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# DISCRIMINATION UNDER A DESCRIPTION

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# I. INTRODUCTION

## A. THE PROBLEM OF DESCRIPTION

Determining the merit of a discrimination claim can be complicated by threshold uncertainties about how the treatment at issue should be characterized. As is the case with human action generally, the act or policy giving rise to the victim's complaint will often be susceptible of multiple descriptions that are equally veridical, or literally accurate.[1] Difficulties can arise when the treatment at issue would constitute actionable discrimination when characterized in one of those ways but not the others. To use a common philosophical construction, we might say that claims about discrimination often operate "under a description" of the differential treatment at issue. That is, the same instance of conduct might constitute impermissible discrimination under one description but not another.

I will refer to this phenomenon as the "problem of discrimination under a description" or the "problem of description." The problem of description is potentially a serious source of instability for antidiscrimination law, particularly in contexts where the law has not settled on clear reasons for choosing among alternative contested descriptions of challenged conduct.

Consider, first, a simple example of multiple descriptions, albeit one that has a clear legal resolution. Suppose that an employer operates a business whose employees must work closely with clients. Many of those clients have expressed discomfort working with foreigners. To appease those clients, the employer adopts a practice of excluding non-natives from the employer's workforce. In this scenario, the employer's practice can be described in at least two ways. One way of describing the employer's practice is as "catering to customer preferences." A second is as "differentiating among job candidates on the basis of national origin." Each

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[1] For seminal discussions of this problem in the case of action generally speaking—commonly referred to in philosophy as the problem of intentionality of action "under a description"—see DONALD DAVIDSON, *Agency*, *in* ESSAYS ON ACTIONS AND EVENTS 43, 46–61 (1980); G.E.M. ANSCOMBE, INTENTION 37–47 (2d ed. 1963); *see also* G.E.M. Anscombe, *Under a Description*, 13 NOÛS 219 (1979).

description is veridical. Under the first description, the employer's practice is not inherently objectionable. Under the second description, the employer is obviously engaging in impermissible employment discrimination.[2]

Of course, anyone familiar with employment discrimination law will object that the first description cannot be taken seriously, because according to prevailing federal law, the truth of the second description is sufficient to make the employer's conduct unlawful under Title VII.[3] But it is important to see that this objection does not disprove that the first description is veridical—i.e., factually accurate. The employer's conduct is legally regarded as the impermissible consideration of national origin, though not because it would be literally untrue to describe it as catering to customer preferences. Rather, the law in this context, in order to effectuate a policy of eradicating the consideration of national origin in employment hiring, gives conclusive effect to the description of the employer's practice under which it is invalid. The same result would apply in contexts involving racial classifications. If an employer's differential treatment of employees can veridically be described as involving the use of a race-based classification, it will ordinarily be prima facie discriminatory, even if a race-neutral description of the employer's actions could also fit the facts. In these contexts, the law has developed a set of commitments that are more or less impervious to the problem of description.

In other areas of antidiscrimination law, however, the problem of description remains acute. This seems especially so in contexts that raise issues of discrimination because of sexual orientation, and more specifically, in situations where the ostensibly differential treatment at issue appears open to description both as differential treatment based on sex and, at the same time, as differential treatment based on sexual orientation. In these situations, the choice of description carries significant implications for the legal analysis of the claim at issue. Under prevailing law in many jurisdictions, sex discrimination is handled differently

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[2] *See* 42 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful for an employer to fail to hire any individual because of that individual's national origin).

[3] *See* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981) (noting that customer preferences cannot justify consideration of sex).

from sexual-orientation discrimination, since whether the latter form of discrimination should be legally prohibited remains contested.

### B. EXAMPLES OF THE PROBLEM IN CASES OF SEXUAL-ORIENTATION DISCRIMINATION

In *Prowel v. Wise Business Forms, Inc.*, a male employee filed an action under Title VII, claiming that his employer had taken adverse action against him because of his sex.[4] The employee's theory of liability rested on a *Price Waterhouse* claim[5] of impermissible gender stereotyping.[6] In essence, he argued that he was subjected to adverse action because of his self-described "effeminate" mannerisms—various habits and affectations that presumably would not have drawn any pejorative notice if he had been a woman rather than a man.[7] Responding to the employer's argument that the plaintiff was merely trying to smuggle a claim of sexual-orientation discrimination into the protective ambit of Title VII, which recognizes no such cause of action,[8] the Third Circuit panel concluded that the plaintiff's claim could go forward if the employer's treatment of him constituted sex stereotyping, but not if it constituted sexual-orientation discrimination.[9] The viability of the plaintiff's discrimination claim was thus made to depend upon how the employer's conduct could properly be described. If it constituted differential treatment because of failure to conform to masculine gender stereotypes, then the claim

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[4] 579 F.3d 285, 286 (3d Cir. 2009).

[5] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (recognizing a cause of action under Title VII for discrimination because of failure to conform to gender stereotype), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

[6] *Prowel*, 579 F.3d at 286–87.

[7] *See id.* at 287 (contrasting stereotypical male characteristics with those of claimant).

[8] *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (noting Title VII does not recognize homosexuals as a protected class); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (allowing the claimant to seek relief under Title VII for discrimination based on gender but not sexual orientation).

[9] *Prowel*, 579 F.3d at 292.

could go forward; but if it constituted differential treatment because of sexual orientation, then it could not.[10]

Similarly,[11] in *Perry v. Schwarzenegger*,[12] which involved a federal challenge to California's voter-enacted state constitutional bar on the recognition of same-sex marriage,[13] the district court wrestled with the question of the proper characterization of the differential treatment at issue. Proposition 8 can be regarded as discriminatory on the basis of sexual orientation, insofar as its main function and operative consequence is to deny the right of marriage to gay and lesbian couples.[14] At the same time, however, as the district court acknowledged, Proposition 8 could be regarded as a form of discrimination because of sex, insofar as it effectively makes the validity of an individual's marriage dependent on each individual's sex.[15] For example, Smith is permitted to marry a man if Smith is a woman, but not if Smith is a man.[16] Somewhat cryptically, the district court asserted that "[s]exual orientation discrimination is . . . a phenomenon distinct from, but related to, sex discrimination."[17] Then, in choosing a framework of analysis for the constitutional challenge at hand, the court concluded that the plaintiff's discrimination claim was "based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex."[18]

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[10] The court sought to resolve the dilemma by focusing on the employer's subjective intent. *See id.* at 290–92. As I explain later, however, the problem of description cannot be reduced to uncertainty about an actor's intent. *See infra* Part III.A.

[11] Or perhaps not so similarly. I explain later that the point of the court's inquiry in *Prowel* is in some ways fundamentally different from the issue in *Perry*.

[12] 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[13] *Id.* at 927.

[14] *Id.* at 996. On appeal, the Ninth Circuit Court of Appeals found it significant that Proposition 8 was not exactly a denial of the right, but in fact a *withdrawal* of a right that had previously been given legal recognition. *Brown*, 671 F.3d at 1076.

[15] *Schwarzenegger*, 704 F. Supp. 2d at 996.

[16] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) (arguing that actions taken against a man that would not be taken against a woman is discrimination on the basis of sex).

[17] *Schwarzenegger*, 704 F. Supp. 2d at 996.

[18] *Id.* In its affirmance of the district court's decision, the Ninth Circuit did not explicitly discuss this argument, choosing instead to dispose of the case on what it viewed as narrower grounds. *Brown*, 671 F.3d at 1064.

On the opposite side of the sex-discrimination argument, some have sought to describe restrictions on same-sex marriage as a universal, sex-neutral limitation on marrying a member of one's own sex. Under this sort of description, one might argue that a prohibition of same-sex marriage should not be regarded as differential treatment because of sex at all because such a prohibition *equally* forbids men and women from marrying within their own sex.[19] In the same vein, some might even argue that prohibitions against same-sex marriage do not constitute sexual-orientation discrimination because they make it equally impossible for *all* persons, regardless of their sexual orientation, to marry within their own sex.[20]

It seems, therefore, that the question whether same-sex marriage restrictions can be regarded as discriminatory depends on how such restrictions are described. If Proposition 8 is described as a "prohibition of gay and lesbian marriage," then it is obviously sexual-orientation discrimination. But if it is described as "a condition on who can enter into marriage with a man (i.e., only women)" or "a condition on who can enter into marriage with a woman (i.e., only men)," then it takes on the character of sex discrimination, insofar as the limitation formally depends on a sex-based classification. And yet, if Proposition 8 can be described as a universal prohibition on marriage within one's own sex, then it seems that it does not amount to sex discrimination or perhaps even discrimination at all.

