

ARTICLES

Now Something for the Glass Half-Empty Crowd: *Bostock v. Clayton County, Georgia* Explained

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I. INTRODUCTION	53
II. DEFINITION OF TERMS.....	55
III. THE DECISION IN BOSTOCK CREATED SOME LASTING PROBLEMS FOR EQUALITY JURISPRUDENCE	61
A. <i>Conflating and Confusing Gender Identity and Sexual Orientation</i>	62
B. <i>Undermining Efforts to Advance Understanding and Recognition of Gender Identity in All Its Complexity</i>	66
C. <i>Widening the Frame and Losing Focus</i>	72
D. <i>Balancing Civil Rights Protections for Communities</i>	76
E. <i>Reinforcing Gender Stereotypes</i>	81
IV. ALTERNATIVES.....	85
V. CONCLUSION	88

I. INTRODUCTION

The Supreme Court’s decision in *Bostock v. Clayton County*¹ has been celebrated across the country by civil rights advocates,² providing a good result for the discriminated-against litigants and probably many others who suffer from unequal treatment due to their status. But, the way the case was argued and its majority opinion will create new and lasting problems, mostly for transgender individuals.

The timing of the case, arriving at the Court with conservatives in the majority, was ominous. Additionally, the Court’s early decision to

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1. 140 S. Ct. 1731 (2020).

2. Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), <http://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html>.

combine the sexual orientation cases—*Zarda v. Altitude Express, Inc.*³ and *Bostock v. Clayton County Board of Commissioners* [hereinafter *Bostock I*]⁴—with the gender identity case *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,⁵ seemed to do neither a favor. The surprising result allowing sexual orientation and gender identity discrimination to be actionable under Title VII was welcomed by all interested in remedies for discrimination against persecuted sexual minorities.⁶

However, by consolidating the cases and writing a carefully limited opinion deciding them all in *Bostock*, the Court has missed an opportunity to settle the confusion among judges, policymakers, and the public about the differences between sexual orientation and gender identity. By adopting a narrow definition of the term “sex” in Title VII’s sex discrimination prohibition, it has also hampered efforts to advance understanding and recognition of gender identity in all its complexity.⁷ The circumspect reasoning fails to address some of the practical consequences of the decision, in particular how it will impact efforts to advance women’s equality.⁸ As a result, it presents new harms, running the risk of splintering equality movements and derailing civil rights protections for women.⁹ Ultimately, public policy should adopt a focused approach to protecting people from discrimination on the basis of gender identity and sexual orientation, or move towards adoption of gender neutrality. If accomplished, this could eliminate gender and sexual orientation categories and, after some time, discrimination on the basis of sex as well.

Part II of this Article will set out the definition of terms and explain how the Court interpreted the “because of sex” phrase in Title VII to cover employees fired in the consolidated cases for both sexual orientation and gender identity. Part III will address each of the concerning aspects of the Court’s decision in *Bostock* as a long-term solution to gender identity and sexual orientation discrimination. Finally, Part IV will provide alternatives

3. 883 F.3d 100 (2d Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. (2020).

4. 723 F. App’x. 964 (11th Cir. 2018), *rev’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. (2020) (per curiam).

5. 884 F.3d 560 (6th Cir. 2018), *aff’d* *Bostock v. Clayton Cnty.*, 140 S. Ct. at 1754.

6. *See* Liptak, *supra* note 2.

7. *See infra* Part II.

8. *See infra* Parts III.D and E.

9. *See infra* Part III.C.

to the less-than-fulsome protections provided by Title VII as interpreted in *Bostock*.

II. DEFINITION OF TERMS

In the lower courts, *R.G. & G.R. Harris Funeral Homes, Inc.* involved transgender discrimination and *Zarda* and *Bostock I*¹⁰ involved sexual orientation discrimination in the workplace. The lynchpin of all, when consolidated in *Bostock*, involved the word “sex.” Put most simply, they asked the courts to decide whether the word “sex” in Title VII’s prohibition against sex discrimination includes both sexual orientation and gender identity discrimination.¹¹ Title VII prohibits discrimination in employment on the basis of sex, making it:

An unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of . . . sex . . . ; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex¹²

However, in the “definitions” section of the statute, the term “sex” is not defined explicitly.¹³

10. These are the two cases involving sexual orientation discrimination and, when referred to together in this article, refer to the cases as argued together in oral arguments before the Court in *Bostock*.

