

THE COMORBIDITIES OF SSOGIE EQUALITY: A CRISIS LENS TO UNDERSTANDING ITS FUTURE

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I. INTRODUCTION

In 2015, the Supreme Court in *Obergefell v. Hodges*¹ recognized the constitutional right of individuals in same-sex relationships to marry. Despite criticism for its family-normativity stance,² depiction of singlehood as unsatisfying,³ and exclusion of all other relationships except for

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¹ *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

² Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 30-31 (2015); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1539 (2016); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1248 (2016); Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 685 (2018).

³ Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126-27 (2015); Martin Manalansan, *Solitary Readings about Being Single after Obergefell*, ILL. PROGRAM FOR RES. IN THE HUMAN (Sep. 17, 2015), <https://iprh.wordpress.com/2015/09/17/solitary-readings-about-being-single-after-obergefell-by-martin-manalansan>.

monogamous ones,⁴ the decision was widely heralded as a landmark victory in the long struggle for LGBTQ+ equality.⁵ A decade later, the optimism that accompanied *Obergefell* has given way to a more fraught landscape. The ACLU is currently tracking over five hundred anti-LGBTQ bills.⁶ After taking office in his second term, Trump has openly declared war on what he has denominated as *gender ideology*, vowing to dismantle protections for trans and non-binary folks.⁷ Meanwhile, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*⁸ has jeopardized the substantive due process doctrine central to *Obergefell*.

Beyond challenging the linear narrative of progress often associated with the expansion of civil rights, the current juncture in sex, sexual orientation, and gender identity and expression (SSOGIE) equality in the United States demands a more nuanced understanding of how equality is achieved. The struggles for reproductive justice and LGBTQ+ equality, although spatially separated, are intertwined, as evidenced by *Dobbs*, and share a constellation of conundrums in their challenge to patriarchy, heteronormativity, and gender binarism that must be disentangled and studied.⁹ Some of these paradoxes include the appointment of the highest number of women to the federal bench while the courts simultaneously curtail reproductive rights, the Supreme Court protecting against trans discrimination in employment under Title VII while allowing private parties to deny services to same-sex couples under the First Amendment, and the rise in anti-abortion and anti LGBTQ+ rights legislation amidst growing

⁴ Ali Murat Gali, *Crawling Out of Fear and the Ruins of an Empire: Queer, Black, and Native Intimacies*, *Laws of Creation and Futures of Care*, 34 YALE J.L. & FEMINISM 176, 188 (2023); Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CAL. L. REV. CIRCUIT 117, 117–18 (2015).

⁵ Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147 (2015); *Attorneys Rally Around High Court's Gay Marriage Decision*, LAW360 (June 26, 2015), <http://law360.com/articles/672972/attorneys-rally-around-high-court-s-gay-marriage-decision>; Russell K. Robinson & David M. Frost, *Marriage Equality & Intersectionality*, 23 ANALYSIS OF SOC. ISSUES & PUB. POL'Y 219, 226 (2023); Joshua Layne, *Why Obergefell's Legacy Matters: The Fight for Living Constitutionalism*, HARV. POL. REV. (June 26, 2024), <https://theharvardpoliticalreview.com/why-obergefells-legacy-matters/>.

⁶ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> (last updated, Dec. 6, 2024).

⁷ Danielle Kurtzleben, *Trump's Executive Actions Curbing Transgender Rights Focus on 'Gender Ideology'*, NPR (Feb. 7, 2025), <https://www.npr.org/2025/02/07/g-s1-46893/trump-anti-trans-rights-executive-action-gender-ideology-confusion>.

⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 249–50 (2022).

⁹ While the framework offered here is applicable to racial equality movements, the crises being experienced in that counter-hegemonic movement may be at a different stage and warrant a distinct, focused analysis beyond the scope of this piece. Furthermore, the analysis presented here reflects observations and developments in SSOGIE equality up to the submission date. Subsequent events may further shape or complicate the dynamics discussed here.

social acceptance of non-traditional sexual orientation and gender identities and reproductive autonomy.

To interrogate these contradictions, this article turns to Antonio Gramsci's crisis lens of the *interregnum*. Gramsci characterizes the *interregnum* as a period of instability in which the counter-hegemonic forces have ruptured the existing equilibrium, and the old order is no longer viable.¹⁰ Still, a new one has not yet fully emerged because the counter-hegemonic forces have yet to consolidate as the leading class.¹¹ This temporal and political space is created by what Gramsci denominates as an organic crisis.¹² For Gramsci, this period is an inflection point in which two options could guide the course: a path to a new order or reestablishing the old.¹³ This article argues that the United States is undergoing such an organic crisis: a moment in which the direction of SSOGIE rights toward either regression or transformation remains uncertain.

By applying Gramsci's framework to the evolving terrain of reproductive and LGBTQ+ rights, this article seeks to illuminate both the dangers and possibilities of the current moment. It aims to offer a theoretical contribution that supports resistance to the ongoing erosion of personal liberties affecting women and LGBTQ+ individuals in the hope that this *interregnum* is one of opportunity and not of greater peril. The article begins by outlining Gramsci's concepts of organic crisis and *interregnum*, emphasizing their relevance to the present juncture in SSOGIE equality in the United States. It then sheds light on the emerging legal and political contradictions surrounding SSOGIE equality that have resulted from anti-SSOGIE equality actors seeking to retain their power. Finally, it considers how a Gramscian lens might inform an understanding of the future of SSOGIE equality, guided by resistance strategies in pursuing a more expansive vision of equality.

¹⁰ Solomon Kassa Woldeyesusa & Mohammed Yimam Endris, *Hegemony and Counter-Hegemony in Ethiopia: Imagining a Post-TPLF Order*, 9 MOD. AFR.: POL., HIST. & SOC'Y, 119, 141 (2021) (citing Sara Salem, ANTICOLONIAL AFTERLIVES IN EGYPT: THE POLITICS OF HEGEMONY 201 (2020)).

¹¹ *Id.*

¹² Milan Babic, *Let's Talk about the Interregnum: Gramsci and the Crisis of the Liberal World Order*, 96 INT'L AFFAIRS 767, 772 (2020).

¹³ See D. Davis & Tony Lynch, *The Old Order Is Dying, But a New One Cannot Be Born: Exploring New Social and Political Terrains in Trying Times*, 37 SOCIAL ALTERNATIVES 3, 3 (2018) (highlighting the uncertainty of the organic crisis); Babic, *supra* note 12, at 772 (noting that during an organic crisis, the old order loses its legitimacy, and supportive states may not offer solutions but instead distance themselves from its fundamental elements, which marks this period as an inflection point where the path forward could lead to a new order or a reestablishment of the old one).

II. THE INTERREGNUM: GRAMSCI'S ORGANIC CRISIS LENS

Imprisoned by Mussolini's regime, Antonio Gramsci embarked on a project to understand fascism's triumph in Italy.¹⁴ His work culminated in the innovative theory of hegemony¹⁵ that analyzes that period through a crisis lens.¹⁶ "While Gramsci did not develop a crisis theory himself, his thinking can be described as crisis-driven. . . ."¹⁷ One of his work's most significant contributions, the *interregnum* concept, is imbued in the crisis idea.

Gramsci described the *interregnum* as a crisis that "consists precisely in the fact that the old is dying and the new cannot be born . . . [and] a great variety of morbid symptoms appear."¹⁸ He coined the term *interregnum* to explain the imbalance dynamic that occurs while a counter-political idea challenging the established order has not yet solidified itself as the consensual worldview (that which cannot yet be born) and the ruling class, who is losing the consent of the subaltern class, is seeking to preserve its power by ruling or, in other words, by exercising its physical power (the dying old).¹⁹ What Gramsci created by describing the *interregnum* in this manner "is a genuine dynamic theory of crisis that perceives it as a process rather than as an event."²⁰ Shifting from the canonical Marxist concept of crisis, he envisions it "more as a contradictory development of the system than as an aspect of that system's breakdown."²¹

"The oscillation between the old and the new that Gramsci refers to [when describing the *interregnum*] is . . . not relegated to [a] transitional status, but is a constant factor that opens up possibilities for the political action of an organized body." In other words, the crisis is an inflection point that counter-hegemonic groups can take advantage of to build a revolution,²² not a sign that a change is inevitably coming. Delving into the

¹⁴ Steve Jones, ANTONIO GRAMSCI 25 (2006).

¹⁵ "The concept of hegemony is really a very simple one. It means political leadership based on the consent of the led, a consent which is secured by the diffusion and popularization of the world view of the ruling class." Thomas R. Bates, *Gramsci and Theory of Hegemony*, 36 J. HIST. OF IDEAS 351, 352 (1975).

¹⁶ Babic, *supra* note 12, at 770.

¹⁷ *Id.*

¹⁸ Bates, *supra* note 15, at 358.

¹⁹ Aníbal Rosario-Lebrón, *For Better and For Better: The Case for Abolishing Civil Marriage*, 5 WASH. U. JUR. REV. 189, 229-31 (2013).

²⁰ Michele Filippini, USING GRAMSCI: A NEW APPROACH 88 (Patrick J. Barr trans., 2017).

²¹ *Id.*

²² Crises can lead to different types of revolutions. One is the passive revolution. At least four different understandings of the meaning of passive revolution can be identified in recent scholarship. Peter D. Thomas, *Gramsci's Revolutions: Passive and Permanent*, 17 MOD. INTELL. HIST. 117, 119 (2020). However, all of them relate to a weak or nonexistent opposition from the subaltern classes. Bates, *supra* note 17, at 353. In the absence of any strong competing or opposing interests that challenge the leading class, the ruling class

multiple meanings or ways that Gramsci used or described crisis can help counterforces to better structure political action that takes advantage of this inflection point.

First, he describes the crisis as an imbalance caused by the intensification of certain phenomena that fail to resist opposing forces or successfully immunize themselves from them.²³ As such, the ever-present crisis could be latent or explicit, depending on the “balancing game played out between conflicting forces.”²⁴ In the case of the latent crisis, the leading or ruling class continuously neutralizes the advent of opposing forces that seek to rebalance the system and change it.²⁵ “On the other hand, a crisis becomes explicit when certain elements become more intense or others suddenly fall dormant.”²⁶

Gramsci also describes the crisis in two opposing ways: *conjunctural* and *organic*. “Conjunctural crises are those that appear in daily political life; they are usually of a less fundamental nature and, on their own, not system-changing.”²⁷ Organic crises, on the other hand, challenge the worldviews upon which the social and political orders are built.²⁸ They produce the morbid symptoms of the *interregnum* and can eventually tear down the ruling power relations and their societal orders.²⁹

imposes a revolution from the top. *Id.* In that case “a passive revolution can be a technique of statecraft which an emergent bourgeois class may deploy by drawing in subaltern social classes while establishing a new state on the basis of the institution of capitalism, such as in the case of the Italian Risorgimento.” Adam David Morton, *What is This Thing Called Passive Revolution?*, PROG. IN POL. ECON., (Feb. 24, 2016) <https://www.ppesydney.net/what-is-this-thing-called-passive-revolution/>. In the presence of opposing interests but accompanied by the leading class’ continual rebalancing of them, the ruling class restores and expands its dominance. An example of this second passive revolution is “the expansion of capitalism as a mode of production, as in the case of ‘Americanism and Fordism.’” *Id.*

In contrast, an “active revolution” involves a more direct and participatory transformation, typically driven by popular movements or the working class, aiming to fundamentally change the existing social and political order. Marcello Mustè, *Gramsci, Benjamin, and Passive Revolutions*, in WALTER BENJAMIN AND ANTONIO GRAMSCI, 98-99 (Dario Gentili, Elettra Stimilli & Gabriele Guerra, eds. 2024). While Gramsci extensively analyzed passive revolutions, he did not explicitly use the term “active revolution” in his writings. *Id.* However, the concept can be inferred as the opposite of passive revolution, representing a scenario where the subaltern classes actively engage in revolutionary activities to overthrow the existing order. *Id.*

²³ Filippini, *supra* note 20, at 92.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Babic, *supra* note 12, at 770.

