) ("The combination of cultural superiority and the idea that nonagricultural use was of lesser worth than agricultural use created a lens through which land *seen* as unused was therefore considered *empty*. To perceive of such land as *terra nullius*—empty land—stood in stark contrast to generations of indigenous people living on it, and yet it served in a circular way in certain geographies to justify the idea that such land had just been 'discovered' and could therefore be occupied and claimed by Europeans.") (footnote omitted).

64. Andrea Smith, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*, 16 GAY & LESBIAN Q. 41, 51 (2010).

65. *See* HIXSON, *supra* note 20, at 11 (noting that part of the act of settler colonization "required not only cleansing of the land, either through killing or removing, but sanitizing the historical record as well").

66. Wolfe, *supra* note 37, at 388.

67. HIXSON, *supra* note 20, at 48–49.

instances of the physical and violent annihilation of Indigenous lives at the hands of European settlers.[68]

But genocide is not the only method settlers used for elimination. The settler drive to establish sovereignty also engendered structurally and culturally pernicious means to remove Indigenous groups.[69] In infamous examples such as the Cherokee Trail of Tears, American settlers displaced various Indigenous populations from their tribal lands in extensively devastating ways, equating more or less to "[m]ass incarcerations" that compulsorily uprooted tribal and cultural legacies and ways of life of all Indigenous nations involved.[70] As settlers saw land as *terra nullius*, they believed deeply that they were on a "civilizing mission."[71] By feeling so, they sustained ways of "othering" based on perceived differences and broadened efforts from genocide to domesticating non-settlers.[72] Settlers must accomplish both the capture of territory while justifying their self-imposed "civilizing mission"—or colonization—of land and people whom settlers regard as inferior.[73] As Hixson notes, a curious psychology is what pushes settlers toward supremacist thinking: "Historical distortion and denial are endemic to settler colonies."[74] For example, "[i]n order for the settler colony to establish a collective usable past, legitimating stories must be created and persistently affirmed as a means of naturalizing a new historical narrative."[75] This observation squares evenly with psychologist Ashis Nandy's famous observation that ultimately, "[c]olonialism colonizes minds in addition to bodies."[76] Concurring with this notion, Smith illustrates the amnesic, psychological dimensions of settlers, observing that

> [c]onsequently, they viewed the land and indigenous peoples as something to be used for their own purposes; colonizers could not respect the integrity of either the land or

68. *See* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 60–67 (2020) [hereinafter SAITO, SETTLER COLONIALISM].

69. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 16–17.

70. SAITO, SETTLER COLONIALISM, *supra* note 68, at 68–69.

71. *See* VERACINI, SETTLER COLONIALISM, *supra* note 52, at 28–29, 33.

72. *Id.* at 16 (domesticating quote).

73. *See also* HIXSON, *supra* note 20, at 6–7, 10–11.

74. *Id.* at 11.

75. *Id.*

76. ASHIS NANDY, THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM xi (2d. ed 2009).

> indigenous peoples. "The resulting tensions, then could be resolved . . . only by being played against . . . the natural world and natural peoples . . . the way the people of Christian Europe ultimately could live with the reality of the Noble Savage in the Golden World was to transform it progressively into the Savage Beast in the Hideous Wilderness." Within this colonial imagery, the Native is an empty signifier that provides the occasion for Europe *to remake its corrupt civilization*.[77]

The internalized and collective settler psychology of supremacy motivates settler colonial projects and spurs the ensuing violence and marginalization of various non-settler groups.[78] The persistence of these narratives in American settler colonialism matters. They encompass the imaginative—and often nationalistic and patriotic—narrative techniques for indefinitely sustaining an American empire state of mind.

B. Settler Colonialism's Sexuality Project

1. White Settler Heteropatriarchy

In part, this empire state of mind is preoccupied with normalizing sexuality. The American settler state has always been a heteropatriarchal one that presides over a race-gender-sexuality project. White heteropatriarchy serves as the substantive organizing grammar of elimination itself.[79] Its maintenance is at the ends of settler sovereignty and settlers' civilizing mission.[80] Historian Evelyn Nakano Glenn notes, "[m]asculine whiteness . . . became central to settler identity, a status closely tied to ownership of property and political sovereignty."[81] This sovereignty "in turn articulated with

77. Smith, *supra* note 64, at 51 (quoting KIRKPATRICK SALE, THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY 203 (1990)) (emphasis added); *see also* Wolfe, *supra* note 37, at 388.

78. HIXSON, *supra* note 20, at 20 ("Psychological drives and conditions such as trauma, denial, repression, projection, fantasy, guilt, rationalization, narcissism, victimization, and others permeate the history of colonialism and therefore must be considered, however imperfectly, in any effort to gain a comprehensive understanding.").

79. Glenn, *supra* note 20, at 60.

80. *See id.* at 60–61.

81. *Id.* at 60.

heteropatriarchy, which rendered white manhood supreme with respect to control over property and self-rule."[82]

To be sure, heteropatriarchy and its subordinative practices of gender and sexual behaviors were imported from longstanding European cultural norms. Expressed in how American settler societies conceived of the family unit—which was both central to the fundamental makeup of settler colonies and to settler survival[83]—White heteropatriarchy framed gender roles and legal statuses of settlers and self-legitimized the logic of elimination.[84] Settler wives, for instance, were legally subordinated by the status of their husbands, had no separate legal independence apart from their husbands, and were relegated to supporting male colonizers.[85] When settler women did insert themselves directly into the operations of colonization, they did so typically in the civilizing sphere, "gain[ing] agency by taking part in the colonial encounter, for example as missionaries or in promoting policies of child removal."[86] Reiterating the observations of others who study settler colonialism, Glenn notes, "it was presumed that 'heteropatriarchal nuclear-domestic arrangements, in which the [White] father is both protector and leader should serve as the model for social arrangements of the state and its institutions.'"[87] From there, heteropatriarchal norms and narratives radiated across settler societal beliefs and behavior.[88]

Examples of White heteropatriarchy as the organizing principle underscore Glenn's remark that American settler colonialism was substantively a "race-gender project" that "transplanted certain racialized and gendered conceptions and regimes from the *metropole* but also transformed them in the

82. *Id.*

83. *Id.* at 57–58 (contrasting the English colonies from other European colonies in the Americas based on the migration of families and noting the "advantageous" impact of family-based colonization for settlers).

84. *Id.* at 60.

85. *Id.* (observing that "[s]ettler wives [were] denied an independent legal identity; instead, her identity was merged into that of her husband, and her property and labor were under his control"); *see also* HIXSON, *supra* note 20, at 10, 34.

86. HIXSON, *supra* note 20, at 10 (footnote omitted).

87. Glenn, *supra* note 20, at 60 (quoting Maile Arvin, Eve Tuck & Angie Morrill, *Decolonizing Feminism: Challenging Connections Between Settler Colonialism and Heteropatriarchy*, 25 FEMINIST FORMATIONS 8–34 (2013)).

88. HIXSON, *supra* note 20, at 10 ("'Persistent gendering' marginalized the feminine and thus exalted male power.").

context and experiences in the New World."[89] As "exogenous others seeking to claim rights to land and sovereignty over those who already occupied the land," settlers harnessed both racist and gendered discourses to "conceiv[e] of indigenous peoples as less than fully human" in order to "justif[y] disposing them and rendering them expendable and/or invisible."[90] Concurrently and reflexively, such discourses also allowed settlers to "conceive[] of themselves as more advanced and evolved, bringers of progress and enlightenment to wilderness."[91] Out of all this, "[w]hat emerged of the settler colonial project was a racialized and gendered national identity that normalized male whiteness. . . . [Settlers] harnessed race and gender to construct a hierarchy of humankind."[92]

2. Sexual Deviance and Settler Constructions of Sexuality

Settler hierarchy, however, runs deeper than masculine-over-feminine privileging. Scholars who align with Glenn on this race-gender project have also observed that the nation-building drive of settler colonialism not only begets constructions that intertwine race and gender but have also *included constructions of sexuality* to propagate White heteropatriarchy.[93] Indeed, sexual behaviors and performative gender deviations from heteropatriarchal norms came under target for elimination:

> From the first point of contact with European colonizers—long before modern lesbian, gay, bisexual, transgender, or queer identities were formed and vilified—Indigenous peoples, enslaved Africans, and immigrants, particularly immigrants of color, were systematically policed and punished based on actual or projected "deviant" sexualities and gender expressions, as an integral part of colonization, genocide, and enslavement.[94]

89. Glenn, *supra* note 20, at 60.
90. *Id.*
91. *Id.*
92. *Id.*
93. *See* HIXSON, *supra* note 20, at 10–11.
94. MOGUL ET AL., *supra* note 19, at 1.

Working within post-structuralist biopolitical theorizing,[95] ethnographer Scott Lauria Morgensen posits that "[i]n the Americas and, specifically, the United States, the biopolitics of settler-colonialism was constituted by the imposition of colonial heteropatriarchy and the hegemony of settler sexuality, which sought both the elimination of Indigenous sexuality and its incorporation into the settler sexual modernity."[96] Others note that, in relation to normalized sexualities under White heteropatriarchy, so-called "deviant sexualities were projected wholesale onto Indigenous peoples" and that such deviancy was associated with "sexual sin."[97]

To essentialize or "naturalize hierarchy," rigid patriarchal gender binaries were imposed to distinguish settlers from Indigenous people and their more fluid gender self-embodiment and presence: "Although Indigenous societies are widely reported to have allowed for a range of gender identities and expressions, colonization required the violent suppression of gender fluidity in order to facilitate the establishment of hierarchical relations between two rigidly defined genders, and, by extension, between colonizer and colonized."[98]

For example, the presence of sexual and gender identities and practices in Indigenous societies that were unrecognized within settler gender binaries led to the settler perception that such identities and practices represented an immoral sexual primitivity.[99] They allowed settlers to believe that all Indigenous people must have embodied such immorality, adding

95. SCOTT LAURIA MORGENSEN, SPACES BETWEEN US: QUEER SETTLER COLONIALISM AND INDIGENOUS DECOLONIZATION 32 (2011) ("I argue that the biopolitics of settler colonialism produces settler sexuality as the context traversed by non-Native and Native people formulating queer modernities.").

96. *Id.* at 34.

97. MOGUL ET AL., *supra* note 19, at 2; ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 10 (2015).

98. MOGUL ET AL., *supra* note 19, at 3.

99. *See id.* ("Accounts of missionaries and colonists alike are replete with alternatively voyeuristic and derogatory references to Indigenous 'men' who take on the appearance, mannerisms, duties, and roles of 'women,' and who simultaneously described or assumed to be engaging in sexual conduct with members of the same 'sex.' Such sexual relationships were generally described as degrading, involving 'servile' positions and being 'used' by men, although in some instances, they are characterized as special and valued friendships. Tales of women who dressed and acted as if they were men (according to Western ideas) while concealing their 'true' nature (assumed to be female), often accompanied by derisive descriptions of sexual relations with women, were also recorded, albeit far less frequently.") (referencing JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 281–334 (1992)).

yet another reason beyond racial constructs for elimination while legitimizing Eurocentric heteropatriarchal sexual hegemonies: "Knowing European manhood's boundaries to be porous and needing reinforcement, and meeting indigenous possibilities that threw such boundaries into question, early conquerors invoked berdache as if assigning a failure to differentiate sex to Indigenous people, but they did so to define sexual normativity for them *all*."[100] The sexual immorality implicated in such primitivity and deviancy, compared to practices within heteropatriarchal normativity, seemed to elevate normative settler sexuality above Indigenous sexualities.[101] Non-heteronormative sexual practices that fell under this deviancy, such as sodomy, "very often became a useful pretext for demonizing—and eliminating—those whose real crime was to possess [the land that] Europeans desired."[102] Instrumentally, religion then served as a means for reifying settler heteropatriarchy, helping to actively police "deviant" sexualities and sexual behaviors.[103] Religion, of course, continues to be a modern salient force for marginalizing queerness.[104]

The use of sexuality in the settlers' civilizing mission did not simply and exclusively justify violent, punitive instances in which Indigenous individuals were perceived as challenging heteropatriarchal norms and practices. Settlers projected sexual deviancy on the Indigenous to both wholesale subordinate them—or, as Morgenson and others have noted, to "queer" them—and to reinforce the sexual norms and practices of individuals who belonged within settler societies.[105] Beyond using sexuality to otherize Indigenous people and other peoples of color, the settler colonial state is often interested in regulating intra-settler sexual deviance as well. In this way, just as with gender, heteropatriarchy motivated the elimination of what its norms regarded as "deviant" sexual behaviors—and ultimately,

100. MORGENSEN, *supra* note 95, at 37 (emphasis in original).

101. *Id.* ("By imputing sexual primitivity to racialized targets of conquest, early-modern narratives of berdache affirmed the fulfillment of natural sex and desire by conquerors.").

102. MOGUL ET AL., *supra* note 19, at 3 (footnote omitted).

103. *Id.* at 4.

104. *E.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding that First Amendment protects plaintiff's religiously motivated objections against complying with state nondiscrimination laws that would enforce service for gay clientele).

105. MOGUL ET AL., *supra* note 19, at 2.

in more contemporary settings, "deviant" sexualities. Thus, both non-heteronormative behaviors and sexualities would threaten the settler status quo. Policing Indigenous people through racialized sexuality also distinguished those within settler societies who may deviate from heteropatriarchal norms regarding sexual behaviors and expressions: "The queering of Native peoples defined not only settler sexuality, broadly, but also the definition of queer subjects *among* white settlers: as a primitive, racialized sexual margin akin to what white settlers attempted to conquer among Natives."[106] This observation, of course, does not assert that the practice of normalizing sexual behaviors and sexuality started only with the American settler society, nor does it indicate that this normalization was on a strictly identified heterosexual-versus-homosexual binary, as such identity categories had not yet emerged.[107] Rather, sexual deviancy in Indigenous practices, as observed by settlers, was phenomenologically aimed at distinguishing between the civilized and the primitive/uncivilized, as "[p]ersons marked as berdache became targets of violent efforts to reconfigure Indigenous society in colonial and masculinist terms;" the settler interpretation of Indigenous sexualities and practices through projected heuristics upon berdache became, according to Morgensen, "a logic of sexual primitivity and civilization that created Indigenous people and colonists in relation to each other."[108] In other words, "if colonial observers invoked berdache to mark Indigenous difference, the aim was to teach both colonial *and* Indigenous subjects the relational terms of colonial heteropatriarchy."[109] Henceforth, "in settler societies in the Americas, sexuality served as a primary locus in projecting settler colonial power."[110]

Yet, such production of heteropatriarchy at the time has an accumulative effect on our contemporary sexual hierarchies. Settler colonialism conditions how we organize modern sexualities. Morgensen posits that "[i]n the United States, the

106. MORGENSEN, *supra* note 95, at 32.

107. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 (2d. ed. 1983) (noting that historians have located the emergence of categories of "homosexual" and "heterosexual" as a nineteenth-century occurrence) [hereinafter D'EMILIO, SEXUAL POLITICS].

108. MORGENSEN, *supra* note 95, at 37.

109. *Id.*

110. *Id.* at 35.

sexual colonization of Native peoples produced modern sexuality as 'setter sexuality': a white and national heteronormativity formed by regulating Native sexuality and gender while appearing to supplant them with the sexual modernity of settlers."[111] From here, "[q]ueer modernities in a settler society are produced in contextual relationship to the settler colonial conditions of modern sexuality."[112] Perhaps this observation extends the transformation that Glenn mentions of heteropatriarchy as it was replicated by settlers on conquered lands.[113] Again, "[t]he sexual regulation of Native peoples by the biopolitics of settler colonialism in the United States was a proving ground for producing *settlers as subjects of modern sexuality*."[114] In contrast to primitivity, White heteropatriarchy, which represented "modern" civilization, became a way not just to "other" and regulate Indigenous people but also to nationalize settler identity—"a method *to produce* settler colonialism"[115] and legitimize continued occupation. This sexualizing legacy demonstrates settler colonialism's tendency to universalize sexuality and gender according to its positioning and its civilizing mission.

3. Earlier Sodomy Criminalization

We can trace this production of heteropatriarchal norms by examining how early settler states policed behavior that contradicted the promotion of heteropatriarchy and settler sovereignty—particularly in the context of the legal maintenance of the settler family structure. As Anthony Michael Kreis has shown, "[m]arriage and family formation were vital for economic survival and states adopted laws to channel sexual conduct into marital relationships and reinforce patriarchal life."[116] Kreis and others have noted how "New England colonies, for example, outlawed individuals from 'solitary living' so that every colonist was 'subject to the governance of family life.'"[117]

111. *Id.* at 31.
112. *Id.*
113. *See* Glenn, *supra* note 20, at 58.
114. MORGENSEN, *supra* note 95, at 42 (emphasis added).
115. *Id.*
116. Anthony Michael Kreis, *Policing the Painted and Powdered*, 41 CARDOZO L. REV. 399, 409 (2019) [hereinafter Kreis, *Policing*].
117. *Id.* (quoting 3 PUBLIC WOMEN, PUBLIC WORDS: A DOCUMENTARY HISTORY OF AMERICAN FEMINISM 226 (Dawn Keetley & John Pettegrew eds., 2002)).

Similarly, Sylvia Law also mentions how "[f]amilies of colonial America were deeply patriarchal."[118] Law adds a congruent legal spin to Glenn's observations about settler wives: "By custom and law, married women were civilly dead and subject to the control of their husbands."[119] Both observations underscore settler patriarchy's promotion of men as heads of families and its significant cultural and legal resonances: "The individual as a conception in Western thought has always assumed that behind each man—that is, each individual—was a family. But the members of that family were not individuals, except the man, who was by law and custom its head."[120]

In terms of regulating the sexual conduct of colonial settlers, maintaining the settler family was the goal. Correspondingly, Kreis summarizes that "[l]aws in the colonial and federalist periods regulated sexual conduct typically as general prohibitions for crimes against nature."[121] If, during this period, "the family structure is a core function of ethics, mores and the law," then in terms of regulating sexuality, such crimes against "nature" preserved and promoted the settler family as status quo.[122] In this vein, sodomy criminalization during this earlier settler period had the purpose of regulating conduct within settler societies rather than eliminating non-heteronormative sexualities.[123] Historians have hinted at the margins of this intersection. For instance, in noting that sexual deviancy during the earlier settler era was policed with consequences, such as "death for sodomy," historian John D'Emilio attributes, in part,

118. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 199 (1988) [hereinafter Law, *Gender*].

119. *Id.* (referencing CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 181 (1980)).

120. *Id.* at 199–200 (quoting C. Degler, *supra* note 119, at 189).

121. Kreis, *Policing*, *supra* note 116, at 409.

122. Law, *Gender*, *supra* note 118, at 199 ("Colonial Americans 'discouraged forms of sexuality which would complicate social organization by producing persons with ambiguous claims to a position within the family.'" (quoting JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 32 (1980))).

123. *Id.* at 200. Instead, as Law further notes,

> [i]n colonial America, laws condemning sodomy were one piece of a highly intrusive web of social intervention enforcing patriarchal family arrangements. Religion and family provided individuals a sense of identity, oneness with others, and purpose in life, but at the expense of the individual liberty and equality of the majority.

Id.

such grave policing of non-heteronormative sexual practices to the default single-viewed purpose of sex and sexuality of the colonial world—*for creating families*: "For the North American settlers who migrated from England in the seventeenth and eighteenth centuries, the imperative to procreate dominated the social attitude toward and organization of sexuality."[124] Like Glenn and others, D'Emilio notes the heteropatriarchal family was at stake:

> The production of children by each conjugal pair was as much a necessity as the planting of crops in the spring, since the cooperative labor of parents and their offspring generated the material goods that sustained life. Fertility in colonial America was extraordinarily high; the average pregnancy rate for white New England Women was more than eight.[125]

As D'Emilio notes that at this time, "'[h]eterosexuality' remained undefined, since it was literally the only way of life."[126] Sodomy crimes were not then used to target non-heteronormative sexual identities, which were still undefined categories. Such crimes would do so subsequently;[127] but for the time being, they aimed toward preserving settler family structures.

Other historians have corroborated D'Emilio's views. Noting the high birth rate that occurred in the American colonies, historian Jonathan Ned Katz has remarked similarly that sexual behavior and the ordering between the sexes within New England colonial societies was framed under a "reproductive imperative."[128] Thus, laws delineated sexual deviancy and punished non-procreative sexual behaviors, such as sodomy and masturbation.[129] And this "reproductive imperative" conveniently reinforced a gender hierarchy that carved out binaries between men and women and privileged men over

124. D'EMILIO, SEXUAL POLITICS, *supra* note 107, at 10.
125. *Id.*
126. *Id.*
127. An example of a subsequent law that criminalized consensual same-sex sodomy would be the Texas statute that was eventually overturned in *Lawrence v. Texas*, which provided that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003) (overturned by Lawrence v. Texas, 539 U.S. 558 (2003)).
128. JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 37 (2007).
129. *Id.* at 38.

women within heteronormative, reproductive terms.[130] Such "procreative order[ing]" essentializes male and female genders within a heteropatriarchal framework resembling—if not identical to—American settler colonialism's race-gender-sexuality grammar.[131] Through heteropatriarchy, this rigid division between male and female genders invigorates elimination and simultaneously produces settler sovereignty. In this way, the policing of sexual behavior and gender roles was not exclusively enforced against Indigenous people but also coded within settler societies as well—*against White settlers themselves*. Here, observers from queer historical studies confirm what Morgensen notes more directly in settler colonial discourse. Indeed, "[s]ettler colonialism is a primary condition of the history of sexuality in the United States."[132] Like D'Emilio's observation that heterosexuality remained undefined as a default perspective, Morgensen remarks similarly that within the realm of sexuality in the United States, "[s]ettler colonialism is present precisely when it appears not to be, given that its normative function is to appear inevitable and final."[133] By regulating sexuality, what was inevitable and final at this historical juncture was settler heteropatriarchy hidden behind the promotion of the White settler family.

