

## The Long Arm of *Bostock v. Clayton County*: Opening 42 U.S.C. § 1985(3) to Claims of Anti- LGBT Discrimination

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42 U.S.C. § 1985(3) is a Reconstruction-era statute that allows one to recover damages from those that conspire to deprive one of one’s constitutional or statutory rights. In the 1970s, the Supreme Court began requiring a showing of discriminatory animus in order to confer liability under the statute. The lower courts have since found that allegations of discriminatory animus against LGBT folks are insufficient to satisfy the requirement. Most circuits have also held that sex-based discrimination is cognizable under § 1985(3), citing federal law’s condemnation of the practice. Other circuits have found sex-based discrimination cognizable under the statute as well, but for opaque reasons. And others still have concluded that § 1985(3) does not reach sex-based discrimination at all, appealing to its legislative history.

Then in 2020, the Supreme Court decided *Bostock v. Clayton County*, with Justice Neil Gorsuch establishing a new interpretation of Title VII’s prohibition of sex-based discrimination. This Comment argues that Justice Gorsuch’s opinion is not merely relevant for the scope of Title VII but also has ramifications for the scope of § 1985(3) because it gives rise to three key propositions: (1) federal law now condemns anti-LGBT discrimination, affording special protections to LGBT folks; (2) discrimination against LGBT folks necessarily constitutes discrimination on the basis of sex; and (3) legislative history should only be used if the relevant statute is genuinely ambiguous. Justice Gorsuch has thus provided LGBT plaintiffs with a master key, suggesting arguments tailored to each circuit’s position on sex-based discrimination, such that any circuit should permit LGBT folks to use § 1985(3) in the wake of *Bostock*.

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#### INTRODUCTION

In 1985, David Monitor was working at “Chaps,” a private health club that catered to Chicago’s LGBT community.<sup>1</sup> He was seated at the club’s reception desk when several members of the Chicago Police Department burst in and abruptly arrested him.<sup>2</sup> One of the officers began questioning him, but Monitor invoked his right to remain silent.<sup>3</sup> This inexplicably resulted in a beating. The officer choked Monitor, threw him against some lockers, and kicked at his groin.<sup>4</sup> Alleging anti-LGBT discrimination, Monitor later brought suit under a Reconstruction-era civil rights statute, now codified at 42 U.S.C. § 1985(3).<sup>5</sup> The Northern District of Illinois summarily dismissed Monitor’s claim, though, reasoning that anti-LGBT discrimination was beyond the scope of § 1985(3).<sup>6</sup>

Since 1871, § 1985(3) has provided a civil cause of action against those who conspire to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges and

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<sup>1</sup> See *Monitor v. City of Chicago*, 653 F. Supp. 1294, 1296 (N.D. Ill. 1987).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* at 1296, 1300.

<sup>6</sup> See *Monitor*, 653 F. Supp. at 1300.

immunities under the laws.”<sup>7</sup> Given the breadth of these terms, § 1985(3) would seem to be an ideal cause of action for Monitor and other victims of anti-LGBT conspiracies. Conspirators—including both state and private actors<sup>8</sup>—can be liable under § 1985(3) for targeting just about any substantive right.<sup>9</sup> But after acknowledging in *Griffin v. Breckenridge*<sup>10</sup> that private conspirators can be liable under § 1985(3), the Supreme Court feared the statute would become unconstitutionally broad.<sup>11</sup> The Court therefore required a finding of “racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action” in order to confer liability.<sup>12</sup>

Most circuits have taken the Court up on its invitation to extend protection to some nonracial classes.<sup>13</sup> The principal extension has been for conspiracies involving “sex-based” discrimination.<sup>14</sup> Many circuits have reasoned that federal law condemns sex-based discrimination in other contexts, so it must be sufficiently invidious to satisfy § 1985(3)’s discriminatory animus requirement.<sup>15</sup> Other circuits have simply assumed, without much explanation, that sex-based discrimination meets the Supreme Court’s requirement.<sup>16</sup> But a minority of circuits have declined to extend protection to other classes, suggesting that the discriminatory animus requirement can be satisfied only by race-based discrimination because § 1985(3), as indicated by its legislative history, was intended to deal with the Ku Klux Klan and its sympathizers.<sup>17</sup>

Unfortunately for plaintiffs like Monitor, no circuit has held that § 1985(3) reaches anti-LGBT discrimination.<sup>18</sup> The Ninth

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<sup>7</sup> 42 U.S.C § 1985(3).

<sup>8</sup> See *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971).

<sup>9</sup> See *Padway v. Palches*, 665 F.2d 965, 969 (9th Cir. 1982) (suggesting that a § 1985(3) claim can be based on any right not granted by Title VII).

<sup>10</sup> 403 U.S. 88 (1971).

<sup>11</sup> See *id.* at 101–02.

<sup>12</sup> See *id.*

<sup>13</sup> See, e.g., *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1338–39 (11th Cir. 1999) (collecting cases).

<sup>14</sup> See *id.*

<sup>15</sup> See, e.g., *id.* at 1337.

<sup>16</sup> See, e.g., *Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc.*, 32 F.3d 989, 994 (6th Cir. 1994).

<sup>17</sup> See, e.g., *Wilhelm v. Cont’l Tile Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983).

<sup>18</sup> See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979), *abrogation recognized by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); Peggy R. Katzer, *Civil Rights—Title VII and Section 1985(3)—Discrimination Against Homosexuals*, 26 WAYNE L. REV. 1611, 1617–18, 1623 (1980).

Circuit is the only circuit court to have directly addressed the issue, holding in 1979 that anti-LGBT discrimination was beyond the scope of § 1985(3).<sup>19</sup> Although it had already recognized sex-based discrimination under § 1985(3), the Ninth Circuit distinguished anti-LGBT discrimination on the grounds that federal law had not (yet) accorded special protections to LGBT folks.<sup>20</sup> The Northern District of Illinois adopted the Ninth Circuit's reasoning in dismissing Monitor's § 1985(3) claim.<sup>21</sup> In the decades since, other victims of anti-LGBT discrimination have similarly had their § 1985(3) claims rejected by district courts across the country.<sup>22</sup>

This trend might change. In 2020, the Supreme Court decided *Bostock v. Clayton County*,<sup>23</sup> which involved a lawsuit brought after several LGBT plaintiffs were fired on account of their sexual orientation or gender identity.<sup>24</sup> The plaintiffs sought relief under Title VII's prohibition of discrimination "because of . . . sex" in the workplace.<sup>25</sup> Speaking through Justice Neil Gorsuch, the Court insisted that Title VII be parsed without regard to legislative history.<sup>26</sup> The Court instead analyzed the text's prohibition of sex-based discrimination, finding that it encompassed discrimination on the basis of sexual orientation or gender identity.<sup>27</sup> Thus, *Bostock* clarified that Title VII protects LGBT folks<sup>28</sup>—a holding that stands in apparent tension with the Ninth Circuit's rationale for limiting the scope of § 1985(3).

If *Bostock* were to expand § 1985(3) protections to LGBT plaintiffs, it would endow the community with a general instrument of self-defense.<sup>29</sup> LGBT people like Monitor, who encounter

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<sup>19</sup> See *DeSantis*, 608 F.2d at 333.

<sup>20</sup> See *id.* ("Congress did not and has consistently refused to include homosexuals as a group within the special protection of Title VII.").

<sup>21</sup> See *Monitor*, 653 F. Supp. at 1300.

<sup>22</sup> See, e.g., *David v. Local 801, Danbury Fire Fighters Ass'n*, 899 F. Supp. 78, 80 (D. Conn. 1995); see also *Thomas v. Wright*, 2014 WL 6983302, at \*2 (N.D. Ala. Dec. 10, 2014).

<sup>23</sup> 140 S. Ct. 1731 (2020).

<sup>24</sup> See *id.* at 1737–38.

<sup>25</sup> See *id.* at 1738 (citing 42 U.S.C. § 2000e-2(a)(1)).

<sup>26</sup> See *id.* at 1747.

<sup>27</sup> See *id.* at 1738–43.

<sup>28</sup> See *Bostock*, 140 S. Ct. at 1737.

<sup>29</sup> To engage with *Bostock*, this Comment uses the conceptual framework of the Court, which does not admit of a gender-sex distinction or the nuances of sexual and gender identity. See, e.g., *id.* at 1741. Further legal scholarship—guided by contemporary gender and sexuality studies—is necessary to assess the utility of § 1985(3) for those whose identities do not fall neatly within the "LGBT" acronym.

unwarranted violence from state actors,<sup>30</sup> could allege conspiracies to deprive them of their rights under the Fourteenth Amendment.<sup>31</sup> If harassed by private actors while traveling interstate,<sup>32</sup> LGBT folks could allege conspiracies to deprive them of their “rights of national citizenship.”<sup>33</sup> LGBT people could even sue their former conversion therapy centers, alleging conspiracies to deprive them of their right in tort to be free from intentional infliction of emotional distress.<sup>34</sup> If expanded by *Bostock*, § 1985(3) would not only permit these claims against public and private discrimination; it would also incentivize plaintiffs’ attorneys to bring them. Judges are generally entitled to award attorney’s fees to plaintiffs who prevail in their § 1985(3) actions.<sup>35</sup>

Despite the stakes involved, there is currently no scholarship on *Bostock*’s implications for the scope of § 1985(3). Most commentary on § 1985(3) was published decades ago.<sup>36</sup> While commentary on *Bostock* is certainly in vogue, it has yet to review the case’s implications for § 1985(3).<sup>37</sup> This Comment fills that scholarly void, assessing whether and how victims of anti-LGBT discrimination may avail themselves of § 1985(3) after *Bostock*.

This Comment proceeds in four parts. Part I discusses the development of § 1985(3) in the courts, with special attention paid to how different circuits have extended the Supreme Court’s requirement of discriminatory animus beyond race-based discrimination. It finds that on the issue of sex-based discrimination, the circuits have sorted themselves into three camps: (1) some have reasoned that § 1985(3) covers sex-based discrimination because

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<sup>30</sup> See generally ARI SHAW, VIOLENCE AND LAW ENFORCEMENT INTERACTIONS WITH LGBT PEOPLE IN THE US (2020) (summarizing research showing that “LGBT people in the United States are particularly susceptible to violence and discrimination by law enforcement”).

<sup>31</sup> See *Padway*, 665 F.2d at 968–69.

<sup>32</sup> See Allison Hope, *Traveling as a Trans Person: It’s Complicated*, CNN TRAVEL (June 28, 2019), <https://perma.cc/H2GB-NQ22>.

<sup>33</sup> *Means v. Wilson*, 522 F.2d 833, 838 (8th Cir. 1975); see also *infra* notes 253–60 and accompanying text.

<sup>34</sup> See Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It’s Still Legal in 41 States*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html>; *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 323 (8th Cir. 1990) (“The right under state law to be free from [ ] intentional infliction of emotional distress can be the basis for an action under section 1985(3).”).

<sup>35</sup> See 42 U.S.C. § 1988(b).

<sup>36</sup> E.g., Devin S. Schindler, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88 (1985).