²⁸ *Id.* at 772.

²⁹ *Id.*

For an organic crisis to occur, the leading class³⁰ must experience a political crisis.³¹ In other words, the ruling class must suffer a crisis of authority that threatens its hegemony.³² This happens when the leading class loses its ideological domination by losing the consensus to rule.³³

Gramsci argued that domination is accomplished by coercion and consent; thus, power must be maintained on two axes.³⁴ The first axis is the physical force, authority, or violence.³⁵ This axis is associated, for instance, with the army, the police, the militia, and the judiciary.³⁶ The second axis is the hegemony, also known as consent or civilization.³⁷ The hegemony axis is associated with social institutions related to education, religion, political parties, the media, and cultural systems.³⁸

The first axis works under the premise that the subaltern class' conduct shall be maintained through the coercive mechanisms of the government.³⁹ The second axis' operation, however, is more complex. The hegemony axis is predicated on creating a worldview that facilitates the subaltern class' embrace of the leading class' ideology.⁴⁰ Gramsci argued that not only traditional intellectuals (*e.g.*, clergy, academics, and bureaucrats) but also

³⁰ Gramsci argues that for a class to establish itself as the ruling class, it must, *inter alia*, lead or, in other words, win over as broad an alliance as possible to its cause. John D. Holst & Stephen D. Brookfield, *Catharsis: Antonio Gramsci, Pedagogy, and the Political Independence of the Working Class in ANTONIO GRAMSCI: A PEDAGOGY TO CHANGE THE WORLD* 211 (Nicola Pizzolato & John D. Holst, eds. 2017).

³¹ Filippini, *supra* note 20, at 99.

³² Walter L. Adamson, HEGEMONY AND REVOLUTION: A STUDY OF ANTONIO GRAMSCI'S POLITICAL AND CULTURAL THEORY 141 (Echo Point Books & Media 2014).

³³ Filippini, *supra* note 20, at 99.

³⁴ Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 B.Y.U.L. REV. 515, 519 (2000).

³⁵ Gwyn Williams, *The Concept of "Egemonia" in the Thought of Antonio Gramsci: Some Notes on Interpretation*, 21 J. HIST. IDEAS 586, 591 (1960); see Antonio Gramsci, *The Formation of the Intellectuals*, in SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 134, 137 (Quintin Hoare & Geoffrey Nowell eds., 1971).

³⁶ Litowitz, *supra* note 34, at 519; Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion, and their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain*, 33 U. MICH. J.L. REFORM 411, 412 (2000).

³⁷ Williams, *supra* note 35, at 591; see Gramsci, *supra* note 35, at 170.

³⁸ Litowitz, *supra* note 34, at 519; Kapur & Mahmud, *supra* note 36, at 412.

³⁹ Rosario-Lebrón, *supra* note 19, at 217. "Yet, that premise does not mean that the coercion axis exists merely as a conditioning mechanism with no effects on the psyche of the individuals or that it only impacts the 'public sphere,'" *id.* The activities within the coercion axis "encompass dimensions of pragmatism as well as of symbolism," *id.*

⁴⁰ Valeriano Ramos, Jr., *The Concepts of Ideology, Hegemony, and Organic Intellectuals in Gramsci's Marxism*, THEORETICAL REV. (1982), <https://www.marxists.org/history/erol/periodicals/theoretical-review/1982301.htm>.

organic ones (*e.g.*, activists and artists) are needed to create, promote, and maintain the worldview.⁴¹

When that worldview is successfully challenged, as it has been done by SSOGIE equality movements eroding patriarchy, heteronormativity, and gender binarism, then the ruling class no longer leads but only rules, creating a crisis of legitimacy and consensus.⁴² In Gramsci's view, the leading class merely ruling means resorting to the police power of the state to keep and restore the authority lost.⁴³ In the case of the United States, forces opposing patriarchy, heteronormativity, and gender binarism have intensified to the point of forcing a political crisis.

For instance, patriarchy has been eroded by the suffrage movement, the abolition of coverture, reforms in rape and marriage law, the legal recognition of sexual harassment and intimate partner violence, the decriminalization of abortion and birth control methods, the equal pay movement, and the #MeToo movement. Similarly, heteronormativity and gender binarism have experienced significant erosion. From the groundbreaking research of Magnus Hirschfeld and Alfred Charles Kinsey into gender identity and sexual orientation, the Stonewall riots, the derogation of sodomy laws, the recognition of trans rights, the acceptance of LGBTQ+ individuals in the military, same-sex marriage, and the social acceptance on non-heterosexual orientations, antagonistic forces have constantly been moving the oscillating equilibrium of gender identity and sexual orientation away from the leading class. These advances in SSOGIE equality have been faced with multiple *backlashes* or, in Gramscian terms,

⁴¹ Walter I. Gonçalves, Jr., *Outsider Public Defenders as Organic Intellectuals*, 32 BERKELEY LA RAZA L.J. 1, 13 (2021); Jorge L. Esquirol, *Making the Critical Moves: A Top Ten in Progressive Legal Scholarship*, 92 U. COLO. L. REV. 1079, 1091 (2021).

⁴² Filippini, *supra* note 20, at 99. Gramsci did not have an opportunity to proffer what are the stages of the interregnum that lead to an organic crisis. I intended to conceptualize some of them in a previous article. See Rosario-Lebrón, *supra* note 19, at 229-33.

⁴³ As Thomas R. Bates explains:

Civil society is the marketplace of ideas, where intellectuals enter as "salesmen" of contending cultures. The intellectuals succeed in creating hegemony to the extent that they extend the world view of the rulers to the ruled, and thereby secure the "free" consent of the masses to the law and order of the land. To the extent that the intellectuals fail to create hegemony, the ruling class falls back on the state's coercive apparatus which disciplines those who do not "consent," and which is "constructed for all society in anticipation of moments of crisis of command . . . when spontaneous consensus declines."

Bates, *supra* note 15, at 353 (quoting Antonio Gramsci, GLI INTELLETTUALI E L'ORGANIZZAZIONE DELLA CULTURA 9 (Turin 1966) (translated by the author)).

conjunctural crises that have kept the struggle for equality in a constant process of contestation and restoration of the dying order.⁴⁴

However, in recent years, the erosion of the hegemony axis has escalated from the conjunctural to the organic, as the leading class has lost the consensus to rule. This loss in consensus is evidenced by all sorts of morbid symptoms that have emerged in SSOGIE equality. These comorbidities are the indicia that the current juncture in reproductive and LGBTQ+ rights is an inflection point in the fight for equality.

III. THE DYING ORDER: COMORBIDITIES OF SSOGIE EQUALITY

A. *The Physical Axis*

The first morbid symptoms to appear in the organic crisis in SSOGIE equality can be seen in the physical force axis. As the authority crisis unleashed by the loss of consensus forces the ruling class to take actions that oppose popular views or values, the leading class resorts to the police power (*i.e.*, physical force axis) to restore its hegemony. This reaction is precisely how anti-SSOGIE equality actors in the United States have responded to the erosion of their hegemonic power in terms of reproductive and LGBTQ+ rights. To oppose counter-hegemonic views, anti-SSOGIE equality actors have augmented their police power against LGBTQ+ individuals and women while subverting democratic values, they have strengthened and broadened criminalization practices already in place, increased the policing reach of the state by using private citizens as agents, defunded SSOGIE equality initiatives, and circumvented the social acceptance of LGBTQ+ individuals and women by multiplying control over the judiciary. This strategy to criminalize conduct deemed unacceptable under the patriarchal, heteronormative, and gender binary structures has been deployed in all branches of the government.

After every perceived progress in SSOGIE equality, the legislative branch has been used to enact laws to shift the equilibrium back in favor of the leading class. In the last thirty years, Congress and state legislatures have enacted defense of marriage acts,⁴⁵ bathroom bills,⁴⁶ abortion bans,

⁴⁴ See Sarah L. Swan, *Constitutional Backfires Everywhere*, 25 U. PA. J. CONST. L. 311, 312 (2023) (emphasizing the complexity of constitutional design and the necessity for careful consideration of potential backlashes when implementing reforms).

⁴⁵ Defense of Marriage Acts (DOMAs) are laws that define marriage as a union between one man and one woman, primarily aimed at preventing same-sex marriages from being legally recognized. The most prominent example was the Defense of Marriage Act (DOMA) passed by the federal government in 1996. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

⁴⁶ Bathroom bills are bills or laws that regulate access to public restrooms and other gender-segregated facilities, typically based on a person's assigned sex at birth rather than their

targeted regulation of abortion providers laws (“TRAP laws”),⁴⁷ and religious freedom of restoration acts (RFRAs),⁴⁸ among others. The executive, on the other hand, has defunded organizations providing reproductive care to women,⁴⁹ blocked funds to states recognizing SSOGIE equality,⁵⁰ rescinded policies in gender identity equity,⁵¹ enacted policies re-banning transgender individuals from serving in the military,⁵² and declared war through executive orders to SSOGIE equality under the label

gender identity. See *Bans on Transgender People Using Public Bathrooms and Facilities According to their Gender Identity*, MOVEMENT ADVANCEMENT PROJ., https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans (last visited Apr. 22, 2025)

⁴⁷ Targeted Regulation of Abortion Providers (TRAP laws) are statutes that impose strict regulations on abortion providers with the goal of making it more difficult for clinics to operate and, in some cases, forcing them to close. For example, in *Whole Woman’s Health v. Hellerstedt*, the Supreme Court struck down provisions of a Texas House Bill 2 (2013) that imposed strict regulations on abortion providers, including requirements that clinics meet surgical center standards and that doctors have admitting privileges at nearby hospitals. 579 U.S. 582, 582, 624 (2016).

⁴⁸ Religious Freedom Restoration Acts (RFRAs) are laws enacted at both the federal and state levels to safeguard the free exercise of religion for individuals and organizations. The federal RFRA was passed in 1993 in response to *Employment Division v. Smith*. 494 U.S. 872, 907 (1990). Congress wished to restore the pre-*Smith* strict scrutiny standard for any law that burdens religious freedom, regardless of whether the law is neutral and generally applicable. However, in *City of Boerne v. Flores*, the Supreme Court restricted RFRA’s applicability to federal actions. 521 U.S. 507, 536 (1997). In response, many states enacted their own RFRAs to extend similar protections against state and local government policies. Additionally, RFRA expanded the scope of protection of free exercise by recognizing corporations as entities that can claim religious freedom rights. *Burwell v. Hobby Lobby Stores*. 573 U.S. 582, 745 (2014).

⁴⁹ Enforcing the Hyde Amendment, 90 Fed. Reg. 8751 (Jan. 24, 2025) (revoking Executive Order 14076 of July 8, 2022 and Executive Order 14079 of Aug. 3, 2022); 45 C.F.R. 155-56 (2021) (making it harder for insurers to elect to cover abortion coverage); DEP’T OF HEALTH AND HUM. SERV., SMD: #18-003, *rescinding* SMD #16-005 CLARIFYING “FREE CHOICE OF PROVIDER” REQUIREMENT (2018) (allowing states to exclude abortion providers like Planned Parenthood health centers from Medicaid programs); Alice Miranda Ollstein, *Trump Administration Issues Rule to Strip Millions from Planned Parenthood*, POLITICO (Feb. 22, 2019), <https://www.politico.com/story/2019/02/22/planned-parenthood-funding-trump-1164038>.

⁵⁰ Associated Press, *Maine Sues the Trump Administration over Funding Freeze after Dispute over Transgender Athletes*, CNN (Apr. 7, 2025), <https://www.cnn.com/2025/04/07/us/maine-trump-funding-freeze-transgender-athletes/index.html> (reporting that Maine has filed a lawsuit against the Trump administration after federal funding for school meal programs was frozen in response to the state’s refusal to enforce a federal ban on transgender girls participating in girls’ sports).