*Prowel* and *Perry* are cases in which the viability of a discrimination claim seemingly depended on how the differential

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[19] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 435–36 (Cal. 2008) (discussing standards used by California courts in evaluating equal protection challenges); Baehr v. Lewin, 852 P.2d 44, 71 (Haw. 1993) (Heen, J., dissenting) (stating that the statute at issue treats everyone equally); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986) (en banc) (noting that the statute at issue applies equally to men and women, therefore prohibiting an equal protection challenge on that basis); Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 19 (1994) (arguing that there is no sex discrimination where men and women are treated exactly the same).

[20] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 517 (Conn. 2008) (Zarella, J., dissenting) (rejecting the assumption that the state's marriage laws barring same-sex marriage "classify persons on the basis of sexual orientation" because "nothing in those laws expressly does so").

treatment at issue was described. In *Prowel*, the success of the plaintiff's Title VII claim depended on whether his treatment could accurately be characterized as sex discrimination, rather than sexual-orientation discrimination.[21] In the district court's decision in *Perry*, the description of Proposition 8 as sex discrimination or sexual-orientation discrimination affected the operative standard of constitutional scrutiny.[22]

Both cases are examples of the sensitivity of antidiscrimination analysis to a contestable choice of characterization. They show how the problem of discrimination under a description gives rise to a vexing question for antidiscrimination law: if there are two or more veridical ways of describing a particular instance of ostensibly differential treatment, what, if anything, justifies the choice of one description over another? The question's importance is obvious. If a descriptive choice cannot be justified, then neither can any substantive conclusion or determinative analysis that depends on that choice.

### C. OBJECTIVES

In this Article, I explore the problem of description in cases of differential treatment that simultaneously implicates the classifications of sex and sexual orientation. How should the law choose between a description of the conduct as sex discrimination or as sexual-orientation discrimination in contexts, such as *Prowel* and *Perry*, where both descriptions are factually true? For that matter, why must the law regard prohibitions of same-sex marriage as discriminatory at all, when such prohibitions can be described as universally imposed legal disabilities that prevent all individuals from marrying within their own sex?

I discuss some of the existing literature and case law touching on these issues,[23] with particular attention to the arguments of Andrew Koppelman,[24] the responses to those arguments that have

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[21] Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 289 (3d Cir. 2009).

[22] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996–97 (N.D. Cal. 2010). As it turns out, the issue is mooted by the court's conclusion that Proposition 8 could not survive even the weakest possible form of constitutional scrutiny—rational basis review. *Id.* at 997.

[23] *See infra* Parts II.A–B.

[24] *See infra* Parts II.A.*1*.

been offered by Martha Nussbaum and Edward Stein,[25] and the judicial decisions (focusing on the context of same-sex marriage litigation) on both sides of the debate.[26] I provide some suggestions for understanding what is truly at stake in disagreements about how disputed conduct should be described, and I attempt to expose the fallacy of arguments for and against the prohibition of same-sex marriage that presuppose the correctness of a particular description.[27] I show how our substantive normative commitments with regard to the inclusion (or exclusion) of gays and lesbians from our social institutions are what ultimately determine and justify the terms we use to describe the policies that specially affect them.[28]

## II. ALTERNATIVE DESCRIPTIONS OF THE PROHIBITION OF SAME-SEX MARRIAGE

In this section, I provide a detailed explanation of the disagreement over whether the differential treatment of gays and lesbians should be subject to description as sex discrimination, sexual-orientation discrimination, or a nondiscriminatory prohibition on marrying within one's own sex.

### A. SEX DISCRIMINATION OR SEXUAL-ORIENTATION DISCRIMINATION?

*1. The Formal Sex-Discrimination Argument.* The basic argument for regarding differential treatment against gays and lesbians as discrimination because of sex is succinctly articulated by Andrew Koppelman:

> As a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of

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[25] *See infra* Parts II.A.*2*.
[26] *See infra* Parts II.A–B.
[27] *See infra* Parts III.A–D.
[28] *See infra* Parts III.A–D.

> sex. . . . If a business fires Ricky . . . because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then . . . Ricky is being discriminated against because of his sex.[29]

This formal argument for the description of differential treatment based on sexual orientation as sex discrimination—let us call it the "formal sex-discrimination argument" or the "formal argument," for short[30]—follows logically from the standard definition of sex discrimination as adverse differential action toward an individual that is predicated on the individual's sex. Under this standard definition, if a person is subjected to adverse differential treatment and would not have been subjected to such treatment but for his or her sex, then the person may have a claim for sex discrimination.[31]

All actions directed at gays and lesbians are of this sort, insofar as classifying someone as gay or lesbian necessarily presupposes that person is of a particular sex, viz., the same sex as that of persons with whom he or she is disposed to enter into the relevant kind of relations.[32] Although Koppelman advances other less formal reasons in favor of supporting the claim that differential treatment against gays and lesbians constitutes sex discrimination,[33] the formal argument by itself is sufficient to

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[29] Koppelman, *supra* note 16, at 208; *see also* Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 397–406 (2001) (discussing this argument and its use in gay rights cases).

[30] Andrew Koppelman, who is perhaps the argument's strongest proponent, calls it the "analytic" argument. Koppelman, *supra* note 16, at 208. I borrow the "formal" label from Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 485–87 (2001).

[31] *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80–82 (1998) (recognizing a claim of same-sex sex discrimination under Title VII when members of one sex, but not the other, are exposed to disadvantageous treatment in employment).

[32] *See* Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 527 (2001) (arguing that laws explicitly discriminating against gays are predicated on determining an individual's sex and thus constitute sex discrimination).

[33] *See generally id.* (arguing, among other points, that antigay discrimination perpetuates

establish that differential treatment against gays and lesbians can be veridically described to fit the structure of sex discrimination.

The formal sex-discrimination argument has been more than an academic analytical exercise. A number of judges and one state legislature have invoked some version of it. For example, in *Baehr v. Lewin*, a plurality of the Supreme Court of Hawaii argued that a state statute "restrict[ing] the marital relation to a male and a female" constituted a denial of access to marriage "on the basis of sex" and therefore subjected the statute to the same constitutional scrutiny applicable to sex discrimination in that state.[34] In an opinion concurring in the Massachusetts Supreme Judicial Court's decision invalidating state restrictions against same-sex marriage, Justice Greaney posited that it was "self-evident" that denying the right of same-sex couples to marry would constitute sex discrimination, because under such a restriction, "an individual's choice of marital partner is constrained because of his or her own sex."[35] Additionally, Wisconsin's state employment discrimination statute explicitly provides that in the employment context discrimination because of sex includes "discriminat[ion] against an individual . . . [in various aspects of] employment because of the individual's sexual orientation."[36]

*2. Responses to the Formal Sex-Discrimination Argument.* Not everyone accepts the formal argument for the description of sexual-orientation discrimination as sex discrimination. Martha Nussbaum has argued that differential treatment of gays and lesbians should not be understood as sex discrimination.[37] She calls the formal argument "clever" but "legalistic in the pejorative sense" because "it doesn't quite get at what is really going on."[38] In

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substantive inequalities between men and women).

[34] 852 P.2d 44, 60, 64 (Haw. 1993).

[35] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring). The same argument is articulated in Justice Johnson's concurring opinion in *Baker v. State*, 744 A.2d 864, 904–06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

[36] WIS. STAT. ANN. § 111.36(1)(d)(1) (West 2012).

[37] MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 115–16 (2010).

[38] *Id.* at 115.