<sup>37</sup> See generally, e.g., Susannah Cohen, Note, *Redefining What it Means to Discriminate Because of Sex*, 122 COLUM. L. REV. 407 (2022).

federal law condemns the practice in other contexts; (2) others have simply assumed, without much explanation, that the statute covers sex-based discrimination; and (3) others still doubt that § 1985(3) reaches beyond race-based discrimination, appealing to legislative history. Next, Part II analyzes *Bostock* and suggests that the case may be cited for its bearing on the concept of sex-based discrimination, the relevance of legislative history, and federal law's attitude toward LGBT discrimination. Part III then argues that the tripartite significance of *Bostock* allows it to function as a master key, opening § 1985(3) to LGBT plaintiffs with arguments tailored to each circuit's position on sex-based discrimination. Part IV concludes by illustrating how LGBT plaintiffs might use § 1985(3) to enforce their constitutional and statutory rights.

### I. SECTION 1985(3) AND DISCRIMINATORY ANIMUS

For nearly a century after it was enacted, § 1985(3) “languished in relative obscurity.”<sup>38</sup> Section 1985(3) only began attracting plaintiffs' attention in the 1970s, when the Supreme Court clarified that liability under the statute required discriminatory animus but not state action.<sup>39</sup> Part I.A details the origin of the discriminatory animus requirement and the few occasions on which the Court has addressed its scope. The lower courts have frequently strained to interpret the Supreme Court's guidance.<sup>40</sup> Accordingly, Part I.B outlines their divergent views on what types of discrimination satisfy the discriminatory animus requirement.

#### A. The Supreme Court's Requirement of Discriminatory Animus

In 1971, the Supreme Court introduced a discriminatory animus requirement for § 1985 claims in *Griffin*. The case involved a White gang that had beaten several Black travelers after mistakenly assuming that they were civil rights activists.<sup>41</sup> The Black travelers sued under § 1985(3), alleging a conspiracy to deprive

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<sup>38</sup> Schindler, *supra* note 36, at 89.

<sup>39</sup> *See id.* (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

<sup>40</sup> *See, e.g.*, *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1338–39 (11th Cir. 1999) (keeping a “grand tally” of the circuits that have considered whether women are a “class of persons” within the meaning of § 1985(3)).

<sup>41</sup> *See Griffin*, 403 U.S. at 90–92.

them of their “rights of national citizenship.”<sup>42</sup> Because the attackers were private citizens, the Court spent much of its opinion grappling with whether § 1985(3) required state action.<sup>43</sup> The Court resolved the issue with special emphasis on legislative history.<sup>44</sup> The sponsors of § 1985(3), Representatives Samuel Shellabarger and Charles Willard, gave “no suggestion whatever that liability would not be imposed for purely private conspiracies.”<sup>45</sup> It was therefore clear to the Court that § 1985(3) did not require state action.<sup>46</sup>

However, the Court feared that, without a state-action requirement, § 1985(3) would become unconstitutionally broad.<sup>47</sup> To ensure that the statute did not become “general federal tort law,” the Court returned to the legislative history.<sup>48</sup> Representative Willard had stated that § 1985(3) would punish those who have “the intent to deprive a person of the equal protection of the laws.”<sup>49</sup> Representative Shellabarger had similarly affirmed that § 1985(3) would cover the “violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights.”<sup>50</sup> The Court thus read § 1985(3)’s invocation of the term “equal” to entail a requirement of discriminatory animus. That is, § 1985(3) requires that there “be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”<sup>51</sup> Because the White gang acted with naked animus against the Black travelers, the Court’s new requirement posed no barrier to liability in *Griffin*.<sup>52</sup>

The Court revisited this discriminatory animus requirement several years later in *Great American Federal Savings & Loan*

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<sup>42</sup> *Id.* at 106.

<sup>43</sup> *See id.* at 93–102.

<sup>44</sup> *See id.* at 99–101.

<sup>45</sup> *Id.* at 100.

<sup>46</sup> *Griffin*, 403 U.S. at 101 (“It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)’s coverage of private conspiracies.”).

<sup>47</sup> *See id.* at 101–02.

<sup>48</sup> *Id.* at 102.

<sup>49</sup> *Id.* at 100 (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 188 (1871)).

<sup>50</sup> *Id.* at 100 (emphasis omitted) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871)).

<sup>51</sup> *Griffin*, 403 U.S. at 102. In a footnote, the Court identified “animus” with any kind of “intent.” *Id.* at 102 n.9. This usage of “animus” is therefore distinct from others in the Court’s civil rights jurisprudence, where the term presupposes some kind of “animosity.” *See, e.g., Romer v. Evans*, 517 U.S. 620, 634 (1996).

<sup>52</sup> *Griffin*, 403 U.S. at 103.

*Ass'n v. Novotny*.<sup>53</sup> The case involved a lawsuit brought by a man fired after expressing his support for the equal treatment of women, which the Equal Employment Opportunity Commission had deemed a violation of his Title VII rights.<sup>54</sup> However, the Court decided that violations of Title VII rights could not serve as the bases of § 1985(3) claims.<sup>55</sup> Otherwise, the Court reasoned, victims of workplace discrimination could circumnavigate the litigation rules prescribed by Title VII, which Congress presumably intended to be followed.<sup>56</sup> In reaching its decision, the Court expressly reserved judgment on whether § 1985(3) covered sex-based discrimination not already deemed actionable under Title VII.<sup>57</sup>

The Court revisited the scope of § 1985(3)'s discriminatory animus requirement in *United Brotherhood of Carpenters and Joiners of America v. Scott*.<sup>58</sup> Union members had beaten workers who refused to join their organization, prompting those workers to file suit.<sup>59</sup> To determine whether § 1985(3) covered discrimination against an economic class like non-Union workers, the Court again excavated the legislative history.<sup>60</sup> Although some floor statements suggested that § 1985(3) was intended to cover discrimination on any basis, the Court found that the "central concern" behind the statute was combating the Ku Klux Klan and its sympathizers.<sup>61</sup> The Court therefore found that, unlike discrimination on the basis of race, economic discrimination was not cognizable under § 1985(3).<sup>62</sup>

The Court last addressed the discriminatory-animus requirement in 1993. *Bray v. Alexandria Women's Health Clinic*<sup>63</sup> involved an action filed by abortion seekers against anti-abortion demonstrators, the latter having obstructed access to a clinic.<sup>64</sup> Like the plaintiff in *Novotny*, the abortion seekers alleged sex-

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<sup>53</sup> 442 U.S. 366 (1979).

<sup>54</sup> *See id.* at 368–69.

<sup>55</sup> *See id.* at 378.

<sup>56</sup> *See id.* at 374–76.

<sup>57</sup> *See id.* at 370 n.6 ("It is unnecessary for us to consider whether a plaintiff would have a cause of action under § 1985(3) where the defendant was not subject to suit under Title VII.").

<sup>58</sup> 463 U.S. 825 (1983).

<sup>59</sup> *See id.* at 828.

<sup>60</sup> *See id.* at 834–39.

<sup>61</sup> *Id.* at 837.

<sup>62</sup> *See id.* at 838.

<sup>63</sup> 506 U.S. 263 (1993).

<sup>64</sup> *See id.* at 266–67.



based discrimination, and again, the Court declined to rule on whether § 1985(3) covered the practice in general.<sup>65</sup> The Court instead observed that “there are common and respectable reasons” for opposing abortion,<sup>66</sup> as illustrated by Congress’s restriction of abortion funding.<sup>67</sup> The demonstrators’ actions may have been motivated by those nondiscriminatory reasons, and as a result, in the Court’s view, there was no sex-based discrimination for it to analyze.<sup>68</sup>

By way of summary, § 1985(3) has been imbued with a discriminatory animus requirement since the 1970s. Racial discrimination clearly satisfies the requirement, and economic discrimination clearly does not. However, it remains an open question whether § 1985(3) reaches sex-based discrimination.

## B. The Discriminatory Animus Requirement in the Lower Courts

The discriminatory-animus requirement has received far more consideration in the lower courts than at the Supreme Court. Indeed, most circuits have already weighed in on whether sex-based discrimination is cognizable under § 1985(3).<sup>69</sup> This Section begins by classifying the circuits according to their positions on § 1985(3)’s capacity to reach sex-based discrimination. Next, it reviews LGBT plaintiffs’ lack of success with § 1985(3) in the lower courts.

### 1. Section 1985(3) and sex-based discrimination.

The vast majority of circuits have determined that § 1985(3) does reach sex-based discrimination. One of the first to do so was the Third Circuit, which reached its determination after reviewing the general state of federal law.<sup>70</sup> Because it found that federal law treats sex-based discrimination as “irrational and odious,”

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<sup>65</sup> See *id.* at 269 (“We find it unnecessary to decide whether [women in general] is a qualifying class under § 1985(3), since the claim that petitioners’ opposition to abortion reflects an animus against women in general must be rejected.”).

<sup>66</sup> *Id.* at 270.

<sup>67</sup> See *id.* at 274.

<sup>68</sup> *Bray*, 506 U.S. at 269–70.

<sup>69</sup> See, e.g., *Lyes*, 166 F.3d at 1339. Only one circuit court—the Fourth Circuit—has not weighed in on whether § 1985(3) reaches sex-based discrimination.

<sup>70</sup> See *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1243 (3d Cir. 1978), *vacated on other grounds by* *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366 (1979).

the Third Circuit concluded that § 1985(3) reached the practice.<sup>71</sup> The Ninth Circuit soon followed suit.<sup>72</sup> After observing that federal law protects men and women against sex-based discrimination in other contexts, the Ninth Circuit held that it was cognizable under § 1985(3) as well.<sup>73</sup> The Second Circuit adopted a similar line of reasoning, pointing to the Nineteenth Amendment's rejection of sex-based discrimination in the context of suffrage.<sup>74</sup> Likewise, the First Circuit decided that § 1985(3) reaches sex-based discrimination after observing that, for the purposes of the Equal Protection Clause, classifications based on sex receive heightened scrutiny.<sup>75</sup> The Eleventh Circuit was the last to join this camp, emphasizing that federal law prohibits discrimination on the basis of sex in the employment and jury selection contexts.<sup>76</sup>

Some other circuits have recognized that § 1985(3) covers sex-based discrimination, but without making their reasoning explicit. Take, for example, the Eighth Circuit.<sup>77</sup> When confronted with a conspiracy directed against a woman "because of her . . . sex," the Eighth Circuit affirmed that the conspiracy was cognizable under § 1985(3)<sup>78</sup> but did not explain why.<sup>79</sup> The Seventh Circuit has similarly held without explanation that § 1985(3) reaches "conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty."<sup>80</sup> The final member of this camp is the Sixth Circuit.<sup>81</sup> Referencing Seventh Circuit precedent, it held that discrimination on such grounds as race, national origin, or sex is cognizable under § 1985(3).<sup>82</sup>

Only two circuits have suggested that sex-based discrimination is not within the reach of § 1985(3). The first of these is the Fifth Circuit.<sup>83</sup> In dicta, it advocated for a narrow construction of

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<sup>71</sup> *Id.* at 1243.

<sup>72</sup> *See* *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979).

<sup>73</sup> *See id.*

<sup>74</sup> *See* *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989).