⁵¹ Abby Goodnough, Erica L. Green, & Margot Sanger-Katz, *Trump Administration Proposes Rollback of Transgender Protections*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/politics/donald-trump-transgender-protections.html>; Johanna Alonso, *Department of Education Reverts to Trump’s Title IX Rule*, INSIDE HIGHER ED. (Feb. 3, 2025), <https://www.insidehighered.com/news/government/politics-elections/2025/02/03/departments-education-reverts-trumps-title-ix-rule>.

⁵² Prioritizing Military Excellence and Readiness, 90 Fed. Reg. 8757, 8757 (Jan. 27, 2025); Joshua Block et al., *Breaking Down Trump’s Trans Military Ban*, ACLU (Mar. 30, 2018), <https://www.aclu.org/news/lgbtq-rights/breaking-down-trumps-trans-military-ban>.

of *gender ideology*.⁵³ Courts have been packed with conservative judges through the effective use of the executive and legislative branches, promoted by campaigns in the hegemony axis by traditional and organic intellectuals such as those in the *Federalist Society*.⁵⁴ The judiciary, in turn, has been used to revert the right to terminate a pregnancy,⁵⁵ reduce reproductive care access,⁵⁶ and curb the advancement of LGBTQ+ rights.⁵⁷

The crisis has intensified to the point that it is no longer sufficient to criminalize abortion and reproductive health practices. States, in turn, have expanded the reach of their police power by allowing private citizen enforcement in laws such as the Texas Heartbeat Act, popularly known as *S.B. 8*.⁵⁸ Likewise, states have enacted statutes allowing private enforcement against schools that permit the use of bathrooms consistent with the gender identities of their students and allow transgender students to play on sports teams consistent with their gender identities.⁵⁹ States have also expanded the scope of traditional private enforcement regimes to include conduct such as seeking, receiving, and providing gender-affirming care to children as child abuse.⁶⁰

⁵³ Kurtzleben, *supra* note 7.

⁵⁴ Noah Feldman, *Takeover: How a Conservative Student Club Captured the Supreme Court* (2021); Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-The-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/?utm_term=.1d2008ed2d75.

⁵⁵ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (holding that there is no federal constitutional right to terminate a pregnancy), *overruling* *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁶ *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 585 U.S. 755 (2018) [hereinafter *NIFLA*].

⁵⁷ *See, e.g.*, 303 *Creative LLC v. Elenis*, 600 U.S. 570 (2023) (deciding under the First Amendment right to free speech that a Colorado anti-discrimination law could not compel a website designer to create wedding websites for same-sex couples); *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 544-45 (2021) (holding that the refusal of Philadelphia to contract with a Catholic foster care agency for unless it agrees to certify same-sex couples as foster parents violates the free exercise clause).

⁵⁸ TEX. HEARTBEAT ACT, 87th Leg., R.S., ch. 62, § 12, secs. 171.201-.212, 2021 TEX. GEN. LAWS 1, 24 (current version at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.212).

⁵⁹ *See, e.g.*, Fairness in Women's Sports Act, FLA. STAT. ANN. § 1006.205 (2021) (providing an action to female students "deprived of an athletic opportunity" by being required to play sports with a transgender athlete); Fairness in Women's Sports Act, IDAHO CODE ANN. § 33-6201 to 33-6206 (2020) (allowing for enforcement by private individuals or parents who can challenge school participation in the courts if transgender students are allowed to compete on sports teams or use facilities consistent with their gender identity); Tennessee Accommodations for All Children Act, TENN. CODE ANN. §§ 49-2-801 to 49-2-805 (2024) (allowing any student, teacher, or school employee to sue if they have to share a restroom with a transgender person).

⁶⁰ *See, e.g.*, Children and Vulnerable Adults, Idaho Code Ann. §§ 18-1501 to § 18-1523 (defining as child abuse providing gender-affirming care to minors, including hormone therapy, puberty blockers, and gender-affirming surgeries); Regulate Experimental Adolescent Procedures (REAP) Act, MISS. CODE ANN. §§ 41-141-1 to 41-141-7 (West);

These novel adaptations of private enforcement regimes represent another morbid symptom in the current juncture of SSOGIE equality: a drastic departure from traditional forms of private enforcement, taking them away from a democratic governance tool and turning them into a voyeuristic practice that undermines civility and deliberation.⁶¹ They also reflect contradictory values from the ones expressed in the litigation advanced by anti-SSOGIE equality actors, in which they seek less state intervention in their discriminatory beliefs or actions.

At the same time, these practices contrast diametrically with the views of the constituents and social reality. For example, the Williams Institute has found a significant increase in the population that identifies outside the gender binary.⁶² Similarly, Gallup has shown an increase in adults in the United States who identify as LGBTQ.⁶³ Gallup also evidences an acceptance of same-sex marriage around 70%.⁶⁴

On the other hand, 63% of people in the United States believe that abortion should be legal in all or most cases.⁶⁵ This data is consistent with the trend that, since *Dobbs*, the majority of anti-abortion ballots presented thus far have failed, and pro-abortion measures have been passed.⁶⁶

Save Adolescents from Experimentation (SAFE) Act, H.B. 1570, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021) (ruled unconstitutional by a federal judge); Tess Vrbin, *Federal Judge Strikes Down Arkansas Ban on Gender-Affirming Health Care for Transgender Youth*, ARK. ADV. (June 20, 2023), <https://arkansasadvocate.com/2023/06/20/judge-strikes-down-arkansas-ban-on-gender-affirming-health-care-for-transgender-youth/>.

⁶¹ Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1545 (2022).

⁶² 1.3% of adults ages 18-24 and 1.4% of 13- to 17-year-olds are transgender, with a gender identity different than the one assigned at birth. 1.3% of adults ages 18-24 and 1.4% of 13- to 17-year-olds are transgender, with a gender identity different than the one assigned at birth. Bianca D.M. Wilson & Ilan H. Meyer, *Nonbinary LGBTQ Adults in the United States*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/> (last visited Apr. 6, 2025).

⁶³ The numbers have almost tripled since Gallup began counting in 2012 and are up by two-thirds since 2020. Of particular notice in the survey is a 0.6 percent increase in people identifying as transgender in comparison to the 2020 results. Claire Cain Miller & Francesca Paris, *Nearly One in 10 U.S. Adults Identifies as L.G.B.T.Q.*, *Survey Finds*, N.Y. TIMES (Feb. 20, 2025), <https://www.nytimes.com/2025/02/20/upshot/lgbtq-survey-results.html>.

⁶⁴ Megan Brenan, *Same-Sex Relations, Marriage Still Supported by Most in U.S.*, GALLUP NEWS (June 24, 2024), <https://news.gallup.com/poll/646202/sex-relations-marriage-supported.aspx>

⁶⁵ *Public Opinion on Abortion*, PEW RSCH. CTR. (May 2024), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/>

⁶⁶ Kate Zernike, *Abortion Rights, on Winning Streak, Face Biggest Test in November*, N.Y. TIMES (Aug. 23, 2024), <https://www.nytimes.com/2024/08/23/us/abortion-ballot-measures-have-had-success-this-year-is-their-biggest-challenge.html>; *Outcome of Abortion-Related State Constitutional Amendment Measures in the 2024 Election*, KAISER FAMILY FOUNDATION, <https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/> (last updated Nov. 6, 2024).

This contrast between legislative practices and social acceptance is another one of the morbid symptoms envisioned by Gramsci. Similarly, the strategy to multiply control over the judiciary poses comparable contradictions. While Donald Trump is the republican president with the most women appointees to the federal bench, his judiciary has been the most effective in curtailing reproductive rights as he promised.⁶⁷ Trump's appointments to the judiciary showcase the morbidity of positioning marginalized groups in the police power apparatus while at the same time restricting their rights and having members of the marginalized groups participate in their own curtailing of rights.

Trump's appointments also highlight the organic character of the crisis. Although, during his first term, Trump was the candidate with the third-highest defeat in the popular vote and the first in recent United States history, he has appointed the same percentage of active judges as Obama and Biden.⁶⁸ Adding to this lack of legitimacy is that Trump transformed the federal judiciary through Mitch McConnell's strategy to block Obama's appointments⁶⁹ to later fill them up with the *Federalist Society's* recommendations.⁷⁰ Thus, even though a majority of the popular vote rejected his campaign to overturn *Roe v. Wade*, his anti-abortion vision was imposed through the power of the courts.

These comorbidities of resorting to police power and subverting democratic values to oppose the counterhegemonic views that have become the popular ones and moving marginalized groups to higher positions in the governmental structure while restricting their rights and having themselves do the curtailing of rights are the expected response to the authority crisis experienced by the leading class in Gramsci's model of the *interregnum*. However, as Gramsci's model posits, responses only in the physical axis are insufficient.

⁶⁷ John Gramlich, *How Biden Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 9, 2025), <https://www.pewresearch.org/short-reads/2023/12/04/most-of-bidens-appointed-judges-to-date-are-women-racial-or-ethnic-minorities-a-first-for-any-president/>.

⁶⁸ *Id.* Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>.

⁶⁹ Seung Min Kim, *McConnell's Historic Judge Blockade*, POLITICO (July 14, 2016), <https://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455>.

⁷⁰ Alex Woodward, *Mitch McConnell Laughs about Stopping Obama Hiring Judges, Allowing Trump to Fill Courts with Conservatives Independent* (Dec. 13, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/mitch-mcconnell-obama-trump-judges-supreme-court-conservative-biden-impeachment-a9245781.html>; Zoya Haq, *How the Federalist Society Shaped America's Judiciary*, YALE NEWS (Nov. 4, 2024), <https://yaledailynews.com/blog/2024/11/04/how-the-federalist-society-shaped-americas-judiciary/>.

Changes in both axes must occur to undermine a system of power.⁷¹ In turn, changes in both axes must happen to retain control during an organic crisis. For this reason, the physical force strategy of packing the courts is closely linked to actions by anti-SSOGIE equality actors in the hegemony axis, as some of the other methods discussed.

B. The Physical & Hegemony Axes

Anti-SSOGIE equality actors have long understood this relationship between the axes and the need to act in both the hegemonic and the physical axes. In 1980, Michael Horowitz understood the importance of intellectual mediation in maintaining or undermining a power system. In a report to the Sarah Scaife Foundation, he wrote:

[I]t was critical for conservative public interest organizations to achieve greater independence from business benefactors, develop specialized expertise, and find more sympathetic clients for their litigation campaigns. He urged conservative patrons to focus on developing credibility for conservative ideas, building relationships with law schools and bar associations, recruiting able and idealistic young attorneys into the movement, and placing them in senior positions in government and private practice. He also highlighted the importance of monitoring judicial appointments, noting “the absence of any input on the part of the conservative movement in the critical judicial selection process.”⁷²

Anti-SSOGIE equality actors, with this in mind, have been able to develop a worldview to which the subaltern class could consent. To do so, they started to develop specialized expertise and fostered relationships with organic and traditional intellectuals such as the media, artists, legal operators, academics, and the government.⁷³ In another morbid symptom move, they decided to frame their discourse in the same code of individual rights that minority groups have used to challenge the hegemonic discourses of patriarchy, heteronormativity, and gender binarism. In doing so, as discussed later, anti-SSOGIE equality actors have been able to buy support from the counter groups themselves to maintain legitimacy and consensus to rule.

⁷¹ Filippini, *supra* note 20, at 66.

⁷² Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1701-02 (2018) (quoting Michael Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms* 75 (unpublished memo prepared for the Scaife Found. 1980)).

⁷³ *Id.* at 1702.