11. In *Zarda*, the Second Circuit decided “whether Title VII prohibited sexual orientation discrimination” by examining the text’s phrasing “because of . . . sex.” Before holding that sexual orientation discrimination was, indeed, prohibited. 883 F.3d at 108, 110. In *Bostock I*, The Eleventh Circuit affirmed that “sexual orientation discrimination” was not a “supported . . . cause of action . . . under Title VII.” 723 F. App’x at 964-65 (per curiam). In *R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit considered whether Title VII prohibited “discrimination on the basis of sex stereotyp[ing]” and “on the basis of transgender and transitioning status.” 884 F.3d at 571, 574-75. In *Bostock*, Justice Gorsuch wrote: “[w]e must determine the ordinary public meaning of Title VII’s command that it is ‘unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin’ § 2000e-2(a)(1).” 140 S. Ct. at 1738.

12. 42 U.S.C. § 2000e-2 (a)(1)-(2).

13. See 42 U.S.C. § 2000e (k). Other federal civil rights laws seeking to protect against sex discrimination are similarly unspecific. For example, Title IX of the Education Amendments of 1972 asserts that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681 (a). There is no

The term “sex” is vague. It most directly and simply refers to anatomical differences between the male and female sexes as related to reproduction.¹⁴ Most definitions are more expansive and include general biological, psychological, and behavioral differences.¹⁵ For example, Merriam-Webster identifies “sex” as “the sum of the structural, functional, and sometimes behavioral characteristics of organisms that distinguish males and females,”¹⁶ and the *American Heritage Dictionary* defines it as “[t]he fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male.”¹⁷

“Sex,” “sexual orientation” and “gender identity” do not necessarily coincide but can be interrelated and, oftentimes, complicated in dictionary definitions and public discourse. *Webster’s Third New International Dictionary* refers to sexual orientation—“the phenomena of sexual instincts and their manifestations”—as a descriptor of the word “sex,”¹⁸ as does the *Oxford English Dictionary*, which includes in its definition “relations and interactions between the sexes; sexual motives, instincts,

further definition or clarification of the word “sex.” *See id.* The Equal Protection Clause of the U.S. Constitution does not mention sex discrimination, but has been interpreted to give “heightened scrutiny” to discrimination in the context of education on the basis of sex, without defining the term. *See U.S. v. Virginia*, 518 U.S. 515, 516 (1996). Appendix C of Justice Alito’s dissent in *Bostock* gives an exhaustive list of where the term “sex” and its interpretation are relevant. *Bostock*, 140 S. Ct. at 1791-1796.

14. *See, e.g., Sex*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/sex> (last visited Mar. 6, 2021) (defining sex as “1a: either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.”). *Sex*, AMERICAN HERITAGE DICTIONARY (2020) (defining sex as “2a: Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions.”). *See also*, Appendices A and B of Justice Alito’s dissent in *Bostock* where he highlights selected dictionary definitions of the word from the twentieth and twenty-first centuries. 140 S. Ct. at 1784-90.

15. *See, e.g., Sex*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/176989> (defining sex as “4a: The distinction between male and female, esp. in humans; this distinction as a social or cultural phenomenon, and its manifestations or consequences”); Brief for Transgender Legal Defense & Education Fund and 33 Organizations Serving Transgender Individuals as Amici Curiae in Support of Respondent Aimee Stephens at 11-12, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC and Aimee Stephens* [hereinafter cited as Brief for TLDEF] (“1. Genetic or chromosomal sex (i.e., the presence of an XX or XY genotype); 2. Gonadal sex (i.e., the presence of ovarian or testicular tissue); 3. Internal morphologic sex (i.e., the presence of seminal vesicles, a prostate, a vagina, a uterus, or fallopian tubes); 4. External morphologic sex (i.e., genitalia); 5. Hormonal sex (i.e., levels of testosterone, estrogens, and progesterone).”) [hereinafter cited as Brief for TLDEF].