<sup>75</sup> *See* *Libertad v. Welch*, 53 F.3d 428, 448–49 (1st Cir. 1995), *abrogation recognized* by *United States v. Velazquez-Fontanez*, 6 F.4th 205 (1st Cir. 2021).

<sup>76</sup> *See* *Lyes*, 166 F.3d at 1337.

<sup>77</sup> *See, e.g.,* *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988).

<sup>81</sup> *See, e.g.,* *Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc.*, 32 F.3d 989, 994 (6th Cir. 1994).

<sup>82</sup> *Id.*

<sup>83</sup> *See, e.g.,* *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 929, 932 (5th Cir. 1977), *superseded by statute, as recognized by* *Wilson v. Harris Trust & Sav. Bank*, 777

the discriminatory animus requirement.<sup>84</sup> The court based its position on the legislative history and, in particular, the title of the bill that eventually became § 1985(3).<sup>85</sup> That original title—An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution, and for other Purposes—persuaded the Fifth Circuit that “the key concern of the legislators was . . . redress of injuries suffered by the class of newly emancipated slaves.”<sup>86</sup> The Fifth Circuit thus signaled that it would not extend § 1985(3) beyond race-based discrimination.<sup>87</sup> The Tenth Circuit, also in dicta, endorsed a similar interpretation of the discriminatory animus requirement.<sup>88</sup> Much like the Fifth Circuit, the Tenth Circuit emphasized § 1985(3)’s legislative history.<sup>89</sup> Most of the floor statements made in support of § 1985(3) concerned the Ku Klux Klan, and per the Tenth Circuit, this “must influence greatly any analysis of the scope of the act.”<sup>90</sup>

To summarize, the circuits have divided into three camps on the question of whether § 1985(3) proscribes sex-based discrimination. The first camp is comprised of the First, Second, Third, Ninth and Eleventh Circuits. They have concluded that sex-based discrimination satisfies the discriminatory animus requirement, referencing various ways in which federal law condemns the practice elsewhere. The Sixth, Seventh, and Eighth Circuits form the second camp. While they also conclude that sex-based discrimination satisfies the discriminatory animus requirement, their reasoning is more opaque. The third camp is composed of the Fifth and Tenth Circuits. They have relied on the legislative history of § 1985(3) to cast doubt on the statute’s coverage of sex-based discrimination.

## 2. Section 1985(3) and anti-LGBT discrimination.

The Ninth Circuit is the only circuit court to have addressed whether victims of anti-LGBT discrimination may bring suit under § 1985(3). The opportunity came in *DeSantis v. Pacific*

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F.2d 1246 (7th Cir. 1985) (citing Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.)).

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 932.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 929.

<sup>88</sup> *See, e.g.,* Wilhelm v. Cont’l Tile Co., 720 F.2d 1173, 1177 (10th Cir. 1983).

<sup>89</sup> *See, e.g., id.* at 1175–78.

<sup>90</sup> *Id.* at 1177.

*Telephone and Telegram Co.*,<sup>91</sup> which involved several gay and lesbian individuals alleging that they were either terminated from their jobs or not hired altogether on account of their sexual orientations.<sup>92</sup> They brought suit under both § 1985(3) and Title VII,<sup>93</sup> but because the case was decided prior to the Supreme Court's decision in *Novotny*, the Ninth Circuit was not compelled to hold that Title VII preempted litigation under § 1985(3). Instead, it was able to grapple with the scope of the discriminatory animus requirement.<sup>94</sup> The Ninth Circuit, consistent with its position on sex-based discrimination, first acknowledged that § 1985(3) "has been liberated from the now anachronistic historical circumstances of reconstruction America."<sup>95</sup> Consistent with the reasoning underlying its position on sex-based discrimination—which was that federal law broadly prohibited the practice—the Ninth Circuit noted that law had yet to condemn discrimination against gay or lesbian people.<sup>96</sup> For instance, Congress had not yet "include[d] homosexuals as a group within the special protection of Title VII."<sup>97</sup> The Ninth Circuit therefore held that discrimination against gay or lesbian people was not cognizable under § 1985(3).<sup>98</sup>

For decades, district courts across the country have relied on the Ninth Circuit's reasoning to reject § 1985(3) claims brought by LGBT plaintiffs. Consider, for example, the Southern District of New York. It resides in the Second Circuit, which like the Ninth Circuit, has held that § 1985(3) reaches sex-based discrimination due to federal law's condemnation of the practice.<sup>99</sup> Accordingly, when a gay man brought a discrimination claim under § 1985(3), the court dismissed the claim on the grounds that there was no "legislation providing this group with special protection."<sup>100</sup> Also

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<sup>91</sup> 608 F.2d 327 (9th Cir. 1979), *abrogation recognized by* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

<sup>92</sup> *See id.* at 328–39.

<sup>93</sup> *Id.* at 328.

<sup>94</sup> *See id.* at 332–33.

<sup>95</sup> *Id.* at 333.

<sup>96</sup> *See DeSantis*, 608 F.2d at 333.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* ("[H]omosexuals are not a 'class' within the meaning of § 1985(3).").

<sup>99</sup> *See Terry*, 886 F.2d at 1359.

<sup>100</sup> *Gay Veterans Ass'n, Inc. v. Am. Legion-N.Y. Cnty. Org.*, 621 F. Supp 1510, 1516 (S.D.N.Y. 1985); *see also* *David v. Local 801, Danbury Fire Fighters Ass'n*, 899 F. Supp. 78, 80 (D. Conn. 1995) (referencing Title VII's lack of protections for gay men to conclude that § 1985(3) did not reach discrimination against them).

consider David Monitor's § 1985(3) claim, discussed in the Introduction.<sup>101</sup> The claim was brought in the Northern District of Illinois, which resides in the Seventh Circuit. The Seventh Circuit does not belong to the same camp as the Ninth Circuit, having assumed without explanation that § 1985(3) reaches sex-based discrimination.<sup>102</sup> Nonetheless, the district court "adopt[ed] the reasoning of the Ninth Circuit" to dismiss Monitor's § 1985(3) claim.<sup>103</sup>

In short, a victim of anti-LGBT discrimination will struggle to find a district court with precedent sympathetic to her § 1985(3) claim. Indeed, no district court has published a decision holding that § 1985(3) has the capacity to reach anti-LGBT discrimination.<sup>104</sup> It is clear that an LGBT plaintiff who aspires to change that status quo will need to make different arguments in different district courts, though. If the district court resides in the First, Second, Third, Ninth, or Eleventh Circuits, her task is straightforward. Because those courts have determined the scope of § 1985(3) with reference to extant federal protections, the LGBT plaintiff will have to show only that federal law now protects her community. On the other hand, consider a district court in the Sixth, Seventh, and Eighth Circuits, which have extended § 1985(3) to sex-based discrimination for opaque reasons. Unable to rely on explicit reasoning from circuit precedent, the LGBT plaintiff in such a district court will need to make an argument about the nature of sex-based discrimination to show that LGBT discrimination is sex-based. Her task changes again if the district court instead sits in the Fifth or Tenth Circuits, which have doubted that § 1985(3) can reach sex-based discrimination in light of its legislative history. To prevail, the LGBT plaintiff will have to demonstrate that this legislative history does not govern the scope of § 1985(3).

## II. THE TRIPARTITE SIGNIFICANCE OF *BOSTOCK V. CLAYTON COUNTY*

All the § 1985(3) precedent that the LGBT plaintiff will have to surmount predates *Bostock*, which dramatically altered the landscape of federal LGBT protections. In *Bostock*, the Supreme

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<sup>101</sup> See *supra* Introduction.

<sup>102</sup> See *Volk*, 845 F.2d at 1434.

<sup>103</sup> *Monitor v. City of Chicago*, 653 F. Supp. 1294, 1300 (N.D. Ill. 1987).

<sup>104</sup> *But see Jenkins v. Miller*, 2017 WL 4402431 (D. Vt. Sept. 29, 2017) (refusing to dismiss a § 1985(3) claim involving anti-LGBT discrimination).

Court consolidated three employment discrimination claims. The first two were brought by Gerald Bostock and Donald Zarda, both of whom were fired after their employers learned they were gay.<sup>105</sup> The third claim was filed by Aimee Stephens, who was terminated after revealing to her employer that she was transgender.<sup>106</sup> The plaintiffs' claims were all brought under Title VII's prohibition of discrimination "because of . . . sex" in the workplace.<sup>107</sup> Speaking through Justice Neil Gorsuch, the Supreme Court held that Title VII indeed prohibits anti-LGBT discrimination in the workplace.<sup>108</sup>

*Bostock* is not merely cited for its holding about the scope of Title VII. Lower courts have also cited *Bostock* for its bearing on what counts as sex-based discrimination and the relevance of legislative history in statutory interpretation.<sup>109</sup> This Part elucidates the tripartite significance of *Bostock*. Part II.A lays out *Bostock*'s influence on analyses of sex-based discrimination. Part II.B then outlines the case's methodological implications. Finally, Part II.C discusses *Bostock*'s effect on how federal law treats anti-LGBT discrimination in the workplace.

#### A. Discrimination on the Basis of Traits Inextricably Bound Up with Sex Necessarily Constitutes Sex-Based Discrimination

To show that Title VII prohibits anti-LGBT discrimination in the workplace, Justice Gorsuch first determined that Title VII invokes a common legal understanding of sex-based discrimination. He performed this exegetical maneuver by appealing to various indicia of statutory meaning, initially citing precedent to the effect that "because of" almost always denotes but-for causation.<sup>110</sup> He then consulted a dictionary from around the same era in which Title VII was passed, finding that "discriminate" meant treating an "individual worse than others who are similarly situated."<sup>111</sup> Justice Gorsuch lastly pointed out that precedent requires discrimination to be intentional, at least when the case is not based

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<sup>105</sup> See *Bostock*, 140 S. Ct. at 1737–38.

<sup>106</sup> See *id.* at 1738.

<sup>107</sup> *Id.* (quoting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

<sup>108</sup> See *id.* at 1743.

<sup>109</sup> See, e.g., *Franco v. Mabe Trucking Co.*, 3 F.4th 788, 795 (5th Cir. 2021); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

<sup>110</sup> See *Bostock*, 140 S. Ct. at 1739 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

<sup>111</sup> *Id.* at 1740.

on an allegation of disparate impact.<sup>112</sup> Stitching together these indicia of statutory meaning, Justice Gorsuch concluded that Title VII's prohibition of discrimination "because of . . . sex" turns on a popular understanding of sex-based discrimination: it prohibits employers from intentionally treating employees worse based, in part, on their sex.<sup>113</sup>

Justice Gorsuch rejected Justice Samuel Alito's suggestion that Title VII appeals to a more esoteric form of sex-based discrimination. As observed in Justice Alito's dissent, discrimination sometimes involves treating a group—not merely an individual—worse than similarly situated groups.<sup>114</sup> If Title VII invoked that notion of discrimination, it would simply prohibit employers from intentionally treating one sex "generally less favorably"<sup>115</sup> than the other.<sup>116</sup> Justice Gorsuch rejected this narrow reading of Title VII by noting that the statute prohibits conduct against "any individual," not just any group.<sup>117</sup> He took this to indicate that Title VII does in fact prohibit discrimination against individuals, preserving his reading of the statute.<sup>118</sup>

The main controversy in *Bostock* was not over alternative forms of sex-based discrimination, however. Thus far, Justice Gorsuch had only established that Title VII prohibits employers from intentionally treating someone worse based, in part, on their sex.<sup>119</sup> This understanding of sex-based discrimination is ubiquitous in civil rights law, so much so that even Justice Alito largely refrained from "suggesting that the statutory language bears some other meaning."<sup>120</sup> Justice Gorsuch's principal task was demonstrating that Title VII's notion of sex-based discrimination encompasses discrimination against LGBT employees.