Using this strategy, as Ann Southworth so aptly points out:

[O]ver the past several decades, conservatives have deployed dozens of legal advocacy organizations to eliminate or diminish rights forged by liberal public interest groups and to establish and revitalize counter-rights. Over time, these organizations have attracted more elite lawyers and staked a claim to the special legitimacy that the public interest law label confers . . . They invested [too] in think tanks, such as the Heritage Foundation, the Cato Institute, and the Manhattan Institute, and in new law schools, such as Regent and Ave Maria. They also supported new journals and other media outlets, as well as scholarly enterprises, such as law and economics, and projects designed to map litigation strategies.⁷⁴

Two actors are of interest in this analysis. The First is the *Federalist Society*, created in 1982, and the other is the *Alliance Defending Freedom* (ADF), launched in 1994. The *Federalist Society* has not only served as a recruiting and grooming center for judges but also as an incubator on how to transform the legal canon and weaponize civil liberties against SSOGIE equality.⁷⁵ Producing organic and traditional intellectuals and new worldviews to be later deployed in litigation and the media, the *Federalist Society* would not have been as effective without other institutions to support it, like ADF.

ADF is a legal firm, in another example of a morbid symptom, modeled on the *National Association for the Advancement of Colored People* (NAACP) and posterior organizations such as the *American Civil Liberties Union* (ACLU), *Latino Justice*, *Puerto Rican Legal Defense and Education Fund* (*Latino Justice LDEF*), and *Lambda Legal*. ADF described itself as “one of the leading Christian law firms committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life.”⁷⁶ ADF has been involved in almost any major SSOGIE equality case in the last two decades. ADF has won cases in the Supreme Court as counsel 15 times and has been involved in 77 cases in which conservatives have won at the nation’s highest court.⁷⁷ That highlights the magnitude of its endeavor.

⁷⁴ *Id.*

⁷⁵ Michael A. Magee, *Rights and Right-Wing Lawyers*, 53 TULSA L. REV. 293, 294 (2018).

⁷⁶ ALLIANCE DEFENDING FREEDOM, *Frequently Asked Questions*, <https://admin.adflegal.org/about> (last visited Apr. 22, 2025).

⁷⁷ ALLIANCE DEFENDING FREEDOM, *ADF at the Supreme Court*, <https://adflegal.org/us-supreme-court/> (last visited Apr. 22, 2025).

Not only do cases won by *ADF* impact the equilibrium in the SSOGIE equality organic crisis by shifting it towards the old order, but cases lost are equally crucial to the halting of rights and show the inner workings of its interaction with the *Federalist Society* and other groups created in the hegemony axis. For example, in *FDA v. Alliance for Hippocratic Medicine*,⁷⁸ we can see how litigants, incorporated apparently to initiate litigation,⁷⁹ choose a forum with a district court judge appointed by Trump from the *Federalist Society*⁸⁰ in the Fifth Circuit, which has become the most conservative or right-wing appellate court.⁸¹ In turn, once the *Federalist Society* Justices gained a majority at the highest court, the Supreme Court has reviewed more Fifth Circuit cases.⁸² This strategy aims to test novel legal theories and tailor cases amenable for the Supreme Court to halt SSOGIE equality.

In *Alliance for Hippocratic Medicine*, anti-abortion advocates challenged the FDA's relaxation of requirements for the use of *Mifepristone* and generic *mifepristone*, among others, the elimination of the initial in-person healthcare provider visit requirement claiming inadequate consideration of evidence.⁸³ The District Court granted a preliminary injunction in favor of the Alliance for Hippocratic Medicine, suspending the FDA's approval of the drug after concluding that plaintiffs who did not prescribe or use mifepristone had Article III standing.⁸⁴ The FDA appealed, and the Court of Appeals concluded that although plaintiffs had standing, they were not likely to succeed in some of their challenges.⁸⁵ The Supreme

⁷⁸ *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024).

⁷⁹ Alliance for Hippocratic Medicine was incorporated in 2022, three months before the lawsuit. Jeevna Sheth & Devon Ombres, *The 5th Circuit Court of Appeals Is Spearheading a Judicial Power Grab*, CAP (May 15, 2024), <https://www.americanprogress.org/article/the-5th-circuit-court-of-appeals-is-spearheading-a-judicial-power-grab>.

⁸⁰ Devan Cole & Matthew Kacsmayk: *The Trump-Appointed Judge Overseeing The Blockbuster Medication Abortion Lawsuit*, CNN (Apr. 7, 2023), <https://www.cnn.com/2023/03/15/politics/matthew-kacsmayk-texas-judge-medication-abortion-lawsuit/index.html>.

⁸¹ In general, The Northern District of Texas, Amarillo Division Amarillo has been used as a preferred jurisdiction to test cases. Sheth & Ombres, *supra* note 79; All Things Considered, *How Trump Appointees Have Helped Transform the Fifth Circuit*, NPR <https://www.npr.org/2023/01/01/1146528811/how-trump-appointees-have-helped-transform-the-fifth-circuit>.

⁸² Adam Feldman, *Taking the Fifth*, EMPIRICAL SCOTUS (Oct. 9, 2023), <https://empiricalscotus.com/2023/10/09/taking-the-fifth/>; *SCOTUS Case Reversal Rates (2007 - Present)*, BALLOTPEDIA, [https://ballotpedia.org/SCOTUS_case_reversal_rates_\(2007_-_Present\)](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)) (last visited Apr. 2, 2025).

⁸³ *All. for Hippocratic Med.*, 602 U.S. at 372.

⁸⁴ *Id.* at 377.

⁸⁵ *Id.*

Court unanimously concluded that plaintiffs did not have standing under any of their theories and left the FDA's regulations in place.⁸⁶

That by no means forecloses similar future challenges. Kavanaugh leaves this door open by stating that "it is not clear that no one else would have standing to challenge FDA's relaxed regulation of mifepristone."⁸⁷ Thus, plaintiffs can go back to the drawing board and elucidate new theories with the directives of the Court in mind on how to expand the use of the state's coercive apparatus through private agents such as associations and doctors.

This is the same strategy that has been used to broaden the interpretation of the First Amendment and weaponize the civil liberties therein to curtail reproductive and LGBTQ+ rights. As Catherine MacKinnon points out:

Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful. Legally, what was, toward the beginning of the twentieth century, a shield for radicals, artists and activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers and corporations buying elections. In public discourse, freedom of speech has gone from a protection for dissenters from dominant power to a claimed protection of those with dominant power, of their hierarchical position, of hierarchy itself. It has gone from an entitlement of structurally unequal groups to continue to impose their hegemony.⁸⁸

After following a similar path to the one in *Alliance for Hippocratic Medicine*, the strategy of anti-SSOGIE equality actors to reimpose their hierarchical standing through free speech has now been fully executed in the litigation of exemptions in public accommodation laws. The anti-SSOGIE equality actors started to challenge prohibiting discrimination against LGBTQ+ individuals, somewhat unsuccessfully, in a variety of settings, such as providing services for same-sex weddings such as wedding

⁸⁶ *Id.* at 396-97.

⁸⁷ *Id.* at 396.

⁸⁸ Catherine MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, in *THE FREE SPEECH CENTURY* 140 (Lee C. Bollinger & Geoffrey R. Stone, eds. 2019). Martin, Quinn, and Epstein have documented how the Roberts Court seems to favor speech promoting conservative causes over speech allied with liberal causes more than any modern Court. Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 *COLUMBIA L. REV.* 1915 (2016).

cakes,⁸⁹ floral arrangements,⁹⁰ and videography services⁹¹ until they refined their arguments to a point in which the Supreme Court could “for the first time in its history, grant a business open to the public a constitutional right to refuse to serve members of a protected class.”⁹²

This opportunity came in *303 Creative LLC v. Elenis*, in which a Colorado-based graphic designer who wanted to expand her business to include custom wedding websites but opposed designing websites for same-sex weddings due to her religious beliefs challenged Colorado’s Anti-Discrimination Act (CADA).⁹³ The graphic designer preemptively sued the state, arguing that as CADA prohibits businesses open to the public from discriminating based on sexual orientation, she was being forced to create websites for same-sex weddings, which would violate her First Amendment free speech rights.⁹⁴ The anti-SSOGIE equality traditional intellectuals in the Supreme Court (*i.e.*, conservative Justices) finally saw the opportunity to adopt an expansive interpretation of speech that includes commissioned speech as expressive conduct so they could use it to create a collective consensus to maintain heteronormativity under the guise of free speech protection.

Displaying another morbid symptom, the Court weaponized against LGBTQ+ folks a civil liberty that the counter-hegemonic groups themselves have used to promote SSOGIE equality. In other words, the Court used the value of the free expression that LGBTQ+ folks had defended to legitimize the shielding of the discrimination against same-sex couples when they precisely expressed their identities through marriage.

This morbid symptom of broadening speech to deny the protection of the law to LGBTQ+ folks has been used as well to halt the reproductive rights of pregnant people. For example, in *National Institute of Family and Life Advocates v. Becerra (NIFLA)*,⁹⁵ in which *ADF* was involved too, the Supreme Court held that a pro-life crisis pregnancy center was likely to succeed in its claim that the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) violated the First Amendment.⁹⁶ The FACT Act required licensed pregnancy centers to inform patients about state-sponsored family planning services, including contraception and abortion, and unlicensed centers to disclose their lack of medical licensure.⁹⁷ The objective of the law was to

⁸⁹ *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 584 U.S. 617 (2018).

⁹⁰ *Arlene’s Flowers, Inc. v. Washington*, 585 U.S. 1013 (2018).

⁹¹ *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

⁹² *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (Sotomayor, J., dissenting).

⁹³ *Id.* at 579-80.

⁹⁴ *Id.* at 580.

⁹⁵ 585 U.S. 755 (2018).

⁹⁶ *Id.* at 779.

⁹⁷ *Id.* at 760-61.

protect pregnant people from being entrapped by crisis pregnancy centers into remaining pregnant.⁹⁸ However, in a novel decision, the Court limited the government's ability to compel speech in professional settings by expanding then again the meaning of the free speech clause.

The morbid symptom of weaponizing civil rights used by pro-SSOGIE equality actors in their quest for equality against them leads to another comorbidity: retreating from litigation and legislative initiatives to prevent negative SSOGIE equality precedents while anti-SSOGIE equality actors intensify their legal strategies. Decisions expanding the scope of rights generate fear of the future and have a chilling effect on legal efforts by counter-hegemonic groups.

For instance, the Court's expansive interpretation of free speech rights in *303 Creative LLC* will open discrimination in many public services as long as plaintiffs can fit their conduct into Gorsuch's newly expanded expressive conduct doctrine. Furthermore, this new understanding of free speech may have effects beyond public accommodation law. Scholars have already warned that the holding in *303 Creative LLC* could weaken current regulations overseeing digital platforms and online content, potentially obstructing rules to prevent discriminatory practices in the tech industry.⁹⁹ These possibilities generate fear and anxiety about the future of equality for LGBTQ+ folks.

This anxiety and fear have compelled counter-hegemonic groups to retreat from litigation efforts and even repel legislation, even before *303 Creative LLC* was finally decided. For instance, in 2019, two years after New York City passed a ban on conversion therapy for adults, the City Council repealed the ordinance.¹⁰⁰ The repeal was in response to a litigation by *ADF* representing an Orthodox Jewish psychotherapist who filed a federal lawsuit challenging the ordinance because it prevented him from offering counseling consistent with his faith to adult patients seeking such guidance and allegedly encroached on his free speech as it prohibited conversations about conversion therapy between therapists and their

⁹⁸ Political Reform Act of 1974, A.B. 775, Cal. Legislature (2025) https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB775.

⁹⁹ Rebecca Aviel, Margot E. Kaminski, Toni M. Massaro & Andrew Keane Woods, *From Gods to Google*, 134 YALE L.J. 1269, 1274, 1296, 1334 (2025).

¹⁰⁰ *NYC Council Votes to Repeal Law that Censors Psychotherapist's Private Conversations with Patients*, ALLIANCE DEFENDING FREEDOM (Sept. 27, 2019), <https://adflegal.org/press-release/nyc-council-votes-repeal-law-censors-psychotherapists-private-conversations-patients/> [hereinafter *NYC Council Votes*].

patients.¹⁰¹ Afraid of setting a bad precedent for LGBTQ+ rights, the city settled the claim¹⁰² and repealed the ban.