16. MERRIAM WEBSTER ONLINE, *supra* note 14.

17. AMERICAN HERITAGE DICTIONARY, *supra* note 14.

18. *Sex*, in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2081 (2002).

desires.”¹⁹ *The American Heritage Dictionary* includes in its entry for “sex” a person’s “identity as either female or male.”²⁰ In the Transgender Legal Defense and Education Fund’s definition, “sex” includes assigned sex at birth, gender of rearing, “[p]sychosexual identity, sexual identity, or gender identity (i.e., brain gender).”²¹ Justice Gorsuch asserted in *Bostock* that sexual orientation within the gender binary of male and female must use sex to explain itself.²² He wrote: “imagine an applicant doesn’t know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box [in answer to the question of whether you are homosexual] without using the words man, woman, or sex (or some synonym). It can’t be done.”²³ At the same time, those who identify as pansexual or queer in terms of their sexual orientation often define their sexual orientation outside of the gender binary.²⁴ Complicated.

There is no dispute or controversy that sexual orientation and gender identity are distinct, yet there is significant confusion among the general public, policy makers, and judges about the differences. Sexual orientation describes a person’s enduring sexual attraction to another person and may be same sex, opposite sex, or both.²⁵ Gender identity is “[a]n internal sense of being male, female or something else, which may or may not

19. OXFORD ENGLISH DICTIONARY ONLINE, *supra* note 15. See also *Sex*, in APA DICTIONARY OF PSYCHOLOGY 970 (Gary R. VandenBos ed., 2015) (“the physiological and psychological processes related to procreation and erotic pleasure.”); *Sex*, in RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1754 (2001) (“the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct.”).

20. AMERICAN HERITAGE DICTIONARY, *supra* note 14.

21. Brief for TLDEF, *supra* note 15, at 12.

22. 140 S. Ct. at 1746.

23. *Id.* at 1746. Justice Sotomayor expressed a similar sentiment about the interrelationship between sex—referring not just to anatomy, but to a larger definition of the term, which includes behavior and gender stereotypes—and sexual orientation during oral argument in *Bostock* and *Zarda*. She said, “If you’re too effeminate a man, you’re a homosexual. If you’re too macho a woman, you’re a lesbian. Happens all the time. So I find it somewhat difficult to unwind the two. If not difficult, nearly impossible.” Transcript of Oral Argument at 50-51, *Bostock*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_2a34.pdf.

24. See James S. Morandini et al., *Who Adopts Queer and Pansexual Sexual Identities?*, 54 J. SEX RSCH. 911-922 (2017); see also *Glossary of Terms*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/glossary-of-terms> (“Queer is often used as a catch-all to include many people, including those who do not identify as exclusively straight and/or folks who have non-binary or gender expansive identities.”).

25. *Sexual Orientation*, in APA DICTIONARY OF PSYCHOLOGY, *supra* note 17, at 974. See also *Glossary of Terms*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/glossary-of-terms> (last visited Mar. 7, 2021) (“Sexual orientation: An inherent or immutable enduring emotional, romantic or sexual attraction to other people.”).

correspond to an individual's sex assigned at birth or sex characteristics."²⁶ One's sexual orientation does not predict or say anything about one's gender identity and vice versa.²⁷ While the Venn diagram of the LGBTQ+ community would have some overlap in the oval, most gay, lesbian, and bisexual people identify with their sex assigned at birth and most transgender people are heterosexual.²⁸ Yet frequently, transgender women are "recast" as feminine men in the same way that cisgender gay men are seen as men who want to be women.²⁹

The abbreviation commonly used by the public and in advocacy, "LGBTQ+" referring to lesbian, gay, bisexual, and transgender, does little to settle the confusion.³⁰ It appears to provide a sequence of like terms, which they are not. Perhaps as a result, much polling and policymaking erroneously lump the labels and issues together. In its LGBT population poll, Gallup acknowledged the shortcomings of this approach: "The

26. *A Glossary: Defining Transgender Terms*, 49 *MONITOR ON PSYCH.* 32 (2018); see also Stacey Colton Meier & Christine M., Labuski, *The Demographics of the Transgender Population*, in *INTERNATIONAL HANDBOOK ON THE DEMOGRAPHY OF SEXUALITY* 289, 291 (2013) (when one's assigned biological sex or sex characteristics don't match their felt gender identity, they are described under the umbrella term of "transgender").