Nussbaum's view, adverse differential action directed at gays and lesbians, such as restrictions on same-sex marriage, should be understood for the central value judgment they express. Manifestly, such restrictions seek to "penalize[ ]" and stigmatize homosexuality.[39] For Nussbaum, the characterization of such differential treatment as sex discrimination misses the moral point. For that reason, she argues sexual orientation in favor of an unalloyed understanding of such treatment as discrimination.[40]

Edward Stein has also argued against conceiving of the differential treatment of gays and lesbians as sex discrimination.[41] Stein rejects the formal sex-discrimination argument for three reasons. First, the groups that are most significantly harmed or disadvantaged by laws that target individuals involved in same-sex relationships are groups defined by sexual orientation—gay men and lesbians—not groups defined by sex—women or men in general.[42] Second, these laws are "maintained by homophobia, not by sexism."[43] Finally, the formal sex-discrimination argument mischaracterizes the basic moral objection to laws that adversely target same-sex relationships.[44] The primary objection to such laws, Stein argues, is "that they make invidious distinctions on the basis of sexual orientation."[45] The sex-discrimination argument obscures that basic objection and, to that extent, " 'closets,' rather than confronts, homophobia."[46]

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[39] *Id.*; *see also* Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012) (arguing that a state's refusal to recognize same-sex marriage "send[s] a message that gays and lesbians are of lesser worth as a class").

[40] NUSSBAUM, *supra* note 37, at 115. The larger point of Nussbaum's book is to criticize legal and social attitudes toward homosexuality that are ultimately rooted in nonrational feelings of revulsion that some people harbor toward gay and lesbian relationships, which she calls "the politics of disgust." *Id.* at xiii. Nussbaum argues that the law should reject the politics of disgust in favor of the "politics of humanity," rooted in the ideals of equal respect and equal liberty. *Id.* at xv, 208. For a critique of the general argument of Nussbaum's book, see Mary Anne Case, *A Lot to Ask: Review Essay of Martha Nussbaum's* From Disgust to Humanity: Sexual Orientation and Constitutional Law, 19 COLUM. J. GENDER & L. 89 (2010) (expressing pessimism about the prospect that opponents of gay rights would accept Nussbaum's politics of humanity).

[41] Stein, *supra* note 30, at 496–505.

[42] *Id.* at 498–502.

[43] *Id.* at 502.

[44] *Id.* at 503–05.

[45] *Id.* at 503.

[46] *Id.* at 504.

*3. An Analysis of the Disagreement.* It is difficult to quarrel with the basic point that Nussbaum and Stein make.[47] They are surely right that any explanation of what makes restrictions on same-sex relationships morally objectionable must focus on reality: they are motivated by homophobic animus and a belief that the loving relationships to which gay and lesbian couples commit themselves are not worthy of the same moral and social esteem as the relationships of heterosexual couples.[48] A central reason that the differential treatment of individuals in same-sex relationships is wrong is that such attitudes and beliefs entail a morally indefensible failure of equal moral respect for such individuals.

But, of course, Koppelman himself has no interest in denying that the differential treatment of gays and lesbians is wrong because it embodies an attitude of unequal respect. Indeed, he agrees that Stein's view—that the sex-discrimination argument obscures the real moral objection to the differential treatment of gays and lesbians—"is a powerful claim."[49] Koppelman even goes so far as to observe that "[t]he sex discrimination argument relies on settled law that was established for the benefit of women, not of gays."[50] But this does not show that the sex-discrimination argument is invalid or unsound. It has the force it does precisely because the differential treatment of gays and lesbians fits the *form* of sex discrimination under settled law, not necessarily because it raises the same set of substantive considerations.[51] In a more recent article addressing some of Nussbaum's concerns, Koppelman explains that the sex-discrimination argument does not purport to be the whole story.[52] It simply "claims sex

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[47] For similar arguments, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997) (rejecting arguments that conflate sexual-orientation discrimination and sex discrimination); John Gardner, *On the Ground of Her Sex(uality)*, 18 OXFORD J. LEGAL STUD. 167, 183 (1998) ("[T]he real moral issue . . . is the wrongfulness of discriminating against women *as such* and homosexual and bisexual people *as such*.").

[48] *See* Perry v. Brown, 671 F.3d 1052, 1095 (9th Cir. 2012) (utilizing this rationale to strike down Proposition 8).

[49] Koppelman, *supra* note 32, at 532.

[50] *Id.* at 534.

[51] *See id.*

[52] Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923, 947 (2010).

discrimination is one of the many wrongs present in antigay discrimination."[53]

Nussbaum and Stein are surely right in saying that the sex-discrimination argument does not completely capture the wrongness of the adverse differential treatment of gays and lesbians. But it does not follow that the sex-discrimination argument must be rejected. More to the point of the present inquiry, their critique does not solve the problem of description. We can agree that a law that denies Smith the right to marry a man if and only if Smith is a man is wrong because it expresses lesser moral respect for the relationship choices of gay men. This makes it no less true, however, that the law conditions Smith's right of access to the institution of marriage with a male partner on Smith's own sex. Thus, Nussbaum's and Stein's account of the moral wrong of restrictions on same-sex marriage does not disprove that those restrictions also fit the settled form of sex discrimination.

It might be suggested that we should solve the problem of description by exclusively adopting, for purposes of legal analysis, the description of the differential treatment in question that best captures the strongest moral objection to that conduct. Perhaps this is the solution implicit in the arguments of Nussbaum and Stein. According to this approach, the formal sex-discrimination argument would be rejected because that description fails to capture the strongest moral objections to adverse differential treatment of same-sex relationships.

This proposal is not without its own serious problems, however. Let us take the example of a state prohibition of same-sex marriage. The problem of description, to restate, is that it seems possible to characterize such a prohibition either as discrimination because of sexual orientation (as Nussbaum and Stein would argue) or as discrimination because of sex (as per the formal

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[53] *Id.* Koppelman analogizes Nussbaum's critique to the claim that Al Capone should not have been prosecuted as a tax evader because the charge of tax evasion did not capture the primary wrongness of the totality of Capone's conduct (including the St. Valentine's Day Massacre). *Id.* Koppelman agrees with Nussbaum that it would be strange to reduce the wrongness of Capone's actions to tax evasion. *Id.* His point is that the lesser moral significance of the tax evasion charge does not make it descriptively false or legally inaccurate: "whatever else he was guilty of, he certainly was guilty of that." *Id.*

argument). Suppose we were to say that the prohibition of same-sex marriage should not be understood as sex discrimination—even though it relies on a sex-based classification[54]—because the strongest objections to such a prohibition do not really speak to the substantive wrongness of sex discrimination. That proposition may seem reasonable enough in isolation, but the difficulty is with the general principle that it implies. Are we prepared to accept, as a general principle of sex-discrimination law, that differential treatment involving the use of a sex-based classification constitutes sex discrimination only if the most important substantive moral objection to that treatment resonates with the traditional concerns of sex-based inequality? This is certainly not a principle that can be found in current sex-discrimination law. Indeed, just the opposite is true. With some notable *sui generis* exceptions,[55] an employer's use of a sex-based classification is sufficient to establish prima facie sex discrimination,[56] and the employer will be liable unless the employer can prove that sex constitutes a bona fide occupational qualification (BFOQ) (in the employment discrimination context)[57] or that the use of the classification is supported by sufficiently strong state interests (in the constitutional context).[58] So, as Koppelman points out, although the formal sex-discrimination argument might seem in some sense "legalistic,"[59] rejecting it would actually require

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[54] Koppelman, *supra* note 32, at 527.

[55] *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc) (holding that it does not necessarily constitute sex discrimination for an employer to implement different dress and grooming codes for male and female employees).

[56] *See, e.g.*, L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (holding that requiring women to pay more into a retirement fund is prima facie sex discrimination); Frank v. United Airlines, Inc., 216 F.3d 845, 853–54 (9th Cir. 2000) (holding that United Airlines' weight policy was facially discriminatory); Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d Cir. 1996) (stating that sex discrimination is shown "by establishing the existence of a facially discriminatory policy").

[57] *See* 42 U.S.C. § 2000e-2(e)(1) (2006) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . where . . . sex . . . is a bona fide occupational qualification.").

[58] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that Mississippi failed to provide "exceedingly persuasive justification" for its interest in denying males nursing school enrollment).