Yet, the strategy of laying low at the moment of most intense contestation of the hegemonic discourses has failed. Notwithstanding the retreat of some pro-SSOGIE equality actors, anti-SSOGIE equality actors kept up with and intensified their strategy of perfecting cases for an even greater expansion of the free speech clause. This failure shows how the strategy, more than a strategy, is another comorbidity of the organic crisis.

An example of how anti-SSOGIE equality actors have kept up their efforts to weaponize even further the First Amendment until the Supreme Court is ready to adopt their arguments is *Chiles v. Salazar*.¹⁰³ Pursuing further the issue of conversion therapy, Kaley Chiles, a licensed professional counselor and practicing Christian, claiming her First Amendment rights were violated, sought a preliminary injunction to halt the enforcement of Colorado's Minor Conversion Therapy Law (MCTL), which bans licensed counselors from attempting to change a minor's sexual orientation or gender identity through counseling.¹⁰⁴ Chiles argued that MCTL infringes upon her First Amendment rights to free speech and free exercise of religion because the law allegedly prevents her from providing counseling aligned with her and her clients' religious beliefs, which view sexuality and gender identity through a faith-based lens.¹⁰⁵ The District Court for the District of Colorado denied the injunction, ruling that the law regulates professional conduct, not speech, and is neutral and generally applicable. The Tenth Circuit upheld this ban as it found that regulating Chiles's conduct was not a regulation of speech.¹⁰⁶ In asking the Supreme Court to review her case, Chiles argues that the Tenth Circuit decision has "deepened a circuit split between the Eleventh and Third Circuits, which do not treat counseling conversations as conduct, and the Ninth Circuit, which does."¹⁰⁷

The Supreme Court's eventual decision in *Chiles* has the potential to further weaponize the free speech clause against women and LGBTQ+

¹⁰¹ Jeffery C. Mays, *New York City Is Ending a Ban on Gay Conversion Therapy. Here's Why*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/nyregion/conversion-therapy-ban-nyc.html>.

¹⁰² *NYC Council Votes*, *supra* note 100.

¹⁰³ *Chiles v. Salazar*, No. 24-539, 2025 WL 746313 (U.S. Mar. 10, 2025) (mem.) (cert. granted).

¹⁰⁴ *Chiles v. Salazar*, 116 F.4th 1178, 1191, 1193 (10th Cir. 2024), *cert. granted*, No. 24-539, 2025 WL 746313 (U.S. Mar. 10, 2025).

¹⁰⁵ *Chiles v. Salazar*, No. 1:22-CV-02287-CNS-STV, 2022 WL 17770837, at *11 (D. Colo. Dec. 19, 2022), *aff'd*, 116 F.4th 1178 (10th Cir. 2024), *cert. granted*, No. 24-539, 2025 WL 746313 (U.S. Mar. 10, 2025).

¹⁰⁶ *Id.* at *10-*13.

¹⁰⁷ Petition for Writ of Certiorari, *Chiles v. Salazar*, No. 24-539, 2024 WL 4800273, at *i (U.S. Nov. 8, 2024).

individuals by extending the logic of expressive conduct established in *303 Creative LLC* to the realm of counseling practices. A decision in favor of Chiles would not only expose LGBTQ+ minors to the well-documented harms of conversion therapy, which include “depression, suicidality, anxiety, social isolation, and diminished capacity for intimacy,”¹⁰⁸ but could also lay the groundwork for shielding through the First Amendment counseling practices that pressure pregnant people into continuing unwanted pregnancies. Even if the Supreme Court is not ready yet or does not feel that its reinterpretation of the First Amendment is set to become an accepted worldview, the litigation will have a chilling effect on existing bans in the more than twenty states that have enacted them¹⁰⁹ and jurisdictions that are contemplating enacting them.

A similar chilling effect has already materialized in the realm of religious exemptions, even though the Supreme Court has yet to expand the scope of the free exercise clause to its pre-*Smith* standard (as anti-SSOGIE equality actors have advanced in similar litigation).¹¹⁰ Anti-SSOGIE equality actors have successfully leveraged the threat of future rulings to extract favorable outcomes. In 2021, Shawnee State University settled with Dr. Nicholas Meriwether, a professor who was disciplined for refusing to address a transgender student by her pronouns, citing his Christian beliefs.¹¹¹ Similarly, in 2023, the West Point School Board settled with a French teacher who was terminated for refusing to use male pronouns for a transgender student, citing his religious convictions.¹¹²

Once again, notwithstanding the pro-SSOGIE equality actors’ retreat from litigation, anti-SSOGIE equality actors have continued to refine and escalate their strategy of perfecting their cases until the Supreme Court is

¹⁰⁸ *What Does the Scholarly Research Say About Whether Conversion Therapy Can Alter Sexual Orientation Without Causing Harm?*, WHAT WE KNOW PROJECT: CORNELL UNIV., <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-whether-conversion-therapy-can-alter-sexual-orientation-without-causing-harm/> (last visited Apr. 22, 2025) (reviewing 47 peer-reviewed studies on the efficacy and risks of conversion therapy).

¹⁰⁹ Movement Advancement Project, Conversion “Therapy” Laws, <https://www.lgbtmap.org/equality-maps/conversion-therapy>.

¹¹⁰ In *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021), the Court declined to reconsider the ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), which holds that generally applicable laws not specifically targeting religious practices do not violate the Free Exercise Clause. However, five of the current Justices indicated that *Smith* should be overturned. *Fulton*, 593 U.S. at 544-45 (Alito, J., concurring); *id.* at 543 (Barrett, J., concurring) (2021).

¹¹¹ Jonathan Franklin, *A University Pays \$400K to Professor Who Refused to Use a Student’s Pronouns*, NPR (Apr. 20, 2022), <https://www.npr.org/2022/04/20/1093601721/shawnee-state-university-lawsuit-pronouns>.

¹¹² Karina Elwood, *Va. School Board Settles with Teacher Fired for Not Using Student’s Pronouns*, *Local Education*, WASH. POST (Oct. 1, 2024), <https://www.washingtonpost.com/education/2024/10/01/teacher-lawsuit-transgender-pronouns-virginia/>.

ready to adopt their arguments regarding free exercise. The most recent example of this strategy can be seen in *Mahmoud v. Taylor*.¹¹³ This term, after the Court's refusal in *Fulton v. City of Philadelphia* to revisit its decision in *Employment Division v. Smith*, the Court in *Mahmoud* took advantage of yet another opportunity to expand the scope of free exercise and parental rights to the detriment of SSOGIE equality. Not only continuing to weaponize the free exercise, but opening the door to weaponize parental rights as well.

In *Mahmoud*, a coalition of Muslim, Christian, and Jewish parents challenged, based on their religious beliefs and parental rights, the Montgomery County Public Schools' policy that mandates the inclusion of LGBTQ-themed books in the elementary school curriculum without allowing parents to opt their children out.¹¹⁴ The Court held that parents were entitled to a preliminary injunction, holding that the policy posed "a very real threat of undermining" the religious beliefs and practices parents sought to instill.¹¹⁵ Applying *Wisconsin v. Yoder*,¹¹⁶ the Court reasoned that government policies violate parents' free exercise rights when they substantially interfere with the religious upbringing of children by placing them in environments hostile to their religious beliefs, exerting pressure to conform to contrary viewpoints.¹¹⁷ The Court went further and stated that private schooling or homeschooling does not cure the constitutional violation of the First Amendment, as public education cannot be conditioned on surrendering religious exercise rights.¹¹⁸ While the court frames this generally in terms of the First Amendment, the reality is that the Court is deciding on the free exercise right of parents and not of children, who are the holders of the public education benefit. Thus, this should be understood as standing for the axiom that private schooling or homeschooling does not cure the constitutional violation of parental rights, instead of free exercise.

Mahmoud thus expands the scope of parental rights, becoming the 303 *Creative LLC* for this constitutional protection. This is more clearly seen in Justice Thomas' concurrence, in which he equates the policy in *Mahmoud*

¹¹³ *Mahmoud v. Taylor*, No. 24-297, 2025 WL 226842 (U.S. Jan. 17, 2025) (mem.) (cert. granted).

¹¹⁴ *Mahmoud v. McKnight*, 102 F.4th 191, 197 (4th Cir. 2024), cert. granted sub nom., *Mahmoud v. Taylor*, No. 24-297, 2025 WL 226842 (U.S. Jan. 17, 2025).

¹¹⁵ *Mahmoud v. Taylor*, No. 24-297, 2025 WL 1773627, at *5 (U.S. June 27, 2025).

¹¹⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a compulsory school attendance law violated Amish parents' free exercise rights by interfering with their ability to raise their children in accordance with their religious beliefs).

¹¹⁷ *Mahmoud*, 2025 WL 1773627, at *22.

¹¹⁸ *Id.* at *20.

to the one rejected in *Pierce v. Society of Sisters*,¹¹⁹ which required public instruction for all children.¹²⁰

Even though *Mahmoud* did not mark a formal return to the pre-*Smith* standard—something five current Justices have openly expressed interest in¹²¹—the decision nonetheless reflects a continued expansion of the free exercise doctrine. But if the Court’s conservative wing, now firmly shaped by the *Federalist Society*,¹²² determines that the moment is ripe, anti-SSOGIE equality actors may ultimately achieve through judicial fiat what they have failed to accomplish through the enactment of RFRA statutes: subvert the political will of states that have declined to broaden their constitutional protections for religious exercise.¹²³ In a forceful dissent, Justice Sotomayor, joined by Justices Kagan and Jackson, warned of this. Sotomayor explained how the mere exposure to ideas conflicting with one’s religious beliefs does not violate the free exercise clause under settled precedent.¹²⁴ She further cautioned that the majority’s ruling could effectively give religious parents veto power over democratically enacted curricula.¹²⁵

Mahmoud showcases another of the morbid symptoms in the current juncture of SSOGIE equality: anti-SSOGIE equality actors have sought greater state independence to restrict or even suppress reproductive and LGBTQ+ rights, while at the same time seeking to subvert the sovereignty of those states using it to advance SSOGIE equality. By the Court imposing an expanded understanding of the free exercise (and parental rights) in *Mahmoud*, it opposes its position in *Dobbs v. Jackson Women’s Health Organization*, in which it explicitly stated that the issue of abortion should

¹¹⁹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that a state law requiring children to attend public school unconstitutionally interfered with the liberty of parents to direct the upbringing and education of their children)

¹²⁰ *Mahmoud*, 2025 WL 1773627, at *27 (Thomas, J., concurring).

¹²¹ *Fulton*, 593 U.S. at 544-45 (Alito, J., concurring); *id.* at 543 (Barrett, J., concurring) (2021).

¹²² At least five Justices of the conservative wing of the Court are current or former members of the Federalist Society (Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett). Ron Elving, *How the Supreme Court's Conservative Majority Came to Be*, Analysis, NPR (July 1, 2023), <https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush>. Chief Justice John Roberts denies ever being a member, but he has been listed as previously serving as a member of the steering committee of the D.C. chapter. Charles, Lane, *Roberts Listed in Federalist Society '97-98 Directory*, WASH. POST (July 25, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/07/24/AR2005072401201.html>.

¹²³ Fifteen jurisdictions do not have RFRA or RFRA-like protections in their state constitutions. *Federal & State RFRA Map*, BECKET FUND. (Apr. 3, 2025) <https://becketfund.org/research-central/rfra-info-central/map/>.

¹²⁴ *Mahmoud*, 2025 WL 1773627, at *40-42, 47 (Sotomayor, J., dissenting).

¹²⁵ *Id.* at *43 (Sotomayor, J., dissenting).

be returned to the states and the democratic process¹²⁶ by implying that education about LGBTQ+ matters does not present a *profound moral question* best suitable of the political process as terminating a pregnancy did.