Articulating his analysis of sex-based discrimination under Title VII, Justice Gorsuch reasoned that discrimination on the basis of traits "inextricably bound up with sex" necessarily constitutes sex-based discrimination.<sup>121</sup> In other words, when traits are defined with respect to sex, discrimination on their basis *ipso*

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<sup>112</sup> *Id.* (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1998)).

<sup>113</sup> *See id.* at 1740–41 (citing 42 U.S.C. § 2000e-2).

<sup>114</sup> *See id.* at 1768–69, 1769 n.22 (Alito, J., dissenting).

<sup>115</sup> *Bostock*, 140 S. Ct. at 1740 (majority opinion).

<sup>116</sup> *Id.* at 1768–69, 1769 n.22 (Alito, J., dissenting).

<sup>117</sup> *Id.* at 1740–41 (majority opinion) (emphasis omitted).

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 1741.

<sup>120</sup> *Bostock*, 140 S. Ct. at 1750 (emphasis omitted).

<sup>121</sup> *Id.* at 1742.

*facto* constitutes sex-based discrimination within the meaning of Title VII. Justice Gorsuch illustrated his analysis with a hypothetical: suppose that an employer fires a person because she is transgender or because she is gay.<sup>122</sup> Two causal factors must have precipitated the firing, namely, “the individual’s sex *and* . . . the sex to which the individual is attracted or with which the individual identifies.”<sup>123</sup> That is enough to satisfy Title VII’s notion of sex-based discrimination, which only requires but-for causation.<sup>124</sup>

Justice Alito objected to Justice Gorsuch’s analysis with an illustration of his own. He recalled the discriminatory hiring policy of the U.S. military, under which “applicants for enlistment were required to complete a form that asked whether they were ‘homosexual.’”<sup>125</sup> An employer was thus able to discriminate against a lesbian or gay applicant without knowing his or her sex.<sup>126</sup> Justice Alito took this example to compel his view that while sexual orientation might be inextricably bound up with sex, discrimination on its basis does not *ipso facto* constitute sex-based discrimination.<sup>127</sup>

Justice Gorsuch replied that even in Justice Alito’s example, “the individual applicant’s sex still weighs as a factor in the employer’s decision.”<sup>128</sup> He mounted his rebuttal by positing an applicant who does not know the meaning of the term “homosexual”—or “transgender,” for that matter.<sup>129</sup> The employer would not be able write out instructions for how to complete the form without appealing to “sex” or some synonymous term.<sup>130</sup> For Justice Gorsuch, this revealed that the employer still seeks to consider the applicant’s sex in its hiring decision.<sup>131</sup> Title VII’s notion of sex-based discrimination, moreover, only requires that the discrimination be intentional.<sup>132</sup> Justice Gorsuch therefore maintained that “it is impossible” to discriminate on the basis of traits

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (emphasis in original).

<sup>124</sup> *Id.* (“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.”).

<sup>125</sup> See *Bostock*, 140 S. Ct. at 1759. (Alito, J., dissenting).

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* (“[D]iscrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex.”).

<sup>128</sup> *Id.* at 1746 (majority opinion).

<sup>129</sup> *Id.*

<sup>130</sup> See *Bostock*, 140 S. Ct. at 1746.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 1741.



inextricably bound up with sex without engaging in sex-based discrimination.<sup>133</sup>

*Bostock* has been repeatedly referenced outside of the Title VII context for its analysis of sex-based discrimination.<sup>134</sup> Courts are particularly apt to cite *Bostock* when interpreting Title IX, which prohibits sex-based discrimination in education programs. Catalyzing the trend, the Fourth Circuit reasoned that, although Title IX's language differs from that of Title VII, both statutes prohibit similar forms of sex-based discrimination.<sup>135</sup> The Fourth Circuit therefore cited *Bostock* for the proposition that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."<sup>136</sup> The Ninth Circuit soon followed suit.<sup>137</sup> After one of its district courts attempted to ignore Justice Gorsuch's logic while resolving a Title IX claim, the Ninth Circuit made clear that "the district court's understanding of *Bostock* was too narrow."<sup>138</sup>

#### B. Legislative History Should Be Used Only in the Case of Ambiguous Statutory Language

Before concluding that Title VII prohibits anti-LGBT discrimination in the workplace, Justice Gorsuch had to address a counterargument based on the statute's legislative history. As Justice Alito pointed out in dissent, the floor debates about Title VII's sex-based discrimination provision made no mention of sexual orientation or gender identity.<sup>139</sup> Postenactment legislative history also suggests that Title VII was not intended to protect LGBT folks. As Justice Gorsuch admitted, "Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law."<sup>140</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *See, e.g.,* M.E. v. T.J., 854 S.E.2d 74, 108–12 (N.C. App. 2020) (applying *Bostock*'s analysis of sex-based discrimination to an equal protection claim).

<sup>135</sup> *See Grimm*, 972 F.3d at 616 (quoting *Bostock*, 140 S. Ct. at 1741).

<sup>136</sup> *Id.*

<sup>137</sup> *See Doe v. Snyder*, 28 F.4th 103, 113–14 (9th Cir. 2022).

<sup>138</sup> *Id.* at 114.

<sup>139</sup> *See Bostock*, 140 S. Ct. at 1776 (Alito, J., dissenting).

<sup>140</sup> *Id.* at 1747 (majority opinion).

Justice Gorsuch nonetheless countered that legislative history is relevant only when the text of a statute is ambiguous.<sup>141</sup> This position is undergirded by a separation of powers rationale. As Justice Gorsuch explained, Congress's lawmaking power extends only to the statutory language it presents to the president.<sup>142</sup> When judges consult legislative history, they "risk amending statutes outside the legislative process reserved for the people's representatives."<sup>143</sup> The Constitution thus requires that judges use legislative history only as a last resort—that is, when the statute is genuinely ambiguous.<sup>144</sup>

Justice Gorsuch further maintained that the text of Title VII unambiguously prohibits workplace discrimination on the basis of traits inextricably bound up with sex.<sup>145</sup> On his view, before a statute is deemed ambiguous, all indicia of its public meaning at the time of enactment must be considered.<sup>146</sup> This includes contemporary dictionaries, conceptual analysis, and—perhaps paradoxically—any binding precedent.<sup>147</sup> As outlined in the previous Section, Justice Gorsuch did not stray to other indicia of Title VII's meaning in determining that it prohibits a garden-variety form of sex-based discrimination, which necessarily encompasses discrimination on the basis of traits inextricably bound up with sex.<sup>148</sup> He therefore concluded that Title VII unambiguously proscribed discrimination on the basis of those traits in the workplace and that, as a result, legislative history to the contrary must be ignored.<sup>149</sup>

Courts like the Fifth and Tenth Circuits have cited *Bostock* for Justice Gorsuch's interpretive methodology, often outside the Title VII context. For instance, consider the Fifth Circuit's efforts to parse 28 U.S.C. § 1631, a statute permitting cases to be transferred for want of jurisdiction.<sup>150</sup> Although some legislative history suggested that § 1631 only permitted transfer for want of

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<sup>141</sup> See *id.* at 1749 ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011))).

<sup>142</sup> See *id.* at 1738.

<sup>143</sup> *Id.*

<sup>144</sup> See *Bostock*, 140 S. Ct. at 1750 ("[L]egislative history can never defeat unambiguous statutory text.").

<sup>145</sup> See *id.* at 1749.

<sup>146</sup> See *id.* at 1738.

<sup>147</sup> See *id.* at 1739–45.

<sup>148</sup> See *supra* text accompanying notes 111–138.

<sup>149</sup> See *Bostock*, 140 S. Ct. at 1749.

<sup>150</sup> See *Franco*, 3 F.4th at 791–801.

subject matter jurisdiction, no such limitation appeared in the text of the statute.<sup>151</sup> The Fifth Circuit, citing *Bostock*, chose to read § 1631 broadly because “no amount of legislative history can defeat unambiguous statutory text.”<sup>152</sup> The Tenth Circuit undertook a similar analysis of 11 U.S.C. § 523, which lists forms of debt not subject to discharge via bankruptcy.<sup>153</sup> While § 523’s legislative history indicated that it was intended to render private student loans nondischargeable, the statute made no mention of this form of debt.<sup>154</sup> The Tenth Circuit cited *Bostock* in its refusal “to ignore the statute’s plain meaning . . . based on allegedly expansive congressional intent.”<sup>155</sup>

As the lower courts have applied Justice Gorsuch’s interpretive methodology outside the Title VII context, *Bostock*-style textualism has displaced more purposivist methodologies—sometimes even methodologies that had previously been sanctioned by the Supreme Court. Consider again § 1631, which the Fifth Circuit parsed without reference to legislative history post-*Bostock*.<sup>156</sup> Before *Bostock* was decided, the Supreme Court had long relied on House reports to interpret § 1631 and similar jurisdictional statutes.<sup>157</sup> Recall also the Tenth Circuit’s interpretation of § 523, which employed *Bostock* to spurn legislative history.<sup>158</sup> Similarly, prior to *Bostock* the Supreme Court had established the relevance of Senate reports to the meaning of § 523 and other statutes in the Bankruptcy Code.<sup>159</sup> The methodological import of *Bostock* is therefore not merely interstitial or confined to circumstances where the Supreme Court has yet to provide any methodological guidance. *Bostock* has indeed displayed a propensity to upset interpretive norms across the U.S. Code.<sup>160</sup>

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<sup>151</sup> See *id.* at 794–95.

<sup>152</sup> *Id.* at 795 (citing *Bostock*, 140 S. Ct. at 1750).

<sup>153</sup> See *McDaniel v. Navient Sols., LLC*, 973 F.3d 1083, 1090–1105 (10th Cir. 2020).

<sup>154</sup> See *id.* at 1095.

<sup>155</sup> *Id.* at 1099 n.14 (citing *Bostock*, 140 S. Ct. at 1738).

<sup>156</sup> See *Franco*, 3 F.4th at 795.

<sup>157</sup> See, e.g., *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 814 (1988).

<sup>158</sup> See *McDaniel*, 973 F.3d at 1099 n.14 (citing *Bostock*, 140 S. Ct. at 1738).

<sup>159</sup> See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998).

<sup>160</sup> Not all methodological guidance is given the effect of *stare decisis*, of course. See Jordan Wilder Conners, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 694–708 (2008). The point here is merely that, perhaps for reasons that are “inconsistent and incoherent,” *id.* at 714, the Court’s methodological guidance in *Bostock* has been given precedential effect by some circuits.