C. Settler Sexuality Project in Bowers

When sexual expression and behavior merged with the concept of sexual identities—more formatively shaping status-based sexual identities familiar to us today—sodomy became used more directly by the heteropatriarchal status quo against sexual minorities.[134] The shift in underlying gender roles and the changing nature of family in the American settler state during the industrialization era and urbanization conflicted

130. *Id.* ("Women and men were constituted within this mode of procreation as essentially different and unequal. Specifically, the procreative man was constructed as seminal, a seed source. The procreative women was constituted as a seed holder and ripener, a relatively 'weaker vessel.'").

131. *Id.*

132. MORGENSEN, *supra* note 95, at 42.

133. *Id.*

134. Kreis, *Policing*, *supra* note 116, at 411 ("Same-sex intimacy did not threaten the primacy of masculinity or the patriarchal order in antebellum America in the way LGBTQ persons did in the late nineteenth century and early twentieth century, as LGBTQ persons formed community bonds and a publicly visible cultural identity closely tied to gender nonconformity.").

with settler heteropatriarchal practices and values.[135] The rise of non-heteronormative sexual identities threatened the family-oriented structure of settler sovereignty and gender roles.[136]

Criminalizing sodomy polices both sex acts and the existence of non-heteronormative sexual identities.[137] Such criminalization externalizes heteropatriarchy's role in American settler colonialism's sexuality project. As some have noted, "[p]atriarchy denigrates genders . . . and often criminalizes behavior that deviates from the patriarchal conception of masculinity."[138] With a gendered male-dominant and female-subordinate lens, Western heteropatriarchy has stereotypically read the act of consensual sodomy between two men so that "a person of the male sex who engages in a sexual practice that is labelled 'feminine' will be gendered 'feminine' and thus subjected to subordination like the female sex."[139] Thus, in some legal systems historically, "[a] man who practices sex in the female manner (by being penetrated) has his litigation rights abridged just as if he were a woman."[140] In this vein, Cary Franklin has noted that discriminatory laws against queer identities in the United States, including "[l]aws and policies that banned same-sex intimacy," essentially "enforc[ed] traditional, normative conceptions of sexuality and gender. A central aim of such laws was to channel men and women into a single, normative family form: the heterosexual marital family."[141] Is this not colonizing? Consensual male sodomy disturbs settler heteropatriarchal sensibilities not merely because the act itself is non-procreative but also because, with the rise of modern queer sexualities, same-sex sodomy infringes upon mainstream male-female

135. *See* D'EMILIO, SEXUAL POLITICS, *supra* note 107, at 11–12 (describing how industrialization and free-labor capitalism provided individuals with autonomy but also changed the importance of the traditional family unit).

136. *See id.* (describing the rise of homoerotic relationships).

137. Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1722 (1993) ("Sodomy statutes maintain themselves in part by their equivocal reference to identities and/or acts. The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity.").

138. Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 MICH. J. GENDER & L. 195, 247 (1995).

139. *Id.* (footnote omitted).

140. *Id.* (footnote omitted).

141. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 827 (2014).

gender norms—the crux of settler power and sovereignty. As noted by Law,

> the censure of homosexuality cannot be animated merely by a condemnation of sexual behavior. Instead, homosexuality is censured because it violates the prescriptions of gender role expectations. A panoply of legal rules and cultural institutions reinforce the assumption that heterosexual intimacy is the only natural and legitimate form of sexual expression. The presumption and prescription that erotic interests are exclusively directed to the opposite sex define an important aspect of masculinity and femininity.[142]

Heuristically, the assumption arises that

> [r]eal men are and should be sexually attracted to women, and real women invite and enjoy that attraction. Though complex rules govern the ways in which heterosexual attraction may be appropriately expressed, the allure of the opposite sex is pervasively assumed. Conversely, the culture and law presume and prescribe an absence of sexual attraction between people of the same sex.[143]

Thus, anti-sodomy laws punish modern queer identities while structuring settler sovereignty and maintaining its sexuality project into our contemporary settler era.

1. Settler Heteropatriarchy in *Bowers*'s Majority

In the late-twentieth century, *Bowers v. Hardwick* exposed this ongoing maintenance in the American settler state.[144] Justice Byron White's majority opinion reifies settler heteropatriarchy while criminalizing queerness. The modern queerphobic alarm against sodomy appeared readily in *Bowers* when the Court upheld Georgia's anti-sodomy law.[145] When

142. Law, *Gender*, *supra* note 118, at 196.
143. *Id.*
144. 478 U.S. 186 (1986).
145. The actual section of Georgia's anti-sodomy law provided that:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

Michael Hardwick challenged Georgia's anti-sodomy statute, his challenge was not merely motivated by a personal sense of injustice from his arrest for engaging in oral sex with another man in his own home; he was also motivated by a pursuit to question the constitutionality of sodomy laws.[146] The Court's recognition of Hardwick as a self-identified "practicing homosexual" likely equated his identity with sexual conduct in ways that unintentionally helped the Court's reasoning.[147] On that level, we can begin to understand how *Bowers* relates to settler colonialism by seeing how the decision signifies law's complicity in reinforcing settler heteropatriarchal authority while condemning Hardwick's sexual identity—and, by extension, condemning other non-heteronormative sexual identities. And subtextually, by situating *Bowers* within settler colonialism, the Court's recognition and its anti-gay holding suggest that Hardwick's queer existence and practices violate norms enshrined by American settler heteropatriarchy; by extension, they disturb its ongoing sovereignty. In other words, *Bowers* exemplifies how the settler status quo maintains the violent aspects of its civilizing mission by criminalizing queer identities and othering them at the same time.

Justice White's majority opinion reinforces the heteropatriarchal structure of settler sovereignty and validates Morgensen's observation that settler heteropatriarchy sets up the conditions for regulating modern sexualities.[148] First, after

> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years[.]

GA. CODE ANN. § 16-6-2 (1984).

146. DAVID A.J. RICHARDS, THE SODOMY CASES: *BOWERS V. HARDWICK* AND *LAWRENCE V. TEXAS* 78 (2009) (observing that Hardwick continued to pursue his arrest under the Georgia anti-sodomy law even after the case was dropped by the district attorney because he had agreed for the ACLU represent him in a constitutional challenge against the anti-sodomy law).

147. *See* Jean L. Cohen, *Is There A Duty of Privacy? Law, Sexual Orientation, and the Construction of Identity*, 6 TEX. J. WOMEN & L. 47, 67–69 (1996). Cohen notes that Hardwick's strategy to self-identify as a "practicing homosexual" and is one who currently and will likely continue to engage in private same-sex activities was meant to "deemphasize the acts at issue, to sever the identity of homosexual from the identity of the sodomite" as part of a strategy to persuade the Court to protect sexual minorities from laws the interfered with an accidental aspect of their identity. *Id.* But as Cohen further notes, the approach backfired by allowing the Court to "equate all homosexual acts with sodomy and to subsume them under the rubric of homosexual identity." *Id.*

148. *See* MORGENSEN, *supra* note 95, at 35 ("[I]n settler societies in the Americas, sexuality served as a primary locus in projecting settler colonial power.");

categorically essentializing Hardwick's sexual identity and using identity as a differentiating component for its decision, the *Bowers* Court emphatically drew its boundaries between intimate sexual acts of "homosexuals" versus "heterosexuals"—privileging heterosexual sex over homosexual sex because of its role and function in the heteronormative family.[149] Thus, no constitutional privacy protections could be afforded to Hardwick's private sexual conduct with another man. As Justice White writes, "none of the rights announced [in prior privacy cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy" because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[150] The Court "queered" sodomy and de-legitimized it against settler heteronormative sex. By using the reproductive imperative to distinguish what was and was not protectable sex, the Court's invocation of family harkens back to that invisible baseline of unmentioned heteronormativity that both Katz and D'Emilio have observed from pre-industrial settler America.[151] The difference here is that the Court can now privilege heteropatriarchy specifically through a division between homosexual and heterosexual identities since heteronormativity is no longer an unstated default position of the colonial status quo; partly through the modern scientific and social categorization of sexual identities, heteronormativity has now a pronounced history of privileging.[152] In this way, whether the *Bowers*'s majority was aware or not, the decision identified the modern incarnation of the settler family as the protective site of society's engagement with sex while stereotyping "homosexuals" as people outside that familial structure. Invariably then, *Bowers* "otherizes" queer identities through the same inherited heteropatriarchal stroke that primitivized Indigenous people based on their sexual practices and family structures. Except, this time, it was not merely against the behavior of a racialized group, but instead it was targeted more

see also id. at 36–37 ("[E]arly-modern European systems of sex fostered misogynist hierarchies, in which transgressive desires could be feared for threatening a reversal of sex.").

149. *Bowers*, 478 U.S. at 190–91.

150. *Id.*

151. *See* discussion *supra* Section I.C.

152. *See* D'EMILIO, SEXUAL POLITICS, *supra* note 107, at 17–20.

broadly and directly against modern non-heteronormative sexual identities.

Secondly, as another way of distancing queer sexualities from the dominant status quo, the *Bowers* majority excluded the possibility of entertaining the constitutional value of protecting sodomy practices by opposite-sex couples. The Court only preferred to single out homosexual sodomy instead. The majority summarily dismissed John and Mary Doe's claim from the suit because they lacked standing, which conveniently allowed the majority to ignore heterosexual sodomy practices entirely.[153] With that, *Bowers* only placed "homosexual sodomy" under scrutiny.[154] This gesture harbors several aims for underscoring settler sovereignty. From a constitutional angle, this narrowing of sodomy easily prevents situating sodomy within the area of other constitutionally protected sex activities between heterosexuals—again avoiding the privacy arena in which cases involving opposite-sex couples have litigated and received protection, and staving off the liberatory potential for queer identities that would destabilize settler heteropatriarchy's hold on gender norms.

In sodomy cases, according to Kreis,

> [t]he danger in recognizing that sexual intimacy between two men or two women might serve a similar purpose as a marriage exposed two problems for the supremacy of masculinity—it challenged marital-related sex stereotypes and tapped into the fears that cropped up nearly a century prior that sex and gender roles were not innate and fixed.[155]

At the same time, the Court's denial to discuss John and Mary Doe also strengthened the essentialization of homosexual identities with a traditionally regarded deviant sexual practice; by framing the sodomy act at issue as "homosexual sodomy," the Court can deliberately float the notion that sodomy, as assumed

153. Once the majority explained that "[t]he only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia status as applied to consensual homosexual sodomy," it also underscored that "[w]e express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." *Bowers*, 478 U.S. at 188, n.2.

154. *Id.* at 190.

155. Kreis, *Policing*, *supra* note 116, at 450–51 (referencing Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 308 (1995)).

to be predominately practiced by homosexuals, is problematic, and so something *definitely troubling* exists about "homosexual sodomy."[156] The Court's avoidance to opine on John and Mary Doe's sex practices privileges mainstream heteronormative sexual identities over queer identities and differentiates between heterosexual and homosexual sodomy—and that difference is situated perhaps within an identity that disturbs traditional heteropatriarchal notions of gender roles. Another possibility could be historical: opposite-sex couples have practiced sodomy as a non-reproductive sex act.[157] A ruling on sodomy without "heterosexual" or "homosexual" labeling could go to a broader stance on the settler reproductive imperative. But narrowing it in the realm of homosexual conduct would, again, suggest privileging of heterosexual identities. So, not discussing heterosexual sodomy leaves the Does' sex act in a differentiated limbo. Thus, again in *Bowers*, upholding Georgia's anti-sodomy law against Hardwick ultimately maintained settler heteropatriarchy's supremacy.

Thirdly, *Bowers* not only reveals heteropatriarchy at the crux of settler sovereignty and as the motivating point to eliminate—specifically criminalize—queer identities, the decision also illustrates heteropatriarchy as the structural grammar of settler sovereignty. As is, the binary classification of heterosexual and homosexual identities and the privileging of the former reveal the settler status quo's prevailing control over sexuality in *Bowers* and the sexual-gender hierarchy that must persist. Once the Court invokes the primacy of the heteropatriarchal family and consequentially excludes queer identities from constitutional privacy protections, it also makes further arguments that reinforce why "homosexual sodomy"

156. *See* Halley, *supra* note 137, at 1722 ("Sodomy statutes place certain people at risk of surveillance, arrest, indictment, conviction and incarceration, while they simultaneously provide for certain other people spaces of relative immunity. What is interesting and complicated about sodomy statutes is that the first group is not exclusively the group of 'homosexuals,' and the second group is not exclusively the group of 'heterosexuals.' This is because sodomy, as it has been criminalized in the United States, is not only about identities: it is also about acts. To think of this is to resist the obvious: we all tend to imagine that sodomy is about homosexuals, but if we think for a moment, we recall that many resolute homosexuals never do any acts that could be called sodomy, while many resolute heterosexuals are, where sodomy is concerned, avid recidivists. The recollection is a gestalt switch: we have stopped thinking about sodomy as an indicator and regulator of identities, and have recalled its reference to acts.").

157. Law, *Gender*, *supra* note 118, at 201.

would not be protected. Hence, *Bowers* reveals the inherited and ongoing sexuality project of American settler colonialism.

On the surface, the Court's curious (and sometimes inaccurate)[158] appeal to history and tradition serves to erase—or again eliminate—queer identities from the settler state. Yet, there is more. The Court uses both legal authority and history to incant the systemic animus against queer identities and, inversely, retrench settlers' heteropatriarchal sovereignty. In regard to "extend[ing] a fundamental right to homosexuals to engage in acts of consensual sodomy," Justice White's reason to decline is all too "obvious" because "[p]roscriptions against that conduct have ancient roots."[159] Such proscriptions are only "obvious" because of tradition—a hint summarily at institutionalized, structural anti-queer bias. But Justice White ventures further. He recalls how sodomy was criminalized during the earlier settler era of the United States: "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights."[160] To add to his historical recollection of sodomy crimes in the United States, Justice White not only references legal scholarship but cites historical criminal sodomy statutes as support.[161] For example, Justice White's first citational

158. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567–72 (stating reasons why "the historical grounds relied upon in *Bowers* are more complex than [Justice White's] majority opinion . . . indicate").

159. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

160. *Id.* In his *Bowers* concurrence, Chief Justice Warren Burger also invokes history and tradition to defend the constitutionality of Georgia's anti-sodomy statute. *See also id.* at 196 (Burger, C.J., concurring). In some ways, Justice Burger ventures further than Justice White by specifically noting that choices to engage in same-sex activity "have been subject to state intervention throughout the history of Western civilization." *Id.* For support, he also raises Judeo-Christian morality, but he also cites Roman law and includes a quick discussion of English anti-sodomy laws during the Reformation. *Id.* at 196–97. In a passage most relevant to showing settler heteropatriachal views of the *Bowers* majority and reminiscent of our discussions of anti-sodomy statutes in early settler colonial eras, Justice Burger traces the historical and colonial roots of Georgia's anti-sodomy law in question in *Bowers* by linking the anti-sodomy statute that the Georgia legislature enacted in 1816 to the settler metropole: "The common law of England, including its prohibition on sodomy, became the received law of Georgia and other Colonies." *Id.* at 197. All of this exegesis serves to fulfill Justice Burger's position in *Bowers* that "[t]o hold the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.*

161. In particular, Justice White references a survey on right to privacy and sodomy statutes. *See* Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 MIAMI L. REV. 521, 523 (1986) (cited in *Bowers*, 478 U.S. at 192–94). Janet Halley has observed the inaccuracies

footnote—footnote 5—lists eleven "[c]riminal sodomy laws in effect in 1791."[162] If that were not enough, however, Justice White then recounts that "when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws" and follows with another supporting footnote list, in footnote 6, that exhibits thirty-eight "[c]riminal sodomy statutes in effect in 1868."[163]

Here, this moment in *Bowers* is performative; it demonstrates queer theorist Judith Butler's observations about the power of citational legacies: "[T]he judge who authorizes and installs the situation he names (we shall call him 'he,' figuring this model of authority as masculinist) invariably *cites* the law that he applies, and it is the power of this citation that gives the performative its binding or conferring power."[164] By design, *Bowers*'s statutory catalog erects settler sovereignty as a present, ongoing heteropatriarchal legal structure that punishes queer identities. As Butler posits further, "[a]nd though it may appear that the binding power of [the judge's] words is derived from the force of his will or from a prior authority, the opposite is more true: it is *through* the citation of the law that the figure of the judge's 'will' is produced and that the 'priority' of textual authority is established."[165]

With Justice White as the Court's heteropatriarchal voice here, his citations performatively conjure the structural sovereignty of settler heteropatriarchy. Thus, his structural reasoning is tied to settler sovereignty in both heteropatriarchal norms and state legal authorities, which legitimize the Court's refusal to "discover new fundamental rights imbedded in the Due Process Clause."[166] In *Bowers*, the civilizing mission of American settler colonialism emerges and constructs a heteronormative and patriarchal state in which stable ideas of masculinity and femininity are entrenched in order to further subordination. Queer and non-heteronormative sexualities

of this source and also Justice White's citations to sodomy statutes in *Bowers*. *See* Halley, *supra* note 137, at 1751 nn.86 (noting "a misleading footnote on the modern repeal of sodomy statutes" in Justice White's opinion) & 91 (criticizing the Survey for inaccuracies and scholarly deficiencies).

162. *Bowers*, 478 U.S. at 192 n.5.

163. *Id.* at 193 n.6.

164. Judith Butler, *Critically Queer*, 1 GLQ: J. GAY & LESBIAN STUD. 17, 17 (1993) [hereinafter Butler, *Critically Queer*].

165. *Id.*

166. *Bowers*, 478 U.S. at 194.

undermine that order, and so discovering "new fundamental rights" for homosexuals, a phrase akin to the obfuscation of special rights language,[167] would seem threatening. Here, the Court stands back upon the baseline status quo, juridically revealing the structure of settler heteropatriarchy while criminalizing sodomy, which essentially criminalizes queerness.

2. Colonizing Aspects of the *Bowers* Dissents: Minoritizing Discourses and Settler Nationalism Through Self-Determination

Though *Bowers*'s dissenting Justices would reach a favorable outcome for queer sexualities by decriminalizing sodomy, their rationale also reflects the settler state's civilizing sexuality project. Both dissenting opinions try to dissociate from the heteropatriarchal settler-nativist structure that Justice White conjures. But most of these dissociations from settler heteropatriarchy avoid any deeper criticisms of gender hierarchies reinforced by sodomy laws. And, for the most part, they do not exist as anti-stereotyping rationales that promote queerness directly. Rather, Justices Harry Blackmun's and John Paul Stevens's strategies here accept settler hierarchy and direct attention toward settler nationalism. Both dissents remove the practice of sodomy from immediate heteropatriarchal alarm. In turn, they relocate sodomy directly within the set of normative functions for individual personhood that they believe the state lacks the authority to invade. As a result, their reasoning brings sodomy under the protective realms of privacy and liberty that would make anti-sodomy laws unconstitutional. But the thrusts of the dissents leave the animating norms of settler heteropatriarchy untouched. Instead, they offer the blueprint for colonizing queerness.

Central to the dissents' discussion is what sodomy represents for an individual's self-defining potential, whether through notions of privacy or liberty. Although Justice Blackmun's dissent is steeped in Hardwick's privacy concerns, while Justice Stevens's dissent is conceptually focused on

167. *See, e.g.*, Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 TOURO L. REV. 347, 408 (2009) (noting that the *Bowers* Court's fundamental rights framing for homosexuals to practice sodomy resembles the special rights campaign for Colorado's Amendment 2 referendum that eventually was overturned in *Romer v. Evans*, 517 U.S. 620 (1996)).

Hardwick's liberty rights,[168] both dissents examine the degree of governmental intrusiveness with the purpose of reserving individuals' opportunities to make choices that underscore self-determination—what Sonia Katyal and others have framed as "sexual self-determination."[169] Whether through privacy or liberty, the *Bowers* dissents both draw constitutional perimeters around choices regarding intimate associations in order to further individual choices that foster personhood. In this way, the dissents would have decriminalized non-heteronormative sexual conduct and consequently liberated queer identities.

a. Minoritizing Discourses

Justice Blackmun's dissent begins with a universalist framing that focuses on the self-determination implications of sexual conduct. Dismissing the majority's deliberately narrow view of the case as rejecting a fundamental right to homosexual sodomy,[170] Justice Blackmun instead finds that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[171] At this starting point, he focuses generally on sexual conduct and does not differentiate between homosexual and heterosexual identities. From there, he quickly concludes that the Georgia sodomy law "denies individuals the right to decide for themselves whether to engage in particular forms of private,

168. *See* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1106–09 (2004).

169. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 170–71 (2002) ("As these cases suggest, these liberties (regarding destiny, identity, and way of life) become even more important when we consider the boundaries of the contested intersections between sexual identity and sexual activity. Just as bodily integrity comprises a certain type of personal sovereignty that is inviolate, a framework for deliberative sexual autonomy permits individuals to make their own decisions about how or whether or not they choose to adopt—or express—a particular type of sexual identity. This kind of "sexual self-determination" draws a boundary that allows persons to undertake their own process of deliberation to ultimately decide how they may choose to represent him or herself.") (referencing Kristen L. Walker, *Evolving Human Rights Norms Around Sexuality*, 6 ILSA J. INTL. & COMP. L. 343, 352 (2000)); *see also* Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 40 (1991) (discussing sexual self-determination in regard to *Bowers*).

170. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

171. *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

consensual sexual activity."[172] In Justice Blackmun's view, the heft of this right to engage freely in such conduct outweighs any prior moral judgment about consensual sodomy—or those who may practice it.[173] This perspective allows him to pronounce that "we must analyze . . . Hardwick's claim in the light of the values that underlie the constitutional right to privacy" and that for Georgia to prosecute its citizens for engaging in consensual sodomy, Georgia "must do more than assert that the choice they have made is an abominable crime not fit to be named among Christians."[174]

Inherent in this early part of Justice Blackmun's dissent is that self-determination specifically undergirds the constitutional right to privacy—or, as he terms it, "the right to be let alone."[175] Again, the tone and manner here reinforce the universal because Justice Blackmun characterizes sodomy without any references to gender or sexual orientation. In fact, sticking to the gender-neutral stance of the Georgia sodomy statute, Justice Blackmun criticizes the majority for attaching sexual orientation connotations to the act for which Hardwick was arrested: "[T]he Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used."[176] His view is that the "sex or status of the persons who engage in the act is irrelevant [under the Georgia law]" and that its "purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity."[177] If a universalist approach to privacy is the way to forge protection for Hardwick, then Justice Blackmun's focus on the gender-neutral coverage of the Georgia anti-sodomy law seems consonant.[178] This focus most clearly allows Justice Blackmun to recapitulate his insistence that Hardwick's claim "involves an unconstitutional intrusion into his privacy and his right to intimate association" and it "does not depend in any way on his sexual orientation."[179] So far, so good. All is fair in love and sodomitical acts. Presumably, what is left for Justice Blackmun to discuss would be a philosophical

172. *Id.*
173. *Id.*
174. *Id.* at 199–200.
175. *Id.* at 199.
176. *Id.* at 200.
177. *Id.* (footnote omitted).
178. *Id.* at 201.
179. *Id.*

analysis of privacy and sexual conduct that lifts self-determination as a humanistic value within privacy and personal decision-making, regardless of sexual orientation.