[59] NUSSBAUM, *supra* note 37, at 115.

carving out significant exceptions to settled doctrines of sex discrimination.[60]

The proposal to give operative legal effect only to the description that best captures the wrongness of the differential treatment in question may also create an unintended hindrance to certain kinds of claims that we want to recognize as sex discrimination. For example, in the employment discrimination context, this approach might create a problem for male plaintiffs who assert claims of gender-stereotype discrimination—victims of prejudice against "effeminate" males.[61] This is because negative attitudes toward effeminate men are surely tied, implicitly if not explicitly, to negative attitudes toward gay men. If this is true, could it not be said that what is *really* going on in cases of discrimination against effeminate men is discrimination because of perceived sexual orientation?[62] If so, then it would seem that, under the proposal that we should choose the legal description of differential treatment that best captures its substantive wrongness, we should have to say that differential treatment of effeminate men should be understood as sexual-orientation discrimination. That would represent a death knell for effeminacy discrimination claims, at least under current Title VII law.[63]

### B. THE NONDISCRIMINATION DESCRIPTION

The disagreement among Koppelman, Nussbaum, and Stein is about the best way to characterize the *objection* to restrictions on

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[60] Koppelman, *supra* note 32, at 534.

[61] *See, e.g.,* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 287 (3d Cir. 2009) (describing how plaintiff believed he was discriminated against because of his effeminate mannerisms); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) ("Vickers contends that in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role.").

[62] *Cf.* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001) (rejecting plaintiff's claim because it was based on sexual orientation rather than discrimination resulting from a failure to comply with gender stereotypes). This is essentially what the defendant in *Prowel* tried to argue. 579 F.3d at 292; *see also* Centola v. Potter, 183 F. Supp. 2d 403, 408–10 (D. Mass. 2002) (discussing the connection between sexual-orientation harassment and gender stereotyping).

[63] *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 218–19 (2d Cir. 2005) (discussing the line-blurring problems that occur when homosexuals file gender-stereotype discrimination claims).

same-sex marriage. This might make it seem that the problem of description in this context is primarily an issue of rhetorical strategy or packaging, since all three would argue that such restrictions are impermissible. The difficulty of the problem of description, however, is much more acute than that. For one thing, as already noted, whether conduct is described as sex or sexual-orientation discrimination has important legal implications, because the applicable prohibitions and standards of scrutiny depend on how the differential treatment in question is framed.[64] Thus, choosing how to characterize the objection is more than a merely academic issue.

What complicates the problem of description in this context even further is that there is yet another way of characterizing the restriction of same-sex marriage. According to this choice of framing, restrictions of same-sex marriage do not constitute discrimination of *any* kind, whether based on sex or sexual orientation.[65] According to this view, a ban on same-sex marriage merely imposes a blanket disability on marrying within one's own sex. This is not sex discrimination, the argument goes, because the disability applies to both sexes. Moreover, it is not even sexual-orientation discrimination, because the prohibition disempowers heterosexuals and homosexuals alike from marrying within their own sex.[66] Restrictions on same-sex marriage treat every individual identically with respect to the ability to marry within his or her own sex, so they do not involve differential treatment, at least on their face.[67]

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[64] *See supra* notes 21–22 and accompanying text.

[65] *See* Baehr v. Levin, 852 P.2d 44, 51 n.11 (Haw. 1993) ("[A] 'heterosexual' same-sex marriage is, in theory, not oxymoronic."); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting) (asserting that statutory restrictions on same-sex marriage "do not discriminate on the basis of sexual orientation"); *cf.* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 516 (Conn. 2008) (Zarella, J., dissenting) ("[T]hose [marriage] laws do not classify on the basis of sexual orientation and . . . persons who wish to enter into a same-sex marriage are not similarly situated to persons who wish to enter into a traditional marriage.").

[66] *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting).

[67] One might argue that such restrictions would still require the use of a sex-based classification, insofar as the sex of the parties to a marriage application would have to be determined before the application could be approved. Koppelman, *supra* note 32, at 527.

I grant that there is an almost irresistible temptation to dismiss this nondiscrimination description as utterly implausible, given the nature of the views that tend to motivate restrictions of this kind, their expressive content,[68] and the obvious fact that prohibitions on same-sex marriage only have a practical restrictive impact on gays and lesbians.[69] So, while we may be disinclined to take seriously the characterization of these prohibitions as a universally imposed disability that prevents everyone from marrying within their own sex, it is not clear how we can prove that this characterization is false.[70]

## III. A DIFFERENTIAL DIAGNOSIS OF DISAGREEMENTS ABOUT DESCRIPTIVE FRAMING

Which of the foregoing alternatives for describing and characterizing restrictions on same-sex marriage is the correct one? How can we even say that one description is more correct than any other? It seems we are in a quandary. In this section, I show that the question of "correctness" miscasts the real issue and suggest some ways to work our way out of the various puzzles embedded in the problem of description. I suggest that disagreements about the proper description of prohibitions of same-sex marriage can be separated into various, more-or-less distinct categories. I attempt to uncover the hidden assumptions and fallacies that cloud our understanding of what is really at stake in each of these types of disagreement.

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But we could at least imagine an application procedure that only asked of each applicant whether he or she was the opposite sex of his or her intended spouse, without actually asking about that individual's sex. I am uncertain whether Koppelman would regard this sort of procedure as depending on a sex-based classification.

[68] *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1079–81 (9th Cir. 2012) (noting that state marriage restrictions raised the inference of animosity towards the gay community).

[69] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 n.24 (Conn. 2008) ("[T]he marriage statutes . . . operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation.").

[70] For a nuanced and careful discussion of the nondiscrimination description of restrictions on same-sex marriage, see Leslie Green, *Sex-Neutral Marriage*, 64 CURRENT LEGAL PROBS. 1 (2011).

A. THE RED HERRING OF INTENT

First, I think we can avoid some pitfalls and make it a little easier to navigate our way to the real problem if we can disentangle the conceptual problem of discrimination under a description from the empirical problem of determining the intention or motivation that lies behind an allegedly discriminatory action.

The problem of discrimination under a description stems from the difficulty of choosing among competing, equally veridical characterizations of an action for purposes of determining whether it is objectionably discriminatory. At its heart, this problem is both a conceptual one about the meaning of discrimination and a normative one about how broad we want our legal prohibitions of discrimination to be. In contrast, determining an actor's motive for engaging in discriminatory conduct is generally an epistemic or evidentiary problem. It is about discovering a certain set of knowable facts in the world pertaining to the reasons, desires, purposes, beliefs, and knowledge (collectively, the motives) on which the actor based his conduct.

The conceptual problem of description cannot simply be reduced to the epistemic problem of discovering motives or intentions. Of course, under current principles of federal equal protection law and the framework governing disparate treatment claims under Title VII, discrimination is defined to include a certain dimension of intentionality, so adjudicating a claim of discrimination will often require finding out what the actor's intention actually was.[71] But the problem of description, as laid out in Section II, cannot be resolved just by discovering more facts about an actor's subjective intentions or motives. The theoretical problem is not reducible to uncertainty about whether any particular action was done with the *intention* of discriminating on the basis of sex or sexual orientation or of imposing a universal disability. The problem is

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[71] *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

that *whatever* action was intended, that intended action still seems to remain subject to the alternative descriptions.

Recognizing this point can help us to see why the court's resolution in *Prowel*[72] seems somewhat unsatisfying. There, an employee asserted a Title VII claim for sex discrimination based on allegations that his employer had fired him because of traits and mannerisms that he himself described as effeminate.[73] The employer argued, and the district court held, that the plaintiff was really trying to assert a claim for sexual-orientation discrimination.[74] As the Third Circuit noted, effeminacy-based discrimination is arguably actionable under Title VII[75] (as a form of gender stereotyping that would be unlawful under *Price Waterhouse*[76]), but discrimination because of sexual orientation is not.[77] To decide which way the employer's conduct should be characterized, the court argued that it was necessary to determine the employer's motive for the plaintiff's discharge, which was ultimately a triable question of fact.[78] If the employer was motivated by the plaintiff's effeminate traits and mannerisms, then the discharge should be regarded as actionable gender-stereotyping discrimination, whereas if the employer was motivated by beliefs about the plaintiff's sexual orientation, then it should be regarded as nonactionable sexual-orientation discrimination.[79]

The *Prowel* court's approach was, in a way, perfectly sensible for deciding the question it confronted. Discrimination in the form of disparate treatment under Title VII is defined in terms of an employer's intent,[80] so perhaps it should not be surprising that the court made the defendant's liability depend upon a finding of such intent.