Beyond allocating power to decide contested issues, *Dobbs* shows another comorbidity: expanding certain rights while narrowing others. In order to halt SSOGIE equality through state legislation, as it has not been possible to do so federally through legislation, anti-SSOGIE equality actors have pushed the Court not only to revoke the recognition of abortion but also to narrow the substantive due process.¹²⁷ Even if the narrowing of the substantive due process plays against the recognition of new rights for women and LGBTQ+ individuals, it is also to the detriment of the rights interests of anti-SSOGIE equality actors, who will probably soon need new rights to stall efforts for a more egalitarian society.

As expected under Gramsci's *interregnum* theory, this inherent contradiction of expanding certain rights while narrowing others is common to all the morbid symptoms that are a byproduct of the bifrontal (physical and consent axes) response launched by hegemonic groups. As discussed, similar inherent contradictions emerge in the comorbidities of appropriating the rights discourse of the counter-hegemonic groups, adopting minorities' litigation strategies, weaponizing civil liberties, and retreating from litigation amidst legal efforts to subvert equality and past successes, and seeking greater state independence while subverting that independence by imposing federal standards of civil rights. These contradictions highlight the importance of working on the hegemony or consent axis, which, as Gramsci's model posits, is crucial if the hegemonic group wishes to lead instead of merely ruling. Consent can never be achieved if the contradictions are not well concealed under an acceptable worldview for the counter-hegemonic groups.

C. *The Hegemony Axis*

Dobbs displays how the Court uses its opinions to build upon the consent axis by testing legal theories to see if they can find widespread acceptance or by hinting at arguments so anti-SSOGIE equality actors can embrace them and further develop them. Justice Thomas, in his

¹²⁶ The Court made the following statements emphasizing the role of the political process in the question of abortion. "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives." *Dobbs*, 597 U.S. at 232. "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* abrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *Id.* at 302.

¹²⁷ *Id.* at 331 (Thomas, J., concurring).

Concurrence, does precisely so when he calls for revoking the fundamental rights to contraceptive access, engage in private, consensual sexual acts, and same-sex marriage, but leaves out, for example, the fundamental right of parental control over child rearing, the object of litigation in *Mahmoud*.¹²⁸ Shaping worldviews through judicial writing has very impactful effects on SSOGIE equality. It also serves to understand the comorbidities that emerge when the hegemonic group attempts to curb challenges to patriarchy, heteronormativity, and gender binarism.

One of the most salient morbid symptoms associated with this practice is how conservative Justices have been able to have the liberal Justices join in worldviews that are harmful to SSOGIE equality, providing consensus and halting the progress of rights. The epitome of this comorbidity is seen in *Masterpiece Cakeshop*, in which two members of the liberal wing of the Court, Kagan and Breyer, joined in the decision to remand the case of the baker who was found to have discriminated against a gay couple for refusing to sell them a cake for their wedding and who challenge the decision on the grounds of free speech and free exercise because they agreed with the weaponization of the animus doctrine by litigants and the Court.¹²⁹ The liberal Justices side with the conservative Majority because of the alleged violation of religious neutrality from the Colorado Rights Commission when commissioners made historically accurate comments about freedom of religion being used in the history of the United States to justify discriminatory actions.¹³⁰

In doing so, the liberal Justices, clouded by the morbid symptoms of this *interregnum*, have inadvertently contributed to the halt of SSOGIE equality. First, they broadened the scope of the animus doctrine to include a dominant sector in society (*i.e.*, Christians), thereby allowing discrimination against a politically unpopular group, contrary to the doctrine's intended application prior to *Masterpiece Cakeshop*. Second, they bought into the idea advanced by anti-SSOGIE equality actors since *Obergefell* that they constitute a nascent minority.¹³¹

In *Masterpiece Cakeshop*, anti-SSOGIE equality actors advanced the theory that they are a minority deserving of constitutional protection under the animus doctrine because they are currently an unpopular group, as the country and the State have moved to a *new orthodoxy*¹³² (*i.e.*, the *gay agenda* or *gender ideology*). This framing enables anti-SSOGIE equality actors to garner support, even from within counter-hegemonic groups, by casting

¹²⁸ *Id.*

¹²⁹ *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 640-43 (Kagan, J., concurring).

¹³⁰ *Id.*

¹³¹ *See Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J. dissenting).

¹³² *See id.*; *Masterpiece Cakeshop*, 584 U.S. at 667 (Thomas, J., dissenting).

themselves as victims of exclusion, thus making it socially and legally difficult for pro-SSOGIE equality actors to challenge such decisions without appearing intolerant or bigoted, contrary to the tolerance values they promote. Moreover, it provides the Court with a convenient rationale for its decisions that undermine SSOGIE equality, portraying them as grounded in broadly shared values (common worldviews).

Anti-SSOGIE equality actors have not confined their creation of shared values and ideas (worldviews) to their litigation. They have also engaged in the creation of hegemonic products as part of their work as *organic intellectuals*. A prime example is the companion media content produced by *ADF* in its cases.

For instance, in *Telescope Media Group v. Lindsey*, *ADF* introduces in a video the videographer couple challenging the anti-discrimination provision that requires them to provide services to same-sex couples by portraying them as a family that welcomes diversity, which has two adopted children from Ethiopia, who says that they “believe having convictions causes [them] to move towards to people that are different from [them],” with a big table in their house in which they welcome even people from the LGBT community.¹³³ They portray themselves as far as possible from a bigot.

However, they are compelled to go to court and file a lawsuit that would discriminate against the same people they break bread with because their *now minority religious view* of marriage forces them not to provide services to people they even welcome into their houses. This portrayal of a new religious minority is in contradiction with the estimates that more than 60% of the population of the United States still identifies as Christian.¹³⁴ The video seeks to bring a new worldview in which the discriminatory conduct of the videographers should be tolerated because otherwise, pro-SSOGIE equality actors would be engaging in the same kind of bigotry that they have denounced.

Another tactic used in these materials to reshape the worldview of groups opposing patriarchy, heteronormativity, and gender binarism is to characterize the State as a powerful enemy who is attempting to disenfranchise all minority views and intervene in the most intimate parts of an individual’s life. They craft a picture of David versus Goliath that resonates with groups that have long been disenfranchised and persecuted by the State for a long time. For example, in *Schwartz v. City of New York*,

¹³³ Alliance Defending Freedom, *Create Freely: The Larsens' Story* | *ADF Client Film*, YOUTUBE (Dec. 6, 2016), https://youtu.be/_v-NVkrvEw?t=215.

¹³⁴ *Modeling the Future of Religion in America*, PEW RESEARCH CTR. (Sept. 13, 2022), <https://www.pewresearch.org/religion/2022/09/13/how-u-s-religious-composition-has-changed-in-recent-decades/>.

ADF employs a cartoon video to reinforce this framing.¹³⁵ Their narrative and stylistic choices present the plaintiff as an underdog standing against institutional power even in the face of a resolution in which the State retreated from imposing a ban on conversion therapy by repealing the law.¹³⁶ Albeit the positive outcome, the case's resolution is even framed as a cautionary tale underscoring the need to protect not only this *nascent minority* but everyone from government intervention in the realm of private life by attesting that "The people lose when the government is the one dictating which ideas should prevail."¹³⁷

This strategy has been successful within and outside the courtroom. An example of the implications of subscribing to this theory can be seen in *Fulton v. City of Philadelphia*.¹³⁸ In *Fulton*, in an attempt to reinstate the pre-*Smith*/current RFRA analysis into free exercise jurisprudence, the Court was asked to revisit the *Smith* interpretation of the free exercise clause that generally applicable laws may incidentally burden religion.¹³⁹

Although, as discussed, the Court avoided revisiting *Smith*, the Court unanimously held that Philadelphia's refusal to contract with Catholic Social Services (CSS) for foster care services unless CSS certified same-sex couples as foster parents violated the First Amendment.¹⁴⁰ The Court found that the law at issue in *Fulton*, contrary to the law in *Smith*, was not neutral and generally applicable because the Commissioner had the discretion to grant exceptions to the anti-discrimination requirement.¹⁴¹ The Court also held that public accommodations laws did not apply to CSS because certifying a foster parent is not "made available to the public" in the usual sense of the phrase, removing it from the protections afforded by LGBTQ+ anti-discrimination.¹⁴² (Not that such a finding would have any effect, as we can infer from the holding in *303 Creative LLC*.) Thus, the State's actions were subject to strict scrutiny, a burden Philadelphia did not meet as the Court held the law was not necessary to achieve a compelling government interest.¹⁴³

¹³⁵ Alliance Defending Freedom, *When Government Polices Private Conversations*, YOUTUBE (July 27, 2020), <https://youtu.be/EvNsNbrV13M?t=238>. A similar picture is depicted in ADF's materials of *NIFLA*. Alliance Defending Freedom, *NIFLA v. Becerra: Can a State Regulate Professional Speech*, YOUTUBE (Mar. 18, 2018), <https://youtu.be/Dw7iJS9O6go?si=P0IVO-LbD3Zz39Zu>.

¹³⁶ Alliance Defending Freedom, *When Government Polices Private Conversations*, YOUTUBE (July 27, 2020), <https://youtu.be/EvNsNbrV13M?t=238>.

¹³⁷ *Id.*

¹³⁸ See, e.g., *Fulton v. City of Phila.*, 593 U.S. 522 (2021).

¹³⁹ *Id.* at 532.

¹⁴⁰ *Id.* at 542-43.

¹⁴¹ *Id.* at 536.

¹⁴² *Id.* at 540.

¹⁴³ *Id.* at 540-43.

The liberal wing of the Court, probably trying in part to avoid a decision revoking *Smith* and because they have bought in somewhat into the theory of the nascent minority and did not wish to engage in the bigotry practices they have criticized, joined the Majority without any written opinion. Scholars have criticized the liberal Justices' choice not to write an opinion because avoiding the pre-*Smith* question perpetuates the uncertainty in free exercise jurisprudence involving religious exemptions.¹⁴⁴

Although the liberal wing of the Court failed in their role as *traditional intellectuals* by failing to provide a defense of anti-discrimination principles and thus allowing the uncertainty of the use of free exercise as a shield against LGBTQ+ protections, perhaps the critique would be more poignant if it highlighted that the Justices have failed to do so because they have adopted, to some level, the novel interpretations pushed by anti-SSOGIE equality actors such as the nascent minority. Moreover, buying into those new worldviews precludes them from developing new legal theories, as conservatives have done through the *Federalist Society* and their litigation strategy. For example, the liberal wing could have pushed for a more expansive interpretation of accommodation laws or the concept of neutrality by not excluding it from giving discretion for exemptions. Not doing so is another morbid symptom: the acceptance of the anti-SSOGIE equality actors' worldviews that curtail the elaboration of progressive LGBTQ+ equality and reproductive justice worldviews. This comorbidity in the consent axis has allowed for the intensification of the weaponization of the free exercise right. We already see the effects of this failure to articulate new frameworks by the liberal wing of the Court in *Mahmoud* that has paved the way for the weaponizing of parental rights.

This reshaping of the worldviews and acceptance by the counter-hegemonic groups requires making the system appear to have changed in some respects. That is another one of the comorbidities in the hegemony axis. To do so, the anti-SSOGIE equality actors must code their language into the language of the counter-hegemonic movements and provide some victories to pro-SSOGIE equality actors. However, these are temporary wins or a step to restrict later rights like the ones in *Alliance for Hippocratic Medicine*.

This practice is not recent, either. Justice Kennedy implemented it well when deciding cases about sodomy and same-sex marriage, such as

¹⁴⁴ Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 5 AM. CONST. SOC'Y SUP. CT. REV. 137, 221 228-29, 230-33 (2021); Elizabeth Sepper & James D. Nelson, *Fulton v. Philadelphia: A Masterpiece of an Opinion?*, ACS BLOGS-EXPERT FORUM (June 18, 2021), <https://www.acslaw.org/expertforum/fulton-v-philadelphia-a-masterpiece-of-an-opinion/>.