27. *Glossary of Terms: Transgender*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited Mar. 7, 2021) ("Transgender people may be straight, lesbian, gay, bisexual, or queer."). See also Deborah Coolhart & Anibal Torres Bernal, *Transgender in Family Therapy*, 6 *FAM. THERAPY MAG.* 38 (2007) (Gender identity "differs from sexual identity because it defines one's own gender, not the gender(s) of the people one is attracted to.").

28. See PEW RSCH. CTR., *A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES* 115 (2013). A 2012 survey indicates that 11% of the people who self-identified as transgender also self-identified as gay, lesbian or bisexual. *Id.* But see Sarah M. Burke et al., *Structural Connections in the Brain in relation to Gender Identity and Sexual Orientation*, 7 *SCIENTIFIC REPORTS* 1 (2017) (finding evidence that there is a higher prevalence of homo- or bisexuality among transgender, as opposed to cisgender people). There is some discrepancy about how the sexual orientation of a transgender person is calculated. See GLAAD, *supra* note 27 ("a person who transitions from male to female and is attracted solely to men would typically identify as a straight woman."). But see DEBORAH SOH, *THE END OF GENDER: DEBUNKING MYTHS ABOUT SEX AND IDENTITY ON OUR SOCIETY* 32 (2020) (asserting that sexual orientation is determined in accordance with sex assigned at birth, meaning that a person who transitions from male to female and is attracted solely to men would be gay.).

29. See Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 *CAL. L. REV. ONLINE* 9, 19-20 (Mar. 2020).

30. Sometimes the abbreviation includes Q for "queer" (LGBTQ), I for "intersex", A for "asexual" or "ally" or + (LGBTQ+) (to include other identities and sexual minorities). Kaitlin Miller, *What Do the Letters Mean in LGBTQIA+?*, *ACTIVE TIMES* (June 2, 2020), <http://www.theactivetimes.com/what-letters-mean-lgbtqia>. See, e.g., *Human Rights Campaign Home Page*, <http://www.hrc.org/> (last visited Mar. 7, 2021) (using LGBTQ); *A Global Celebration Arrives in New York*, *HERITAGE PRIDE*, <http://www.nycpride.org/history-news/a-global-celebration-arrives-in-new-york> (last visited Mar. 7, 2021) (uses LGTBQI+).

general grouping of these four orientations [*sic*] (lesbian, gay, bisexual and transgender) into one question involves significant simplification, and other measurement techniques which ask about each of these categories individually yield different estimates.”³¹ Additionally, the generalization can have serious impacts in health care. For example, the Institute of Medicine explained that “[a]lthough the acronym LGBT is used as an umbrella term, and the health needs of this community are often grouped together, each of these letters represents a distinct population with its own health concerns.”³² No doubt, there is much that is shared among this grouping in terms of societal acceptance (or lack thereof), victimization, harassment, non-recognition, and discrimination.³³ However, the distinctions between the GBL and transgender people are vast, poorly understood by the public and policymakers, and are obscured by the grouping.

Then, there is the confusion about the differences between “sex” and “gender.” One view is that the word “sex” should be reserved for the biological aspects of being male or female, and that the word “gender” should be used only to refer to sociocultural roles.³⁴ This can create some difficulty when trying to understand gender identity without falling back on stereotypes.³⁵ If gender is only about sociocultural roles, then it would follow that identity based on gender is just and only that. This not only requires legitimation of stereotypical gender roles, but undermines a full understanding and minimizes the experience of transgender people.

31. Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <http://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

32. INSTITUTE OF MEDICINE (US) COMMITTEE ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH ISSUES AND RESEARCH GAPS AND OPPORTUNITIES, *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING I* (2011).

33. See PEW RSCH. CTR., *supra* note 27, at 41-42 (“of all LGBT respondents,” 66% experienced at least one type of discrimination, bullying, or harassment; 30% had been threatened or physical attacked; 21% had been discriminated against in the employment context; 39% have “been rejected by a friend or family member due” to their sex orientation or gender identity).