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[72] Prowel v. Wise Bus. Forms, 579 F.3d 285 (3d Cir. 2009).
[73] *Id.* at 287.
[74] *Id.* at 289, 292.
[75] *Id.* at 292.
[76] *Id.* at 290 (discussing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).
[77] *Id.* at 292.
[78] *Id.*
[79] *Id.*
[80] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive [in disparate treatment] is critical.").

At the same time, the court's solution seems conceptually unsatisfying. I believe that this is because it provides no answer to the problem of description.[81] Suppose that the trier of fact were to conclude that the employer's termination of the plaintiff had in fact been motivated by a belief relating to his sexual orientation. We can assume that the termination would not be legally actionable under a description of sexual-orientation discrimination. But knowing that the termination was *intentional* under the description of sexual-orientation discrimination does not preclude its description in other terms. In other words, even if the employer's conduct was motivated by animus toward gay men, it would *nevertheless* be possible to characterize that conduct as gender stereotyping, insofar as animus toward gay men can surely be described as a form of bias relating to their failure to conform to traditional notions of acceptable male behavior. Indeed, although the court did not consider it (and probably did not have occasion to), the employer's conduct could *also* still be described as sex discrimination, per Koppelman's formal argument: the employer would not have fired Prowel for the particular conduct in which he engaged or for his choice of sexual partners if he had been a woman.

To put it another way, the *Prowel* court adopts a legal rule of decision reflecting an unwillingness to hold an employer liable under Title VII when its conduct is intended as sexual-orientation discrimination.[82] But this approach does not provide a general solution to our problem of discrimination under a description, because even if the content of an actor's intention can be described as sexual-orientation discrimination, that very intention may be subject to veridical redescription as sex discrimination or gender-stereotyping discrimination.[83] The problem of settling on a

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[81] I do not mean that the court should have tried to put the issue in these terms. I am here only using the court's analysis to illustrate my point that the discovery of facts about an actor's intention does not solve the problem of description.

[82] *See Prowel*, 579 F.3d at 292 (holding that Prowel had a claim only if he could show he was terminated as a result of his sex and not his sexual orientation).

[83] This will be the case if the particular features of the differential treatment that are sufficient to make it intentional under the description of sexual-orientation discrimination are also sufficient to make it intentional under the description of sex discrimination.

description of the actor's intention simply recapitulates the problem of discrimination under a description.

### B. COMPETING DESCRIPTIONS THAT "OVERDETERMINE" THE WRONGNESS OF THE CONDUCT

A simple but important observation that may aid our inquiry is that it is possible for an action to be wrong or legally objectionable for multiple reasons. In other words, the wrongness of conduct, such as the adverse differential treatment of individuals involved in same-sex relationships, may be overdetermined.[84] The wrongness of an action is overdetermined if there is more than one reason for concluding that the action is wrong and each of those reasons is independently sufficient to support that conclusion. But we might also think of an action's wrongness as being overdetermined; that is, if it could be regarded as wrong under more than one veridical description. Furthermore, if the action is wrong in virtue of being discriminatory, those multiple descriptions might overdetermine the action's wrongness *qua* objectionable discrimination. We might say that an action is overdetermined *qua* discrimination if there is more than one way of describing the differential treatment in question and the action would constitute objectionable discrimination under more than one of those descriptions.

Sometimes, a given instance of differential treatment may be overdetermined *qua* discrimination because the group that it disadvantages can be classified in multiple ways.[85] In such cases,

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[84] *Cf.* Koppelman, *supra* note 32, at 538 (stating of antigay laws that "[t]heir unconstitutionality is overdetermined").

[85] Overdetermination cases should not be confused with cases that raise "intersectionality" problems. In an intersectionality case, the challenged action is *not* manifestly discriminatory with respect to two (or more) classifications considered independently but could be regarded as discriminatory with respect to a group defined by the conjunction of multiple classifications. Suppose, for example, that an employer liberally hires Black men and White women but refuses to hire Black women. It might be problematic to characterize the employer's conduct as discrimination with respect to Blacks or as discrimination with respect to women. The employer's conduct becomes manifestly discriminatory only when we define the disadvantaged comparison class as Black women. This does not fit my definition of an overdetermination problem, because there is, arguably, only one description under which the employer's conduct would constitute objectionable discrimination. For the seminal article introducing the problem of intersectionality, see

the action will be susceptible to alternative descriptions corresponding to each of the objectionably discriminatory classifications that it implicates. The availability of these alternatives may give rise to disagreements about how the differential treatment in question should be described. But if the descriptive alternatives *overdetermine* the wrongness of the action as discrimination, it would be conceptual confusion to claim that any one of the alternatives was uniquely *correct* in capturing what makes the conduct discriminatory. In a case of overdetermination, each descriptive alternative picks out a sufficient reason for regarding the conduct as objectionable discrimination. In that kind of case, we might argue that one descriptive alternative should be given legal or moral *priority* over the other and therefore adopted *as if* it were uniquely correct based on extrinsic considerations (such as the expressive implications of our stated grounds of objection), but this would not necessarily show that the other possible description was unsound *ab initio*.

This observation may cast a helpful light on the disagreement among Nussbaum, Stein, and Koppelman as to the proper description of discriminatory restrictions on same-sex marriage. Each offers various arguments in support of characterizing such restrictions either as sexual-orientation discrimination or sex discrimination. Koppelman's argument for the latter description is that they depend on the use of a sex-based classification.[86] Nussbaum and Stein argue, just as convincingly, that the restrictions should be understood as sexual-orientation discrimination because they express unequal respect for gays and lesbians and confer subordinate status upon the committed relationships into which they enter.[87] But each of these arguments seems independently sufficient to justify concluding that

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Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. *See also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (discussing the "various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color").

[86] Koppelman, *supra* note 16, at 208.

[87] NUSSBAUM, *supra* note 37, at 115; Stein, *supra* note 30, at 503.

restrictions on same-sex marriage are objectionable in virtue of being discriminatory. If this is so, then what the arguments of Nussbaum, Stein, and Koppelman demonstrate is simply that the wrongness of same-sex marriage restrictions is overdetermined.[88]

Once we see their disagreement in this way, it becomes obvious that we would be misguided to try to argue for the unique correctness of characterizing same-sex marriage prohibitions as either sexual-orientation discrimination or sex discrimination. Each description corresponds to an independently sufficient basis for objecting to the treatment on grounds of discrimination. Accepting the truth of one description does not disprove the truth of the other. Thus, we can agree fully with Nussbaum and Stein that restrictions on same-sex marriage are impermissible because they constitute sexual-orientation discrimination without having to give up Koppelman's sex-discrimination argument.

In sum, in a context where alternative competing descriptions of a disputed act jointly overdetermine its impermissibility as discrimination, the right question to ask is not which description is "correct," but how and whether the normative objections underlying each description should be given effect in our legal conceptions of discrimination. Disagreements about which alternative description should be understood as disputes about the relative moral or legal priority of the substantive objections that attach to each alternative.

Koppelman's argument for regarding the prohibition of same-sex marriage as sex discrimination relies implicitly on a claim that the law's general proscription of formal sex-based classifications is sufficiently important that it should not be artificially suppressed just to give greater prominence to arguments that focus more directly on the equal status of gays and lesbians. Taking the sex-discrimination objection off the table in the context of the same-sex-marriage debate would amount to saddling the legal prohibition of formal sex discrimination with an implicit ad hoc exception that makes it inapplicable to differential treatment bearing on the equal status of gays and lesbians.[89] Such an

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[88] *See* Koppelman, *supra* note 32, at 538 (arguing for multiple lines of opposition to antigay laws).

[89] I am grateful to Andrew Koppelman for suggesting the use of the language of

approach would, in effect, assign a lower priority to legal principles barring formal sex discrimination than to the goal of achieving explicit legal recognition of the equal status of gays and lesbians. Nussbaum's and Stein's arguments for regarding same-sex marriage prohibitions exclusively as sexual-orientation discrimination implicitly endorse precisely that prioritization of principles. Their view assumes that we should indeed place a higher priority on achieving progressive principles that promote the law's explicit recognition of the equal rights of gays and lesbians than on the strict application of already-established legal principles that vindicate existing norms against the use of sex-based classifications.