Lawrence,¹⁴⁵ *Windsor*,¹⁴⁶ and *Obergefell*. The decisions in these cases brought by pro-SSOGIE equality actors served a twofold purpose regarding halting SSOGIE equality. First, the decisions excluded the possibility for LGBTQ+ individuals to use the equal protection clause in their favor by claiming the status of a suspect or quasi-suspect class.¹⁴⁷ Second, they promoted some erasure of LGBTQ+ identities and partially reaffirmed heteronormative values.

For example, *Lawrence* was turned into the right of any adult to engage in consensual sex (it was not even clear whether minors of the age of consent were protected from consenting to same-sex legal encounters) as opposed to the right to engage in homosexual sex. Not only did the Court in doing so erased the queer dimension of the challenge, but it also avoided deciding on the issue of whether LGBTQ+ folks deserved to be classified as a protected class under the equal protection clause.¹⁴⁸ Similarly, in *Windsor*, while equal protection principles were at the core of the case, the court did not directly address the idea of sexual orientation as a suspect class. Rather than classifying LGBTQ+ people as a protected class, the Court invoked the animus doctrine and the Fifth Amendment,¹⁴⁹ allowing the Court to strike down DOMA without recognizing sexual orientation as a suspect or quasi-suspect class. Finally, in *Obergefell*, the Court, avoiding an equal protection decision, enshrined monogamous marital relationships under due process as constitutionally protected, which, in turn, negated other types of romantic relationships that have historically been present in the LGBTQ+ community.

Something similar was accomplished in *Bostock*.¹⁵⁰ In this case, after presenting as a man for most of her employment, Aimee Stephens informed her employer of her intent to transition to woman and was subsequently fired.¹⁵¹ Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC), which sued the Funeral Home for

¹⁴⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding as unconstitutional under the due process Clause a Texas statute criminalizing same-sex sex).

¹⁴⁶ *United States v. Windsor*, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act's definition of marriage as between a man and a woman as a violation of the Fifth Amendment's guarantee of equal protection because the federal government treated married same-sex couples differently than opposite-sex couples without sufficient justification).

¹⁴⁷ Peter Nicolas, *Obergefell's Squandered Potential*, 6 CALIF. L. REV. CIRCUIT 137, 138 (2015) (criticizing the Court's failure in *Obergefell* to recognize sexual orientation as a suspect classification); Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J. FORUM 1, 12 (2015) (arguing how a favorable same-sex decision in *Obergefell* did not mean a future with a broader legal regime of formal equality for LGBTQ+ folks).

¹⁴⁸ *Lawrence*, 539 U.S. at 574.

¹⁴⁹ *Windsor*, 570 U.S. at 769-70.

¹⁵⁰ *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020).

¹⁵¹ *Id.* at 653-54.

violating Title VII of the Civil Rights Act based on gender identity and sex stereotypes.¹⁵² While the District Court ruled in favor of the employer, the Sixth Circuit reversed, finding the termination unlawful.¹⁵³ The Supreme Court later consolidated this case with others, ruling that Title VII's sex discrimination protections extend to gender identity and sexual orientation.¹⁵⁴

The unexpected result in favor of SSOGIE equality is part of one of the most pernicious comorbidities in the juncture of reproductive and LGBTQ+ rights: providing temporary SSOGIE equality victories while emptying the meaning of the worldviews developed by the counter-hegemonic groups and using the temporary victory as a breathing space before the advent of political and social erasure of women and LGBTQ+ folks and the fracture of their social movements. The Majority Opinion in *Bostock* to decide the case in favor of trans folks conflated discrimination based on gender expression and identity, sexual orientation, and sex into the latter, erasing decades of work of queer activists and scholars differentiating between these concepts. At the stroke of a pen, the Court countered challenges to heteronormativity and gender binarism and erased the people it allegedly intended to protect with its decision.

This erasure is more evident after Trump's executive orders attacking transgender individuals by placing restrictions on federal gender markers,¹⁵⁵ indicating the federal government will only recognize two sexes,¹⁵⁶ directing agencies to take action to prevent gender-affirming care from being provided to people under the age of nineteen,¹⁵⁷ prohibiting transgender girls from participating in school sports teams that align with their gender,¹⁵⁸ and the erasure of transgender folks from historical sites such as Stonewall.¹⁵⁹ The idea, in the Majority, that these different concepts (like gender identity and sexual orientation) were not needed and superfluous and could be conflated into sex is currently being used to reimpose gender binarism through the police power of the State.

¹⁵² *Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566-67 (6th Cir. 2018), *aff'd sub nom.*, *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020).

¹⁵³ *Bostock*, 590 U.S. at 654.

¹⁵⁴ *Id.* at 653-54.

¹⁵⁵ *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, 90 FED. REG. 8615 (Jan. 20, 2025).

¹⁵⁶ *Id.*

¹⁵⁷ *Protecting Children from Chemical and Surgical Mutilation*, 90 FED. REG. 8771 (Jan. 28, 2025).

¹⁵⁸ *Keeping Men Out of Women's Sports*, 90 FED. REG. 9279 (Feb. 5, 2025).

¹⁵⁹ Juliana Kim, *Park Service Erases 'Transgender' On Stonewall Website, Uses The Term 'LGB' Movement*, *National*, NPR (Feb. 14, 2025), <https://www.npr.org/2025/02/14/g-s1-48923/stonewall-monument-transgender-park-service>.

The strategy of providing temporary victories also shows how this Court uses these pro-SSOGIE equality cases to impose its hegemonic views more strongly. The court in *Bostock* was buying more time to avoid recognizing these groups as protected classes, as it has been doing since the equal marriage cases, to ensure that they do not figure as a category in the law, erasing them socially and politically. The more time the Court has left elapsed on the question of whether LGBTQ+ folks should be considered a suspect or quasi-suspect class, the easier it would be to deny this protection as LGBTQ+ folks continue to attain more political power.

In this term, even though the Court was pressed in *United States v. Skrametti* about what type of protection transgender individuals should receive under equal protection,¹⁶⁰ the Majority of the Court continued to avoid the issue. After Tennessee enacted in 2023 SB1 restricting affirming gender care to minors in identifying with a gender different from their sex assigned at birth, the United States Department of Justice, alongside affected families and medical professionals, challenged the law, arguing that it violated the due process and equal protection clauses.¹⁶¹ Although the District Court initially blocked the law, it was later upheld by the Sixth Circuit Court of Appeals, which ruled that the state had a rational basis for restricting such treatments.¹⁶² The Supreme Court determined that the law did not involve a trans classification but that the statute draws only two distinctions: one based on age (permitting treatment for adults but not minors) and another based on medical purpose (allowing puberty blockers and hormones for certain conditions, but not for the treatment of gender dysphoria).¹⁶³ Thus, it needed not engage in an equal protection analysis for a trans category.¹⁶⁴

Despite the outcome in *Skrametti* regarding equal protection, the strategy of avoiding equal protection has already shown its ugly face. While the Majority sidestepped the question of whether transgender individuals are entitled to heightened scrutiny, two of the Concurring Opinions made the implications of this avoidance clear.

Justice Barrett, joined by Justice Thomas, asserted that transgender individuals do not qualify as a suspect class under the equal protection clause, reasoning that they lack the “obvious, immutable, or distinguishing characteristics” of a discrete group.¹⁶⁵ She further argued that suspect class

¹⁶⁰ L. W. by & through Williams v. Skrametti, 83 F.4th 460, 468–69 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky *ex rel.* Cameron, 144 S. Ct. 389 (2023), *cert. granted sub nom.* United States v. Skrametti, 144 S. Ct. 2679 (2024).

¹⁶¹ *Id.* at 469.

¹⁶² *Id.* at 469, 491.

¹⁶³ United States v. Skrametti, 145 S. Ct. 1816, 1829 (2025).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1851–53 (Barrett, J., concurring).

analysis should focus narrowly on a history of *de jure* discrimination, dismissing broader patterns of private or societal bias sanctioned by the law.¹⁶⁶ Similarly, Justice Alito, in a separate concurrence, acknowledged that the law could be understood as classifying based on transgender status, but likewise concluded that transgender individuals do not merit suspect or quasi-suspect classification.¹⁶⁷ In his view, they do not meet the traditional criteria of immutability, pervasive legal discrimination, and political powerlessness that would warrant heightened judicial protection.¹⁶⁸

Together, these Opinions unfold how the strategy of avoidance was supposed to play out from its inception in the same-sex marriage litigation. By already hinting that the Court is going to adopt a narrow application of the equal protection doctrine that explicitly denies constitutional recognition to transgender status, a group even more discriminated against than the more salient members of the LGBTQ+ community, the Justices have buried all possibility for gay and lesbian individuals to claim a protected status of suspect or quasi suspect class.

Moreover, in *Skrametti*, Justices Thomas and Barrett provided anti-SSOGIE equality actors new avenues to limit the holding of *Bostock* protecting gender and sexual minorities under the guise of sex discrimination by arguing that it should not be extended to the equal protection clause.¹⁶⁹ So did Justice Alito.¹⁷⁰ These expressions, in addition to the arguments of the new orthodoxy and the nascent minority, and *Dobbs*, show how the equal protection avoidance strategy seeks to put a tight seal on future LGBTQ+ rights recognition and even set out its regression.

Contrary to the right of interracial marriage that is predicated as well on equal protection grounds, same-sex marriage, which lacks any other source for its protection, could be revoked as abortion did. The same holds for any LGBTQ+ right predicated on substantive due process. As rights already recognized for LGBTQ+ folks are in imminent danger of being rolled back, and substantive due process seems like an unlikely vessel for the recognition of new rights, avoiding equal protection issues in SSOIE equality appears to have worked efficiently in halting its progress as it now granting protections on suspect class arguments seems more of an uphill battle than two decades ago.

In addition, as Chan Tov McNamara has discussed, *Bostock*, by conflating gender with sex, gives proponents of cis-woman protective arguments ammunition to argue that antidiscrimination protections for

¹⁶⁶ *Id.* at 1853-55 (Barrett, J., concurring).

¹⁶⁷ *Id.* at 1861 (Alito, J., concurring).

¹⁶⁸ *Id.* at 1866-67 (Alito, J., concurring).

¹⁶⁹ *Id.* at 1837-39 (Thomas, J., concurring).

¹⁷⁰ *Id.* at 1860 (Alito, J., concurring).

transgender persons threaten to abolish protections for women, creating fissures within pro-SSOGIE equality movements.¹⁷¹ Not only from trans-exclusionary radical feminists (TERFs) but other feminist and queer groups that might question the suitability of uniting claims with trans folks as it can represent a regress in some of the victories.

The morbidity of providing temporary SSOGIE equality victories to re-appropriate the language (worldviews) developed by feminists and queer traditional and organic intellectuals to weaponize them later against them as well as the comorbidity of accepting the depictions and new worldviews of anti-SSOGIE equality actors such as the nascent minority theory also exemplify the costs of compromises within the LGBTQ+ movement. A price was paid for prioritizing the interests of affluent gay men in marriage equality, which converged with the interests in equality of the LGBTQ+ community at large, at the expense of more forceful fights for the recognition as a protected class and the enactment of anti-discrimination laws that would have safeguarded gender non-conforming individuals, low-income, and people of color in the LGBTQ+ community who were the ones who built the gay movement before, during, and after Stonewall.¹⁷² This prioritization opened the door for anti-SSOGIE equality actors to deploy some strategies to attempt to retain their hegemony. For example, leaving some groups behind, like trans and non-binary folks, allowed anti-SSOGIE equality actors to create fissures in the movement or to try to erase trans and non-binary folks' presence and repack heteronormativity and patriarchy. It is also being used to expand police power practices and weaponize civil liberties like free exercise through attacks designed to target this collective of the LGBTQ+ community.

III. THE NEW THAT CANNOT YET BE BORN: THE FUTURE OF SSOGIE EQUALITY

All the comorbidities discussed in both axes and their interactions evidence that the current juncture in SSOGIE equality in the United States is one of an organic crisis. The depth of this crisis and the relevance of Gramsci's concept of the *interregnum* for understanding it are most clearly illustrated, however, by the far right's public embrace of Antonio Gramsci himself, whose anti-liberal critiques are now being repurposed to advance

¹⁷¹ Chan Tov McNamara, *Cis-Woman-Protective Arguments*, 123 COLUM. L. REV. 845, 907 (2023).