However, Justice Blackmun's dissent does not sustain itself on such a purely universalist approach to self-determination. In other words, self-determination is not the end upon which his rationale rests. Instead of purely analyzing self-determination as its own virtue capable of upholding a fundamental right to privacy to protect Hardwick or anyone else from criminal sodomy prosecution, the importance of self-determination becomes conflated with discussions about sexual orientation elsewhere in Justice Blackmun's dissent.[180] Unfortunately, this conflation breaks his dissenting opinion away from his universalist, value-driven ideology about the unconstitutionality of anti-sodomy laws. What emerges is a minoritizing discourse that is used to justify self-determination.

We see this discourse emerge distinctly when Justice Blackmun notes shifting views on homosexuality in psychiatric circles.[181] Homosexuality is not a disease "[b]ut, obviously, neither is it simply a matter of deliberate personal election."[182] Instead, Justice Blackmun views homosexuality like a "condition"—something "relatively permanent in duration" and "of great magnitude and significance in terms of human behavior and values."[183] For that reason, he sees that the "[h]omosexual orientation may well form part of the very fiber of an individual's personality" and should, by analogy, be protected very much in the way the Court had constitutionally protected individuals with other conditions, such as narcotics addiction, from certain criminal sanctions.[184] Otherwise, "[a]n individual's ability to make constitutionally protected 'decisions concerning sexual relations' is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy."[185] In the way I read it, the "right to be let alone" is salient in Justice Blackmun's dissent because it allows homosexuals to be themselves—not because of the underlying reason that everyone should be

180. *See id.* at 202 n.2 (discussing the "[h]omosexual orientation" and reason for constitutional protection).

181. *Id.*

182. *Id.*

183. *Id.* (quoting Justice White in Powell v. Texas, 392 U.S. 514, 550 n.2 (1968) (White, J., concurring)).

184. *Id.*

185. *Id.*

allowed that autonomy to determine their own authenticity or even simply that everyone should have the option of physical intimacy. Rather, Justice Blackmun's reasoning relies on the idea that the "right to be let alone" should apply to same-sex sexual conduct specifically because homosexuals *cannot help being who they are* due to a "condition." The result is minoritizing rather than universalizing.[186] Justice Blackmun could have continued conceptualizing self-determination as a universally regarded value that invigorates our individual right to privacy; but as he reveals further in his dissent, he is aware of homosexuality as a status and how it plays into constitutional cases.[187] Although he criticizes Justice White's majority for its tendencies to single out homosexual sodomy in *Bowers*, his dissent is also problematic because it minoritizes queer identities.

Whether Justice Blackmun's dissent is well-intended or not, his universalizing-then-minoritizing discourse confirms queer theorist Eve Kosofsky Sedgwick's observation about the modern Western conceptualization of homosexuality. Such conceptualization is, in her words, "organized around a radical and irreducible *incoherence*."[188] This peculiar incoherence seems to have some connection to the definitional boundaries of homosexuality as a status and the conduct of acts that are definitionally *homosexual*. Thus, in Sedgwick's theorizing, this incoherence lends itself to mainstream Western views that both minoritize and universalize the gay identity: "[This incoherence] holds the minoritizing view that there is a distinct population of persons who 'really are' gay; at the same time, it holds the universalizing views that sexual desire is an unpredictably powerful solvent of stable identities."[189] What makes one a homosexual? Is it a condition? Is it conduct? Both? Who gets to decide this? In *Bowers*, we see this slipperiness not only in Justice Blackmun's dissent but also in Justice White's usage of

186. Similarly, Jean Cohen has also found that, despite intentions "to show and to seek respect for those on behalf of whom he wrote," Justice Blackmun's dissent manufactures a "minoritizing discourse" on the "homosexual personality" because he assumes that "[p]rohibiting 'homosexual sodomy' violates the right to privacy because it is for homosexuals expressive of a central facet of being." Cohen, *supra* note 147, at 80.

187. *See Bowers*, 478 U.S. at 203 n.2 (Blackmun, J., dissenting) (noting in part that "homosexuals" are not yet a suspect class in equal protection cases).

188. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 84 (1990).

189. *Id*.

"practicing homosexual" to narrow the issue to constitutional rights over same-sex conduct.[190] What does one do to *practice* as a homosexual? This inquiry raises a question of conduct. Can one be a homosexual without practice? This inquiry raises a question of status. And, again, who gets to decide? This inquiry raises a question of authority.

The minoritizing/universalizing rhetoric consequentially reflects a mainstream line-drawing of sexual identities. As Sedgwick writes, the incoherence also holds "that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice versa for apparently homosexual ones."[191] This observation demonstrates how the incoherence about non-heteronormative identities is, at least, a boundary that keeps both categorical identities conceptually apart. But what's worse is how that differentiation leads to othering by the mainstream because, according to Sedgwick, the incoherence also holds "that at least male heterosexual identity and modern masculinist culture may require for their maintenance the scapegoating crystallization of a same-sex male desire that is widespread and in the first place internal."[192] Jeb Rebenfeld sees this maintenance precisely in the *Bowers* dissents. According to Jed Rubenfeld, in the *Bowers* dissents, "[p]ersonhood merely attempts to do away with the ensuing stigmatization by ensuring that each group has identical legal standing and rights."[193] But the differentiation of each group also serves to perpetuate hierarchy: "[T]he impulse toward hierarchy actually precedes and produces the differentiation in identities."[194] And in this fashion, "personhood, at the instant it proclaims a freedom of self-definition, reproduces the very constraints on identity that it purports to resist. Homosexuality is but one instance of this phenomenon."[195] Clearly, "to protect the rights of 'the homosexual' would of course be a victory," but

190. *See Bowers*, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."); *see also* Cohen, *supra* note 147, at 67–69 (recounting the *Bowers* Court used "practicing homosexual" to "equate all homosexual acts with sodomy and to subsume them under the rubric of homosexual identity"). *Id.*

191. SEDGWICK, *supra* note 188, at 85.

192. *Id.*

193. Jeb Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 781 (1989).

194. *Id.*

195. *Id.*

to claim that "homosexuality is essential to a person's identity is no liberation but simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies 'faggots.'"[196]

Ultimately, this incoherence, as described by Sedgwick, is another indication of how the settler mainstream deals with non-heteronormative identities. Again, the settler sexuality project is at play. In my view, the incoherence is the regard for non-heteropatriarchal identities in the settler state that occasions the continual othering of queer sexualities. Accordingly, the minoritizing/universalizing discourse in Justice Blackmun's dissent could be accomplishing *implicitly* what the majority's application of anti-sodomy statutes is doing *explicitly*: reifying settler heteropatriarchy apart from non-heteronormative sexualities—in fact, othering them to reinforce the settler mainstream's primacy. Thus, the same settler civilizing script of self-preservation appears in Justice Blackmun's dissent as it does in the *Bowers* majority's insistence that homosexual sodomy ought to be criminalized. In Nan Hunter's reading,

> implicit in the logic of the Blackmun dissent is the acceptance of the majority's frame. When he argues that the law touches on acts that are central to identity and self-definition, he, too, is using homosexuality as his reference point. It seems unlikely that Blackmun would have argued that sexual conduct was self-definitional if the case had been about heterosexual conduct.[197]

Indeed, Justice Blackmun's dissent would produce a favorable legal result for queer parties in terms of their privacy against the prosecution of sodomy statutes, but its minoritizing rationale only helps to reify settler hegemony. Within Sedgwick's theorizing, "[t]o be gay in this system is to come under the radically overlapping aegises of a universalizing discourse of acts and a minoritizing discourse of persons."[198] In

196. *Id.*

197. Hunter, *supra* note 168, at 107.

198. SEDGWICK, *supra* note 188, at 86. Interestingly, in her work, Sedgwick explores this dual predicament of the modern gay identity by pairing the majority's holding in *Bowers* as an example of marginalizing gay people based on conduct against the holding in *Watkins v. United States Army* as an example of protecting gay people based on status. *Id. Watkins* was a Ninth Circuit decision that involve

order to tolerate homosexuals, the mainstream must "misunderstand them" and make them *incoherent* from heteronormative gender norms—or, borrowing Morgensen and others' notion about settlers, to *queer* them in order to handle them as either outsiders or minorities.[199] They have a condition; they cannot help themselves. So, we must give them the ability to self-determine. Saito finds that this logic precisely animates the script of the settler state when it demonstrates the importance of self-determination: "Because self-determination is articulated as a right of 'peoples,' a state's first line of defense is often to claim that a particular group is simply a 'minority,' or a subset of the general population, not a distinct 'people.'"[200] However well-intentioned, Justice Blackmun's dissent falls within this frame. Thus, even though he would constitutionally prohibit the criminalization of sodomy, Justice Blackmun's rationales also exhibit a settler mindset.

To be sure, one might argue that Justice Blackmun's dissent is liberatory in result. But despite Justice Blackmun's invocation of self-determination and privacy, the moment here is more slippery than liberating. Though liberatory in rights, Justice Blackmun's dissent returns us back to settler hegemony in practice.

b. Self-Determination and Settler Nationalism

Because of this entangled minoritizing/universalizing discourse, self-determination in Justice Blackmun's dissent is conceptually problematic. But the conceptual problem is also subsequently deepened by Justice Stevens's fusion of self-determination and American settler nationalism in his *Bowers* dissent.

The idea that separation from state intrusion preserves personal autonomy resonates in American settler history. From that vantage, the theme of self-determination, aided either by privacy or liberty in the *Bowers* dissents, resembles the drive for settler self-rule and independence that was part of White

the military discharge of an openly gay military officer. *See* Watkins v. United States Army, 847 F.2d 1329, 1330–33 (9th Cir. 1988). The court held that homosexuals constituted a suspect class and that strict judicial scrutiny must apply to governmental discrimination against homosexuals. *Id.* at 1352–53.

199. *See* MORGENSEN, *supra* note 95, at 37; MOGUL ET AL., *supra* note 19, at 2; *see also* discussion *supra* Section I.B.2.

200. Saito, *Tales of Color*, *supra* note 24, at 94.

settlers' process of liberating themselves from the metropole and the beginnings of indigenizing themselves to conquered lands. Recall Veracini's observation that "[s]ettler projects are recurrently born in a vacuum of empire that is intentionally sought, and in a displacement that is associated with a determination to establish unique political settings."[201] Autonomy and self-rule begin with separation from the metropole: "[O]n the one hand, it is at the origin of the settler project, the moment when a collective body 'moves out' in order to bring into effect an autonomous political will; on the other hand, it is also its outcome, the moment when a sovereign polity begins implementing actual jurisdiction."[202] In fact, "[t]he recognition of a settler autonomous capacity and a consequent need to accommodate it is a passage that would be repeated numerous times in consolidating settler contexts elsewhere, a stance that would similarly shape developments way beyond the limits of the future United States."[203] Before the emergence of a minoritizing discourse in his dissent, Justice Blackmun's universalist discussions of a "right to be let alone" seems to bear resemblance to the recognition of a settler autonomous will.

Although Justice Blackmun seems to suggest that self-determination is a virtue recognized in the American experience, he does so in passing—only noting "in a Nation as diverse as ours" that the choice to conduct sexual relationships contributes to individual self-definition in a way that externalizes the plurality of sexual relationships and is derived "from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[204] However, in his separate dissenting opinion, Justice Stevens directly taps into a logic that places self-determination as a central facet of American settler nationalism. As he brings Hardwick's case into the realm of the Court's privacy cases,[205] Justice Stevens observes that "[i]n

201. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 58.
202. *Id.* at 63.
203. *Id.* at 65.
204. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (emphasis in original).
205. *Id.* at 216–17 (Stevens, J., dissenting). Specifically, the cases are: Griswold v. Connecticut, 381 U.S. 479 (1965) (prohibiting states from banning contraception for married couples); Carey v. Population Services International, 431 U.S. 678 (1977) (finding unconstitutional a state statute that criminalized the advertising and distributing of contraceptives to minors); and Eisenstadt v. Baird, 405 U.S. 438 (1972) (prohibiting state from withholding contraceptives from single people while allowing married couples to possess them).

consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern."[206] He reveals that the fundamental concern is the protection of an individual's right to self-determine: "These [privacy] cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny."[207] The moment where self-determination is conceived as an American settler value—thus reflecting the American settler colonial state—arises when he observes that the Court's prior discussions of these decisions "brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."[208] Once Justice Stevens has prefaced that the liberty of being let alone for self-determination's sake has been part of the concept of American freedom, he pronounces that the same liberty interest "surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral."[209] In other words, the liberty interests in a person's right to self-determine is historic and exceptional to the American experience, and as such, it ought to be applicable in *Bowers*.

To be sure, self-determination is conceptually formative and empowering—especially in light of historical subordination. When it comes to intimate associations and sex, the dissents' recognitions that self-determination ought to be universally applicable to non-heteronormative identities seem liberatory. But because self-determination conceptions are distinctly cabined within American settler exceptionalism, the moments of recognition here are not revolutionarily decolonizing; they harken back to reflections of settler structure and hierarchy. In queer theorist Jasbir Puar's study on homonationalism, "[t]he rhetoric of freedom is also of course a mainstay in philosophies of liberal democracy and is indeed a foundational tenant of

206. *Id.* at 217.
207. *Id.*
208. *Id.*
209. *Id.* at 218.

American exceptionalism."[210] Saito is similarly cautious about the settler nationalist implications of inclusion through American constitutional law, noting that

> if one accepts that the United States is—still—a colonial settler state, it follows that the primary purpose of this state's legal system would be to sustain the territorial claims and the relationships of privilege and subordination that ensure control of political, economic, and social institutions by the settler class. Simultaneously, however, the legal system must shore up the ideological justifications of settler society, framed in terms of extending the "American values" of freedom, democracy, and human rights to the world at large.[211]

To preserve an accompanying empire state of mind that extends its territorial drive, the settler state frames its territorial work modernly in the most positive, self-legitimizing, civilized light. Self-determination achieves this framing. While self-determination has an "enduring connection to national liberation," its twentieth-century incarnation, as political scientist Adom Getachew notes, also functions to preserve racial and colonial hierarchies, consequently privileging White supremacy.[212] Others have observed more recently that "the dominant form of self-determination appear[s] to be a principle designed to limit the claims of anticolonial nationalism and to enhance the claims of colonialism, especially the settler-colonial variety and its 'right of conquest.'"[213] Self-determination aligns with American nationalism ideals, and its general malleability presents the settler colonial state with a method of reinforcement.

After *Bowers*, when self-determination indeed became a reason for finding anti-sodomy laws unconstitutional in *Lawrence v. Texas*,[214] Puar notes that "[i]ndividual freedom

210. PUAR, *supra* note 35, at 23.

211. Saito, *Tales of Color*, *supra* note 24, at 65.

212. ADOM GETACHEW, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION 41–52 (Princeton University Press, 2019).

213. Joseph Massaud, *Against Self-Determination*, 9 HUMANITY J. 161, 161 (2018).

214. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003) ("We conclude the case should be resolved by determining whether the petitioners were free adults to engage in private conduct in the exercise of their liberty under the Due Process

becomes the barometer of choice in the valuation, and ultimately, regulation, of queerness."[215] Part II, *infra*, will explore this notion more extensively. Echoing Rubenfield's remarks about *Bowers*, Puar finds that differentiation for non-heteronormative sexualities leads to hierarchy: "Sexual deviancy is linked to the process of discerning, othering, and quarantining terrorist bodies, but these racially and sexually perverse figures also labor in the service of disciplining and normalizing subjects worthy of rehabilitation *away from these bodies*, in other words, signaling and enforcing mandatory terms of patriotism."[216] The connection here in the *Bowers* dissents between sodomy and nationalistic self-determination limits the agency that Justices Blackmun and Stevens might have intended for non-heteronormative queer identities. Specifically, what the *Bowers* dissents offer are blueprints for colonizing queerness, for transferring queer identities into the settler state, rather than any deeper, more complete liberation. Implicitly, they reveal the settler civilizing mission despite inclusive and democratic ideals.

Between *Bowers*'s majority and dissenting opinions, we see two sides of the settler structure—a nativist one that subjugates queer identities against a White heteropatriarchal supremacy and another that potentially civilizes them through settler democratic values. What is missing throughout *Bowers* concerning inciting the colonizing of queerness is—as we will see in Part II—some significant impetus in the settler script of colonization to begin that transfer.[217] Thus, *Bowers* sustains sodomy crimes. But in subsequent decisions, we see precisely what ignites the transfer of queerness into the American settler state.

II. QUEER TRANSFER INTO THE AMERICAN SETTLER STATE

A. Civilizing Mission and Improvability

When land occupation is no longer contested but must be sustained indefinitely, elimination does not disappear; instead,

Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.").

215. PUAR, *supra* note 35, at 22.

216. *Id.* at 38.

217. *See* discussion *infra* Section II.A.

colonization embodies a "continuity through time" that replicates the structural hierarchy of settler dominance while elongating above the historical capture of territory.[218] In this fashion, Wolfe's elaboration that in the settler colonial experience, "[t]he colonizers come to stay—invasion is a structure not an event" becomes more evident.[219] Settler preoccupation to make conquest permanent explains why and how the United States has never decolonized:

> [S]ettler societies, including the United States, cannot continue to function as such without continuously enforcing their jurisdiction, political and military, over their claimed territories and doing everything in their power to ensure that their assertion of sovereignty is accepted as legitimate within the larger global order, notwithstanding any illegalities involved in the acquisition of the lands at issue.[220]

The projects of elimination on a perceived *terra nullius* are regenerative and continual.[221] The suppression of non-settlers broadens from outright violence toward regulation and colonization.

Within colonial systems internationally, Antony Anghie considers the "civilizing mission" as fundamental to colonialist ideologies, describing it as "the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe."[222] Although settler colonialism differs from extractive colonial systems in terms of the complexity of colonizing

218. Wolfe, *supra* note 37, at 390.

219. *Id.* at 388.

220. Saito, *supra* note 24, at 28 (referencing NATSU TAYLER SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW 136 (2010)).

221. *See* VERACINI, SETTLER COLONIALISM, *supra* note 52, at 3 (suggesting that settler colonial projects "claim both a special sovereign charge and a regenerative capacity" because "settlers, unlike other migrants, 'remove' to establish a better polity, either by setting up an ideal social body or by constituting an exemplary model of social organization."); *see also* Wolfe, *supra* note 37, at 388 (noting that within settler societies, "elimination is an organizing principle of settler-colonial society rather than a one-off (and superseded) occurrence").

222. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3 (2007).

relationships,[223] we have seen through regulating sexuality that settlers regard "civilizing" as their colonial project as well. Under Veracini's discernment, "[s]ettler colonialism is about domesticating" and there are "recurring settler anxieties pertaining to the need to biopolitically manage their respective *domestic* domains."[224] In that way, "all settler projects [are] foundationally premised on fantasies of ultimately 'cleansing' the settler body politic of its (indigenous and exogenous) alterities."[225] Part of this cleansing process is internally directed so that settlers have envisioned themselves naturalized to the land as part of that replacement while replicating a neo-European way of life—in other words, settlers' own perceived self-indigenization to the conquered territory and their own Europeanization on a new frontier.[226] Looking more closely, Veracini posits that "[i]ndigenisation is driven by the crucial need to transform an historical tie ('we came here') into a natural one ('the land made us')."[227] In contrast, "Europeanization consists in the attempt to sustain and reproduce European standards and way of life."[228]

At first glance, indigenization and Europeanization might appear as contradictory drives. However, both are centrally "fundamental features of settler projects" and "are not irreconcilable . . . as both processes refer exclusively to the segment of the population system that is characterized by improvability."[229] The supremacist way of self-regard and regard for others motivates settlers' sustained mission to replace, cleanse, and civilize. In this manner, both "indigenization and Europeanisation can be, and are, routinely compounded. The settler colonial idioms of 'improvement' and 'progress' refer to both."[230] As we will see, a perceived capability to become "improved" animates settler colonization of queer identities.

223. The difference between settler colonialism and extractive colonial systems, as Veracini notes, is that the domesticating or civilizing mission involves three constituents—among the settlers, the Indigenous Other, and Exogenous Others—rather than merely two constituents in extractive colonialism—between the colonizer and the colonizer. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 16.

224. *Id.*

225. *Id.* at 33.

226. *Id.* at 20–21.

227. *Id.* at 21–22.

228. *Id.* at 22.