### C. Federal Law Protects LGBT People Against Discrimination in the Workplace

The black letter holding of *Bostock* proceeds directly from Justice Gorsuch's repudiation of Title VII's legislative history. By shrugging off the uncodified intentions of Congress, Justice Gorsuch preserved the upshot of his textualist analysis: discrimination on the basis of traits inextricably bound up with sex—including sexual orientation and gender identity—necessarily constitutes sex-based discrimination within the meaning of Title VII.<sup>161</sup> Title VII therefore prohibits discrimination against LGBT folks *because* it prohibits discrimination on the basis of sex.<sup>162</sup> The scope of this holding extends far beyond the Court's hypotheticals. Title VII does not merely prohibit sex-based discrimination in hiring and termination decisions; it also protects employees from discrimination in "compensation, terms, conditions, or privileges of employment."<sup>163</sup> Moreover, Title VII applies with equal force to public and private employers.<sup>164</sup>

Soon after *Bostock* was decided, President Joseph Biden issued Executive Order 13988 to ensure that the augmented scope of Title VII was enforced.<sup>165</sup> The order, which references *Bostock* by name, directs the Equal Employment Opportunity Commission (EEOC) to "fully enforce Title VII."<sup>166</sup> Accordingly, the EEOC released new resources for employers clearly detailing their obligations to LGBT employees under *Bostock*.<sup>167</sup> The agency also redoubled its remedial efforts, recovering over three million dollars more for LGBT employees than it had the previous year.<sup>168</sup>

Congress responded to *Bostock* in a similar fashion. In the two years since *Bostock* was decided, Congress has made no attempt to reject Justice Gorsuch's reading of Title VII, despite

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<sup>161</sup> See *Bostock*, 140 S. Ct. at 1742.

<sup>162</sup> See *id.* at 1754.

<sup>163</sup> See *id.* at 1740 (quoting 42 U.S.C. § 2000e-2(a)(1)).

<sup>164</sup> Cf. *id.* at 1753–54 (dismissing the employers' First Amendment concerns).

<sup>165</sup> See *generally* Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>166</sup> *Id.* at 7023.

<sup>167</sup> See *EEOC Announces New Resources About Sexual Orientation and Gender Identity Workplace Rights*, EQUAL EMP. OPPORTUNITY COMM'N (June 15, 2021), <https://perma.cc/45ZR-B58C>.

<sup>168</sup> See *LGBTQ+-Based Sex Discrimination Charges*, EQUAL EMP. OPPORTUNITY COMM'N (2021), <https://perma.cc/URW2-PW87>. Prior to *Bostock*, the EEOC was only able to pursue damages for LGBT plaintiffs in judicial districts that had anticipated the opinion with their own broad readings of Title VII. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 343–45 (7th Cir. 2017).

Justice Alito labeling it a “usurpation” of congressional power.<sup>169</sup> Instead, Congress is currently in the process of entrenching Justice Gorsuch’s interpretation.<sup>170</sup> The Equality Act, described by its drafter as a codification of *Bostock*, prohibits anti-LGBT discrimination in the workplace and several other contexts.<sup>171</sup> The House passed the Equality Act in 2021, and it is currently pending in the Senate Judiciary Committee.<sup>172</sup>

*Bostock* therefore prompted components of all three branches of the federal government to unite in opposition to discrimination against LGBT employees. Beginning with the judiciary, Justice Alito provided the Court in *Bostock* with various reasons for denying LGBT employees the protection of Title VII.<sup>173</sup> The Court, in refusing to accept any of those reasons, signaled that it would faithfully effectuate statutory protections for LGBT workers. The executive branch surely evinced its enthusiasm for protecting LGBT employees in Executive Order 13988 and in its vigorous enforcement of Title VII’s post-*Bostock* scope. Finally, by making no attempts to reject *Bostock*, Congress indicated its tacit acceptance of protections for LGBT workers. The Equality Act may even imply a ringing endorsement of LGBT protections, depending on how one views its prospects in the Senate. This much, however, is clear: *Bostock* resulted in each branch of the federal government recognizing protections for LGBT employees.

The upshot is that *Bostock* is significant for at least three reasons. The first is that *Bostock* debuted a new analysis of sex-based discrimination, which encompasses discrimination on the basis of traits inextricably bound up with sex. Circuit courts have gone on to import this analysis into the Title IX context because Title IX and Title VII prohibit similar forms of sex-based discrimination. Second, *Bostock* plumps for a zealously textualist approach to statutory interpretation, characterized by its limited reliance on legislative history. *Bostock*’s brand of textualism has since spread to other corners of the U.S. Code and, in the process, displaced methodologies the Court previously used to interpret those provisions. Third, *Bostock* held that federal law prohibits discrimina-

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<sup>169</sup> *Bostock*, 140 S. Ct. at 1836–37 (Alito, J., dissenting).

<sup>170</sup> See Jennifer C. Pizer, *Anything Less is Less than Equal: The Structure and Goals of the Equality Act*, AM. BAR ASS’N (July 5, 2022), <https://perma.cc/25WC-LYAT>.

<sup>171</sup> See *id.*

<sup>172</sup> Equality Act, H.R. 5, 117th Cong. (1st Sess. 2021).

<sup>173</sup> See *supra* text accompanying notes 115–117, 126–127.

tion against LGBT folks in the workplace. Congress and the executive branch have since accepted this development in the law, seeking its codification and rigorous enforcement.

### III. *BOSTOCK'S* IMPLICATIONS FOR THE SCOPE OF § 1985(3)

Section 1985(3) was passed long before *Bostock* was decided, predating even Title VII itself. The statute nonetheless appears susceptible to reinterpretation in light of *Bostock*. This is most evident in the Ninth Circuit's 1979 determination that § 1985(3) does not reach anti-LGBT discrimination, which explicitly referenced Title VII's omission of protections for LGBT employees as a reason for confining § 1985(3)'s scope.<sup>174</sup> If nothing else, *Bostock* held that Title VII does in fact prohibit anti-LGBT discrimination in the workplace, thus militating reconsideration of the scope of § 1985(3).<sup>175</sup>

*Bostock's* implications for the scope of § 1985(3) hardly stop with the Ninth Circuit, though. As discussed in Part I, the circuit courts have divided into three camps when interpreting § 1985(3), each of which would require a different kind of argument to accept a claim of anti-LGBT discrimination under the statute.<sup>176</sup> Furthermore, Part II explained that *Bostock* is significant in three ways. This Part endeavors to show that LGBT plaintiffs can mobilize each aspect of *Bostock's* significance to ensure that any circuit will be receptive to their § 1985(3) claims. Part III.A asserts that in the First, Second, Third, Ninth, and Eleventh Circuits, *Bostock's* recognition of federal LGBT protections enables all victims of anti-LGBT discrimination to bring § 1985(3) claims. Part III.B then contends that in the Sixth, Seventh, and Eighth Circuits, *Bostock's* analysis of sex-based discrimination permits a larger class of victims to bring claims under § 1985(3). The class—comprised of those who have suffered discrimination on the basis of traits inextricably bound up with sex—includes victims of anti-LGBT discrimination. Part III.C finally argues that in the Fifth and Tenth Circuits, *Bostock's* approach to statutory interpretation allows victims of discrimination based on any immutable characteristic to bring § 1985(3) claims.

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<sup>174</sup> See *DeSantis*, 608 F.2d at 333 (“Congress did not and has consistently refused to include homosexuals as a group within the special protection of Title VII.” (citing 42 U.S.C. § 2000e-2)).

<sup>175</sup> *Bostock*, 140 S. Ct. at 1754.

<sup>176</sup> See *supra* Part I.

### A. Claims Alleging Discrimination Against LGBT Folks

The least controversial application of *Bostock* to § 1985(3) concerns the opinion's recognition of federal protections for LGBT folks. To conclude that § 1985(3) reaches sex-based discrimination, the First, Second, Third, Ninth, and Eleventh Circuits considered extant federal protections against the invidious practice.<sup>177</sup> LGBT plaintiffs bringing suit under § 1985(3) in these circuits therefore need only point to *Bostock*'s bearing on how federal law treats LGBT folks.

These circuits should not be treated as homogenous, though. The Ninth Circuit has determined the scope of § 1985(3) by considering whether the federal political branches had passed statutes proscribing the kind of discrimination at issue.<sup>178</sup> The Second Circuit has similarly considered the work of the federal political branches but has also focused on the existence of a relevant constitutional amendment.<sup>179</sup> On the other hand, the Third and Eleventh Circuits have sought to gauge the disposition of the federal judiciary, not that of the federal political branches. The analyses of these circuits have accordingly emphasized cases in which the Supreme Court had used federal legislation to proscribe the form of discrimination in question.<sup>180</sup> The First Circuit has also concentrated on judicial activity, yet its analysis hinged on whether the sort of discrimination received heightened scrutiny under the Equal Protection Clause.<sup>181</sup>

Beginning with the Ninth and Second Circuits, *Bostock* and its aftermath establish that the federal political branches condemn anti-LGBT discrimination. After all, *Bostock* interpreted Title VII to protect LGBT folks against discrimination in various employment contexts.<sup>182</sup> The Ninth Circuit, which looked to statutes to determine the disposition of the federal political branches, should thus accept that *Bostock* establishes federal condemnation

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<sup>177</sup> See *supra* notes 70–76 and accompanying text.

<sup>178</sup> See, e.g., *DeSantis*, 608 F.2d at 333.

<sup>179</sup> See *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989).

<sup>180</sup> See *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243 (3d Cir. 1978), *vacated on other grounds by Novotny*, 442 U.S. 366; *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1338 (11th Cir. 1999).

<sup>181</sup> See *Libertad v. Welch*, 53 F.3d 428, 448–49 (1st Cir. 1995), *abrogation recognized by United States v. Velazquez-Fontanez*, 6 F.4th 205 (1st Cir. 2021).

<sup>182</sup> See *Bostock*, 140 S. Ct. at 1740 (“Employers may not ‘fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.’” (emphasis omitted) (quoting 42 U.S.C. § 2000e-2(a)(1))).

of anti-LGBT discrimination. The federal political branches may not have foreseen that Title VII would protect LGBT employees, but as Justice Gorsuch observed in *Bostock*, the text of Title VII captures the relevant opinions of the political branches.<sup>183</sup> Even if Justice Gorsuch were doubted on this point, though, both the executive branch and Congress endorsed *Bostock*'s interpretation of Title VII in the wake of the decision.<sup>184</sup> The Second Circuit, on the other hand, has used a constitutional amendment as evidence of the disposition of the federal political branches.<sup>185</sup> Despite its favorable reception, *Bostock* has triggered no discussion of a constitutional amendment protecting LGBT folks. But the Second Circuit only cited the amended Constitution to show that the political branches had taken some action to safeguard "the full rights of citizenship."<sup>186</sup> The Second Circuit should thus regard statutory protections as equally relevant, requiring no more evidence of political condemnation than the Ninth Circuit.