### C. COMPETING DESCRIPTIONS THAT "UNDERDETERMINE" THE WRONGNESS OF THE CONDUCT

If alternative veridical descriptions can sometimes overdetermine the wrongness of an act as discrimination, they can also sometimes *under*determine its wrongness as well. Thus, just as some disagreements about the proper description of an ostensibly discriminatory act may simply reflect the act's overdetermined impermissibility, others may be diagnosed as a case of underdetermination.

Let us say that the impermissibility of an adverse differential action is *under*determined by the alternative veridical descriptions at issue where the action is arguably impermissible under one of the alternative descriptions but permissible under another. For example, if we are talking about the permissibility of conduct in the domain of Title VII, we might say that the alternative descriptions of the conduct as sex discrimination and as sexual-orientation discrimination may underdetermine the conduct's impermissibility, insofar as differential treatment is impermissible under the former description but is not actionably impermissible under the latter,[90] at least according to prevailing interpretations

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"exception" here and for pressing me to clarify my discussion below of what I call principles of priority.

[90] *See* Dawson v. Bumble & Bumble, 398 F.3d 211, 217–19 (2d Cir. 2005) (comparing the viability of sex discrimination and sexual-orientation discrimination claims under Title

of the statute.[91] In the face of such underdetermination, the impermissibility of a disputed conduct will depend, as a matter of law, on which description of the conduct is given operative effect.

When the permissibility of disputed conduct is underdetermined by the available veridical descriptions in this way, the choice of description becomes in some ways a direct surrogate for a normative judgment about the permissibility of the treatment at issue. Under Title VII, choosing to describe the adverse treatment of a gay or lesbian individual as a form of sex discrimination implies a normative judgment that the treatment should be regarded as legally impermissible. Choosing to describe that same treatment as sexual-orientation discrimination implies the opposite judgment.

This first point—that in a case of underdetermination the choice of description will be driven by associated normative predilections—is perhaps an obvious one. But there is a further insight that we should not overlook. Where the available veridical descriptions underdetermine an action's permissibility, each of the competing normative principles associated with the contested descriptions necessarily represents a valid norm. In other words, in an underdetermination context, there will be at least one principle that says that the disputed conduct, under one given description, constitutes impermissible discrimination, and another principle that says that the conduct, under another description, does not constitute impermissible discrimination. This is true by hypothesis, because if there are not at least two competing valid normative principles, then the multiple descriptions would not jointly underdetermine the action's permissibility in the first place. What I claim is that the choice of one description among alternatives in an underdetermination case is not only an implicit endorsement of one particular normative principle, it is also an implicit judgment that the normative principle behind that choice is more *important* than the valid normative principles that

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VII); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 260–65 (3d Cir. 2001) (discussing the accepted methods of proving sex discrimination).

[91] For an engaging scholarly argument that these prevailing interpretations are unjustified, see Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

underlie the alternatives. Thus, the choice of the disputed descriptive characterization entails a higher-order "metaprinciple" that says that the normative principles activated by that description have a higher priority than the competing principles that would be activated by the alternatives.

Let us return to a simple example to illustrate my meaning. Recall the employer discussed in the Introduction who discriminates on the basis of national origin in order to appease racist customers.[92] In that context, it is possible to describe the employer's conduct as "catering to customers" or as "discrimination because of national origin." Those descriptions underdetermine the impermissibility of the employer's conduct as discrimination: it is arguably permissible under the former description but impermissible under the latter. Here, our knowledge of the law may spoil any naïve uncertainty we could feel on these facts, so it may seem obvious that the employer's conduct should be legally analyzed as differential treatment because of national origin, even though the other description might also be factually accurate. But it is true nevertheless that each alternative description activates a generally valid norm. The description of differential treatment based on national origin would of course activate the basic prohibition against permitting national origin to be a factor in the distribution of employment opportunities. The description of catering to customers, if given effect, would activate general norms of market freedom or legal noninterference with business judgment. Here, the choice of description is not a close call: of course the employer's conduct should be analyzed under the description of national origin discrimination (as the law on point directs).[93] My point is that this choice of operative description is not based on any matter of fact, but instead depends upon a hidden, implicit normative principle that gives priority to the antidiscrimination norm over the market freedom norm in this particular context. While the employer's conduct could be described as catering to customer needs, which is generally

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[92] *See supra* Part I.A.

[93] *Cf.* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir. 1981) (holding that stereotyped customer preference does not justify a sexually discriminatory practice).

permissible, we analyze it as national origin discrimination because we consider it more important to give full, active expression to the relevant antidiscrimination norm. Thus, the market freedom norm is suppressed.

Similar observations apply in Title VII cases like *Prowel*,[94] where the legal permissibility of the employer's conduct depends on whether it is described as discrimination because of sexual orientation or because of sex. To simplify, suppose that an employer fires a male employee upon discovering that the employee is involved in a sexual relationship with another man, and the employee subsequently challenges the termination under Title VII, asserting a claim of sex discrimination. The problem of description is that the termination can veridically be described as either a form of sex discrimination (firing an employee for having a sexual relationship with a man only if the employee is also a man) or as sexual-orientation discrimination (firing the employee because he is gay), and these alternative descriptions underdetermine whether the treatment constitutes impermissible discrimination under Title VII.[95] If the termination was sex discrimination, the employee wins; if it was sexual-orientation discrimination, the employee loses.

What could justify a choice between these descriptions? What would justify, say, characterizing the treatment exclusively as sexual-orientation discrimination and rejecting its characterization as sex discrimination? The first (more obvious) point is that the choice to characterize the conduct as sexual-orientation discrimination would be in effect a choice to activate the legal principle that says that such conduct is outside the scope of Title VII and hence does not constitute actionable discrimination. The descriptive choice is a surrogate for the normative principle, and so the justifiability of that descriptive choice depends on the justifiability of that underlying principle.

Now here is the further point that I said we should not overlook. The choice to characterize the employer's conduct exclusively as sexual-orientation discrimination is not only a surrogate for the underlying conclusion that such conduct is not

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[94] *See supra* Part I.B.

[95] *See supra* Part III.C.

prohibited by Title VII. It is also a tacit claim that the prohibition against sex discrimination should not be given operative effect—i.e., it should be *suppressed*—with respect to this sort of conduct, and even more to the point, that it should be suppressed for the sake of giving effect to a different norm that says that sexual-orientation discrimination is outside the scope of Title VII's prohibitions. Since, by hypothesis, the description of the conduct as sex discrimination cannot be ruled out as a purely factual matter, this tacit suppression of the sex discrimination prohibition must depend on a hidden normative judgment that adjudicates between these norms. The choice to analyze the employer's conduct as sexual-orientation discrimination implicitly relies on a principle that gives precedence to the value of excluding gays and lesbians from the protective scope of Title VII over the value of the consistent application of existing prohibitions against formal sex-dependent classifications. The principle says, in effect, that although the employer's conduct could be described as formal sex discrimination—which is generally impermissible—we must make an exception to this general norm of impermissibility and analyze that conduct exclusively as sexual-orientation discrimination for the sake of giving active expression to the policy of excluding sexual orientation from the classifications proscribed by Title VII. The hidden normative judgment underlying this principle is that the latter policy is more important in this context than the prohibition of formal sex discrimination.

To be clear, I do not claim that this particular normative principle of priority can or should be defended. My point is that this sort of principle is necessarily implied by the claim that the employer's conduct in our hypothetical case should be described exclusively as sexual-orientation discrimination, and not as sex discrimination. The claim that the employer's conduct should be analyzed under the description of sex discrimination would imply an analogous normative principle of priority under which the prohibition of using sex-based classifications would be ranked as more important than the policy of preventing Title VII from reaching decisions based on consideration of sexual orientation as such. Either way, the choice of description for purposes of analysis

can be justified only to the same extent as the principle of priority that the choice implies.

All of these observations in the context of Title VII also apply to the problem of description as it arises in the context of moral and constitutional debates about the proper analysis of the prohibition of same-sex marriage. In a legal framework where the equally veridical descriptions of sex discrimination and sexual-orientation discrimination underdetermine the permissibility of restrictions on same-sex marriage,[96] our choice of description implies a principle for deciding what priority should be assigned to whatever reasons we might recognize for the exclusion of same-sex couples from the institution of marriage relative to the reasons for prohibiting the use of classifications that formally depend on sex.