229. *Id.*

230. *Id.*

Indigenous and exogenous "Others" are subjects of this civilizing mission: "A successful settler society," according to Veracini, "is managing the orderly and progressive emptying of the indigenous and exogenous Others segments of the population economy and has permanently separated from the abject Others, drawing internal and external lines that cannot be crossed."[231] Within law and politics, Saito agrees: "Settler states establish, maintain, and protect their hegemony by exercising complete control over Indigenous peoples, non-Indigenous Others, and 'deviant' members of the settler class."[232] Surprisingly, however, this hegemonic process does not always appear externally oppressive. But it is framed within rationalized desires for democratic progress that legitimize settler sovereignty: "Their exercise [of complete control] remains in constant tension with the settlers' ideological justifications for that sovereignty—their superior civilization, their democratic and humanitarian values, the leading role they play in their own narrative of progressive human development."[233] Within the settler sexuality project, Justice Stevens's *Bowers* dissent exhibits such aspects when he invigorates choices regarding consensual sodomy with individual liberty concepts enshrined constitutionally.[234]

As we will see in *Lawrence v. Texas*,[235] the trajectory of such individual liberty framing can steer us back to a realm of settler heteronormativity. Precisely, this recursiveness makes the sustaining of settler sovereignty—that elimination—perpetual: "[S]ettler society is always, in Deriddean terms, a society 'to come,' characterized by the *promise* rather than the practice of a truly 'settled' lifestyle."[236] Thus, domestication, or this civilizing mission, requires settlers to continually court non-settlers but never fully include them at the expense of settler dominance or supremacy. "On the one hand," Saito describes, "settler society is presumed sacrosanct and the inclusion of Others cannot be allowed to corrupt it; on the other, it needs to demonstrate,

231. *Id.* at 28.
232. Saito, *Tales of Color*, *supra* note 24, at 27.
233. *Id.* at 27–28.
234. *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting) ("The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.").
235. 539 U.S. 558 (2003).
236. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 23 (footnote omitted).

continuously, that humanity at large will benefit from accepting its social and political structures and internalizing its worldview."[237] The phenomenological tension between perceived sameness and difference between settlers and non-settlers has allowed settlers to open and constrict the pores of this concurrent process in order to always keep the non-settlers under settler paradigms but also sufficiently distanced.[238] From this directed tension, settlers are able then to colonize others and extend their civilizing mission indefinitely.[239]

Crucially, the civilizing mission is motivated by perceptions of non-settlers' improvability. "[A]s the indigenous/exogenous opposition becomes meaningless, the representational regimes of settler colonialism see either 'improvable' or 'non-improvable.'"[240] The settler state must recognize improvability in non-settlers, and the narrative of improvability functions as a redemptive one. Outsiders to the settler world—i.e., "[p]eople needing reform"—invariably "would access the population . . . provided that they are deemed capable of eventual admission within the settler section of the population economy."[241] Conversely and predictively, however, "[e]xogenous Others that are perceived as unimprovable are permanently restricted entry: settler nativist agitation sees to it."[242] From a civilizing perspective, this selection criterion—the ability to improve (or

237. Saito, *Tales of Color*, *supra* note 24, at 28.

238. *See id.* at 23 ("Settler projects . . . express an unresolved tension between sameness and difference" and the "line separating settler and indigenous must be approached but is never finally crossed" so that "[i]n the end, the indigenous remains always more genuinely indigenous.").

239. *See id.* at 27–28 ("Settlers presume a prerogative to determine who will be allowed to enter and who may—or must—remain within their claimed boundaries, which peoples will be accorded particular civil or political rights, and the extent to which settler privilege will be promoted and protected by the state. Many of these determinations are enshrined in the settler state's legal system, which is also utilized to ensure that each population subgroup remains in its assigned place, geographically, socially, economically, and politically. The settlers depict these powers as prerogatives of sovereignty, but their exercise remains in constant tension with the settlers' ideological justifications for that sovereignty—their superior civilization, their democratic and humanitarian values, the leading role they play in their own narrative of progressive human development.") (footnotes omitted); *see also id.* at 28 ("This tension is mediated by the dynamic of difference—i.e., the construction of racial identities in a manner that ensures that the assimilationist vision proffered by the settlers will remain just out of reach—and this explains much about the construction and perpetuation of racialized hierarchy in the United States.") (footnotes omitted).

240. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 29.

241. *Id.*

242. *Id.*

perhaps, the ability to be redeemed)—is what settlers impose on who can transfer into the settler state. What was missing in *Bowers* but appears saliently in post-*Bowers* pro-LGBTQ decisions is how the Court began to perceive that sexual minorities are indeed improvable—are capable of being civilized according to settler values, which is the inciting requirement for colonization. In the American settler sexuality project, that improvability can be characterized by degrees of LGBTQ alignment with the White, heteropatriarchal settler class.

B. Recognizing Queer Improvability in Romer

Buoyed by the legal and political changes in LGBTQ visibility after *Bowers*, the Supreme Court's 1996 decision, *Romer v. Evans*,[243] evinces settler mainstream's recognition of improvability in sexual minorities that conditioned the civilizing and colonizing of certain queer identities. The rise of gay and lesbian political issues in the national consciousness during the 1990s and the increasing mainstream visibility of LGBTQ people helped decrease national intolerance for non-heteronormative sexualities. Political scholar Stephen Engel recounts how "[t]he unprecedented visibility of gays and lesbians at the 1992 Democratic Convention and the prevalence of the 'gay issue' in the election, especially in relation to the military ban, brought the movement into the realm of mainstream politics."[244] Of course, so too was the political capital raised from gay constituents during that campaign year, demonstrating gay and lesbian political clout.[245] In parallel, gay cultural visibility in film, television, popular music, and theater expanded and coalesced during this time with some positive effects.[246] These shifts mirrored changing public attitudes toward sexual minorities: "[V]isibility promotes and reflects greater tolerance of homosexuality; homosexuality is considered a legitimate topic

243. 517 U.S. 620 (1996).

244. STEPHEN M. ENGEL, THE UNFINISHED REVOLUTION: SOCIAL MOVEMENT THEORY AND THE GAY AND LESBIAN MOVEMENT 58 (2001).

245. *See* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 126 (1996) ("The 1992 election saw the fulfillment of the gay mainstream's strategy of leveraging money and votes. Significantly, the election marked the first time that gay and lesbian activists launched a coordinated national effort to raise identifiably gay (and large) sums of money for one presidential candidate.").

246. *See* ENGEL, *supra* note 244, at 58–59.

of exploration, as demonstrated by the proliferation of gay and lesbian studies at the university level as well as the increased portrayal of gays on the small and large screen."[247] Some of this visibility was tied to activism and media coverage of the HIV/AIDS crisis of the mid-1980s to the 1990s as well.[248] To some degree, the thought of including queer sexualities in public life sustained more robust conversations in issues such as open military service, marriage, and anti-discrimination ordinances during the 1990s.[249] Though the results were decidedly mixed, the cultural and political visibility of queer lived experiences evolved and endured in the post-*Bowers* years so that "gays and lesbians may have received new prominence in national electoral politics."[250]

In *Romer*, the Court's finding of improvability in queer identities coincides with this period of changing national gay tolerance. Working within *Bowers*'s shadow but also with new-found political and cultural buoyancy for sexual minorities, the *Romer* Court examined the constitutionality of Colorado's referendum Amendment 2.[251] Voted into effect by Colorado citizens in 1992, Amendment 2 officially denied any status-based legal protections associated with "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[252] Amendment 2 had been campaigned into law in critical response

247. *Id.* at 58.

248. *See* CRAIG A. RIMMERMAN, THE LESBIAN AND GAY MOVEMENTS: ASSIMILATION OR LIBERATION? 46–49 (2d ed. 2015) [hereinafter RIMMERMAN, THE LESBIAN AND GAY MOVEMENTS].

249. *See generally* SUZANNA DANUTA WALTERS, ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA (2001) (observing increasing mainstream exposure of gay culture during the 1990s); *see* Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. Politics 1208, 1208–09 (2003) (observing shifting public opinions about gay rights, including in armed forces service and in anti-discrimination in employment); *see also* Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1533–34 (2006) (noting how earlier marriage equality litigation in the 1990s and the national debates that ensued has "increased the visibility of lesbians and gay men in ways that no other gay rights issues had done before").

250. ENGEL, *supra* note 244, at 54.

251. Romer v. Evans, 517 U.S. 620, 623–24 (1996); *see also* Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 909–51 (1996) (chronicling the various judicial and political advances in gay rights that occurred between *Bowers* and *Romer* decisions, specifically in military service, consensual same-sex sodomy, family, and non-discrimination laws).

252. *See Romer*, 517 U.S. at 623–26.

to various municipal ordinances that had protected against sexual orientation discrimination.[253] But, writing for the majority, Justice Anthony Kennedy gauged that the status quo elimination of sexual minorities in Amendment 2 was constitutionally "far reaching."[254] Considered "[s]weeping and comprehensive," Amendment 2 was campaigned into law based on a "special rights" argument that was misleading.[255] Thus, Amendment 2 could not survive rational basis.[256]

Amendment 2's prohibitions against protecting sexual minorities externalize the "ancient," spiteful moralizing against homosexual sodomy that Justice White had referenced in *Bowers*.[257] Amendment 2's proponents distorted the sex practices of LGBTQ identities as morally deviant, paralleling the primitivized sexual othering of Indigenous practices settlers historically used to justify elimination.[258] In their

253. *See id.* at 623–25; *see also* CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 141–44 (2002) [hereinafter RIMMERMAN, FROM IDENTITY TO POLITICS].

254. *Romer*, 517 U.S. at 627. Amendment 2 itself reads:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b (1992) (overruled by *Romer*, 517 U.S. 620 (1996)).

255. *Romer*, 517 U.S. at 623–26; *see* RIMMERMAN, FROM IDENTITY TO POLITICS, *supra* note 253, at 144 (noting that the campaign for Amendment 2 was crafted with the "special rights" argument). The special rights argument was an obfuscating argument by Amendment 2's proponents to galvanize public referendum support. *See* Jeremiah A. Ho, *Queering* Bostock, 29 AM. U.J. GENDER SOC. POL'Y & L. 283, 317 (2021) [hereinafter Ho, *Queering Bostock*]. This argument framed sexual orientation anti-discrimination protections as "special rights" for a morally reprehensible group who did not deserve such rights. But in actuality, such rights are rights that facilitate basic civic participation and should be enjoyed at the basic fundamental level of lived human experience. *Id.* at 317.

256. *Romer*, 517 U.S. at 635.

257. *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986) ("Proscriptions against that conduct have *ancient* roots.") (emphasis added).

258. *See* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 102 (2010) (observing that despite campaigning on a slogan of "[h]ate is not a family value," Amendment 2

mischaracterizations, gay men were dehumanized, appeared sexually monstrous, and were pathologically entrenched in self-destructive behaviors.[259] Such tactics marginalized sexual minorities based on the politics of difference as measured against heteronormativity. One pamphlet distributed by Colorado for Family Values used pseudo-statistics on gay sex practices to generate the idea of sexual perversion in gay men and then targeted the voting public with differentiating rhetoric: "Gay activists want you to think they're 'just like you.'"[260] The pamphlet's intentional message was, of course, to get readers to believe that sexual minorities could not be "just like you." However, the *Romer* majority identifies this rhetoric as animus: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[261] In Justice Kennedy's view, the mischaracterizations of sexual minorities led to Amendment 2 as "a classification of persons undertaken for its own sake," which violates equal protection.[262]

The political and national visibility of LGBTQ identities likely helped Justice Kennedy propose a convincing articulation of harm. Signaling perceived improvability—even in the shadow of *Bowers*—*Romer* is a moment in which sexual minorities are *slightly* humanized.[263] Here, *Romer*'s signaling is subtle—if not subterranean—but its pro-gay holding coincides with a socio-

campaigners also made sure that "material about the degenerate lives and horrible sex practices of gays and lesbians were always present").

259. *Id.* at 94 (excerpting Amendment 2 campaign pamphlet, which included statements such as "[y]ou may already know that the sexual practices of gays differ drastically from those of most Colorado's population" and "[g]ays have been unwilling (or unable) to curb their voracious, unsafe sex practices in the face of AIDS").

260. *Id.*

261. *Romer*, 517 U.S. at 634.

262. *Id.* at 635.

263. *See* Tobin A. Sparling, *The Odd Couple: How Justices Kennedy and Scalia, Together, Advanced Gay Rights in* Romer v. Evans, 67 MERCER L. REV. 305, 320–21 (2016). Sparling writes that *Romer* "indicated the Supreme Court had dramatically shifted its attitude towards gay people. The Court's majority framed gay people, not as criminal sodomites like *Bowers v. Hardwick* had done, but *as people*." *Id.* at 320 (emphasis added). In this way, "Justice Kennedy viewed the gay Coloradans as persons entitled to dignified human treatment." *Id.* at 321 (referencing *Romer*, 517 U.S. at 635). Sparling also demonstrates this dramatic change in regard for sexual minorities by comparing the sentiment in Justice Burger's concurrence in *Bowers*, where homosexuality is "a disgrace to human nature" to Justice Kennedy's regard in *Romer* for homosexuals as "a class of persons" that "[a] State cannot so deem . . . a stranger to its laws." *Id.* at 320 n.134.

historical context where national gay and lesbian activism had created some progressive advances that appealed to strong democratic sensibilities.[264] Even controversies that did not eventually bring about major change to queer lived experiences during the 1990s—such as Don't Ask, Don't Tell[265]—seem to evince moments where "Democrats and liberals tended to become more pro-gay."[266] Observing "elite-driven" components of this shifting tendency, some scholars have found that elite influences led to greater public evolution on LGBTQ issues during this time, especially as issues were being framed around egalitarian and moral traditionalist values.[267]

Here, the assimilationist tactics of LGBTQ movement activism could have framed such visibility in ways that also positively undergirded issue evolution and underscored the improvability of queer identities consistent with *Romer*'s holding. For instance, during the 1990s, assimilationist tactics existed in some areas of gay rights activism, quite notably in the AIDS movement with the "de-gaying" of the crisis[268] and with those who represented such activism, whether behind-the-scenes or as targeted supporters.[269] William Eskridge has noted that "social prejudice against a religious or sexual minority aims at suppression or erasure of the minority" and that, in response, assimilation is not an atypical tactic.[270] While the drive to eliminate is "extreme," the "more moderate goal is assimilation, where the minority renounces its distinctive nomic values and

264. *See, e.g.*, VAID, *supra* note 245, at 126 (discussing political gains in the 1992 presidential elections); *see also* Jacobs, *supra* note 251, at 909–51 (discussing judicial and political advances in gay military service, protections for sodomy and family, and non-discrimination laws).

265. Don't Ask, Don't Tell is the short-hand moniker for the policy on gay military service signed by President Clinton in which gay military service was permitted so long as homosexual conduct was not engaged. *See* 10 U.S.C. § 654 (repealed by Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (Dec. 22, 2010)); *see also* Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell"*, 21 HOFSTRA LAB. & EMP. L.J. 403, 404–11 (2004) (discussing the history and context on the policy).

266. JEREMIAH J. GERRETSON, THE PATH TO GAY RIGHTS: HOW ACTIVISM AND COMING OUT CHANGED PUBLIC OPINION 39 (2018).

267. *Id.* at 39–43.

268. *See, e.g.*, RIMMERMAN, FROM IDENTITY TO POLITICS, *supra* note 253, at 96–98.

269. ENGEL, *supra* note 244, at 61.

270. William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2421 (1997) [hereinafter *"Coming Out"*].

conforms at least in part to majority beliefs and practices."[271] As Engel and others have noted, national organizations that achieved notoriety on gay rights issues during this time "did not necessarily have staffs or constituents which represent the diversity inherent in the sexual minority communities. Demographically speaking, individuals involved in political lobbying efforts have tended to be highly educated, middle- and upper-class, and white."[272] Whether intended or not, the effect is assimilative or mainstreaming. According to Engel, "the national voice(s) of the gay and lesbian community, or at least those that mainstream media venues will hear, tend to reinforce this atypical image of the community along class, gender, and racial lines" and "[t]he constrained image of the gay subject as white and middle-class also enables the heterosexual community to ignore those individuals who do not fit this stereotype. Visibility is gained at the exclusion of potential members of the movement."[273]

In *Romer*, the most telling sign that pairs assimilation with improvability appears not in the majority opinion but in Justice Antonin Scalia's dissent.[274] Anthony Kreis remarks that Justice Scalia's dissent "reflect[s] the rhetoric of the 1990s that sexual minorities are a privileged elite class" and that the initial reference to the elite class at the outset of the dissent was "an insightful interest-convergence argument as to why [the majority] felt comfortable overturning Amendment 2."[275] Thus, Justice Scalia's opposition to *Romer*'s pro-gay holding draws out the majority's motivations—what the majority realizes about sexual minorities here despite affirming sodomy criminalization a decade prior.[276] Eskridge recounts Justice Scalia's reference to

271. *Id.* at 2421.

272. ENGEL, *supra* note 244, at 60.

273. *Id.* at 60–61.

274. Romer v. Evans, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

275. Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 L. & INEQ. 117, 147–48 (2013).

276. Sparling, *supra* note 263, at 314–15 (noting the contrasts and interplay between Justice Scalia and Justice Kennedy's opinions in *Romer*). Sparling reads Justice Scalia's dissent as giving "the impression that he had pierced the veil that Justice Kennedy's grand themes had thrown over the real issues as hand." *Id.* at 314 (referencing *Romer*, 517 U.S. at 638). For instance, Sparling points out that Justice Scalia observed how the majority's elevation of discriminatory treatment of sexual minorities effectively placed such discrimination to something on par with bias based on race or religious background. *Id.* (quoting *Romer*, 517 U.S. at 636). From here, Sparling concludes that "Justice Scalia appeared, in his *Romer* dissent,

Kulturkampf in his *Romer* dissent as figuratively portraying "a culture clash between fundamentalist religious and pro-gay nomoi"[277] and more broadly indicating "a state struggle to assimilate a threatening minority, or to force conformity upon it."[278] Indeed, Justice Scalia vents that the *Romer* majority "ha[d] no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality . . . is evil."[279] His acerbic references to the "elite class" insinuate that the majority perceived that gay identities can be favored by raising some inciting degree of alignment between sexual minorities and the status quo. Read against *Bowers*, that complicity indicates perhaps a perceived improvability of sexual minorities based on assimilation: "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."[280] Once again, he exposes the views of that elite class: "How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools."[281] He likens the progressive issue evolution on sexual orientation discrimination to the thoughts and positions of a narrow but exclusive lawyer class:

> [I]f the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals.[282]

to disclose inside knowledge of the inner workings and motivations of the majority opinion." *Id.*

277. Eskridge, *supra* note 270, at 2413–14.

278. *Id.*

279. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (internal citations omitted).

280. *Id.* at 652.

281. *Id.*

282. *Id.* at 653 (referencing Bylaws of the Association of American Law Schools, Inc. § 6–4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, *in* 1995 Handbook, Association of American Law Schools).

Thus, his affirmations about "special rights" are amplified, suggesting preferential treatment for gays and lesbians, especially as *Bowers* had not been overturned.[283]

Notably, Justice Scalia references the kind of predominant gay visibility of that era, which scholars have described as an assimilated "mainstream" gay image that "tends to be that of the middle-class white gay male."[284] This image had profound effects on changing how settler sovereignty likely regarded sexual minorities because "[t]he image of the middle-class white gay male is that precise level of visibility which the heteronormative patriarchy can accept without becoming threatened."[285] Additionally, such alignment also uplifts. Kreis elaborates that "[Scalia's] intent was surely to highlight that the LGBT community is a powerful and visible force within the legal community and that visibility makes it easier for his fellow justices to grant rights to a group of people with whom lawyers typically associate."[286] Assimilation minimizes the primitivizing sexual deviancy that Amendment 2 proponents tried to conjure in sexual behavior between gay men.[287] They, and other sexual minorities, can now visibly join the American lawyer class and teach without fear of discrimination at reputable American law schools; in essence, they are now uplifted and improved because of some alignment with the status quo: "Bringing Scalia's point to its logical end, LGBT people typically look and behave just as privileged, well-to-do lawyers look and behave."[288] In essence, they do not threaten the settler class but can be brought into its

283. *See, e.g.*, *id.* at 641 ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

284. ENGEL, *supra* note 244, at 59.

285. *Id.* at 61.

286. Kreis, *Gay Gentrification*, *supra* note 275, at 148.

287. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771 (2002). Kenji Yoshino provides a cautious critique about assimilation. On the one hand, "[a]ssimilation is the magic in the American Dream. Just as in our actual dreams, magic permits us to transform into better, more beautiful creatures, so too in the American Dream, assimilation permits us to become not only Americans, but the kind of Americans we seek to be." *Id.* at 771–72. But assimilation's "profound seductive" vision is also complicated by its reality in law—"that in the gay context demonstrates in a particularly trenchant manner that assimilation can be an effect of discrimination as well as an evasion of it." *See generally id.* From this observation, Yoshino theorizes the form of assimilation he calls "covering," where minorities do not hide their identities but are pressured to "downplay" their identities—or in essence, "cover" them.

288. Kreis, *Gay Gentrification*, *supra* note 275, at 148.

elite sectors and professions. Sexual minorities may no longer threaten the status quo as much because they can become civilized within mainstream American society, which occasions constitutional protections that further democratic progress. They are accordingly perceived as improvable.

C. Colonizing Queer Intimacy in Lawrence

In part, Justice Scalia's *Romer* dissent identifies what Kreis calls "the merger of elite legal interests and the White privileged LGBTQ community's interests" that eventually overturned *Bowers*.[289] In the settler colonialist context, that merger was a recognition of queer improvability that incited *Lawrence v. Texas*'s decriminalization of consensual same-sex sodomy in 2003.[290] *Lawrence* involved two men, John Geddes Lawrence and Tyler Gardner, who were arrested and charged in Houston, Texas after police discovered them engaging in consensual sexual conduct that fell within the definition of "deviate sexual intercourse" under the Texas criminal code.[291] Both men were later convicted under the same statute, and their convictions were affirmed on appeal.[292]

Extending the liberty and individual self-determination conceptualizations from Justice Stevens's *Bowers* dissent, Justice Kennedy's *Lawrence* majority opens with a libertarian recalibration of the queer sex issue that establishes a more civil and considerate regard for such non-heteronormative sexual practices: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition, the State is not omnipresent in the home."[293]

Referencing how the *Lawrence* plaintiffs were arrested for same-sex intimacy in the home also harkens to Justice Blackmun's privacy arguments in *Bowers*.[294] Something has now improved to justify this re-envisioning of same-sex intimacy. *Lawrence* is now ready to explore how "[l]iberty presumes an autonomy of self that includes freedom of thought,

289. *Id.* at 149.
290. 539 U.S. 558, 578–79 (2003).
291. TEX. PENAL CODE ANN. § 21.06(a) (2003); *Lawrence*, 359 U.S. at 562–63.
292. *Lawrence*, 539 U.S. at 563.
293. *Id.* at 562; *see also* Bowers v. Hardwick, 478 U.S. 186, 217–18 (1986) (Stevens, J., dissenting).
294. *See* Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting).

belief, expression, and certain intimate conduct"[295]—including consensual same-sex sodomy. But the overturning of *Bowers* does not decolonize. Rather, as this section will explore, *Lawrence* plays into the colonizing trappings of self-determination exhibited previously in the *Bowers* dissents. Indeed, with democratic values projected, the protection of queer sex initiates as part of settlers' contemporary sexuality project.