*Bostock* additionally demonstrates that the federal judiciary recognizes the political branches' condemnation of anti-LGBT discrimination. Not only did the decision acknowledge that Title VII protects LGBT employees, but it also applied the statute to three instances of anti-LGBT discrimination and found each was proscribed.<sup>187</sup> The Third and Eleventh Circuits have gauged the disposition of the federal judiciary by considering all relevant Supreme Court decisions. After the Supreme Court decided *Bostock*, then, they would readily accept that the federal judiciary stands with the political branches against anti-LGBT discrimination. This would be a particularly easy determination for the Third Circuit. Despite considering all relevant Supreme Court decisions, the Third Circuit has required less evidence of judicial condemnation when the characteristic at issue bears "no relation to ability to perform or contribute to society."<sup>188</sup> LGBT status is, of course, one such characteristic.

On its face, the First Circuit appears to have set a higher bar, focusing on whether heightened scrutiny is warranted in Equal Protection Clause challenges. It is plausible that Justice Gorsuch's analysis of sex-based discrimination entails heightened

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<sup>183</sup> See *id.* at 1749.

<sup>184</sup> See *supra* notes 165–172 and accompanying text.

<sup>185</sup> See *supra* note 179 and accompanying text.

<sup>186</sup> *Terry*, 866 F.2d at 1359.

<sup>187</sup> See *Bostock*, 140 S. Ct. at 1743–44.

<sup>188</sup> *Novotny*, 584 F.2d at 1243.



scrutiny for anti-LGBT discrimination,<sup>189</sup> but the LGBT plaintiff in the First Circuit should be able to succeed with something less. The First Circuit has said that § 1985(3) reaches discrimination warranting heightened scrutiny “at the very least,”<sup>190</sup> supporting its position by claiming consistency with the Third Circuit.<sup>191</sup> Hence, like the Third Circuit, the First Circuit would presumably consider evidence beyond heightened-scrutiny determinations when gauging the disposition of the federal judiciary. So likewise, it should find *Bostock* sufficient to establish the federal judiciary’s intolerance of anti-LGBT discrimination.

The most straightforward application of *Bostock* to § 1985(3) concerns its bearing on federal protections for LGBT folks. The decision condemned anti-LGBT discrimination in various employment contexts and was later accepted or endorsed by the political branches. Providing a direct hook for this development, the First, Second, Third, Ninth, and Eleventh Circuits determine the scope of § 1985(3) by gauging the disposition of federal law toward the relevant form of discrimination. *Bostock* would thus impel these circuits to begin accepting—and, in the case of the Ninth Circuit, stop rejecting—the § 1985(3) claims of LGBT plaintiffs.<sup>192</sup>

#### B. Claims Alleging Discrimination on the Basis of Any Characteristic Inextricably Bound Up with Sex

LGBT plaintiffs filing suit in the Sixth, Seventh, and Eighth Circuits will need to make a more complex argument, though. These circuits have also acknowledged that sex-based discrimination is cognizable under § 1985(3), but they have been less transparent in their reasons for doing so.<sup>193</sup> Fortunately, Justice Gorsuch reached the black-letter holding of *Bostock* by demonstrating that discrimination on the basis of traits inextricably bound up with sex necessarily constitutes sex-based

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<sup>189</sup> See Cohen, *supra* note 37, at 442 n.247.

<sup>190</sup> *Libertad*, 53 F.3d at 448.

<sup>191</sup> See *id.* at 448–49.

<sup>192</sup> LGBT litigants can try making the same argument in the Fourth Circuit, which is something of a blank slate due to its limited encounters with § 1985(3). But those litigants should also appeal, in the alternative, to the more ambitious arguments outlined in Part III.A and Part III.B.

<sup>193</sup> See, e.g., *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) (“[Section] 1985(3) extends beyond conspiracies to discriminate against persons based on race to conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty.” (citing *Munson v. Friske*, 754 F.2d 683, 695 (7th Cir. 1985))).

discrimination.<sup>194</sup> His analysis thus requires circuits—such as the Sixth, Seventh, and Eighth—that have allowed § 1985(3) to cover sex-based discrimination to also permit coverage of discrimination based on sexual or gender identity, regardless of their initial rationales.

In *Bostock*, Justice Gorsuch analyzed Title VII’s notion of sex-based discrimination, which is characterized by three features. At least two of those features are clearly mirrored in § 1985(3). First, the discrimination must be intentional to be cognizable under Title VII.<sup>195</sup> Section 1985(3) also deals with intentional discrimination. It creates civil liability for conspiracies, which must be entered into intentionally.<sup>196</sup> Second, Title VII demands that the discrimination be directed at an individual, not a group.<sup>197</sup> Section 1985(3) likewise prohibits individual discrimination, creating liability for conspiracies directed at “any person or class of persons.”<sup>198</sup> If the “any person” disjunct is not to be construed as mere surplusage, § 1985(3) must reach conspiracies involving either group or individual discrimination. Third, Title VII requires only that sex be a but-for cause of the discrimination.<sup>199</sup> It does not require that sex be the only cause. This proved crucial to Justice Gorsuch’s analysis of sex-based discrimination, which hinged on an observation that some characteristics are defined with respect to sex.<sup>200</sup> Justice Gorsuch therefore deduced that discrimination on the basis of such characteristics necessarily involves two causal factors, one of which is sex.<sup>201</sup> However, his deduction would have failed to expand the scope of sex-based discrimination if Title VII had required sex to be the *only* causal factor. He instead would have shown that discrimination on the basis of LGBT status—caused both by one’s sex and some other factor, like the sex to which one is attracted or the sex with which one identifies—never constitutes sex-based discrimination.

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<sup>194</sup> See *supra* Part II.A.

<sup>195</sup> See *Bostock*, 140 S. Ct. at 1740 (“[T]he difference in treatment based on sex must be intentional.”).

<sup>196</sup> See, e.g., *Ocasio v. United States*, 578 U.S. 282, 287–88 (2016) (explaining the traditional elements of conspiracy, including intent).

<sup>197</sup> See *supra* notes 114–118 and accompanying text.

<sup>198</sup> 42 U.S.C. § 1985(3).

<sup>199</sup> See *Bostock*, 140 S. Ct. at 1739.

<sup>200</sup> See *supra* Part II.A.

<sup>201</sup> See *Bostock*, 140 S. Ct. at 1742 (“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).” (emphasis in original)).

Luckily, the Sixth, Seventh, and Eighth Circuits have assumed that § 1985(3) also requires sex to be a but-for cause of the discrimination. The Eighth Circuit, for instance, has held that § 1985(3) reaches discrimination “because of . . . sex.”<sup>202</sup> As Justice Gorsuch pointed out in *Bostock*, “because of” almost always denotes but-for causation.<sup>203</sup> The Seventh Circuit has similarly allowed § 1985(3) to reach sex-based discrimination when the discriminatory treatment is based on a couple “improper factors,”<sup>204</sup> such as an employee’s sex and “aspects of her personal life.”<sup>205</sup> Likewise, the Sixth Circuit has characterized § 1985(3) as simply requiring that “the defendant[‘s] actions were motivated to any degree” by discrimination on the basis of a characteristic like sex.<sup>206</sup> At least in these circuits, it is clear that § 1985(3) follows Title VII in merely requiring but-for causation. Justice Gorsuch’s analysis of sex-based discrimination is therefore applicable to their view that such discrimination is cognizable under § 1985(3).

If applied, however, Justice Gorsuch’s analysis would create friction with the Supreme Court’s black letter § 1985(3) holdings. While the Supreme Court has yet to decide whether sex-based discrimination is cognizable under § 1985(3), *Bray* apparently held that discrimination against those who seek abortions does not constitute discrimination on the basis of sex.<sup>207</sup> Justice Gorsuch’s analysis of sex-based discrimination implies otherwise, given that the characteristic of “seeking an abortion” seems to be inextricably bound up with sex. Someone who seeks an abortion is someone with female reproductive organs who intends to terminate her pregnancy. If discrimination against characteristics inextricably bound up with sex constitutes sex-based discrimination, then it is hard to see how discrimination against those who seek abortions would not qualify.

The holding of *Bray* can nonetheless be construed more narrowly. This is because the plaintiffs in *Bray* alleged discrimination against all people who have female reproductive organs—that is, against an entire group.<sup>208</sup> The Supreme Court rejected this allegation because, on its view, discrimination against those who seek abortion does not entail mistreatment of *everyone* with

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<sup>202</sup> *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

<sup>203</sup> *See Bostock*, 140 S. Ct. at 1739.

<sup>204</sup> *Volk*, 845 F.2d at 1435.

<sup>205</sup> *Id.* at 1427.

<sup>206</sup> *Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc.*, 32 F.3d 989, 994 (6th Cir. 1994).

<sup>207</sup> *See Bray*, 506 U.S. at 269.

<sup>208</sup> *See id.*

female reproductive organs.<sup>209</sup> As reasoned earlier in this Section, though, § 1985(3) reaches discrimination against both groups and individuals.<sup>210</sup> Discrimination against individuals requires only that some people are mistreated on the basis of some characteristic, while discrimination against groups also requires that the mistreatment is directed at an entire class of people.<sup>211</sup> Therefore, even though discrimination against abortion seekers does not constitute discrimination against “women in general,”<sup>212</sup> it does not follow that discrimination against abortion seekers cannot constitute individual discrimination on the basis of sex. Perhaps, then, *Bray* should be cabined to the legal theory of its plaintiffs. That is, perhaps it should be understood as holding only that discrimination against abortion seekers does not qualify as group discrimination on the basis of sex, contra the plaintiffs’ legal theory.

There are in fact good grounds for construing the holding of *Bray* narrowly. Because the plaintiffs in *Bray* did not allege individual discrimination, the Justices were not briefed on the issue by either party. The functional rationale for the Supreme Court’s refusal to issue advisory opinions is precisely that they would have to do so without the benefit of adversarial briefing: party briefs are thought to “sharpen[ ]” the Court’s decision-making process.<sup>213</sup> Moreover, the primary reason proffered against construing Supreme Court precedent narrowly is that parties have come to rely on it and will thus be unjustly surprised that their conduct is illegal.<sup>214</sup> Those who discriminate against individual abortion seekers can make no such complaint, however. Discriminatory animus is just one element of a claim under § 1985(3). The statute also requires that those who engage in the discrimination conspire to deprive the plaintiff of some legal entitlement.<sup>215</sup> Accordingly, they cannot claim that they were unjustly surprised with legal liability, having expected *Bray* to have a broader significance for § 1985(3). The conspirators still sought to deprive the plaintiff of a legal entitlement; a *Bray*-induced belief that they could do so with legal impunity is not a legitimate reliance interest.

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<sup>209</sup> See *id.* at 270.

<sup>210</sup> See *supra* notes 197–199 and accompanying text.

<sup>211</sup> See *Bostock*, 140 S. Ct. at 1741.

<sup>212</sup> *Bray*, 506 U.S. at 269.

<sup>213</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>214</sup> See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 276 (1972).

<sup>215</sup> See *Griffin*, 403 U.S. at 102 n.10.

If *Bray* is construed narrowly, Justice Gorsuch's analysis of sex-based discrimination can be imported into the § 1985(3) context without upsetting any binding Supreme Court precedent. His analysis would indeed result in the Sixth, Seventh, and Eighth Circuits extending § 1985(3) to reach anti-LGBT discrimination. As Justice Gorsuch demonstrated in *Bostock*, LGBT status is inextricably bound up with sex.<sup>216</sup> A transgender person, for instance, is someone whose gender identity is usually associated with the opposite sex. Justice Gorsuch's analysis therefore implies that discrimination on the basis of LGBT status necessarily constitutes sex-based discrimination. Because the Sixth, Seventh, and Eighth Circuits have already held that sex-based discrimination is cognizable under § 1985(3), they would conclude the same of anti-LGBT discrimination.