34. See, e.g., APA DICTIONARY OF PSYCHOLOGY, *supra* note 19, at 970 (“Sex refers especially to physical and biological traits, whereas GENDER refers especially to social or cultural traits, although the distinction between the two terms is not regularly observed.”); *Resources: Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (“Gender expression: External appearance of one’s gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.”).

35. See Jessica Williams, Note, *Beyond the Binary: Protecting Sexual Minorities from Workplace Discrimination*, 71 FLA. L. REV. 22, 32-38 (2020).

“Transgenderism” involves a feeling that one is in the wrong body where one’s “own internal gender identity does not match the sex they were assigned at birth.”³⁶ It is more than wanting to wear pants or makeup. The alternative view is that not only is sex biological, but so is gender: gender identity is biological and remains constant regardless of anatomy.³⁷

In *Bostock*, the Court narrowed the definition of sex to its most simple reference: the biological differences between the male and female sexes as related to reproduction. Justice Gorsuch wrote:

Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term “sex” in 1964 referred to “status as either male or female [as] determined by reproductive biology.” The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties’ debate, and because the employees concede the point for argument’s sake, we proceed on the assumption that “sex” signified what the employers suggest, referring only to biological distinctions between male and female.³⁸

The term “sex” in Title VII is now defined to be the reproductive biological distinctions between male and female. As written in the *Bostock* opinion, discrimination on the basis of those binary, biological distinctions is why sexual orientation and gender identity discrimination in employment is now covered by Title VII.³⁹ The limited nature of this

36. See *GLAAD*, *supra* note 27.

37. See SCIENTIFIC REPORTS, *supra* note 27, at 9 (“observed right-hemisphere differences between the transgender groups and cisgender controls . . .”). See also Brief for TLDEF, *supra* note 14, at 14 (“Since the 1950s, the medical community has recognized gender identity—one’s internal sense of sex—as one of the many biological components of sex.”); Richard A. Friedman, Opinion, *How Changeable Is Gender?*, N.Y. TIMES (Aug. 23, 2015), <http://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html> (“The fact that some transgender individuals use hormone treatment and surgery to switch gender speaks to the inescapable biology at the heart of gender identity.”); Brief for TLDEF, *supra* note 15, at 20, (“[B]y undergoing surgery or hormone treatment, transgender people do not change their sex. Physical transitioning is therapeutic; however, throughout the process, the transgender person maintains the same gender identity. That is, they maintain the same ‘sex,’ which is innate and immutable . . .”).

38. *Bostock*, 140 S. Ct. at 1739. See Brief for Respondent Aimee Stephens at 24, R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (2019) (No. 18-107) [hereinafter Brief for Respondent Aimee Stephens] (“this case does not require the Court to decide whether the term ‘sex’ in 1964 included gender identity. Ms. Stephens prevails even if ‘sex’ is limited to the definitions proposed by Harris Homes and the United States, namely ‘a person’s status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction.’”).

39. See *Bostock*, 140 S. Ct. at 1739, 1754.

finding not only failed to achieve the full promise of equality for the LGBTQ+ population, but created some additional difficulties with sexual orientation and gender identity issues.

III. THE DECISION IN *BOSTOCK* CREATED SOME LASTING PROBLEMS FOR EQUALITY JURISPRUDENCE

Interpreting Title VII in various ways, *Bostock I*, *Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc.* each made its way up to the Court. In *Bostock I*, the Eleventh Circuit affirmed the decision of the District Court and held that Title VII does not prohibit discrimination on the basis of sexual orientation and dismissed the suit.⁴⁰ In *Zarda*, the Second Circuit found the opposite and allowed the case to proceed.⁴¹ Similarly, the Sixth Circuit found more expansive coverage of Title VII and allowed the case to move forward.⁴²