In a jurisdiction where sexual-orientation discrimination as such is not impermissible, the claim that the prohibition of same-sex marriage should be regarded as differential treatment based on sexual orientation, not sex, implies that the reasons for allowing gays and lesbians to be legally excluded from the institution of marriage are more important than the reasons for prohibiting the use of sex-based classifications in general. In effect, the view that the prohibition of same-sex marriage should be analyzed under the description of sexual-orientation discrimination even though it could also be described as sex discrimination implies a higher-order principle that suppresses, or recognizes an exception to, the prohibition of sex-based classifications where the use of such a classification is necessary to exclude same-sex couples from the institution of marriage. In contrast, in a context of legal underdetermination, the view that same-sex marriage should be regarded as impermissible sex discrimination would imply that the prohibition of the use of sex-based classifications is sufficiently important that an exception should not be allowed, even if necessary to exclude same-sex couples from that institution.

To summarize, my general claim is that where multiple descriptions of a disputed act underdetermine its impermissibility

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[96] Recall that the permissibility of restrictions on same-sex marriage is underdetermined, in my sense, if such a restriction is permissible under the description of sexual-orientation discrimination but impermissible under the description of sex discrimination.

as discrimination, the choice of description is not just a surrogate judgment about the act's permissibility *vel non*. It is also an implied judgment about the relative priority of competing norms. In a context of underdetermination, a claim that the disputed conduct should be analyzed only under one particular description implies the justifiability of a principle of priority that suppresses the otherwise valid norms that would be activated by the alternative descriptions, for the sake of giving active expression in the relevant context to the norms associated with the favored description. The implied principle of priority effectively creates an exception to the suppressed norms for conduct under the favored description. Ultimately, the justification of the choice of description in a case of underdetermination depends on the plausibility of that implied principle. The choice to give operative effect to one among multiple veridical descriptions of an action can be justified only to the same extent as the normative principle of priority that the choice implies.

### D. TAKING THE NONDISCRIMINATION DESCRIPTION SERIOUSLY

My arguments above suggest that disagreements about the characterization of conduct as sex discrimination or as sexual-orientation discrimination are surface manifestations of deeper substantive disputes about the relative priority of our attitudes with regard to those forms of differential treatment.

In the context of the same-sex marriage controversy, there remains at least one more way of describing restrictions on same-sex marriage: an alternative that denies that such restrictions involve discrimination of any kind. According to this descriptive alternative, the prohibition of same-sex marriage imposes a universal disability on entering into marriage with a member of one's own sex. The disability is universal insofar as it formally applies to men, women, gays, lesbians, and heterosexuals. Thus, one might argue that the prohibition of same-sex marriage can be regarded as a nondiscriminatory, categorical refusal to give any individual the power to enter into a same-sex marriage.[97] In this

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[97] *See supra* Part II.B. *See* Green, *supra* note 70, at 2–6 (distinguishing between

final section, I attempt to deconstruct this "nondiscriminatory" descriptive gambit.

The insistence that restrictions on same-sex marriage are nondiscriminatory, no less than claims for regarding such restrictions as sex discrimination or sexual-orientation discrimination, is driven by an underlying polemic. The point of the nondiscrimination description is, of course, to remove the debate from the context of discrimination altogether and to frame the prohibition of same-sex marriage as nothing more (and nothing less) than the uniform denial of a narrow right—viz., the right of marriage to a same-sex partner.[98] Depending on the law of the governing jurisdiction, such a right might not be thought to fall within the scope of existing constitutional protections.

Those who support same-sex marriage are likely to feel an immediate inclination to refuse to take the nondiscrimination gambit seriously.[99] As the Connecticut Supreme Court put it, to describe a prohibition on same-sex marriage as a nondiscriminatory bar on marrying within one's sex "would be to blink at reality,"[100] because such a description so obviously ignores the purposes, underlying motivations, and practical and expressive meanings of restrictions on same-sex marriage. Furthermore, the nondiscrimination argument as applied to same-sex marriage seems structurally quite similar to the disreputable argument (rejected in *Loving v. Virginia*)[101] that state antimiscegenation laws were not discriminatory because they equally barred everyone from marrying outside their own race.[102]

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homosexual and same-sex marriages).

[98] The strategy is in some ways reciprocal to the alternative argument advanced in *Lawrence v. Texas* by lawyers for the defendant and some *amici* that the criminal sodomy statute at issue in the case, which was being challenged on the primary ground that it violated noncomparative privacy rights, could also be regarded as invalid under the Equal Protection Clause. Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).

[99] *See In re* Marriage Cases, 183 P.3d 384, 440–41 (Cal. 2008) (rejecting the nondiscrimination argument as "sophistic").

[100] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 n.24 (Conn. 2008).

[101] 388 U.S. 1, 7–8 (1967).

[102] *See* Koppelman, *supra* note 32, at 521–23 (discussing the Supreme Court's treatment of the argument that antimiscegenation laws treat affected races equally); *see generally* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) (examining why both miscegenation laws and sodomy laws violate the Equal Protection Clause).

As a conceptual matter, however, it does not seem altogether obvious that the nondiscrimination description is nonveridical. Whatever else a prohibition of same-sex marriage might be, it does constitute a formally universal disability on entering into marriage with a member of one's own sex. So the problem of description rears its head again. Restrictions on same-sex marriage may be objectionably discriminatory under the description of differential treatment of gays and lesbians (or of differential treatment because of sex), but the restrictions appear to be nondiscriminatory under the description of denying the right to marry within one's sex. What, then, can be said in response to the nondiscrimination argument?

Perhaps the most readily available response is that the ostensibly nondiscriminatory prohibition of same-sex marriage has a decidedly disparate impact on gays and lesbians, since heterosexuals do not usually enter into such relationships.[103] This response, however, may be unsatisfying for at least a couple of reasons. First, there are certain strategic costs in relying on this response as discrimination arguments based solely on the disparate impact of a neutral law have not met with success in constitutional litigation.[104] Second, and relatedly, some may feel a sense that this response concedes too much and understates the objection to legal prohibitions of same-sex marriage. Proponents of same-sex marriage argue not that such prohibitions are neutral restrictions with collateral discriminatory effects, but rather that they are discriminatory at their core, and that the law should not countenance their characterization as nondiscriminatory in the first place.

One possibility for a deeper, more satisfying response to the nondiscrimination argument can be arrived at by way of a slight detour into privacy rights jurisprudence. I have in mind the debates about the proper level of generality at which a right should be characterized for purposes of deciding whether it is

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[103] This is surely part of what the Connecticut Supreme Court meant in criticizing the nondiscrimination argument for "blink[ing] at reality." *Kerrigan*, 957 A.2d at 431 n.24.

[104] *See* Washington v. Davis, 426 U.S. 229, 246 (1976) (finding neutral test with disparate impact not discriminatory).

"fundamental" and therefore protected as a matter of substantive due process.[105] That whole controversy is relevant here because the claim that prohibitions of same-sex marriage are nondiscriminatory denials of a constitutionally noncognizable right to marry within one's own sex begs the question whether the right at issue is being described at the appropriate level of generality. The strategy of the nondiscrimination gambit is to cast the prohibition of same-sex marriage as a nondiscriminatory infringement of a nonfundamental right that does not enjoy traditional constitutional protection. But if that is the argument, then of course everything turns on how we choose to characterize the right at stake. If it is claimed that no fundamental right of same-sex marriage can be located within our relevant constitutional traditions, one can reply that this characterization of the right at stake is artificially narrow. While there may be no specific tradition of requiring the government to recognize relationships composed of two individuals of the same sex as marriage, one might argue that the more general right to enter into marriage with the committed partner of one's choice without state interference has long been a fixed landmark of our constitutional terrain.[106]

This debate about how to frame the putative right at issue in the prohibition of same-sex marriage is, at bottom, a version of the problem of description, albeit in the context of defining noncomparative rights. Laurence Tribe and Michael Dorf have written extensively about this issue under the rubric of determining the proper "level of generality" at which to frame a disputed right.[107] They argue that there is really no value-neutral

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[105] *See, e.g.,* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (discussing the proper characterization of the right at issue and rejecting its narrow characterization as a "right to engage in consensual sodomy"); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (arguing that the proper level of generality for characterizing a disputed constitutional right should be set at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

[106] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[107] *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73–117 (1991).

way to decide the level-of-generality question.[108] In matters surrounded by deep social controversy, the description of the right in question ultimately requires nothing less than deciding what kind of society we are, and what reasons we can have—consistent with our constitutional commitments—for refusing to protect or respect certain kinds of conduct or statuses. The key insight is that our shared values ultimately determine the appropriate level of generality at which we should articulate the rights we have, and not the other way around.[109] In an important way, these observations converge on the arguments I offered earlier in my discussion of competing descriptions that over- or underdetermine the impermissibility of ostensibly discriminatory conduct.