### C. Claims Alleging Discrimination on the Basis of Any Immutable Characteristic

The LGBT plaintiff will require a more ambitious argument in the Fifth and Tenth Circuits, which have not acknowledged that sex-based discrimination is cognizable under § 1985(3).<sup>217</sup> These circuits reached their narrow constructions of § 1985(3) by appealing to the statute's legislative history.<sup>218</sup> Because the legislative history indicates that Congress passed § 1985(3) to deal with the Ku Klux Klan, these circuits doubt it reaches beyond race-based discrimination.<sup>219</sup> Fortuitously, though, *Bostock* recommends a zealously textualist approach to statutory interpretation, under which judges must ignore legislative history unless the statute's text is ambiguous.<sup>220</sup> *Bostock* further instructs judges to assess the text's ambiguity only after consulting various indicia of original public meaning, such as contemporary dictionaries and any binding precedent.<sup>221</sup>

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<sup>216</sup> See *Bostock*, 140 S. Ct. at 1742 (“[T]o discriminate on these grounds [(homosexuality and transgender status)] requires an employer to intentionally treat individual employees differently because of their sex.”).

<sup>217</sup> See *supra* notes 83–90 and accompanying text.

<sup>218</sup> See, e.g., *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 932 (5th Cir. 1977) (“[T]he key concern of the legislators was to put force behind the Civil War Amendments . . . Nowhere have we seen it suggested that Congress was concerned about discrimination being practiced against insolvents.”).

<sup>219</sup> See *supra* notes 83–90 and accompanying text.

<sup>220</sup> See *Bostock*, 140 S. Ct. at 1749–50.

<sup>221</sup> *Id.* (“[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be [used]. . . . [t]o ferret out [ ] shifts in linguistic usage.”).

It might seem unlikely that *Bostock* would persuade the Fifth and Tenth Circuits to abandon an established method of interpreting § 1985(3). After all, these circuits consulted the statute's legislative history because the Supreme Court suggested it was important in *Griffin*.<sup>222</sup> Nonetheless, Part II.A showed that *Bostock* has prompted some circuits to spurn legislative history when interpreting other statutes, even where the Court had previously established the utility of historical evidence.<sup>223</sup> Those circuits were indeed none other than the Fifth and Tenth.<sup>224</sup> It is not implausible, then, that they will do the same in the § 1985(3) context.

To apply Justice Gorsuch's interpretive methodology to § 1985(3), the Fifth and Tenth Circuits would start with binding precedent, just as Justice Gorsuch did in *Bostock*.<sup>225</sup> In *Griffin*, the Supreme Court held that § 1985(3) requires discriminatory animus and that the requirement is satisfied when the conspirators engage in racial discrimination.<sup>226</sup>

Moreover, in *Scott*, the Supreme Court held that discrimination based on economic class does not satisfy the discriminatory animus requirement.<sup>227</sup> While the Supreme Court also addressed § 1985(3) in *Novotny* and *Bray*, neither occasion resulted in a holding about the scope of the discriminatory animus requirement.<sup>228</sup> At the outset, then, Justice Gorsuch's interpretive methodology would simply require the Fifth and Tenth Circuits to construe § 1985(3) such that it reaches discrimination based on race but not economic class, ensuring consistency with binding precedent.

The Fifth and Tenth Circuits would next turn to the text of § 1985(3). Section 1985(3) creates civil liability for conspiracies that deny "the equal protection of the laws, or of equal privileges and immunities under the laws."<sup>229</sup> Reconstruction-era dictionaries indicate that when "equal" is used as an adjective, the term

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<sup>222</sup> See *supra* notes 83–90 and accompanying text.

<sup>223</sup> See, e.g., *Franco v. Mabe Trucking Co.*, 3 F.4th 788, 795 (5th Cir. 2021) ("[N]o amount of legislative history can defeat unambiguous statutory text.").

<sup>224</sup> See *supra* notes 83–90 and accompanying text.

<sup>225</sup> See *supra* notes 110–113 and accompanying text.

<sup>226</sup> See *Griffin*, 403 U.S. at 102–03.

<sup>227</sup> See *Scott*, 463 U.S. at 834–39.

<sup>228</sup> See *supra* text accompanying notes 53–57, 63–68.

<sup>229</sup> 42 U.S.C. § 1985(3).

indicates that a state of affairs is “like another” and “just.”<sup>230</sup> The secondary meaning of “just” is particularly important: it distinguishes “equal” from Reconstruction-era synonyms like “equable” and “equivalent,” which do not have any normative significance.<sup>231</sup> Indeed, if this secondary meaning were ignored, the government would incur § 1985(3) liability whenever it conspires to treat people differently for “just” reasons, as when it imprisons the criminal, restricts the unstable, or fines the negligent. That would be absurd, of course, and even the most devout textualists will not follow the text into absurdity.<sup>232</sup> Thus, it is clear that conspirators liable under § 1985(3) must do more than treat one unlike another; they must discriminate in a way that is antithetical to a just legal system.

The Supreme Court’s civil rights jurisprudence has long identified this sort of discriminatory conduct with discrimination on the basis of immutable characteristics.<sup>233</sup> An immutable trait is a “characteristic determined solely by the accident of birth,”<sup>234</sup> such as race or sex. Since the 1970s, the Supreme Court has maintained that discrimination based on an immutable characteristic “would seem to violate ‘the basic concept’” of a just legal system.<sup>235</sup> By contrast, discrimination on the basis of mutable characteristics is regarded as less pernicious<sup>236</sup>—and sometimes even as unfit for judicial remediation.<sup>237</sup> This line of cases therefore makes clear that discrimination is anathema to a just legal system if and only if it targets an immutable characteristic.

Synthesizing text with binding precedent, the Fifth and Tenth Circuits would find that § 1985(3) creates liability for discrimination on the basis of an immutable characteristic. The text’s appeal to immutability—apparent when “equal” is filtered through Reconstruction-era dictionaries and the Supreme Court’s

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<sup>230</sup> See, e.g., *Equal*, SAMUEL JOHNSON, COMPREHENSIVE JOHNSON’S DICTIONARY: AN ENLARGED EDITION OF JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE 79 (1862).

<sup>231</sup> See *id.*

<sup>232</sup> *K Mart Corp. v Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) (“[I]t is a venerable principle that a law will not be interpreted to produce absurd results.”).

<sup>233</sup> See Jessica A. Clarke, *Against Immutability*, 125 *YALE L.J.* 2, 4–12 (2015).

<sup>234</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>235</sup> See *id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

<sup>236</sup> See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

<sup>237</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (“Political affiliation is not an immutable characteristic, but may shift from one election to the next. . . . These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.”).

civil rights jurisprudence—even provides a principled way of reconciling *Griffin* with *Scott*. Race is clearly immutable,<sup>238</sup> but, for perhaps dubious reasons, economic class is regarded as within one’s control.<sup>239</sup> As a result, if § 1985(3) creates liability for discrimination on the basis of an immutable characteristic, it would reach discrimination on the basis of race but not economic class.

Most importantly, if the Fifth and Tenth Circuits were to adopt Justice Gorsuch’s exegetical methodology, they would find that anti-LGBT discrimination is unambiguously cognizable under § 1985(3). The Supreme Court has treated LGBT status as an immutable characteristic, much like race or sex.<sup>240</sup> Therefore, the discriminatory animus requirement should permit § 1985(3) to reach anti-LGBT discrimination directly. There would be no need to appeal, as Justice Gorsuch did in *Bostock*, to the relationship between sex-based discrimination and discrimination against LGBT folks.<sup>241</sup> By eliminating this analytical step, the LGBT litigant would also preempt any additional ambiguity about the meaning of § 1985(3), rendering the legislative history of the statute irrelevant to the Fifth and Tenth Circuit’s constructions.

The long arm of *Bostock* thus even extends § 1985(3) to anti-LGBT discrimination in the Fifth and Tenth Circuits. Here, *Bostock* is stretched to the brink of dislocation: the LGBT plaintiff must appeal neither to the opinion’s black letter holding nor to its analysis of sex-based discrimination, but rather to its exegetical methodology. The Fifth and Tenth Circuits have demonstrated a unique willingness to import *Bostock*’s interpretive methodology into other statutory schemes, though.<sup>242</sup> And once the LGBT plaintiff has convinced the court to adopt Justice Gorsuch’s textualism, she can persuasively show that § 1985(3) covers discrimination based on any immutable characteristic, including LGBT status.

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<sup>238</sup> See, e.g., *Frontiero*, 411 U.S. at 686 (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”).

<sup>239</sup> See Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Class and Race in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 122 (2009) (“The perception, though, is that, unlike race and gender, poverty is not immutable: the American Dream is that, through hard work, a person can rise from even a seriously disadvantaged background.”).

<sup>240</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 660–62 (2015).

<sup>241</sup> See *supra* Part II.A.

<sup>242</sup> See *supra* notes 83–90 and accompanying text.



## IV. SECTION 1985(3) IN SERVICE OF LGBT PLAINTIFFS

Insofar as *Bostock* allows LGBT plaintiffs to sue under § 1985(3), LGBT plaintiffs gain a general mechanism of rights enforcement. Section 1985(3) broadly provides for civil liability against those who conspire “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.”<sup>243</sup> On its face, the statute does not impose any limitations on which substantive rights an actionable conspiracy must target. This Part therefore illustrates the myriad ways that victims of anti-LGBT discrimination may put § 1985(3) to use in the wake of *Bostock*. Part IV.A addresses enforcement of constitutional rights, while Part IV.B deals with enforcement of statutory rights.

## A. Enforcing Constitutional Rights

The Fifth and Fourteenth Amendments house the lion’s share of constitutional rights relevant to discrimination.<sup>244</sup> It is unfortunately easy to imagine conspiracies to deprive LGBT folks of their Fifth and Fourteenth Amendment rights. Administrators might decline to issue marriage licenses to gay couples,<sup>245</sup> attempting to deprive them of their right to marry someone of the same sex.<sup>246</sup> Law enforcement agents might also be unusually rough with the LGBT folks they encounter, seeking to deprive them of their right against excessive force.<sup>247</sup>

When attempting to vindicate rights secured by the Fourteenth Amendment, however, LGBT plaintiffs gain little from § 1985(3). This is because the rights enshrined in the Fourteenth Amendment are rights against certain types of state or municipal action.<sup>248</sup> In effect, the state or municipal action requirement renders § 1985(3) redundant in light of 42 U.S.C.

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<sup>243</sup> 42 U.S.C § 1985(3).

<sup>244</sup> See generally J.H. Leek, *Due Process: Fifth and Fourteenth Amendments*, 60 POL. SCI. 188 (1945) (explaining the expansion of the Fifth and Fourteenth Amendments in antidiscrimination cases throughout the Lochner Era).