1. Emerging Awareness

Essentially reminding us of queer improvement, Justice Kennedy identifies "an emerging awareness" developing within the law regarding privacy, sex, and same-sex behavior.[296] A rising trend has begun to evince how "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[297] The American Law Institute and some states have, since the mid-twentieth century, disfavored criminally penalizing private, consensual sexual acts.[298] Even internationally, a new regard toward decriminalizing same-sex conduct has emerged—especially in Western European venues.[299] After exploring UK and European human rights precedents that favorably treated consensual same-sex sodomy, Justice Kennedy suggestively circles back to the United States to indicate that of the thirteen states that criminalize consensual sodomy, four enforce such laws only against same-sex behavior, and that generally in most states where same-sex and opposite-sex sodomy are still penalized, "a pattern of nonenforcement" prevails.[300] Even Texas, he notes, has conceded that since 1994, no one has been prosecuted for such acts.[301]

Such references to Western international courts and changing legal attitudes have a cosmopolitan, civilizing effect because, according to Katherine Franke, "[*m*]*odern* states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. *Pre-modern*

295. *Lawrence*, 539 U.S. at 562.
296. *Id.* at 572–73.
297. *Id.* at 572.
298. *Id.*
299. *Id.* at 572–73.
300. *Id.* at 573.
301. *Id.*

states do not."[302] Under Stewart Chang's reading of *Lawrence*, Justice Kennedy's reach toward European examples demonstrates in part that the "recognition of gay rights has often been framed as an issue of modernity and progress."[303] Injected into a settler colonial perspective, both Chang and Franke's observations seem to illustrate Veracini's theory that part of the settlers' colonialism project involves "the Europeanization" of themselves on *terra nullius*—that inward drive to replicate a superior notion of themselves by modeling a civilized template.[304] Concurrently, *Lawrence*'s references to international human rights cases from Europe also indicate perceived improvability.[305] While international examples may internally pressure the Court to "catch up" to other modern courts regarding same-sex sodomy, they also seem to conveniently suggest that queer sexualities also embody humanizing potential—unlike the settler status quo's historical and morally-driven desires to subordinate queer sexualities. This new "emerging awareness" invigorates a revision for tolerating non-heteronormative sexual conduct in the United States by marking queer identities more redeemable than previously imagined.[306]

In his *Lawrence* dissent, Justice Scalia also alludes to this emerging awareness, but he does so acerbically—to emphasize that the majority's new awareness is the recognition of gay and lesbian assimilation that paves the way for decriminalizing sodomy.[307] Extending his harangue from *Romer*, he reduces the *Lawrence* majority to a "product of a law-profession culture":

302. Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 5 (2012) [hereinafter Franke, *Dating the State*].

303. Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT'L L.J. 309, 312 (2014).

304. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 21–22. Franke also notes an insidious interest convergence as well: "Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings. So long as a state treats its homosexuals well, the international community will look the other way when it comes to a range of other human rights abuses." Franke, *Dating the State*, *supra* note 302, at 5.

305. *See, e.g.*, *Lawrence*, 539 U.S. at 573 (referencing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)).

306. *Id.* at 572.

307. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (citing Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting)).

> I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.[308]

Of course, that earlier opinion was *Romer*. Reading together *Lawrence*'s majority and Scalia's dissent here, what emerges is the majority's civilizing motivations in re-envisioning same-sex sodomy.

2. Transfer of Assimilation

Once Justice Kennedy neutralized the primitive associations with consensual same-sex behavior and elevated its regard in a modernizing context, consensual same-sex sodomy can now receive protection from the privacy jurisprudence from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[309] *Lawrence* enacts the type of colonizing noted by Veracini as a "transfer by assimilation."[310] With Indigenous populations, assimilation describes "a process whereby indigenous people end up conforming to variously constructed notions of settler racial, cultural, or behavioural normativity."[311] Going deeper into this idea, Veracini describes that "it is the settler body politic that needs to be able to absorb the indigenous people that have been transformed by assimilation."[312] In that way, the transfer is always at the hands of the settler majority because "successful assimilation is never dependent on indigenous performance."[313] As Veracini and Saito have both demonstrated, settlers' need to include others is part of their drive to dominate and civilize.[314] Indeed, assimilation never achieves inclusion. Rather, assimilation ultimately subordinates. Veracini confirms this aspect when revealing that "[t]he need to assimilate indigenous people can . . . coexist with the aim of unassimilable difference,"

308. *Id.*
309. *Id.* at 573–74.
310. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 37–39.
311. *Id.* at 38.
312. *Id.*
313. *Id.*
314. *Id.* at 38–39.

which "explain[s] why assimilation is never ultimately successful."[315] In this way, assimilation engenders colonization. In *Lawrence*, transfer by assimilation is precisely how queerness is colonized.

To be sure, the decriminalization of consensual sodomy in *Lawrence* is an important LGBTQ holding. Yet assimilationist tactics from *Romer* extend to *Lawrence* to civilize and align consensual same-sex behavior with settler society.[316] Such conduct is now civilized enough to exist alongside other behaviors pertinent to an individual's decisions regarding "marriage, procreation, contraception, family relationships, child rearing, and education."[317] *Lawrence* now finds that the choice to engage in consensual same-sex sodomy is imbued with personal dignity and autonomy.[318] But eventually, this alignment is colonizing.

Most telling about how *Lawrence* effectuates such a colonizing transfer through assimilation is the way its rhetoric normatively re-imagines queer sex. Here, Justice Kennedy imbues queer sexual activity with the strings often tied to mainstream normative sex and expectations in relationships, marriage, monogamy, and family—all heteropatriarchal ideals inherited from the early American settler-era practices.[319] Throughout *Lawrence*, the normative pattern of monogamous relationships is universally assumed upon queer sex practices: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[320] If that's the case, then anti-sodomy laws would "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[321] Without pushing same-sex monogamous relationships into the marriage realm, Justice Kennedy heightens liberty interests in the choice to engage in same-sex

315. *Id.* at 39.

316. *See* Romer v. Evans, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting); *see also* discussion *supra* Section II.B.

317. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

318. *Id.* at 573–74.

319. *See* Glenn, *supra* note 20, at 60 (noting that American settler colonialism is a "race-gender project" that is preoccupied with "[m]asculine whiteness" and organizing settler families in "heteropatriarchal nuclear-domestic arrangements").

320. *Lawrence*, 539 U.S. at 567.

321. *Id.*

sodomy by shaping its significance within the contours of heterosexual marital activities. *Lawrence* epitomizes a preference for a heteronormatively assimilative version of consensual same-sex acts. In what Marc Spindelman calls the "like-straight" analogy, *Lawrence*'s assimilationist vision normatively situates queer sex within a gendered, heteronormative realm while disregarding its non-heteronormative practices.[322] Thus, the rhetoric is assimilative and affects a settler colonial transfer. Part of this assimilative tactic, as Spindelman surmises, resulted from over-romanticized gay rights advocacy leading to the *Lawrence* decision itself: "To show how good gay could be, the lesbian and gay rights briefs in *Lawrence* went out of their way to praise heterosexuality over and over again."[323] In fact, in their filings, constitutional law scholars sentimentalized same-sex relationships as similar to heterosexual ones.[324] Perhaps it worked. After *Lawrence*, what becomes sanctionable is queer sex that normatively aspires to resemble sexual expressions of heterosexual relationships.

Noting the *Lawrence* opinion's alignment with the status quo, Angela Harris finds that the way *Lawrence* treats consensual same-sex sodomy possibly demonstrates "the reconsolidation of preexisting relations of privilege and subordination."[325] Gay liberationist activists in the 1970s were

322. *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619 (2004) ("The normative power of this 'like-straight' idea came from the presumptive goodness of heterosexuality, a sexual status that is socially sacrosanct and legally protected.") (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 662, 682, 685 (1980)); *see also id.* at 1629 (noting that *Lawrence* bases its like-straight analogy in "its solicitude for heterosexual sexual rights," which colloquially means that "[r]ights that are made to the king's measure are fit for a queen").

323. *Id.* at 1619.

324. *Id.* at 1619–20 ("One romantic depiction of heterosexual, hence homosexual, 'domestic bliss, for instance, appeared in the brief filed by eighteen of our country's leading constitutional law scholars."); *see id.* at 1620 (noting how this brief "detailed some of the ways that 'gay people,' just like heterosexuals, 'form couples and create families that engage in the full range of everyday activities, from the most mundane to the most profound,' including how "[g]ay people, for example, 'shop, cook, and eat together,'" how they "celebrate the holidays together, and share one another's families," how they "make financial and medical decisions for one another," and how they "rely on each other for companionship and support," which all show how "[m]any gay couples share 'the duties and the satisfactions of a common home.'").

325. Angela P. Harris, *From Stonewall to the Suburbs?: Toward A Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1541 (2006); *see also id.* at 1543 ("*Lawrence* contemplates the folding of sexual sovereignty into the framework of structural liberalism, as the Court's incantations of 'liberty' and

among a broader cultural movement that "began to provide increasing alternatives to heterosexual monogamy."[326] Monogamy reflected familial institutions dependent on heteropatriarchal gender norms—against which groups whose familial organizations and sexual behaviors threatened settler society were judged and othered.[327] Recent legal challenges in the 2000s, during *Lawrence* and the rising push for marriage equality, "are linked to an emergent crisis in 'the family' itself."[328] Similar to the way Justice Kennedy mischaracterizes queer sex practices in a monogamous, heteronormative light, he also mischaracterizes the actual facts of *Lawrence*. The two men, Lawrence and Garner, who were charged under the Texas law, were likely not in an exclusive relationship, and their sexual encounter probably did not go beyond casual, no-strings-attached sex.[329] Justice Kennedy's convenient amnesia mutes the facts plainly in this decision, avoiding problematic connotations of gay promiscuity that could lead back to a pre-modern, uncivilized version of homosexual sex; instead, the script of heterosexual domestic bliss is the prescriptive one to play.[330] In this fashion, the like-straight analogy in *Lawrence* imbues consensual same-sex sodomy with heteronormative, "civilized" ideals and effaces queer ones to strengthen a liberty-based holding. But this tactic also entangles consensual same-sex sodomy in prescriptive aspirations of heterosexual relationships, monogamy, and family.

'privacy' (and its own disclaimers about the possible reach of the decision) suggest.").

326. *Id.* at 1567.

327. *Id.*

328. *Id.*

329. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 45 (2012) (observing that Lawrence and Garner "were never in a romantic or sexual relationship with each other, either before or after the sodomy arrests").

330. *See* Lawrence v. Texas, 539 U.S. 558, 562–63 (2003). Justice Kennedy is quite sparse with factual details in his recitation of the case: "In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace." *Id.*

3. Colonizing Effects

Also constraining in *Lawrence* is how consensual same-sex sodomy is normatively yoked under a racially White pretense of queer sex practices.[331] The interracial dynamics of the case are muted along with, by extension, the practice of sexualizing racial minorities in order to distance them from the mainstream. Here, what appears is "reverse" racial sexualizing. Although *Lawrence*'s central issue is about the constitutionality of criminalizing consensual same-sex sodomy, racialization through sexuality—particularly and frequently through non-heteronormative sexual conduct—has taken place in settler society to strengthen whiteness through heteronormative masculinity.[332] But as Jasbir Puar astutely observes, "[t]he interracial pairing of Tyron Garner, a younger black man, and John Geddes Lawrence, an older white man, are not details remarked upon in any court documents of the case" until after the Court decided the case.[333] Exploring the complexities of race, gender, and sexuality that the Court ignores in *Lawrence*, Dale Carpenter interprets that "a mix of homophobia and racism may have been at work" in Garner and Lawrence's arrests.[334] During the arrests, Garner's perceived effeminacy "clearly bothered" law enforcement, and that likely the offense of sodomy "may have been aggravated because [or so it was said] the black man was playing the receptive (passive, subordinate, female) role to

331. PUAR, *supra* note 35, at 117–19. Puar notes how gay rights discourses "produces whiteness as a queer norm (and straightness as a racial norm)" because they "enact[] a kind of amnesia about how U.S. legal discourse historically has produced narratives of homosexuality in relation to race." *Id.* at 118 (quoting Siobhan B. Somerville, *Queer* Loving, 11 GLQ: J. GAY & LESBIAN STUD. 335, 336 (2005)). Specifically in *Lawrence*, Puar observes this amnesia in the opinion's erasure of Tyrone Garner's race—in both the facts of the opinion and the stylizing of the case name). *Id.* at 118–19. Puar finds that this erasure is consistent with prioritizing the visibility of sexual minorities over "racialized subjects," which implies that those who will benefit from *Lawrence*'s decriminalization of sodomy will be those who practice sodomy and are considered non-racialized subjects. *Id.* at 120 (noting *Lawrence*'s impact reflects "the sexual subjects it liberates in exchange for the racial subjects it imprisons").

332. *See generally* MARK RIFKIN, WHEN DID INDIANS BECOME STRAIGHT? KINSHIP, THE HISTORY OF SEXUALITY, AND NATIVE SOVEREIGNTY (2011).

333. PUAR, *supra* note 35, at 118–19 (citing Siobhan B. Somerville, *Queer* Loving, 11 GLQ: J. GAY & LESBIAN STUD. 335, 346 (2005)).

334. CARPENTER, *supra* note 329, at 103. Carpenter notes that one of the officers was Black and these acts were likely racial betrayal as well. *Id.* at 104; *see also* Marc Spindelman, *Tyrone Garner's* Lawrence v. Texas, 111 MICH. L. REV. 1111, 1128 (2013) (reviewing Carpenter's book).

the white man during sex."[335] If true, this plays right into expected gender norms: "At the scene of the arrest, Lawrence was aggressive and belligerent (masculine); Garner was passive and cooperative (feminine)."[336] Garner possibly violated masculine norms, which also at the same time "othered" him as a Black man—even to one of the arresting officers, who was also Black.[337] Yet, Justice Kennedy bypasses these factual dynamics.

Under Russell Robinson's assessment, "if Justice Kennedy had candidly acknowledged these facts [in *Lawrence*], it would have been harder to describe gay relationships in uniformly transcendent terms."[338] As with using heteronormative family and relationship values as leverage, ignoring the homophobic depiction of sexual depravity as a structural tactic to racialize non-White people leverages the mission to civilize same-sex sodomy. Discounting the racial dynamics trades race for sexuality, which furthers the hierarchy of whiteness within the case but also in sodomy's transcendence in *Lawrence*. Without talking about race, Justice Kennedy implicitly leaves whiteness as the norm—as it always is in the settler state—and effectively sanitizes queer sex. Because "in our contemporary milieu, the growing visibility and 'inclusion' of gay and lesbian subjects into the national legislative fold of the United States (not to mention market interpellation) appear to be at the expense of racialized subjects," Puar urges that *Lawrence* "must be examined in this intensely charged racial atmosphere, which repetitively defines the slippery contours of racial markings not only in relation to a dominant white American formation, but also among people of color themselves."[339] As Puar also points out, *Lawrence* coincides with the early days of America's post-September 11 war on terror, where sodomy was racially weaponized in the national consciousness—particularly in the military abuses of interned Muslims at Abu Garib and in the salacious media coverage of pop-singer Michael Jackson's child molestation trials.[340] In disregarding Garner's race, *Lawrence* dodges an opportunity to address racializing tactics that intersect with

335. CARPENTER, *supra* note 329, at 103.
336. *Id.*
337. *Id.*
338. Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 223 (2018) (citing *Lawrence* as example of "transcendent" characterization).
339. PUAR, *supra* note 35, at 119.
340. *Id.* at 116–17.

homophobia, while it arguably safe-harbors non-heteronormative sexualities who are White. In both instances, the shamefulness of non-heteronormative sexual conduct was entangled with racialized portrayals of these incidents.[341]

Returning home to the domestic framework that houses consensual same-sex sodomy in *Lawrence*, we see how Justice Kennedy's domestic connotation civilizes queer sex and also geographically colonizes it. In Franke's view, *Lawrence* "domesticates" queer sex as sex that can be practiced but only in private—essentially trapped in the home sphere: "[T]he liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated. It is not the synonym of a robust liberal concept of freedom."[342] Ostensibly, this private arena where sex takes place undercuts his assurance that "freedom extends beyond spatial bounds" if Justice Kennedy's references to where sex takes place are notably in private.[343] Thus, "[r]epeatedly, Justice Kennedy *territorializes* the right at stake as a liberty to engage in certain conduct in private."[344] The domestic sphere is invariably where settler heteropatriarchal norms and values about gender and family have been preserved.[345] This privatization of sex is another part of *Lawrence*'s colonizing transfer of queerness. *Lawrence*'s private "territorializing" of same-sex activities transmits the message that only certain acts—those practiced by monogamous homosexual couples domestically in private—are sanctionable: "*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo- and hetero-sex/intimacy, while at the same time rendering all other zones more dangerous for nonnormative sex."[346] Such "domestic bliss" is deceptively precarious because "[i]t can be used to float political projects that render certain normative heterosexual

341. *Id.*

342. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1401 (2004) [hereinafter *Domesticated Liberty*].

343. *Id.* at 1403.

344. *Id.* (emphasis added).

345. *See* Harris, *supra* note 325, at 1567 (calling domesticity "a set of practices and ideologies . . . since the late nineteenth century" but also one ultimately associated with the family); *see* PUAR, *supra* note 35, at 124 ("Western liberal feminists have typically understood the private as an axiomatic space of women's subjugation to men, the domestic dominion that lassos women to unpaid work in the home, reproductive expectations, heteronormative nuclearity, and vulnerability to domestic violence: the 'patriarchal family home.'").

346. Franke, *Domesticated Liberty*, *supra* note 342, at 1415.

couples as its primary reference points and ethical paradigms."[347] Consensual same-sex sodomy is condoned only if the public does not have to see it or know about it and instead only abstractly imagines it as a part of a monogamous normative relationship: "The legal program that is most easily suggested by *Lawrence* is one undertaken by adult gay couples who seek recognition for their relationships and whose sexuality is not merely backgrounded, but closeted behind the closed doors of the bedroom."[348] Even more cynically, Puar remarks that *Lawrence* "looks a tad like cleaning up the homeless and moving them out of view, a sanitizing of image and physical as well as psychic space."[349]

To add more to the treachery of domestic bliss, Puar associates *Lawrence*'s domestic privacy to American homeownership and questions how accessible that normative domestic privacy is if it is "a racialized and nationalized construct insofar as it granted not only to heterosexuals but to certain citizens and withheld from many others and from noncitizens."[350] Puar criticizes the normative and aspirational privacy in *Lawrence* as "gesturing to homonormative subjects of class, racial, legal status, and gender privilege who have material access to it *against* the sexually nonnormative racialized subjects discursively and perhaps even literally barred from it."[351] Queer identities who lack racial, gender, and economic privilege to secure such privacy would potentially be having sex that is not favored normatively in *Lawrence*.

The Court's reenvisioning of queer sex exposes the transfer by assimilation in *Lawrence* that civilizes same-sex sodomy in order to protect it as a fundamental right that furthers self-determination ideals. But to get to that reimagination and protection, ideal expectations about heteronormative sex had to be grafted onto the Court's imagining of queer sex acts. Meanwhile, the opinion also leaves structural settler norms of White heteropatriarchy—even those underscored in *Bowers*—alone. No critique of the gendered normativity that anti-sodomy

347. *Id.*
348. *Id.* at 1416.
349. PUAR, *supra* note 35, at 123 (citing Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, *in* MATERIALIZING DEMOCRACY: TOWARDS A REVITALIZED CULTURAL POLITICS 175, 181 (Russ Castronovo & Dana D. Nelson eds., 2002)).
350. *Id.* at 124–125.
351. *Id.* at 125.

laws reinforced ever enters the conversation in *Lawrence*. Instead, Franke has astutely observed that the stigma that Justice Kennedy raises in *Lawrence* is not inflicted upon queer identities because of the mere existence of anti-sodomy laws, but rather the convictions received under such laws—a narrow critique of the results of such laws based on the invasion of personal liberty, rather than a critique of what structural marginalization these laws represent.[352] The opinion's restraint was what allowed some post-*Lawrence* cases to probably "understand *Lawrence* to impose absolutely no check on the legal enforcement of heteronormative preferences."[353] Rather than establishing a more transcendent rationale, *Lawrence* relies on heteropatriarchal structural norms to legitimize consensual same-sex sodomy for constitutional protection.

Like *Bowers*, *Lawrence* preserves existing settler hierarchies. The kind of queer sex worth the settler state's protection is a sanctioned consensual same-sex sodomy practiced monogamously in private by couples who are ideally White, male, economically privileged, and otherwise aligned with mainstream settler values. Along with sexual minorities of color, lesbians are conspicuously kept out of *Lawrence*.[354] This is the queer intimacy that American settler values and principles of fundamental rights can condone—the kind that resembles the normative sex of the quintessential settler family. Decriminalizing sodomy in *Lawrence* does not destabilize settler heteropatriarchy, nor does it liberate queer sex. Instead, *Lawrence* assimilates consensual same-sex sodomy within the existing mainstream norms. *Lawrence* ultimately colonizes.

D. Colonizing Queer Relationships

Lawrence may have settled the legal issue over consensual same-sex sodomy by civilizing it into mainstream settler consciousness. However, the question of recognizing same-sex relationships within marriage remained unresolved at the Court for the next decade.[355] Litigation over same-sex marriages has

352. Franke, *Domesticated Liberty*, *supra* note 342, at 1405.

353. *See id.* at 1412–13 (noting an example of such a post-*Lawrence* case in Kansas).