Remember that the possibility of describing the prohibition of same-sex marriage as a nondiscriminatory denial of a nonfundamental right does not *disprove* that it nevertheless excludes gays and lesbians from the institution of marriage. By the same token, the argument in favor of regarding the prohibition of same-sex marriage as objectionably discriminatory does not disprove, nor require disproving, that it imposes a formally universal disability. Thus, the possibility of describing the prohibition of same-sex marriage as nondiscriminatory in some sense does not settle the normative question of how the law should understand it. In other words, the argument that the prohibition of same-sex marriage is permissible because it merely constitutes the imposition of a universal disability begs the critical question of why *that* description should be given operative effect, to the exclusion of others that emphasize the prohibition's plainly discriminatory aspects.

A mirror image of this criticism can be made, in my view, of the Ninth Circuit's reasoning in its decision affirming Judge Walker's opinion invalidating California's Proposition 8.[110] The Ninth Circuit argued that, under the California Supreme Court's interpretation of Proposition 8 (and also in light of the restriction's

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[108] TRIBE & DORF, *supra* note 107, at 97–104.

[109] *Id.* at 96.

[110] Perry v. Brown, 671 F.3d 1052, 1054 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (Walker, C.J.).

"actual effect"),[111] California's refusal to recognize same-sex marriage had to be characterized as the "*taking away* from [same-sex couples] alone the right to marry,"[112] a right that previously had been granted to them under state constitutional law.[113] That characterization of Proposition 8—as a discriminatory taking away of existing rights—is surely one that fits the facts. Even so, what makes the problem interesting is that it is not the only one. The court's choice of description does not conclusively defeat the nondiscrimination argument (although this was not really something that the court explicitly focused on, to be sure), because, even granted that Proposition 8 could be described as the discriminatory taking away of a right, one could still say that the elimination of the marriage rights of same-sex couples was nothing more than the effectuation of a universal individual disability on marrying another individual of the same sex. What is needed is an explanation of why the "discriminatory taking away" description should be *privileged* or given priority over the universal disability description.

What is needed for the argument to be complete, in other words, is not a conclusory *ipse dixit* in favor of one particular description of the law in question, but a normative justification that the substantive principles implicated by that description are the ones to which we have most reason to give active expression. The best response to the claim that the prohibition of same-sex marriage constitutes a universal disability, therefore, is not that it is false, but that we do not have sufficient reason to limit our understanding of the prohibition in this narrow way.[114] Under the nondiscriminatory description, the prohibition of same-sex marriage is understood as a universal bar on marrying within one's sex. But because the prohibition of same-sex marriage can

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[111] *Brown*, 671 F.3d at 1079.

[112] *Id.* at 1076; *see also id.* at 1079 (indicating that "voters were told to '*eliminate* the right of same-sex couples to marry' ").

[113] *Id.* at 1076.

[114] *Cf.* Lawrence v. Texas, 539 U.S. 558, 566–67 (2003) (arguing that framing the constitutionality of criminal sodomy statutes as " 'whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy' . . . discloses the Court's own failure [in *Bowers v. Hardwick*] to appreciate the extent of the liberty at stake" (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986))).

*also* be veridically described as a discriminatory exclusion of gays and lesbians from the institution of marriage, the question is whether our reasons for regarding the prohibition as the denial of a nonfundamental right are strong enough to overcome our reasons for regarding it as a discriminatory exclusion. Once again, the choice among the alternative descriptions calls for a normative principle governing the relative priority of the competing policies that are implicated, and our choice will be justified only insofar as that principle is.

In summary, the nondiscrimination gambit purports to transform the same-sex marriage debate into a question of noncomparative rights—whether there is a fundamental right to state recognition of marriages between individuals of the same sex.[115] But even if it were shown that no such right existed as a matter of historical description, the permissibility of prohibiting same-sex marriage would still depend—as a matter of normative social policy—on a question of our priorities. Are the reasons for allowing states to refuse to recognize such a right more important than the reasons against limiting the institution of marriage in a way that excludes gay and lesbian citizens or segregates their committed, loving relationships into a category connoting that they are less worthy of esteem?[116] Ultimately, this asks nothing more and nothing less than: What kind of a society are we? Do we see ourselves as having good reason to insist on traditional norms surrounding the institution of marriage, even knowing that this

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[115] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 525–26 (Conn. 2008) (Zarella, J., dissenting) (addressing whether "any two consenting, unrelated adults have a fundamental right to marry regardless of their respective sexes").

[116] These are precisely the questions that the Ninth Circuit takes up in its constitutional analysis. The court finds that there simply are no legitimate reasons for a state to refuse to recognize the committed relationships of gay and lesbian couples as "marriage" (while at the same time affording such couples all of the substantive privileges attendant thereto); and that Proposition 8, in the end, amounts to "nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class." *Brown*, 671 F.3d at 1093–94. This, the court says, is inconsistent with our basic constitutional commitment to equality. *Id.* Whether or not the court is right in its somewhat formalistic insistence that Proposition 8 must be characterized as a "taking away" of rights from same-sex couples alone, it is its substantive judgment about our reasons for including or excluding gays and lesbians from the institution of marriage that must do all of the normative work.

insistence will effectively alienate a significant number of our fellow citizens from one of our central social institutions? Or do we see ourselves as having good reason to move toward a more expansive understanding of our institutions, more in line with our strong commitment to inclusive ideals of social participation and the elimination of status-based unequal treatment? The way we answer these questions in the context of constitutional debate "expresses our deepest sense, as a society, of what freedom and equality are; of what it means to have fundamental rights; of what it means to have certain protected areas of both liberty and equality that are seen as inherent in the very idea of human dignity."[117] Resolving ourselves to answer these questions of value is the only way we are going to be able to decide on the legal descriptions we want to affix to the legal restriction of same-sex marriage. It cannot be the other way around.

## IV. CONCLUSION

The problem of discrimination under a description arises when an ostensibly discriminatory act or policy is susceptible of multiple descriptions that are equally veridical and the permissibility or legal significance of the disputed act seems to depend on which description is given legal effect. In such cases, legal analysis of the conduct in question can get tangled up in threshold disagreements about its proper characterization. The goal of this Article has been to provide an analytic understanding of what is at stake in these disagreements. I have emphasized, first, that in cases where the disputed conduct is subject to multiple veridical descriptions, there can be, by definition, no fact-of-the-matter as to which description is correct. Thus, arguments that attempt to derive a normative conclusion about the permissibility of the disputed conduct from a particular descriptive anchor will inevitably beg the question. The better approach is to identify the substantive normative principles that are implicated by the competing alternative descriptions, and then understand how they conflict. I have suggested that problems of description can be "diagnosed" in at least three ways.

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[117] NUSSBAUM, *supra* note 37, at 208.

In some cases, the alternative veridical descriptions of the disputed conduct "overdetermine" its impermissibility as discrimination. In others, the competing descriptions "underdetermine" its impermissibility as discrimination. And in still other contexts, the available descriptions may underdetermine whether the conduct should be regarded as involving differential treatment at all. Disagreements in each of these kinds of cases implicate conflicts of substantive normative principles. I have shown how the nature of the conflict may vary slightly across each of my diagnostic categories. Most importantly, though, I have argued that in all cases that raise the problem of discrimination under a description, the choice of description implies a higher-order principle that assigns priority among the competing valid norms and policies implicated by the alternatives. The justification of the choice of description can only be as strong as the justification of the principle of priority implied by that choice. The proper characterization of ostensibly discriminatory acts that seem open to multiple descriptions is therefore always a matter of our substantive normative priorities.