¹⁷² Craig Willse & Dean Spade, *Marriage Will Never Set Us Free*, CONVERGENCE MAG. (Sept. 6, 2013), <https://convergencemag.com/articles/marriage-will-never-set-us-free>; Hugh Ryan, *We Didn't Queer the Institution of Marriage. It Straightened Us*, GUARDIAN (June 29, 2014), <http://www.theguardian.com/commentisfree/2014/jun/29/same-sex-marriage-straightened>; Barnard Center for Research on Women, *Marriage Will Never Set Us Free*, YOUTUBE (Sept. 29, 2016), <https://youtu.be/rZjb5zynk4>.

reactionary agendas.¹⁷³ This ideological disarray signals the erosion of traditional political boundaries and the emergence of new, shifting hegemonic formations.

Gramsci argues that when the crisis reaches this point, two distinct options could guide its course. One is for antagonistic forces to develop, organize, and impose themselves.¹⁷⁴ Organization is “the most important weapon an antagonistic force may deploy when the equilibrium is constantly oscillating.”¹⁷⁵ However, when the counter-hegemonic forces are incapable of organizing, “the crisis is transformed from an opportunity to a situation of great danger for the subaltern classes.”¹⁷⁶

This great peril comes from the immunization of the hegemonic power against the counter-hegemonic forces in light of the absence of an alternative or, as Dario Gentili describes it, a new life.¹⁷⁷ That is why antagonistic forces cannot rely on a spontaneous breakdown of the current system and remain inconspicuous until the crisis resolves itself. Perhaps, the most significant lesson from Gramsci’s hegemony theory and crisis lens is “that an old order cannot be made to vanish simply by pointing out its evils, any more than a new order can be brought into existence by pointing out its virtues.”¹⁷⁸

Albeit the morbid symptoms that appear during this crisis stem “from their identification as outgrowths of the ‘dying’ order,”¹⁷⁹ we cannot take the morbid symptoms as a signal that the system is changing and that, eventually, a new order will be established. The morbid symptoms merely “show that the existing order suffers from existential problems that are unlikely to be solved within the limits of the old framework” and that “a new, hegemonically stable order does not seem to be on the rise, ready to supplant the old one.”¹⁸⁰ The morbid symptoms are contradictions that reflect the underlying cultural and political contradictions that have arisen as a byproduct of the contestation process.

Pro-SSOGIE equality actors should consider this inflection point a great accomplishment and a crucial point in their counter-hegemonic efforts. The

¹⁷³ Michael C. Bender & Brian Spegele, *Meet MAGA’s Favorite Communist*, WALL ST. J. (Apr. 26, 2024), <https://www.wsj.com/politics/meet-magas-favorite-communist-5a1132ad> (discussing how Christopher Rufo, a prominent conservative activist who aims to reshape United States institutions in favor of conservative values and who positions himself as a foundational thinker for the New Right, draws ideological inspiration from Italian Communist thinker Antonio Gramsci).

¹⁷⁴ Filippini, *supra* note 20, at 100.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 102.

¹⁷⁷ Dario Gentili, *CRISI COME ARTE DI GOVERNO*, 69 (2018).

¹⁷⁸ Bates, *supra* note 15, at 365.

¹⁷⁹ Babic, *supra* note 12, at 773.

¹⁸⁰ *Id.*

organic crisis would not be in existence but for all the efforts executed in both the consent and the physical axis that successfully challenged patriarchy, heteronormativity, and gender binarism. Yet, as the resistance from groups opposing SSOGIE demonstrates, these hegemonic discourses are far from dying. But even if this crisis does not mean that inequality will disappear on its own, it is not destined to remain either. Thus, this crisis should not be looked at with defeatism. It is an opportunity to move the needle even further in favor of equality. Perhaps it is the most critical point in time to do so.

For that reason, as Gramsci posits, it is crucial to think very thoroughly about organizing. As discussed, recent litigation shows us that the lack of organization can mean the tip moves to the inequality side, not only because, in the cases discussed, the Court has curtailed rights but because litigants defending SSOGIE equality have started to retreat from litigation to avoid adverse precedent, producing equally prejudicial outcomes.

Traditional intellectuals have not overlooked the need to organize. Their work brings hope that we are still in an era of opportunity. Some, such as Marie-Amélie George, have discussed some of the tensions that can come as movements have to deal with becoming more inclusive and reorganized. George discusses the implications of expanding LGBT to LGBTQ+. ¹⁸¹ She argues that including new identities while promoting greater recognition and equality creates tensions regarding representation, resource allocation, and legal strategies within the movement. ¹⁸² She further highlights how courts and legislatures have responded to these changes, sometimes reinforcing traditional understandings of identity while at other times embracing a more fluid and inclusive approach. ¹⁸³ The importance of unpacking these tensions in this organic crisis was discussed in reference to the morbid symptoms in the hegemony axis. Anti-SSOGIE equality actors can use these tensions to create fissures and to erase work and members from these communities.

Similarly, Bella Mancini Pori and Edward Stein have highlighted the importance of rethinking past litigation strategies that respond to the concern that exposure to queer people or ideas will make children queer by arguing that sexual orientations are innate or immutable as they buy into the worldview that being queer or having a queer child is a failure. ¹⁸⁴ They instead wish to avoid the regression in rights to which liberal Justices have contributed by embracing the worldviews put by anti-SSOGIE equality

¹⁸¹ Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243 (2021).

¹⁸² *Id.* at 314. Aníbal Rosario Lebrón, *When Saying Gay Is No Longer Sufficient: Response to Marie-Amélie George's Expanding LGBT*, 73 FLA. L. REV. F. 21, 22 (2023).

¹⁸³ See George, *supra* note 181, at 301-15.

¹⁸⁴ Bella Mancini Pori & Edward Stein, *Multi-Generation Queer Families: Foregrounding the LGBTQ Children of LGBTQ People*, 26 GEO. J. GENDER & L. 57, 61-66 (2025).

actors about the nascent minority.¹⁸⁵ For that reason, they advocate for activists to challenge the idea “that parents should strive for normalcy in the form of straight children.”¹⁸⁶ In this way, they support moving away from the past strategy of marriage equality of arguing the equivalence between same-sex families and traditional families. Beyond rethinking the litigation strategies, Pori and Stein are promoting the creation of new worldviews and explicitly rejecting the ones created by anti-SSOGIE equality actors.

Other scholars, such as Katie Eyer, have argued that the language and tools of the anti-SSOGIE equality actors should be re-appropriated. For example, in Eyer’s essay entitled *Textualism and Progressive Social Movements*, she examines the strategic potential of textualism for progressive legal advocacy.¹⁸⁷ Eyer argues that, despite its association with conservative legal thought, textualism can be a powerful tool for progressive movements and that by focusing on the text itself, progressive lawyers can craft arguments that appeal ideologically to judges who oppose SSOIE equality as well as those who support it, especially as textualism has become a well-established and widely accepted theory of adjudication.¹⁸⁸

Eyer’s proposal is one of the many strategies that can be deployed by adopting some of the approaches that anti-SSOGIE equality actors have successfully employed in attempting to retain power. Others may include amplifying constitutional protections through legislative action. For example, states that still legislate in favor of reproductive and LGBTQ+ rights should enact RFRA-like statutes that will expand the circumstances where reproductive rights, equal protection, due process, or other civil rights will operate in favor of marginalized groups, perhaps by requiring stricter scrutiny tests than currently required by the Supreme Court. New York has recently passed an amendment to its constitution to achieve something similar. The people of New York voted to amend section 11 of article 1 of the state Constitution, the equal protection clause, to constitutionally recognize as suspect classes “ethnicity, national origin, age, disability, . . . or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes.”¹⁸⁹

I have also suggested that another approach can be taken: adopting new legal frameworks that subvert the weaponization of civil rights, which has

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 85.

¹⁸⁷ Katie Eyer, *Textualism and Progressive Social Movements*, 90 U CHI. L. REV. ONLINE (2024), <https://lawreview.uchicago.edu/online-archive/textualism-and-progressive-social-movements>.

¹⁸⁸ *Id.*

¹⁸⁹ Grace Ashford, *New Yorkers Pass an Equal Rights Amendment Tied to Abortion Access*, N.Y. TIMES (Nov. 5, 2024), <https://www.nytimes.com/2024/11/05/nyregion/new-york-proposition-1-abortion.html>.

gained so much traction under the current Supreme Court.¹⁹⁰ For instance, states can adopt the horizontal effect doctrine and make civil rights (and even constitutionalize some rights that have not yet found a place in their constitutions) actionable between private parties.¹⁹¹ This would force courts in discrimination cases or other similar cases in which anti-SSOGIE equality actors encroach on the rights of women or LGBTQ+ folks to balance the rights of both instead of conducting the rights versus state interests analysis traditional in United States constitutional law.¹⁹²

Other scholars have also advocated adopting new interpretative tools for analyzing LGBTQ+ rights. For example, Nick Wolfram has suggested applying the *evolving standards of decency* test to protect LGBTQ+ folks,¹⁹³ while Professor Luke Boso has proposed an *anti-subordination approach* in mediating competing claims of equality and liberty.¹⁹⁴ Others, like Professor Kyle Velte, have called for looking into the race context and recovering the race analogy in LGBTQ+ religious exemption cases.¹⁹⁵

Finally, other strategies might involve more direct use of the popular vote or the democratic process. For example, turning the tide regarding judges by packing the courts or using the legislative process or ballot initiatives more aggressively.

At any rate, all these strategies require a constant transformation of narratives socially. It would be impossible to reorganize movements, rethink litigation strategies, change worldviews, deploy new legal doctrines or repurpose old ones, or mobilize politically if there is no foregrounding on the values of building an egalitarian and diverse society and on the harms of patriarchy, heteronormativity, and gender binarism. For that, as Gramsci argued, the work of organic and traditional intellectuals is necessary. Thus, alongside the scholarly and legal work, cultural products that also keep transforming how society views sex, sexual orientation, and gender identity and expression must continue to be produced.¹⁹⁶

¹⁹⁰ Aníbal Rosario Lebrón, *Between the Pessimism of State Action and the Optimism of SSOGIE Equality*, 53 SW. L. REV. 303 (2025).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Nick Wolfram, *Rethinking the Fundamentals: Applying the Evolving Standards of Decency Test to the Court's Evaluation of Fundamental Rights*, 51 UC L. CONST. Q. 135 (2024).

¹⁹⁴ See generally Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341 (2021).

¹⁹⁵ Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67 (2020).

¹⁹⁶ See Scott Skinner-Thompson, Sylvia A. Law & Hugh Baran, *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126 (2016), <https://www.columbialawreview.org/content/marriage-abortion-and-coming-out/> (arguing that increasing public awareness and acceptance of abortion experiences, akin to the

IV. CONCLUSION

By mapping and untangling the comorbidities present in the current juncture of reproductive and LGBTQ+ rights, this article has demonstrated how the United States is currently undergoing an organic crisis in SSOGIE equality. Through Gramsci's lens of the *interregnum*, this moment can be understood not as a temporary or lasting setback but as a profound rupture in the political and cultural order where the old is dying, and the new has yet to be born. Whether this *interregnum* gives rise to renewed oppression or a more inclusive and egalitarian order depends on the ability of pro-SSOGIE equality actors to recognize the nature of this crisis and organize effectively in response. If counter-hegemonic forces fail to contest the reassertion of patriarchal, heteronormative, and gender binarism hegemonies, the progress achieved in recent decades may be rolled back, with devastating consequences for women and LGBTQ+ folks. However, if pro-SSOGIE equality actors understand and confront the comorbidities outlined in this article, this organic crisis would be another inflection point toward building a more egalitarian society.

coming out process for LGBTQ+ individuals, is crucial for halting the decline of reproductive rights).