354. Ruthann Robson, *The Missing Word in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 397, 399 (2004).

355. *Lawrence* was decided in 2003. *See* Lawrence v. Texas, 539 U.S. 558 (June 26, 2003). The issue of same-sex marriage was litigated throughout state courts

existed since the 1970s[356] but lacked any revolutionary legal progress.[357] Even the Court's first courting with same-sex marriages in 1972 with *Baker v. Nelson* ended summarily "for want of a substantial federal question."[358] The rhetoric was tautly exclusionary. The push for marriage, however, never relented. In the 1990s, the momentum for marriage equality suddenly ignited as the issue percolated onto the national political and legal stages, with LGBTQ political influence and visibility galvanizing the image of non-heteronormative sexualities.[359] This was the same period that the Court decided *Romer*, and advancements for sexual minorities led some states to recognize same-sex relationships in alternative arrangements such as civil unions and domestic partnerships.[360] But, of course, the same decade also witnessed Congress's enactment of the Defense of Marriage Act (DOMA).[361] DOMA defined marriage as the union of a husband and wife for purposes of federal statutes and safeguarded states that were disinclined toward adopting same-sex marriages from having to recognize same-sex marriages from other jurisdictions.[362] Congress passed DOMA in reaction to the possibility of Hawaii recognizing same-sex marriages through the litigation that originated in *Baehr v. Lewin*.[363]

Significant progress for legalizing same-sex marriages came shortly after *Lawrence*. Less than a year after *Lawrence*

after *Lawrence*. *E.g.*, Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003). But the Supreme Court didn't decide on marriage equality issues until it overturned the Defense of Marriage Act in *United States v. Windsor* in 2013. *See* United States v. Windsor, 570 U.S. 744, 744–45 (June 26, 2013).

356. *E.g.*, Singer v. Hara, 522 P.2d 1187 (Wash. App. Div. 1 1974).

357. *See* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 31 (2010).

358. Baker v. Nelson, 409 U.S. 810, 810 (1972).

359. Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J. L. & GENDER 269, 293–95 (2015) (narrating the history of the marriage movement in the 1990s).

360. *See, e.g.*, Baker v. State, 744 A.2d 864, 889 (Vt. 1999) (civil unions legalized only three years after the Supreme Court's 1996 decision in *Romer*).

361. 1 U.S.C. § 7 (1996), *amended by* Respect for Marriage Act, 1 U.S.C § 7 (2022); *see also* Daniel J. Galvin, Jr., *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 405, 420 (2019).

362. *See* 1 U.S.C. § 7 (1996).

363. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); *see also* Tina C. Campbell, *The "Determination of Marriage Act": A Reasonable Response to the Discriminatory "Defense of Marriage Act"*, 58 LOY. L. REV. 939, 944–48 (2012) (discussing the text and background for enacting DOMA).

decriminalized consensual sodomy, the Massachusetts Supreme Judicial Council allowed same-sex couples to marry, relying heavily on *Lawrence*'s liberty and privacy reasoning.[364] Other states followed, and within a few years, a "patchwork" of state same-sex marriage recognition appeared.[365] However, the influence of *Lawrence* only extended so far. Despite the private domestication of gay sex and its civilizing implications, many other states still reserved marriage only for opposite-sex couples.[366] *Lawrence*'s sanitized elevation of same-sex sodomy seemed insufficient for a uniform acceptance of same-sex marriages. Arguably, the most turbulent example of this indecisiveness over same-sex marriages appeared in California in 2008. The state supreme court's ruling in *In re Marriage Cases* recognized same-sex marriages which then prompted a public referendum later that year to undo that recognition.[367] Some of the substantive campaigning for that referendum relied on generating a sense of threat to heteronormative families.[368] Eventually, through the late 2000s, the social acceptance of marriage equality began to turn more favorably.[369] But without

364. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) ("Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'") (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992))).

365. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 650-A (2011); N.H. REV. STAT. ANN. § 457:1-a (2009); VT. STAT. ANN. tit. 15, § 8 (2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481–82 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009); *see also* Jeremy W. Peters, *Federal Court Speaks, But Couples Still Face State Legal Patchwork*, N.Y. TIMES (June 26, 2013), https://www.nytimes.com/2013/06/27/us/politics/federal-court-speaks-but-couples-still-face-state-legal-patchwork.html [https://perma.cc/W7XC-NQJT].

366. *E.g.*, FLA. CONST. art. I, § 27; 750 ILL. COMP. STAT. 5/212(a)(5) (2009) (amended 2014); 23 PA. CONS. STAT. ANN. § 1704 (2009).

367. *In re* Marriage Cases, 183 P.3d 384, 452–53 (Ca. 2008); *see* Hollingsworth v. Perry, 570 U.S. 693, 701 (2013) (narrating the history of Proposition 8 in California).

368. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 359 (2009) ("[T]he Yes on 8 campaign sought to valorize 'traditional marriage' not only through the expected route—championing opposite-sex marriage over same-sex marriage—but also by appealing to the family as a bulwark of protection for individuals, especially parents, against an intrusive and threatening state.").

369. *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RSCH. CTR. (Mar. 20, 2013), http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics [https://perma.cc/XRD7-WKWA] (noting and studying the "rise in support for same-sex marriage over the past decade" as "among the largest changes in opinion on any policy issue over this time period").

a promising federal response to same-sex marriage, the marriage issue was left as a disjointed mosaic among states with DOMA existing in the background.[370] To effectuate the transfer of queer relationships federally into the settler state's marriage institution, same-sex relationships—rather than sex—had to be civilized. Again, the first requirement for such transference is improvability.[371] The Court's decision in *U.S. v. Windsor*[372] identifies precisely that.

1. *Windsor* and Improvability

In *Windsor*, the Court recognizes the improvability of same-sex relationships. Here, Edith Windsor and her deceased spouse, Thea Spyer, had been a couple since 1963 and were formally domestic partners in New York City in 1993 before later marrying in 2007 in Canada.[373] New York State, where the couple resided, legally recognized their Canadian marriage.[374] When Spyer passed away in 2009, she left her entire estate to Windsor.[375] However, because DOMA did not recognize same-sex marriages, Windsor presumably did not qualify for the marital exemption under federal estate taxes.[376] After paying $363,053 in estate taxes from the IRS, she subsequently sought a refund but was denied the request.[377] Windsor then brought the suit that would eventually invalidate Section 3 of DOMA.[378]

Windsor's perception of improvability in same-sex relationships echoes *Romer*'s perception of improvability toward assimilated gay identities. Written again by Justice Kennedy, even *Windsor*'s doctrinal resolution in rationality and equal protection mirrors *Romer*.[379] But with *Windsor*, now the terrain involved the most sanctified institution in settler heteropatriarchal existence: *marriage*. Such values regarding family and domesticity appeared more directly at stake in

370. *See* Peters, *supra* note 365.
371. *See supra* Section II.A.
372. United States v. Windsor, 570 U.S. 744 (2013).
373. *Id.* at 753.
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. Artem M. Joukov, *A Second Opinion: Can* Windsor v. United States *Survive President Trump's Supreme Court?,* 27 J.L. & POL'Y 327, 369 (2019) (noting the resemblances in the rationality holdings of *Windsor* and *Romer*).

Windsor than in *Romer*. *Windsor* opens by reciting the facts with a familiar sense of civilized domesticity that was missing from *Lawrence* a decade prior.[380] Justice Kennedy externalizes the domestic monogamous relationships that he alluded to in *Lawrence* in Edith Windsor's seemingly domestic, married-then-widowed circumstance, emphasizing the ordinary and mundane:

> Two women then residents of New York were married in a lawful ceremony in Ontario, Canada in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses.[381]

With this plain, nondescript depiction of the Windsor-Spyer marriage, the humanizing discourse begins. Having "met in New York City in 1963" and marrying in Canada in 2007 because of their "[c]oncern[] about Spyer's health," they are just like any loving married couple subject to death, health, and taxes—and that is Justice Kennedy's point.[382] The only minoritizing difference is that Windsor was excluded from a tax refund by DOMA because she and Spyer were a same-sex couple.[383]

And therein lies the inequality. Something has now changed about same-sex relationships that vividly leverages a sense of inequality. The notion that DOMA created constitutional inequality is undergirded by assimilative sameness that the Court recognizes in the Windsor-Spyer marriage: same-sex couples, as represented by Windsor and Spyer, are now perceived as improved, the requirement for entering the settler state.[384] Henceforth, improvability appears thematically in *Windsor*, and assimilation again underlies the leveraging force that eventually hands Windsor her estate tax remedy and sets same-sex relationships onto the path of settler redemption for marriage.

The sense of improvability of same-sex couples was likely established in *Windsor* through the identity traits that Edith

380. *Windsor*, 570 U.S. at 749–50.
381. *Id.*
382. *Id.* at 753.
383. *Id.* at 751.
384. *See* VERACINI, SETTLER COLONIALISM, *supra* note 52, at 28–29 (discussing settler regard for the "improvable" in "Exogenous Others" as the condition for entering the settler state); *see also supra* Section II.A.

Windsor and Thea Spyer specifically shared with the settler status quo:

> Under the theory of interest convergence, Edith Windsor, a wealthy, white woman in a long-term committed relationship in New York City, was in many ways, the perfect plaintiff to challenge DOMA because she could be sold as part of a respectable, assimilation-based gay image to the general public and, more importantly, to those in power.[385]

Certain attributes about Windsor and her long-term relationship with Spyer conjured familiar status quo depictions about marriage to produce a sense of civilized improvability while also helping Justice Kennedy's rationality reasoning.[386] Windsor's public persona "closely hues to the image of homosexuality that has been consciously crafted in the public sphere."[387] Her wedding to Spyer, announced in *The New York Times* wedding section, suggested sufficient mainstream respectability to garner a feature.[388] Both Windsor and Spyer held "elite pedigrees in terms of education."[389] And as women were notably amiss in *Lawrence*, Windsor's "respectability-based identity as a lesbian represented a departure from the stereotype of hyper-sexuality that is often affiliated with or imputed to gay culture."[390] Also, just as in *Lawrence*, race subtly skewed the portrayal as well: "[Windsor's] racial identity as a white woman reified the primacy of whiteness in the gay community and gay rights movement."[391] Meanwhile, her regionalism did not hurt her either: "[Windsor's] identity as an

385. Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521, 522 (2015).

386. *Windsor*, 570 U.S. at 769–75 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government."); *see also id.* at 770 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

387. Nourafshan & Onwuachi-Willig, *supra* note 385, at 522 n.7.

388. *Id.*

389. *Id.*

390. *Id.* at 523.

391. *Id.*

educated Northerner reinforced notions of sophistication and assimilation in the gay and lesbian community."[392]

Moreover, as a plaintiff, Windsor's "conform[ance] to society's perceived normative ideal in all ways except for her sexuality" was paired with an estate tax case involving significant financial injury.[393] This bit of materialism "was highly salient to white elites, both gay and non-gay alike," capable of evoking a sense of liberal injustice because all of this injury was not of her doing but hinged on federal law's treatment of her sexual identity.[394] Windsor lost $363,053 because DOMA prevented her from accessing the marital exemption from federal estate taxation.[395] The interplay between the assimilated image of Windsor, her long-term marriage to Spyer, and the tax forfeitures of resolving Spyer's estate generates a depiction of same-sex couples that resonate off the normative and assimilative set-up of "domesticated" same-sex intimacy in *Lawrence* and hones it even further. Though alluded to in *Lawrence*, same-sex relationships were then a blurry and abstract notion. The legal acceptance of same-sex couples in marriage was nascent—though just around the corner with Massachusetts and in popular imaginations.[396] But now they come into better focus in *Windsor* only to confront spousal death and a whopping unfair federal tax consequence. The Court's subtextual recognition of improvement conjures an unconstitutional sense of injustice.

In my view, when Justice Kennedy writes that "[DOMA's] demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law," one could infer three significant implications.[397] First, without legalizing same-sex marriages federally just yet, married same-sex couples have been elevated to a status on par with married opposite-sex couples—which signals a perceived improvability.[398] Second,

392. *Id.*
393. *Id.*
394. *Id.*
395. United States v. Windsor, 570 U.S. 744, 753 (2013).
396. *See, e.g.*, Chris Cillizza & Sean Sullivan, *How Proposition 8 Passed in California and Why It Wouldn't Today,* WASH. POST (Mar. 26, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today [https://perma.cc/4SGK-XQ7Y].
397. *Windsor*, 570 U.S. at 771.
398. This perceived improvability and elevation of same-sex relationships seem to emerge elsewhere as well in *Windsor*, for instance, when Justice Kennedy

because same-sex marriages are now seen in *Windsor* as standing on similar ground as opposite-sex marriages, DOMA's differentiation of same-sex marriages more clearly illustrates the unfairness of these legislative restrictions.[399] Third, the perception of improvability and elevation of same-sex relationships helps Justice Kennedy, in part, draw the conclusion that when Congress passed DOMA, it was motivated by "an avowed purpose" of "impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[400] Consequently, in *Windsor*, DOMA's restrictions appear driven by unconstitutional animus.[401] Through the characterized unfairness of Edith Windsor's situation, the Court recognizes same-sex couples' capability for civilized improvement that permits redemption.

2. Colonizing Transfer of Queer Couples in *Obergefell*

If *Windsor* brought same-sex relationships more vividly to the Court's imagination, then *Obergefell v. Hodges*[402]—and later, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[403]—sharpened the focus even further. The colonizing of same-sex relationships in *Obergefell* matches the assimilationist transfer from *Lawrence*. But both post-*Windsor* decisions, *Obergefell* and *Masterpiece*, delineate more explicitly the kind of queer identities selected for inclusion and protection in the settler state and those whom the settler project will continue to excoriate.

In *Obergefell*, relationships that can be uplifted into marriage are consistent with the developing template of assimilationist gay visibility. Various scholars have denoted the

describes New York State's recognition of same-sex marriages as "giv[ing] further protection and dignity" to same-sex relationships and "reflect[ing] both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Id.* at 769.

399. As Justice Kennedy articulates further, DOMA's "second-tier" treatment of same-sex marriages "raises a most serious question under the Constitution's Fifth Amendment." *Id.* at 771.

400. *Id.* at 770. Justice Kennedy's other observation that contributed to his finding of animus in DOMA was Congress's moral disapproval of non-heteronormative sexualities. *Id.* at 770–71.

401. *Id.*

402. 576 U.S. 644 (2015).

403. 138 S. Ct. 1719 (2018).

assimilationist tactics and respectability politics of marriage-rights advocacy leading up to *Obergefell*, critiquing how the movement's lawyers emphasized alignment with the mainstream status quo.[404] But most exactingly, Cynthia Godsoe has noted that the *Obergefell* plaintiff couples typically (1) seemed "all-American," with upper middle-class professions, and racially White compositions, (2) were family-oriented with either childrearing or familial caretaking duties, (3) appeared performatively asexual, and (4) were non-militant or apolitical except for this litigation.[405] Alongside other scholarly critiques of assimilationist strategies in *Obergefell* and marriage equality litigation generally, the interest convergence that elevated same-sex relationships illustrate the perceived alignment of certain same-sex couples with mainstream settler heteronormativity that convinced the Court that particular queer relationships would not threaten marriage but rather fortify it.[406]

Justice Kennedy's *Obergefell* opinion is highly performative as it transfers same-sex relationships into the settler marriage state. Within the opinion, this colonizing transfer takes place in three parts. An initial recognition of the current improved nature of same-sex couples leads the transfer. Then, that recognition is followed by a historical narrative tracking the

404. *See, e.g.*, Katherine Franke, *What Marriage Equality Teaches Us: The Afterlife of Racism and Homophobia*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 238, 249 (Carlos A. Ball ed., 2016) (arguing that "[a]s marriage equality advocates make the plausible case that they share with conservatives the same basic values about marriage, conservatives come around to seeing same-sex couples who wanted to marry as 'just like us,' or enough like us to recognize a shared identity"); NICOLA BARKER, NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE 109–13 (2012) (discussing sameness strategies in various marriage equality campaigns worldwide); Nourafshan & Onwuachi-Willig, *supra* note 385, at 524 (noting that "although some gays and lesbians may have achieved insider status through formal inclusion in the traditional institutions of marriage and the military, these victories were made possible, at least in part, through a strategy that intentionally portrayed the gay community as disproportionately white, affluent, and assimilation-oriented, which elides the actual diverse demography of the gay community, leaving poorer, gay communities of color invisible to the mainstream public").

405. *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 145 (2015), http://www.yalelawjournal.org/forum/perfect-plaintiffs [https://perma.cc/YP59-BSFT].

406. *See* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249, 278–79 (2020) [hereinafter Ho, *Queer Sacrifice*] (discussing the interest convergence that emerged through Justice Kennedy's observations of plaintiff same-sex couples in *Obergfell*).

emergence of such improvability. And finally, same-sex relationships are transferred into the institution of marriage when they are constitutionally extended the fundamental right to marry. Once Justice Kennedy moves through these parts of *Obergefell,* the colonizing transfer is complete.

In the first part of the transfer, Justice Kennedy reminds us of the improvability of same-sex relationships previously noted in *Windsor*. To demonstrate, he draws upon three model same-sex couples—James Obergefell and John Arthur, April DeBoer and Jayne Rowse, and Ijpe DeKoe and Thomas Kostura—who seem to embody some or all of the assimilated mainstream status quo characteristics that Godsoe identified.[407] The three couples presented as racially White, and none of them are portrayed with some sense of political militancy.[408] Some have caretaking functions—either with each other or because they have children.[409] While Justice Kennedy's portrayals of these couples, as likely model same-sex couples, align very much with establishment ideals about relationships and marriage—in their domestic commitment to each other and/or their families, their respectable professions, their patriotism, and even their whiteness—their queer sexualities, however, are restrained. Justice Kennedy utilizes this anti-stereotyping tactic here to push away from any historical primitivizing of queerness or same-sex relationships, only to merge same-sex couples with heterocentric ideals about couplehood, relationships, family, and domestic married life.[410] Moreover, in the case of James Obergefell's marriage to John Arthur, one must not fail to observe the resemblance between the Windsor-Spyer marriage as the *last* time the Court observed a same-sex couple in a major marriage context and the Obergefell-Arthur marriage as the *first* couple to be depicted in the *Obergefell* opinion.[411] Both couples had been in seemingly committed, long-term

407. *See Obergefell*, 576 U.S. at 658–59.
408. *See id.*
409. *See id.*
410. *See* Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089, 1114–20 (2017) (observing how the *Obergefell* opinion prioritizes heteronormative values in marital relationships, family, and childrearing in part through the majority's recognition of selectively chosen same-sex couples who convey shared values).
411. *Compare Obergefell*, 576 U.S. at 658–59, *with* United States v. Windsor, 570 U.S. 744, 753 (2013).

relationships with each other.[412] Both relationships involved a partner with a debilitating health issue that prompted each couple to marry urgently out of state.[413] Both marriages faced legally sanctioned injustices upon the death of the respective ailing same-sex spouse.[414] Aside from the genders of the respective same-sex couples, their stories—or how Justice Kennedy crafts them—are profoundly similar. Essentially, *Obergefell* picks up where *Windsor* left off.

After recapitulating improvability, Justice Kennedy then, secondly, embarks on a historical narrative that situates that improvability to explain how it invigorates the transfer of same-sex relationships into marriage already taking place societally and in some states.[415] Justice Kennedy recalls historically how the primitivizing of consensual same-sex intimacy led to sodomy criminalization.[416] He also recounts how such criminalization essentialized non-heteronormative sexualities so that "many persons did not deem homosexuals to have dignity in their own distinct identity."[417] But then echoing his "emerging awareness" rhetoric from *Lawrence*, Justice Kennedy notes here that a change has occurred to shift public opinions about sexual minorities—for instance, when the American psychiatric

412. *Compare Obergefell*, 576 U.S. at 658–59, *with Windsor*, 570 U.S. at 753.
413. *Compare Obergefell*, 576 U.S. at 658–59, *with Windsor*, 570 U.S. at 753.
414. *Compare Obergefell*, 576 U.S. at 658–59, *with Windsor*, 570 U.S. at 753.
415. *See Obergefell*, 576 U.S. at 659–63.
416. *See id.* at 660 ("Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law."). This immoral condemnation is directly the type of condemnation in *Bowers*. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that the claim "that homosexual sodomy is immoral and unacceptable" is a rational basis to uphold the Georgia sodomy statute because "[t]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed"); *see also* discussion *supra* Section I.C.
417. *Obergefell*, 576 U.S. at 660–61 ("Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.") (referencing Brief for Organization of American Historians as Amicus Curiae 5–28); *see also id.* at 661 ("For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973.") (referencing *Position Statement on Homosexuality and Civil Rights*, 131 AM. J. PSYCHIATRY 497 (1974)).

community de-pathologized homosexuality.[418] The new, emerging insight about same-sex relationships burgeoned so that "same-sex couples began to lead more open and public lives and to establish families."[419] The new awareness grows with political significance, and it is curious that he deliberately mentions how such public tolerance of sexual minorities is equated here directly with the visibility of same-sex couples and their creation of families. At the same time, Justice Kennedy also observes that various changes to the traditional practice and regard for marriage in recent societal memory have also been conditioned on "new insights," which "have strengthened, not weakened, the institution of marriage"[420]—implying that such "new insights" about same-sex relationships might strengthen marriage and well-enough justify extending marriage rights to same-sex couples. Effectively, Justice Kennedy relies on the improvability of same-sex couples as the crux of changing social acceptance of same-sex relationships—improvability that seems to harbor the willing embrace of domestic, committed, family-oriented type relationships that would not threaten the heteronormative status quo.

Thirdly, the most performative and colonizing moment of transference in *Obergefell* occurs when Justice Kennedy formally justifies extending fundamental marriage rights to same-sex couples. His extension is based on "[f]our principles and traditions" that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[421] In lofty invocations of autonomy and liberty ideals, Justice Kennedy philosophizes—indeed, sermonizes—on how marriage provides dignity and avenues of personal destiny.[422] But echoing the model of same-sex couples

418. *Id.* ("Only in more recent years have psychiatrist and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.") (referencing BRIEF FOR AM. PSYCH. ASS'N ET AL., as *Amici Curiae* 7-17).

419. *Id.* at 661.

420. *Id.* at 660.

421. *Id.* at 646.