<sup>245</sup> See Pete Williams, *Supreme Court Rejects Appeal from Country Clerk Who Wouldn’t Issue Marriage Licenses to Same-Sex Couples*, NBC NEWS (Oct. 5, 2020), <https://perma.cc/T8PE-JYVB>.

<sup>246</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 663–79 (2015).

<sup>247</sup> See *supra* text accompanying notes 1–5.

<sup>248</sup> The Civil Rights Cases, 109 U.S. 3, 11 (1883).

§ 1983, another vehicle for civil rights claims. Section 1983 always requires state or municipal action and also provides for conspiracy liability,<sup>249</sup> so when conspirators target a Fourteenth Amendment right, there is no comparative advantage to § 1985(3). The LGBT plaintiff might even be better served by § 1983, for it would not matter whether the judge accepts her arguments about *Bostock*; § 1983 does not require any showing of discriminatory animus.

The utility of § 1985(3) instead lies in the enforcement of Fifth Amendment rights. Although the Due Process Clauses of the Fifth and Fourteenth Amendments are interpreted in tandem, the Fifth Amendment houses rights against certain types of federal action.<sup>250</sup> When attempting to enforce violations of the Fifth Amendment, then, LGBT plaintiffs will find that § 1983's state or municipal action requirement renders the statute impotent. By contrast, § 1985(3) is not burdened with such a requirement.<sup>251</sup> If David Monitor—the “Chaps” secretary beaten by homophobic Chicago police officers<sup>252</sup>—had instead been attacked by FBI or DEA agents, § 1985(3) might have been his sole cause of action.

LGBT litigants will also find § 1985(3) useful in enforcing their “rights of national citizenship.”<sup>253</sup> These are rights protected against interference by any actor.<sup>254</sup> And again, while § 1983 can reach state or municipal violations of the Constitution, the statute is powerless against the violations committed by federal or private actors. The LGBT plaintiff therefore must often use § 1985(3) to enforce the rights inherent in national citizenship, the most relevant of which is the right to travel interstate.<sup>255</sup> The right to interstate travel is violated when an actor inhibits movement between states, which he might achieve with physical force or by limiting the “use [of] highways and other instrumentalities

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<sup>249</sup> See *Monroe v. Pape*, 365 U.S. 167, 170, 184–87 (1961), *abrogated on other grounds* by *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658 (1978).

<sup>250</sup> See *Heiner v. Donnan*, 285 U.S. 312, 326 (1932).

<sup>251</sup> Numerous courts of appeals have concluded that § 1985(3) applies to federal officials. See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 20 (D.C. Cir. 1984); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982); *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (10th Cir. 1975).

<sup>252</sup> See *supra* text accompanying notes 1–5.

<sup>253</sup> *Means v. Wilson*, 522 F.2d 833, 838 (8th Cir. 1975).

<sup>254</sup> See *id.*

<sup>255</sup> See *id.*

of interstate commerce.”<sup>256</sup> An actor also violates the right to interstate travel when his conduct “serves to penalize the exercise” of the right.<sup>257</sup>

To illustrate the utility of § 1985(3) in enforcing the right to interstate travel, consider the dearth of gender-affirming care surgeons in conservative states. This has prompted many transgender individuals to trek across state lines for their procedures.<sup>258</sup> In turn, opponents of gender-affirming care have begun organizing vigorous protests at clinics in progressive states.<sup>259</sup> When activists aim to punish travelers with a “lacerating psychological attack,”<sup>260</sup> they conspire to deprive transgender folks of their right to interstate travel. But because these activists are rarely affiliated with state or municipal governments, they cannot be liable under § 1983. They can only be held accountable—and the right to interstate travel can only be vindicated—with the help of § 1985(3).

## B. Enforcing Statutory Rights

Federal statutory rights are often rights against private or federal conduct, so § 1985(3) can yet again pick up § 1983’s slack when it comes to enforcing rights created by federal statute. The daylight between the two causes of action is even more striking for federal statutory rights, though. Section 1983 is only presumptively available to enforce rights created by federal statute.<sup>261</sup> If there is any evidence of congressional intent to the contrary, § 1983 will be held inapplicable.<sup>262</sup> On the other hand, *Novotny* is the only case in which the Supreme Court held that a litigant could not use § 1985(3) to enforce a federal statutory right. And in *Novotny*, the Court held only that a plaintiff could not make an end-run around Title VII’s litigation rules; once the EEOC had determined that his Title VII rights were violated, the

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<sup>256</sup> *United States v. Guest*, 383 U.S. 745, 757 (1966).

<sup>257</sup> *Dunn v. Blumstein*, 405 U.S. 330, 339 (1972) (citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)).

<sup>258</sup> Jae Dowing, Sarah K. Holt, Michael Cunetta, John L. Core & Geolani W. Dy, *Spending and Out-of-Pocket Costs for Genital Gender-Affirming Surgery in the US*, 157 JAMA SURGERY 799, 804–05 (2022).

<sup>259</sup> Madeleine Carlisle, *Pediatricians Who Serve Trans Youth Face Increasing Harassment. Lifesaving Care Could Be on the Line*, TIME (Feb. 16, 2022), <https://perma.cc/T9UZ-G7NG>.

<sup>260</sup> See *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 319 (8th Cir. 1990).

<sup>261</sup> See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002).

<sup>262</sup> See *id.*

plaintiff was obligated to adhere to EEOC procedures.<sup>263</sup> The Court has yet to provide further guidance on the scope of *Novotny*, but even if it applies to all federal statutes that prescribe litigation rules, it nonetheless imposes a comparatively light burden on § 1985(3). Federal statutes still contain litigation rules far less frequently than they preclude enforcement via § 1983. After all, § 1983 enforcement is precluded whenever there is any evidence that Congress intended as much.

LGBT plaintiffs can also use § 1985(3) to enforce state statutory rights, a use for which § 1983 is wholly inapplicable. Especially relevant for LGBT plaintiffs is the right to be free from intentional infliction of emotional distress.<sup>264</sup> LGBT youth are all too frequently subjected to so-called conversion therapy, which attempts to terrify them into changing their gender identities or sexual orientations.<sup>265</sup> After coming of age, victims of the practice may sue their former therapists under § 1985(3), alleging a conspiracy to deprive them of their right to be free from intentional infliction of emotional distress.

There are several reasons why an LGBT plaintiff might not want to use the state statute itself as her cause of action, the first of which concerns attorney's fees. When suing in tort, a plaintiff's attorney typically demands around 18% of the judgment.<sup>266</sup> Tort law infrequently allows the plaintiff to request that such fees be paid by the defendant.<sup>267</sup> On the other hand, judges are generally entitled to award attorney's fees to plaintiffs who prevail on their § 1985(3) claims.<sup>268</sup> The prospect of an undiluted judgment might be just the incentive a victim of anti-LGBT discrimination needs to bring her claim.<sup>269</sup>

Second, conspiracy liability in tort often requires a plaintiff to demonstrate that each conspirator owed him a duty of care.<sup>270</sup>

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<sup>263</sup> See *Novotny*, 442 U.S. at 378.

<sup>264</sup> See, e.g., *Lewis*, 908 F.2d at 323.

<sup>265</sup> See Brinton, *supra* note 34.

<sup>266</sup> Theodore Eisenberg & Geoffrey P. Miller, *What is a Reasonable Attorney Fee? An Empirical Study of Class Action Settlements*, 31 CORNELL L.F. 2, 3 tbl.1 (2004).

<sup>267</sup> See *id.*

<sup>268</sup> See 42 U.S.C. § 1988(b).

<sup>269</sup> See Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 147–48 (1984) (discussing how awarding attorney's fees decreases the risk of loss for potential plaintiffs and increases the appeal of such cases to lawyers).

<sup>270</sup> Mark A. Behrens & Christopher E. Appel, *The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. ILL. UNIV. L. REV. 37, 43–46 (2010) (“[A] developing line of

This requirement is defined by “policy-laden judgments” and thus varies by jurisdiction, but at bottom, it requires some sort of relationship between the plaintiff and each conspirator.<sup>271</sup> Recall the far-right Kentucky activists imagined in the hypothetical fact pattern above: if one of them had agreed to the obstructive plot but had been unable to travel to Oregon herself, she might be deemed too detached from those harmed to face conspiracy liability in tort.<sup>272</sup> By contrast, § 1985(3) requires no such duty of care. Section 1985(3) requires the plaintiff to show only that a conspiracy existed—in other words, that at least one of the defendants committed an overt act in furtherance of their unlawful purpose.<sup>273</sup>

A final advantage of § 1985(3) over state tort law causes of action concerns forum selection. If a plaintiff sues in tort, it is likely that her claim will have to be brought in a state court. As a federal cause of action, however, § 1985(3) gives rise to federal question jurisdiction and the possibility of a federal venue. A federal venue entails a different location, different discovery rules, and—perhaps most importantly—different judicial predilections.<sup>274</sup> Litigants sometimes lament the biases of state court judges in rural districts,<sup>275</sup> but through § 1985(3), LGBT plaintiffs who fear such bias can still seek justice elsewhere.

## CONCLUSION

The Supreme Court has provided limited guidance on the scope of § 1985(3) beyond simply indicating that it requires some kind of discriminatory animus. Lower courts have responded to this uncertainty with hostility to § 1985(3) claims involving anti-LGBT discrimination. Indeed, a court has yet to publish a final decision on a § 1985(3) claim favorable to LGBT plaintiffs. No decisions on the matter have been published whatsoever since the Supreme Court interpreted Title VII in *Bostock*, though, and the case’s significance for § 1985(3) is threefold: *Bostock* (1) signals to some circuits that federal law now condemns discrimination

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case law in several jurisdictions imposes an independent duty requirement to restrain the spread of civil conspiracy liability to peripheral defendants.”).

<sup>271</sup> *Id.* at 41.

<sup>272</sup> *See id.* at 42–43.

<sup>273</sup> *See Griffin*, 403 U.S. at 103.

<sup>274</sup> THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 15 (2005).

<sup>275</sup> Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 972 (1995).

against LGBT folks, (2) provides others with a novel way of understanding sex-based discrimination, and (3) encourages the remaining circuits to adopt a new approach to statutory interpretation. Each instruction entails that the corresponding circuits will, at the very least, begin accepting § 1985(3) claims from LGBT plaintiffs. In drafting *Bostock*, Justice Gorsuch probably did not imagine that his opinion would have such a dramatic effect on the § 1985(3) case law. However, as he said in interpreting Title VII, “[T]he limits of the drafters’ imagination supply no reason to ignore the law’s demands.”<sup>276</sup>

Having opened § 1985(3) to their claims, *Bostock* endows the LGBT community with a general instrument of self-defense. Whenever an individual encounters a conspiracy to deprive her of a constitutional or state statutory right on the basis of her LGBT status, she may vindicate the right by filing suit under § 1985(3). The ensuing judgment for damages would eventually create valuable deterrence, and more immediately, it would serve a restorative function. For instance, a victim of conversion therapy might use the damages she collects to purchase actual therapy. No matter how LGBT plaintiffs spend the damages they are awarded, though, § 1985(3) will have allowed them to take control back from those who have sought to deny them equality under the law.

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<sup>276</sup> *Bostock*, 140 S. Ct. at 1737.