Not everyone was happy when the Court consolidated the cases for hearing. Unsurprisingly, the winners in the circuit courts argued against consolidation in their respective briefs in opposition to certiorari petitions. In the *R.G. & G.R. Harris Funeral Homes, Inc.* brief, attorneys for fired employee Aimee Stephens asserted that her case was essentially unrelated to those of Donald Zarda and Gerald Bostock claiming, “The Court should deny review in this case because resolution of the petitions in *Zarda* or *Bostock* would not affect the type of sex discrimination claim under which Ms. Stephens prevailed.”⁴³ Solicitor General Noel Francisco disagreed that the resolution of *Bostock I* and *Zarda* would be unrelated to *R.G. & G.R. Harris Funeral Homes, Inc.*, but nonetheless argued that *R.G. & G.R. Harris Funeral Homes, Inc.* should not be decided with the other two on ripeness grounds.⁴⁴ And in *Zarda*, the Brief in Opposition asked the Court

40. *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x. 964 (11th Cir. 2018), *rev’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (per curiam).

41. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

42. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff’d* *Bostock v. Clayton Cnty.*, 140 S. Ct. at 1754.

43. Brief in Opposition for Respondent Aimee Stephens at 30-31 n.13, *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (2019) (No. 18-107).

44. Brief for the Federal Respondent in Opposition at 12, *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (2019) (No. 18-107) (“The question presented in *Zarda* and *Bostock* implicates a much deeper and more entrenched circuit conflict on a similarly important and recurring question that nearly every circuit has addressed, and two courts of appeals sitting en banc have recently rejected the long-prevailing consensus view on that question. Fewer circuits have addressed the questions presented in this case, and the panel decision here appears to be the first

to deny certiorari to see “how the issue plays out in a variety of factual circumstances.”⁴⁵

There were other, more fundamental problems with hearing *R.G. & G.R. Harris Funeral Homes, Inc.*, *Bostock*, and *Zarda* as classic sex discrimination matters which merged issues of gender identity and sexual orientation. They were that doing so would (i) reinforce and prolong the misunderstanding about the differences between sexual orientation and gender identity, (ii) hinder the full understanding and recognition of gender identity, (iii) cause progressive equality movements to lose focus, and (iv) undermine advancements in women’s rights by endangering civil rights protections for women and reinforcing gender stereotypes. Many of these concerns were borne out by the decision in *Bostock* as explained below.

A. *Conflating and Confusing Gender Identity and Sexual Orientation*

As discussed above in Part 1, there is considerable confusion among the general public and policymakers about what the term “transgender” means and how gender identity differs from sexual orientation. Hearing *R.G. & G.R. Harris Funeral Homes, Inc.* together with *Bostock* and *Zarda* conflated the two and failed to advance an understanding of the terms. It also exacerbated confusion among the Justices during oral argument.

In arguing *R.G. & G.R. Harris Funeral Homes, Inc.* under Title VII, certain individuals in the case characterized transgender women as men, reinforcing a basic and detrimental misunderstanding.⁴⁶ Representatives of Aimee Stephens, a transgender woman fired because she planned to self-identify as female at work, did this to frame the argument as discrimination on the basis of biological sex: their client was a man who was discharged from his job because he intended to wear a dress and appear feminine at work.⁴⁷

court of appeals decision to conclude in a Title VII case that gender-identity discrimination categorically constitutes discrimination because of sex under that statute.”)

45. Brief in Opposition at 18, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 17-1623).

46. See Petition for A Writ of Certiorari at 2, *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (2019) (No. 18-107) (“As for Petitioner R.G. & G.R. Harris Funeral Homes, Inc., the Sixth Circuit ordered it to allow a male funeral director [Aimee Stephens] to dress and present as a woman at work.”); Brief for Respondent Aimee Stephens, *supra* note 38, at 16 (alleging a violation of “Title VII by firing Ms. Stephens for failing to conform to its sex- based stereotypes about how men should identify . . . appear, and behave.”).