422. In prior sections of *Obergefell* opinion, Justice Kennedy uses lofty characterizations of marriage, describing marriage, for instance, as "sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm." *See id.* at 656–57. When he explains his four justifications, he continues this lofty tone, for instance, in the way he ascribes personal autonomy implications to marriage when he writes that "[c]hoices about marriage shape an individual's destiny." *Id.* at 666. Similarly, the same grand connotations appear

he mentioned and his new historicism of same-sex relationships earlier in the opinion, his justifications all rely on perceived sameness. His reasons for extending marriage to same-sex couples are centrally enabled by the interest convergence derived from the images of assimilated same-sex couples.

The first three of the four rationales reaffirm status quo values of relationships and marriage and how the perceived sameness of same-sex couples abide by these values. First, echoing *Lawrence*, same-sex couples have committed relationships that ought to be protected under autonomy interests within marriage: "[T]hrough its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[423] Then, citing *Windsor*, Justice Kennedy proclaims that "[t]his is true for all persons, whatever their sexual orientation."[424] Second, echoing *Lawrence* again, Justice Kennedy implies that same-sex couples are capable of monogamy: "[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[425] Using *Lawrence* to remind us that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association," Justice Kennedy relies on sameness and improvability to facilitate this part of the transfer of same-sex relationships into the realm of marriage: "But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there."[426] Residue from *Lawrence*'s civilizing of sodomy seems to permit the impression that same-sex couples are capable of the domesticated, private sexual relations valued in mainstream, family-oriented, heteronormative sex.

In his third rationale, Justice Kennedy summarizes that marriage symbolizes much for preserving the settler family: "It safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[427] Because "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted," Justice

when he writes that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.*

423. *Id.* at 666.

424. *Id.* (referencing United States v. Windsor, 570 U.S. 744, 769 (2013)).

425. *Id.* at 646.

426. *Id.* at 667.

427. *Id.*

Kennedy notes—again drawing on perceived sameness with the status quo—"[t]his provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[428] Here, Justice Kennedy likely presumes no other type of "loving, supportive families" than the default, nuclear heteronormative family, essentially granting that same-sex couples have passed the test in emulating that template rather than acknowledging the lived realities of non-traditional queer couples.[429]

In terms of colonizing queerness, Justice Kennedy's final rationale is the most demonstrative. In the comparison that most explicitly connotes colonization of same-sex relationships into the settler state, Justice Kennedy declares that "this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order."[430] He steps out of the Court's precedence momentarily to quote Alexis de Tocqueville's observation regarding marriage in early nineteenth-century United States to affirm marriage's social primacy. America reveres marriage: "There is certainly no country in the world where the tie of marriage is so much respected as in America."[431] But de Tocqueville's observation also reifies a gendered impression of marriage; the respectability of married life has currency in the public social sphere because the American male with such an ordered married and family life "carries [that image] with him into public affairs."[432] De Tocqueville's quote offers an antiquated reminder that reveals settler White heteropatriarchy by skewing marriage toward a White male-dominated perspective: "[W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace."[433] Justice Kennedy then layers in the Court's 1888 decision in *Maynard v. Hill* to "echo[] de Tocqueville" in describing how civilization—presumably a White settler one—and its perpetual sovereignty or "progress" depends

428. *Id.* at 668.

429. *See id.*; *see* Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 29 (2015) ("[T]he opinion in Obergefell reified the social front of family as the marital family. By basing the opinion on the Due Process Clause, Justice Kennedy had to glorify marriage. And he did, choosing very traditional language.").

430. *Obergefell*, 576 U.S. at 646.

431. *Id.* at 669 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309 (H. Reeve transl., rev. ed. 1990)).

432. *Id.*

433. *Id.*

on marriage as the pillar of both family and society.[434] The social primacy of marriage in the settler state is inescapable, which is why Justice Kennedy affirms that "[m]arriage remains a building block of our national community."[435]

And through marriage, same-sex couples can take part in this community. With all of these social and hierarchical attributes revealed here and prior justifications established, Justice Kennedy finally pronounces that "[t]here is no difference between same- and opposite-sex couples with respect to this principle."[436] Relying on sameness, he rhetorically transfers same-sex couples into the traditional institution of marriage, absorbing them into a tradition that still relies on de Tocqueville's gendered and heteropatriarchal observations to buttress itself. In this ceremonial moment in *Obergefell*, same-sex couples are now perceived to be so similar, improved, and capable of assimilation that their desires to wed and their presence within the settler social order are not seen to threaten the principles of traditional heteronormative marriage or settler society. Rather, it is democratically harmful that they are continually "denied the constellation of benefits that the States have linked to marriage."[437] Such exclusion is now apparently incongruent with the spirit of marriage: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[438] It is only fitting now that "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[439] With this pronouncement, the extension of marriage rights to same-sex couples is ceremonially accomplished, and the transfer of same-sex relationships into the settler state is solemnized. Tethered to the settler state by an assimilative and respectable alignment with the settler

434. *Id.* ("Marriage, the *Maynard* Court said, has long been "a great public institution, giving character to our whole civil polity."). *Id.* (quoting Maynard v. Hill, 120 U.S. 190, 211 (1888)).

435. *Id.*

436. *Id.* at 670.

437. *Id.* ("Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.").

438. *Id.* at 670–71.

439. *Id.* at 670.

status quo, same-sex couples can now marry nationwide. #LoveWins.

3. Abject Queerness in *Masterpiece Cakeshop*

By focusing on sameness, *Obergefell* transports same-sex couples into the institution of marriage. Yet, as Veracini reminds us, transfers by assimilation of outsiders into the settler state never fully realize their inclusion; rather, such inclusion, conditioned on assimilation, satisfies the crux of the settlers' colonizing projects.[440] Thus, in *Obergefell*, colonization, rather than inclusion, occurs. In three years' time, the Court's *Masterpiece Cakeshop* decision illustrates exactly how the inclusion of same-sex relationships is contingent on the terms of the settler status quo, revealing marriage's limits and the contours of how queerness is being colonized.[441]

Though not directly a marriage equality decision, *Masterpiece* involved a married same-sex couple, Charlie Craig and Dave Mullins, who were denied service at a Colorado bakery by a self-identified Christian owner, Jack Phillips.[442] Phillips refused to make and sell a cake that would have celebrated Craig and Mullins's out-of-state marriage.[443] Colorado's public accommodations law favored the couple because it protects against sexual orientation discrimination in a non-religious public setting.[444] Phillips did not fall within any religious exemption, and Craig and Mullins's complaint won on the state level in various venues.[445] Phillips appealed at every step until the decision reached the Supreme Court.[446] When the Court, under Justice Kennedy's authorship, denied relief for Craig and Mullins and sided with Phillips—not on any substantive basis in Colorado's public accommodations law but because Justice Kennedy had found incidentally that a lower administrative venue had exhibited religious hostility against Phillips[447]—the

440. *See* VERACINI, SETTLER COLONIALISM, *supra* note 52, at 38–39.
441. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).
442. *See id.* at 1723.
443. *See id.* at 1724.
444. *See id.* at 1725.
445. *See id.* at 1725–27.
446. *See id.* at 1726–27.
447. *See id.* at 1724.

assimilative premises of colonizing same-sex relationships are revealed.

The *Masterpiece* Court's sudden pivot to religious hostility gives reverence to settler sovereignty. From an interest convergence perspective, the Court's deviation from the merits of Craig and Mullins's claim is a reaction to how the same-sex couple here differed from the couples in *Obergefell* and how they lacked alignment with the settler status quo.[448] In their profiles, Craig and Mullins lacked most of the assimilated and respectable identity traits of *Obergefell*'s litigating same-sex couples.[449] Other than presenting as racially White, Craig and Mullins seemed more "queer."[450] They were not the upper-middle class, "all-American" gay male couple raising a family and keeping to themselves.[451] They did not tone down their public displays of affection in news articles and media functions.[452] Their outward personalities and insistence on their cake brought forth a political activism that might have been mistaken as angry or militant—despite sticking within their legal rights under Colorado law.[453] Without perceived assimilative qualities that other married same-sex couples have had before the Court, the couple's anti-discrimination interests likely did not converge with the Court's interest to affirm settler values. Comparatively, the couple's identity as a married same-sex couple lacked the required improvability here that the Court had detected in other same-sex couples for protections within the settler state—particularly the couples from the marriage cases *Windsor* and *Obergefell*. Quite possibly, their "queerness" seemed aberrant and threatening to the institution of marriage and the status quo.[454] Thus, Justice Kennedy conspicuously nitpicked for signs of religious hostility in order to invalidate the couple's fully meritorious claim while vindicating the means to promote settler heteronormativity.[455] The absence of improvability or assimilated potential—the nonappearance of mainstream respectability of Craig and Mullins—motivates their denial of legal vindication of their rights in the public

448. Ho, *Queer Sacrifice*, *supra* note 406, at 286–97.
449. *See id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.* at 322–23.
455. *See id.* at 316.

sphere, even when the couple likely deserved to prevail substantively.[456] Such exclusion in the context of settler colonialism shows us which type of "queerness" is privileged in the settler state and which is not. Craig and Mullins are not the "exogenous Others" that can avail themselves of absorption into the settler polity through assimilation tactics.[457] Their perceived unassimilated queerness marks them as, what Veracini labels, "abject Others": those whom the settler state deems incapable of colonization.[458]

Perhaps love won in the transfer of same-sex couples into marriage in 2015, but conditionally at the expense of continued marginalization of those sexual minorities who are not "improvable." Queerness in the settler colonial state is conditionally protected if it appears to the mainstream status quo in an assimilated, civilized—even respectable—form.[459] Reading together the Court's recent marriage decisions, the once blurry idea of same-sex relationships finally sharpens enough, but only to resemble settlers' civilized projections. The transfer into marriage is via assimilation toward normative heteropatriarchal values. Consequently, marriage protections for same-sex couples do not decolonize but regulate queer sexualities under normative settler state ideals and values about loving monogamous relationships. Using marriage, the American settler state continues its sexuality project by prescribing which queer identities and relationships can and are deemed desirable for inclusion and which will remain primitivized.

456. *See id.* at 318–24. In the queer context, I have argued that the *Masterpiece* ruling exemplifies a version of Derrick Bell's racial sacrifice theory: where the threat of the minority group to the status quo will prompt the status quo to deny progress even when a remedy legally exists to aid the minority group.

457. *See* VERACINI, SETTLER COLONIALISM, *supra* note 52, at 29 (discussing how "[e]xogenous Others that are perceived as unimprovable are permanently restricted entry" into the settler state).

458. *See id.* at 27–28 (defining "abject Others" as those who are "irredeemable" and "are permanently excluded from the settler body politic, and have lost their indigenous or exogenous status").

459. *See* Ho, *Queer Sacrifice*, *supra* note 406, at 323–24 (theorizing that because Craig and Mullins "did not embody the assimilated and respectable traits of the *Obergefell* plaintiffs and they did not share perceived mainstream American characteristics or demographics," the Court declined grant their discrimination claim).

III. COLONIZING QUEER WORKERS

Federal employment protection of queer identities through *Bostock v. Clayton County, Georgia* arrived only recently after the queer visibility engendered through the marriage equality cases, sodomy decriminalization, and *Romer*'s equality holding.[460] But like protecting queer sex and relationships, the inclusion of queer identities into Title VII employment protections—though long-sought and progressive in some respects[461]—also perpetuates settler colonialism's sexuality project as an opportunity to normalize queer identities in the workplace.

Despite a different context, *Bostock* embodies an identical script for colonizing queerness in the workplace as for marriage and sex: perceived improvability followed by a colonizing method of transfer. We see Justice Neil Gorsuch's recognition of queer improvability through the same emerging awareness motif used in the prior pro-LGBTQ cases. In the first few moments of *Bostock*, after announcing that Title VII protected sexual orientation and gender identity, Justice Gorsuch implies that such a ruling resulted from an emerging awareness about sexual minorities: "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years[.]"[462] Justice Gorsuch never substantively describes what has "become apparent" since 1964; instead, he hints at this emerging awareness. Something about sexual minorities has become so clear now that "the limits of the drafters' imagination supply no reason to ignore the law's demands."[463] Consequently, "[w]hen the express terms of a statute give us one answer and

460. Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731 (2020); Romer v. Evans, 517 U.S. 620, 635–36 (1996).

461. *See* Jeremy W. Brinster, *Taking Congruence and Proportionality Seriously*, 95 N.Y.U. L. REV. 580, 581 (2020) ("Advocates have *long sought* to prohibit employers from discriminating against lesbian, gay, bisexual, and transgender (LGBT) employees.") (footnote omitted) (emphasis added); *see also* Allison Greenberg, *Lessons from* Bostock*: Analysis of the Jurisprudential (Mis)treatment of "Sex" in Title VII Cases*, 13 U.C. IRVINE L. REV. 317, 321 (2022) ("[T]he effect of *Bostock* is *progressive* and uplifting in that it affirms that discrimination against gay or transgender individuals is a per se violation of Title VII. . . .") (emphasis added).

462. *Bostock*, 140 S. Ct. at 1738.

463. *Id.*

extratextual considerations suggests another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[464] Although Justice Gorsuch touts the inclusion of sexual minorities under Title VII's sex provision as an application that "has been standing before us all along,"[465] we are officially being apprised of it now because something regarding sexual minorities has become "apparent." [466]

A. Improvability for Title VII Protection

What has become apparent about LGBTQ workers is, again, improvement. Such improvability is observable in the American corporate status quo's interest in respectable queer identities to promote workplace diversity.[467] This interest materially aligns with settler democratic values.[468] Of course, corporate diversity initiatives also impact corporate branding.[469] In recent years, well-branded corporations have promoted openly gay managers who have risen above organizational hierarchies, and the workplace ratings of companies have included their acceptance of openly identifying LGBTQ workers.[470] In *Bostock*, two amicus filings from corporate America supporting *Bostock* plaintiffs

464. *Id.*
465. *Id.* at 1753.
466. *Id.* at 1737, 1746.
467. *See, e.g.*, Alexander M. Nourafshan, *From the Closet to the Boardroom: Regulating LGBT Diversity on Corporate Boards*, 81 ALB. L. REV. 439, 459–61 (2018) (observing that LGBT presence on corporate executive positions boards help companies, *inter alia*, "maximize financial performance," "facilitate the recruitment and retention of top talent," and "sends positive signals to both employees of an organization, and to consumers that a company has adopted a pro-LGBT inclusive stance") (footnotes omitted).
468. Jenn Flynn, *Diversity and Inclusion: A Worthy Business Investment With Strong Returns*, FORBES (Nov. 5, 2019), https://www.forbes.com/sites/forbesfinancecouncil/2019/11/05/diversity-and-inclusion-a-worthy-business-investment-with-strong-returns [https://perma.cc/79PH-5XMG].
469. Theanne Liu, *Ethnic Studies As Antisubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies*, 11 WASH. U. JURIS. REV. 165, 175 (2018) ("Diversity, equal employment opportunity, and implicit bias trainings, which primarily target individuals in the workplace, exist as a common and widely used remedy and preventative measure to curb and redress claims of racial discrimination in the workplace."); *see also id.* at 177 ("Among businesses and law firms across the United States, diversity is often touted as a central value, often for the actual purposes of engaging broader, multicultural, and diverse markets.").
470. *The World's Most Influential LGBT+ Business Leaders*, CEO TODAY (June 26, 2020), https://www.ceotodaymagazine.com/2020/06/the-worlds-most-influential-lgbt-business-leaders [https://perma.cc/7TFB-QF8T].

emphasize the value of workplace diversity and corporate America's regard for LGBTQ employees. In one brief, the "Fortune 200" tobacco giant, Altria Group, Inc., touted its own initiative toward fostering an inclusive workplace for LGBTQ employees "because creating and maintaining a diverse and inclusive workplace benefits both the company and its employees."[471] Yet, Altria's diversity efforts also impact its branding: "[I]nvestment in diversity and inclusion has led to Altria being repeatedly named by Forbes as one of America's best employers and being rated among the 'Best Places to Work' for 2018 and 2019 by the Human Rights Campaign's Corporate Equality Index."[472]

Even more memorably, another amicus brief filed collectively by 206 major American businesses, including Amazon, American Express, Comcast, Disney, Google, and Starbucks, argued that "[t]he U.S. economy is strengthened when *all* employees are protected from discrimination in the workplace based on sexual orientation or gender identity."[473] Conversely, "[t]he failure to recognize that Title VII protects LGBT workers would hinder the ability of businesses to compete in all corners of the nation, and would harm the U.S. economy as a whole."[474] Very pointedly, these business amici stressed the viability of LGBTQ purchasing power: "A diverse and inclusive workforce likewise furthers businesses' ability to connect with consumers, particularly given that the buying power of diverse groups has increased substantially over the past 30 years. In 2015, the buying power of LGBT people in the United States stood at over $900 billion."[475] These business amici also observed how "[r]ecent studies confirm that companies with LGBT-inclusive workplaces also have better financial outcomes."[476] Here, American corporate bottom lines recognize and cherish queer workers.

471. Brief for Altria Group, Inc. as Amicus Curiae Supporting the Employees at 1, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2966237.

472. *Id.* at 2.

473. Brief for 206 Businesses as Amici Curiae Supporting the Employees at 8, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915042.

474. *Id.*

475. *Id.* at 9 (footnotes omitted).

476. *Id.* at 11.

To further unpack corporate motivations that recognize queerness, Yuvraj Joshi's observations direct us again to signs of perceived improvability toward LGBTQ workers.[477] As "today's gay and lesbian identities are constituted less by sexual practice and rather more by consumption," the outcome "is a complex and symbiotic relationship between 'the gay community' and 'the gay market' and, that being the case, one cannot meaningfully separate the politics of being gay from the business of buying and selling gay."[478] But not all gay identities are equal in the marketplace, and Joshi identifies a status quo privileging of *which* sexual minority is prized and *which* is not: "[W]ho is viewed as a gay consumer bears on who is imaginable as a gay citizen and, crucially, who is deemed suitable for the sexual citizenship that is attended with marriage."[479] Again, assimilation and respectability appear implicitly and centrally in corporate America's recognition of improvability. In the marketplace, improvability becomes a selective but lucrative opportunity: "[T]he gay market is not a pre-existing entity, but an active production, one that overwhelmingly gay male (as opposed to LGBT) professionals have worked to produce."[480]

Within corporate workplace cultures, "[o]penly LGBT people working in professional-managerial status occupations range from those whose sexual identity constitutes part of their professional expertise ('professional homosexuals') to those whose sexual identity plays little to no part in their professional life ('homosexual professionals')."[481] Thus, respectability underscores corporate America's diversity interests and any emerging awareness regarding queer minorities in the workplace. An overlap exists between mainstream corporate America's interests in Title VII's workplace discrimination protections for sexual minorities and the status quo policing of "good" versus "less desirable" sexual minorities.[482] These are,

477. *See* Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 417–438 (2012) (discussing how "public recognition of gay people and relationships is contingent upon their acquiring a respectable social identity" and how "gays and lesbians have become implicated in respectability through their inclusion into capitalism," which includes the corporate workplace).

478. *Id.* at 431–32 (footnotes omitted).

479. *Id.* at 432 (footnote omitted).

480. *Id.*

481. *Id.* (footnote omitted).

482. *See id.* at 432–33 ("Inclusion within the professional class brings certain benefits, but this inclusion comes at a cost. Most professional contexts, even those touted as being 'gay friendly,' maintain heteronormative ideas of gender and

perhaps, the new, "apparent" insights that Justice Gorsuch hints at in *Bostock*, but no less motivate his pro-LGBTQ textualist majority.

B. Bostock*'s Administrative Transfer*

Besides assimilation, Veracini identifies various other colonizing transfers that American settlers use to include non-settlers in its hegemony and further their civilizing mission. In *Bostock*, the Court used an "administrative transfer" to fold the protection of LGBTQ workers within Title VII's "because of sex" provision.[483] According to Veracini, an administrative transfer occurs whenever "the administrative borders of the settler polity are redrawn."[484] Here, settlers revise inclusive or exclusive definitional boundaries to assert their continuing colonizing dominance. For example, with Indigenous populations, settlers' ability to define indigeneity and who legally belongs in that category illustrates the settlers' administrative dominance to define the diverse categories within the settler state.[485] In this way, definitions matter as far as affecting the rights of outsiders being transferred.[486] Settlers can redefine indigeneity to transfer and recognize outsiders within the settler body politic.[487] Justice Gorsuch's textualism in *Bostock* accomplishes such a colonizing transfer in the settler colonial project.

Through textualism, Justice Gorsuch redraws the definitional boundaries of Title VII's "because of sex" provision to include sexual orientation and gender identity

sexuality, adherence to which remains a precondition of institutional citizenship. LGBT professionals must tread carefully, and refrain from expressing their personal identities in personal and political ways that might be deemed 'unprofessional.'").

483. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 44; *see* Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1739–43 (2020) (reading "sex" in Title VII to encompass situations where discrimination based on sexual orientation is also discrimination based on sex).

484. VERACINI, SETTLER COLONIALISM, *supra*, note 52, at 44.

485. *See id.* ("Settlers insist on their capacity to define who is an indigenous person and who isn't, and this capacity constitutes a marker of their control over the population.").

486. According to Veracini, such [administrative] transfers are not physical because "[i]t is rights—not bodies—that are transferred." *Id.*

487. For example, "[p]rivileging a definition of indigeneity that is patrillineally [sic] transmitted . . . can allow the possibility of transferring indigenous women and their children away from their tribal membership and entitlements." *Id.*

discrimination.[488] Essentially, he reads Title VII's "because of sex" provision as "because of a protected characteristic like sex."[489] In determining "whether an employer can fire someone simply for being homosexual or transgender," Justice Gorsuch finds that "[t]he answer is clear"—despite decades of noted legal speculation.[490] He holds 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."[491] Boundaries for protecting LGBTQ workers are now redrawn to reflect that "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[492]

As a result, his textualist application categorizes instances of sexual orientation and gender identity work discrimination as intentional acts that account for an employee's sex in consideration, which—even slightly—triggers Title VII sex discrimination.[493] Justice Gorsuch defines "sex" biologically, though admitting that constructivist positions that relate to sex and gender stereotyping also existed at the time of the Civil Rights Act.[494] "Sex" here strictly refers to male or female biological status.[495] A broader definition of "sex" would have encompassed gender roles and stereotyping and likely evinced a "queerer" understanding than Justice Gorsuch's dictionary definition.[496] But within his textualist majority, Justice Gorsuch prefers reading "sex" with its essentialized, biological designations.[497] Alongside a broad but-for interpretation of the phrase "because of," his textualist reading captures sexual orientation and gender identity discrimination as sex

488. *Bostock*, 140 S. Ct. at 1739. Justice Gorsuch mentions his intentions to reexamine the definition of "because of sex" when he colloquially crafts the issue at hand in *Bostock*: "The question isn't just what 'sex' meant, but what Title VII says about it." *Id.*

489. *Id.*; *see also* Ho, *Queering* Bostock*, supra* note 255, at 347–49.