47. Brief for Respondent Aimee Stephens, *supra* note 38, at 21 (“because Ms. Stephens’s

Stephens’ attorneys’ decision to concede that the term “sex” in Title VII was limited to biological sex assigned at birth, rather than a more fulsome definition of the term including gender identity or sexual orientation, was likely a strategic one. It conformed to the arguments being made in *Bostock* and *Zarda* regarding sexual orientation, which, although argued separately, were consolidated.⁴⁸ Like the gay employees in *Bostock* and *Zarda*, the transgender employee in *R.G. & G.R. Harris Funeral Homes, Inc.* was discharged because “he” didn’t conform to the employers’ idea about the way men should behave.⁴⁹ Pamela Karlan, the attorney who argued the *Bostock* and *Zarda* portions of the consolidated case, clearly states the proposition: discriminating against someone on the basis of sex—a man who loves men rather than a woman who loves men—violates Title VII. There is no need to use the term “sexual orientation” or “gender identity.”⁵⁰ When you discriminate against a man who identifies as a woman rather than a woman who identifies as a woman, that is sex discrimination.⁵¹ Side-stepping messy distinctions likely behooved the litigants.

Stephens’ advocates’ choice also avoided the uphill battle of arguing to a conservative bench that Title VII covers gender identity independent of biological sex. They wanted a victory for their client and may not have considered the long-term impacts of their strategy. Ultimately, their approach paid off for Stephens: the Court accepted their argument.⁵² The Court defined “sex” as biological reproductive anatomy and held that “if

male sex assigned at birth was a but-for cause of her discharge, the court of appeals was correct to hold that she prevails under Title VII”). Moreover, “Her sex assigned at birth is a necessary cause of the discrimination . . .” *Id.* at 25.

48. Brief for Petitioner at 13, *Bostock v. Clayton Cnty, Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018) (No. 17-13801) (“Sexual orientation discrimination constitutes sex discrimination under the plain language of Title VII because one simply cannot consider an individual’s sexual orientation without first considering his sex.”).

49. *Id.* at 15 (“When an employer fires a female employee because she is a lesbian—i.e., because she is a woman who is sexually attracted to other women—the employer has treated that female employee differently than it would treat a male employee who was sexually attracted to women. The employer has acted ‘in a manner which but for that person’s sex would be different’ and has therefore violated Title VII”). *See also*, Brief for Respondent Aimee Stephens, *supra* note 38, at 23 (“It would not have fired her for living openly as a woman if she had been assigned the female sex at birth. Therefore, when Harris Homes fired Ms. Stephens it violated Title VII because her male sex assigned at birth was a but-for cause of its decision.”).

50. Slate’s Amicus with Dahlia Lithwick: Blockbusters: DACA and Title VII, at 1:06:58, SLATE (June 20, 2020), <https://slate.com/podcasts/amicus/2020/06/trump-bad-week-supreme-court>.

51. *Id.*

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

changing the employee's sex would have yielded a different choice by the employer" then the statute is violated.⁵³ To the Court, Aimee Stephens was presented as a man who dressed like a woman.⁵⁴ If a biological woman dressed like a woman, that would have been acceptable.⁵⁵ Since the employee in *R.G. & G.R. Harris Funeral Homes, Inc.* was a man that dressed like a woman, the employee was fired and signaled discrimination.⁵⁶

But this "winning" strategy has severe consequences for transgender rights and recognition. It perpetuates a misunderstanding of transgender people as merely "dressing up" outside the norms of their reproductive anatomy. Preserving—in fact, propagating—this misconception of transgenderism in society will not advance true equality for transgender people.⁵⁷ And, it will raise more issues than it settles, for example, bathroom access and other matters in the "parade of horrors" discussed below.⁵⁸ Of course, a woman should be able to use the woman's restroom! But a man who *thinks* he's woman? *Bostock* put a fine point on created problems that will be litigated in many different contexts for years to come.⁵⁹

Hearing *R.G. & G.R. Harris Funeral Homes, Inc.* together with *Bostock* and *Zarda* not only conflated sexual orientation with gender identity to the detriment of transgender equality, it also reflected the confusion—and perhaps created more—among the Justices during oral argument.⁶⁰ The Justices mixed up the two issues during oral argument several times. One was in a rather extended (and misplaced) colloquy about transgender bathroom use during the *Bostock* and *Zarda* argument. Early in the argument, Justice Sotomayor stated that the "big issue right

53. *Id.*

54. *See id.* at 1734.

55. *See id.* at 1742-43.

56. *See id.* at 1754.