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

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.* at 1739.

495. *Id.*

496. Plaintiffs had argued to define "sex" as a "term [that] bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation." *Id.*; *see also* Butler, *Critically Queer*, *supra* note 164, at 20–21 (using the term "queer" as a de-stabilizing concept that helps reflect upon "a false unity of women and men").

497. *Bostock*, 140 S. Ct. at 1739.

discrimination under Title VII.[498] Without substantive thought toward anti-queer bias, *Bostock* mechanically prohibits situations of sexual orientation and gender identity workplace discrimination purely because they are tethered to considerations of the individual's biological sex.[499] Hence, an employee who is dismissed because the employee is attracted to individuals of the same sex would have a claim under Title VII because the protected characteristic of "sex" is implicated as a but-for cause.[500] Similarly, an employee who is terminated because of a transition from an assigned birth sex could also sue under Title VII.[501]

C. How Bostock *Colonizes*

To be sure, Title VII antidiscrimination protections for LGBTQ workers are significant. But what also occurs is a colonizing transfer of queer workers. Justice Gorsuch redraws the borders of the "because of sex" provision to include queer identities under Title VII's security, entitling them to federal workplace protection.[502] Simultaneously, *Bostock*'s textualism reveals and privileges settler heteropatriarchy over queerness. As a result, *Bostock*'s rationale also subordinates LGBTQ individuals—colonizing them as normative, productive employees—while federally protecting them.

Textualism tacitly maintains settler heteronormativity. *Bostock*'s protection of sexual minorities is solely based on a categorical, binary definition of "sex" as either male or female. This interpretation effectuates a status quo line drawing of protected statuses under mainstream classifications of gender and sexuality while appearing as a logical and necessary result of textualism.[503] From a heteropatriarchal vantage, such a

498. *See id.* at 1754 ("In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.").

499. *Id.* at 1740.

500. *Id.* at 1741.

501. *Id.* at 1741–42.

502. *Id.* at 1739–43.

503. The artificiality of what *Bostock* accomplishes emerges more clearly in contrast to Zalesne's observation that "[w]hen courts state that the term 'sex' in Title VII refers to 'gender,' they are generally referring to 'an individual's distinguishing biological or anatomical characteristics.'" *See* Deborah Zalesne,

simplistic dictionary distinction is where the self-legitimizing privilege of settler heteropatriarchy cuts off any constructionist possibilities of examining gender and sexual orientation bias. If we strictly construe situations based on "sex" to reach discriminatory conclusions, we easily forgo any evaluation of stereotyping bias in both gender discrimination and anti-queer discrimination.

For instance, by diverting his rationale toward textualism, Justice Gorsuch minimizes the relevance of performative gender characteristics that motivate sex discrimination. In his discussion of "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine," he focuses not on the gender stereotyping aspects involved but observes instead that "in *both* cases the employer fires an individual in part because of sex."[504] Title VII liability then ensues: "Instead of avoiding Title VII exposure, this employer doubles it."[505] This approach finds sex discrimination but ignores the role gender expectations play in motivating discriminating norms regarding femininity and masculinity. Wouldn't firing employees for not being feminine or masculine enough illustrate termination based on constructions of gender at least as well as biological sex?

Stereotyping bias has invigorated modern discrimination cases, including those involving gender.[506] Yet, Justice Gorsuch disregards stereotyping bias in sex discrimination cases in *Bostock* while continually re-reading discriminatory scenarios based solely on his textualist approach.[507] His reference to *Price*

When Men Harass Men: Is It Sexual Harassment?, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 404 (1998).

504. *Bostock*, 140 S. Ct. at 1741.

505. *Id.*

506. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 106–14 (2010) (discussing stereotyping as a thematic concept in both the modern civil rights movement generally and in gender discrimination discourse).

507. Abbey Widick, *It Is Time to Move Forward . . . on the Basis of Sex: The Impact of* Bostock v. Clayton County *on the Interpretation of "Sex" Under Title IX*, 68 WASH. U. J.L. & POL'Y 303, 337 (2022). Widick observes that despite the prior reliance of this stereotyping theory in Title VII cases,

> in *Bostock*, Justice Gorsuch . . . referenced this theory just three times in the 37-paged majority opinion: once to state the EEOC's position in

Waterhouse's gender stereotyping rationale is especially thin when he only uses a background observation from the case that "an individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[508] What is only salient to Justice Gorsuch is biological sex, not its accompanying social stereotypes. This primacy toward biological sex also protects queer minorities under his textualist reading—not any biased notions about their sexual identities. Under Justice Gorsuch's textualism, sexuality and gender identity are not relevant because, in his words, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[509] In his view,

> homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.[510]

Sex and biology are all that matters here; queerness is distinct, an afterthought, and not discussed. *Bostock* devalues gender conceptions and queerness for biological sex and ignores underlying heteronormative stereotyping that animates discriminatory bias. While *Bostock*'s textualist result is incredibly beneficial to sexual minorities in its effects, it also leaves concerns for bias against sexual orientation and gender identity unexamined—specifically, what effect does heteropatriarchy and its organizing preferences have on the active production of misogyny and queerphobia in the workplace? Justice Gorsuch's textualism fails to answer this

> *Harris*, once in reference to a hypothetical about a feminine woman, and once to state that the legal test for "sexual stereotypes" is "simple."
>
> *Id.*

508. *Bostock*, 140 S. Ct. at 1741 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 255–56 (1989) (finding Title VII gender discrimination where corporate employer placed stereotypical gender expectations on a woman employee to deny her a promotion)).

509. *Id.*

510. *Id.* at 1742.

question because his reading of "because of sex" accomplishes anti-discrimination while seemingly making deeper considerations of bias unnecessary:

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.[511]

But Title VII should care. *Bostock* neglects an opportunity to correct an employer's bias-motivated values toward an individual's same-sex attraction or non-conforming gender identification—values that reveal stereotypical heteropatriarchal expectations of relationships or cisgenderism. When Justice Gorsuch writes that "Title VII doesn't care" about that "something else," we ought to question this remark because examinations of heteronormative gendered biases are centrally relevant in modern discrimination cases.[512]

What does such heteronormative privileging do to LGBTQ workers who also have Title VII protection? It colonizes them as normative and "good" workers. The privileging of settler values in *Bostock* subordinates and colonizes queerness in the workplace under mainstream paradigms of sex. Despite the corporate interest and need to include LGBTQ workers, the recognition of LGBTQ workers exists within workplaces where presumably heteronormative gender roles prevail, leaving respectability as the prescription for inclusion and survival.[513] Thus, the interests of mainstream corporate America in

511. *Id.*

512. Even under a disparate treatment approach to Title VII, gender bias appears as an animating model for determining discrimination. *See* Kya Rose Coletta, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 202 (2020).

513. D'Emilio observes that the ideology of the family that is needed to maintain a capitalist labor force—in essence, to "drive[] people into heterosexual families"—in a modern capitalist world that also separates the physical bond of traditional family units altogether generates an "instability" for which non-heteronormative individuals have been targeted as "scapegoats." John D'Emilio, *Capitalism and Gay Identity*, *in* THE LESBIAN AND GAY STUDIES READER 473 (Henry Abelove et al., eds., 1993).

recognizing its LGBTQ workers for inclusion's sake are profoundly tempered by the policing of LGBTQ workers. As "[s]exual norms operate at the level of aspirational fantasy and as a form of social status," this respectability-driven corporate inclusiveness places major stereotyping expectations on LGBTQ individuals.[514] Joshi notes that "[m]ost professional contexts, even those touted as being 'gay friendly,' maintain heteronormative ideas of gender and sexuality, adherence to which remains a precondition of institutional citizenship. LGBT professionals must tread carefully and refrain from expressing their personal identities in personal and political ways that might be deemed 'unprofessional.'"[515]

Bostock does not change this sexual hegemony but complicitly recycles it. Textualism fulfills Title VII protections for sexual minorities while allowing settler heteropatriarchy to continue promoting its gendered scripts, which includes privileging assimilated sexual minorities over others who might, otherwise, threaten status quo norms. So, just as with marriage equality and sex, *Bostock*'s protection of sexual minorities in the workplace furthers the colonization of queerness. As normative queer workers are expressly transferred into the protections of the settler colonial state under Title VII, they are subject to the norms, values, and expectations of the settler status quo. *Bostock*'s textualism is, by its administrative powers, a colonization of queerness.

IV. STRUCTURING QUEERNESS

A. Narrative Gaps in Settler Decolonization

Examining how contemporary pro-LGBTQ legal developments colonize queerness helps answer the question posed at this Article's beginning: why continuing legal retrenchments against sexual minorities emerge even after significant victories, such as marriage and antidiscrimination. The Introduction shorthanded such legal retrenchment by invoking Reva Siegel's "preservation through transformation" concept in the queer rights context.[516] By framing the inquiries

514. *See* CHRISTOPHER CHITTY, SEXUAL HEGEMONY: STATECRAFT, SODOMY, AND CAPITAL IN THE RISE OF THE WORLD SYSTEM 25 (2020).

515. Joshi, *supra* note 477, at 432–33.

516. Siegel, *supra* note 4, at 2119.

here regarding queer legal progress within American settler colonialism, what appears emancipatory reveals itself as much less decolonizing and more so the opposite. As historians Elizabeth Strakosch and Alissa Macoun observe, decolonization plays a symbolic role in settler colonial narratives but is never actualized: "Settler colonialism circles around [decolonization], variously locating it in the past, the present, and the future. And yet, in settler-colonial formations, no such radical break ever seems to come."[517] If decolonization is defined as the relinquishment of power and sovereignty of the colonizing polity, then moments of liberty and equality for queer identities seem antithetical to true decolonization if liberty and equality also depend on assimilating to status quo norms and are continually cemented into dominant, settler nationalistic narratives of democracy and justice.

In this way, "[t]he settler colonial project identifies its own endpoint with the moment of decolonization," in reality "[t]he vanishing endpoint that is continually pursued is, in effect, the moment of colonial completion. That is when the settler society will have fully replaced Indigenous societies on their land, and naturalized this replacement."[518] To explain further how this replacement works, historians Yann Allard-Tremblay and Elaine Coburn have added that "[t]he endpoint of settler colonialism is the imagined moment where the colonial relationship between settlers and Indigenous peoples are superseded, because Indigenous peoples no longer exist to jeopardize settler occupation and sovereignty."[519] In that way, "as settler colonialism aims for the naturalization of settler authority and to correct its own imperfectly realized occupation, the ongoing presence of Indigenous peoples justifies diverse eliminatory and assimilationist politics and policies—ironically, proving the incompleteness of the settler colonial project."[520]

Substitute queer identities here for the Indigenous in the settlers' sexuality project, and the script remains the same. Hence, American law's preservation through transformation tendency is coterminous with the fundamental motivations of its

517. Macoun & Strakosch, *supra* note 21, at 41–42.

518. *Id.* at 42.

519. Yann Allard-Tremblay and Elaine Coburn, *The Flying Heads of Settler Colonialism; or the Ideological Erasures of Indigenous Peoples in Political Theorizing*, POL. STUD. 1, 5 (2021).

520. *Id.*

underlying settler logic. Decolonization has not occurred within queer legal advancements.[521] Instead, each of the major pro-LGBTQ cases—*Romer*, *Lawrence*, *Windsor*, *Obergefell*, and *Bostock*—have contributed to a normative transfer of citizenship for sexual minorities that reify the racialized heteropatriarchal grammar of the settler polity, sovereignty, and hegemony. As these decisions reflect the settler state's civilizing mission, they attempt to colonize queer identities, which explains what is ultimately preserved and who is transformed when the juridical dust has settled.

Even more perplexing is how decolonization in the American settler colonial project would occur. Imagining this process is difficult because no definitive script exists: "[T]here is no intuitive narrative of settler colonial decolonization, and that a narrative gap contributes crucially to the invisibility of anti-colonial struggles."[522] As far as offering theoretical approaches to decolonization, Veracini summarizes three: the possibility of settler exodus, elevating reconciliation with colonized groups, and denying the rejection of reforming the settler state to recode the settler state as postcolonial.[523] But the difficulty lies in settler colonialism's regenerative nature. Settlers' civilizing mission labors between asserting its own normative racial-gender-sexuality objectives and affirming its political values and ideals—all for the sake of structuring sovereignty. As demonstrated here in the journey from *Bowers* to *Bostock*, settler exclusion and inclusion of non-heteronormative sexual identities have not had a true anti-colonial teleology. Instead, the direction has been exactly what scholars have identified in settler colonialism classically as palindromic.[524] Either exclusion or inclusion is affected by some interest convergence—some perceived queer improvability—or lack thereof that pushes circumstances to one end of that palindrome.

Likewise, Allard-Tremblay and Coburn also claim that settler colonialist "ideologies shape-shift and return to support a goal that is never fully achieved" and that they "cannot be defeated by reasoned argument alone," which includes any reconciliatory narratives between settlers and non-settlers.[525]

521. *See id.* (noting that there is no decolonial or postcolonial moment).
522. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 105.
523. *Id.* at 105–08.
524. *Id.* at 100.
525. Allard-Tremblay & Coburn, *supra* note 519, at 2–3.

Here, I would add law and its rationality to this category of "reasoned arguments"—or at least a means of producing these arguments within reconciliation narratives between settlers and non-settlers.[526] Against such powerful influences, the prospects of decolonization, according to Allard-Tremblay and Coburn, would come from "a turning away from the colonial state relations that necessitate and sustain them and in a turning toward the resurgence of diverse Indigenous political thoughts that structure alternative political practices."[527] In the Indigenous context, such transformative changes beyond settler colonialism must involve "prefigurative practices," defined as "acting in the present as if the world that is imagined and wished-for was already in existence."[528] Their hope is that prefigurative practices would critically revitalize traditional structures of Indigeneity—languages, rituals, territoriality, diplomacy—"with an aim of renewing Indigenous ways of being, doing, and knowing."[529] Though reviving traditions here might bring their own marginalization issues or require negotiation with modernity, Allard-Tremblay and Coburn are not calling for replicating exact traditional structures for their own sake but "for both old and new purposes."[530] Thus, reviving such practices "from long-standing Indigenous imaginaries"[531] serves ultimately "to *renew* a life-giving force that sustains peoplehoods"[532] by offering individuals opportunities to practice "side step[ping] the settler colonial present, actualizing a different, already existing world, that has been and is targeted for elimination by settler colonialism."[533] From there, perhaps "the settler colonial present may be transcended, progressively disempowered and replaced."[534] Prefigurative practices might produce alternative structures and accompanying narratives to

526. Veracini mentions settler states that have used "judicially led reforms" to "*reconcile*[] itself with indigenous survival and sovereignty" with difficulty or sometimes even reversals, demonstrating the risk of reconciliation. VERACINI, SETTLER COLONIALISM, *supra* note 52, at 107.

527. Allard-Tremblay & Coburn, *supra* note 519, at 2.

528. *Id.* at 14.

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.* (quoting Kelly Aguirre, *Telling Stories: Idle No More, Indigenous Resurgences and Political Theory*, *in* MORE WILL SING THEIR WAY TO FREEDOM: INDIGENOUS RESISTANCE AND RESURGENCE 197 (ed. Elaine Coburn 2015)).

533. *Id.*

534. *Id.*

offset setter colonialism's dominance and serve as a decolonizing catalyst.

B. Queer Prefigurative Practices

Because American settler colonialism is an ongoing race-gender-sexuality project, practices that lead to alternative structures for non-heteronormative sexualities—in the same spirit as Indigenous prefigurative practices—might also similarly empower queer identities, Indigenous and non-Indigenous ones, from settler colonialism's heteropatriarchal grasp.

Very much in line with Allard-Tremblay and Coburn, Francisco Valdes considers the efficacy of creating alternative structures to liberate minoritized sexualities from the colonizing effects of relying on mainstream doctrines. According to Valdes, queers should critically reject the prescriptive restraints that the status quo has imbued formal legal reforms for sexual minorities, such as marriage and sexual intimacy.[535] In his critique of queer legal advances—and also experiences of American civil rights and justice—"social change sticks only when culture, not just law, changes."[536] Turning toward the settler colonial context, we have seen how the progressiveness of law for accepting queerness—in areas such as relationships, sex, and antidiscrimination—always directs progress back to invigorating settler sovereignty. In this way, twining both views together, the law is limited in advancing liberatory progress. Even if it appears as a rational argument for decolonizing, it is not supported by transformative values or practices but continues to perpetuate settler structure. Hence, *Lawrence*, *Obergefell*, and even *Bostock* are means rather than ends.[537] Along with this qualifying observation about law's diminishing propensity to rectify colonization, Valdes externalizes this limitation of legal reforms if they lack accompanying cultural changes; he models an example of approaching LGBTQ victories in marriage that demonstrates the limitation of that legal win

535. Francisco Valdes, *From Law Reform to Lived Justice: Marriage Equality, Personal Praxis, and Queer Normativity in the United States*, 26 TUL. J.L. & SEXUALITY 1, 27 (2017).

536. *Id.* at 27.

537. *See id.* at 2 (alluding to how queer legal reforms are often means rather than ends to social change).

while critically rejecting its colonizing effects. With *Obergefell*, Valdes proposes that sexual minorities could recognize that "to be pro-marriage equality is not to be pro marriage. There is a distinction."[538]

For pro-marriage advocates litigating cases before *Obergefell*, this distinction would not have created the same level of perceived improvability that accessed Justice Kennedy's extension of marriage rights to same-sex claimants because it reflected a certain politics of difference. In fact, it would have diminished any motivation to establish interest convergence. But applied *ex-post* rather than *ex-ante*, it can now provide a normative compass for engaging in practices that question settler heteronormativity's cultural hold on marriage equality and allow individuals the agency to define their own marriages and relationships. Specifically, now "[q]ueer families can re-engage ancient choices relating to monogamy and plurality in newfound ways, relatively unmoored from identitarian influences or imperatives correlated conventionally with race, gender, class, and similar constructs," hopefully to destabilize mainstream prescriptions on sexuality.[539]

Even though Valdes leaves specifics alone, what are "ancient choices" if they are not "prefigurative" ones? By practicing the distinction of being pro-marriage equality and not pro-marriage, Valdes hopes that an "antisubordinationist commitment" to pluralist notions of human diversity and lived experiences will flourish—one that in practice could dislodge what upholds the heteropatriarchal family.[540] Valdes's version of "prefigurative practices" are culture-shifting, everyday practices of sexualities and relationships directed by a sense of queerness that flips our notion of legal rights as a top-down formalist project mandated by the status quo. Instead, from the personal level and then upwards, these practices would "liberate" antisubordinative, cross-cultural negotiations of lived experiences that aggregate as alternative structures for decolonizing sexualities. In this respect, a bottoms-up approach hands legal victories back into the daily experiences of individuals to effectuate personal praxis or autonomy. This liberatory sense is shared by Saito in her discussion on settler decolonization:

538. *Id.* at 12.
539. *Id.* at 8.
540. *Id.* at 15–16.

> If we do not intend to depend on the state, we will have to develop, or re-discover, ways of governing ourselves. Because self-governance is an organic process, I suspect that it simply has to grow, and change, from the ground up, and in response to emerging societal and environmental needs.[541]

This takes the practice of envisioning and acting on personal agency: "Regardless of how the process develops, we can take hope from examples we see around us of people living as if they were free."[542]

What Valdes illustrates as queer normativity hints at a hidden conceit in the way our examination of the limits of contemporary queer legal advancements has been framed. In calling these moments of mainstream legal advancements also attempts of the settler state to "colonize queerness," a critical question ought to arise as to whether indeed queerness can be colonized or whether that notion is merely part of the aspirational fantasy of the settler's mission to uplift the "perfect" sexual minorities for its own control and hegemony. After all, queerness, in theory, is a destabilizing discursive practice rather than an entity that is singularly idealized in essentialized identities. In its post-structuralist sense, queerness resists definition or capture and is devoted to multilateral rather than monolithic experiences of sexuality. Is it primitive? Is it civilized? Is it both or all? Who gets to decide? Who has praxis? In the quest for liberation, it seems that many sexual minorities have forgotten this aspect of queerness and adopted the settlers' amnesia. For now, the intuitive script for decolonizing settler states might be undecided or unknown. But perhaps thinking about queerness in its theoretical potential gives a practical sense of liberation or agency to marginalized sexualities under circumstances that seek to colonize.[543] Structurally speaking, if settler colonialism is an invasion and not an event, then regarding queerness in this way might be the countervailing thought that ought now to invade.

541. Saito, *Tales of Color*, *supra* note 24, at 212–13.

542. *Id.* at 213.

543. Others have noted that acknowledging settler colonialism's existence—thinking about its decolonization—is vitally important despite not having yet any decolonizing script. Hixson, *supra* note 20, at 200; Saito, *Tales of Color*, *supra* note 24, at 214; VERACINI, SETTLER COLONIALISM, supra note 52, at 108.

CONCLUSION

By recognizing how the maintenance of American settler colonialism shapes the contemporary legal challenges and victories of sexual minorities, the historical narrative of colonization reveals itself, in part, as a sexuality project that continues to "civilize" queerness despite outwardly proclaiming the equality and liberty of marginalized sexualities. As we have seen, settler colonialism's profound imprint is often thinly visible, and thus, advocacy that resists colonization is difficult to articulate and justify. Hopefully, this work brings forth some critical and tangible light on why, in terms of progress, things remain the same the more they appear to change. In that endeavor, at some point, perhaps marginalizing patterns will break.