57. It would have been better for the employees' advocates to frame Title VII as protecting the full range of what comprises true gender as opposed to biological sex. *See* Discussion in Part 3, *infra* at 33-34.

58. *Infra* at 25-26.

59. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1783 (2020) (Alito, J., dissenting) ("Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.").

60. It is worth noting that when certiorari was originally granted to the three cases in April 2019, only *Bostock* and *Zarda* were consolidated. *See Order List*, 587 U.S. U.S. SUPREME CT., (Apr. 22, 2019), http://www.supremecourt.gov/orders/courtorders/042219zor_9o1b.pdf.

now raging the country . . . [is] [s]ame-sex bathroom usage.”⁶¹ Justice Gorsuch took up the line of questioning about bathrooms and raised “gender-specific uniform requirements.”⁶² Pamela Karlan, the attorney arguing the *Bostock* and *Zarda* components for the fired employees, attempted several times to get back on track with the issue—sexual orientation discrimination. But, Justice Gorsuch continued to press transgender rights issues, seemingly unaware that they were inapposite to the sexual orientation argument:

JUSTICE GORSUCH: Is it idiosyncratic for a transgender person to prefer a bathroom that’s different than . . . the one of their biological sex? Is it idiosyncratic for a transsexual [sic] person to wish to dress in a different style of dress than his or her biological —

MS. KARLAN: No.

JUSTICE GORSUCH: Sex? Okay. So . . . the question then, at the end of the day, if I understand it, is that those are acts of discrimination under Title VII as you understand it?

MS. KARLAN: Yes, although I think . . . you’d be better advised to ask the question to someone who . . . is representing someone who is transgender. I am representing someone who is gay.⁶³

And, that was not the end of it. Justice Sotomayor doubled-down with a line of questioning that culminated in dress codes at Hooters.⁶⁴ Karlan, frustrated that more than a quarter of her argument was being spent on the wrong issue, stammered, “I—I mean, I do want to get to the question of sexual orientation . . . here.”⁶⁵

In the *R.G. & G.R. Harris Funeral Homes, Inc.* oral argument, there were similar missteps, which evinced a lack of understanding about gender identity. The Justices engaged with David Cole, Aimee Stephen’s attorney, about whether deciding *Harris Homes* also decides a bathroom

61. Transcript of Oral Argument, *supra* note 23 at 12.

62. *Id.* at 13.

63. *Id.* at 16-17. Although Justice Gorsuch acknowledged his confusion when he stated, “the case that we’re about to take up (*R.G. & G.R. Harris Funeral Homes, Inc.*) is more in the realm of my question.” *Id.* at 14.

64. *Id.* at 19. Hooters is a restaurant known for its buxom waitresses. See Ashley Lutz, *Everything You Ever Wanted to Know About Working at Hooters*, BUS. INSIDER (Jan. 7, 2013, 5:22 PM), <http://www.businessinsider.com/hooters-waitress-tells-all-2013-1>.

65. *Id.* at 19. Questions on the Transgender bathroom and dress issues unrelated to sexual orientation discrimination lasted 8:14 minutes. Oral Argument at 7:54, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (No: 17-1618), <http://www.oyez.org/cases/2019/17-1618>.

access case that is likely to come before the Court in the future.⁶⁶ Cole stated that it would not because this case grapples with whether discrimination against Stephens is because of sex.⁶⁷ If it is sex-based discrimination, the injury is clear since her firing was explicitly due to her gender identity.⁶⁸ In a bathroom case, the discrimination (i.e., sex-specific restrooms) is clearly because of sex.⁶⁹ In a case about transgender bathroom access, the question would be whether there is injury.⁷⁰ Chief Justice Roberts responded, “Well, but the difference is that part of the argument, at least, is that the term ‘sex’ includes *sexual orientation*” and further discussed bathroom use in accordance with biological gender.⁷¹ Gender-specific bathroom usage by gay, lesbian, and bisexual individuals was not an issue discussed by either party or the Court in this case. It would have been a slip of the tongue had a similar error in terminology not occurred earlier in the argument when Chief Justice Roberts seemed confused about how to perceive Ms. Stephens. He queried, “if the objection of a transgender man transitioning to woman is that he should be allowed to use, he or she, should be allowed to use the women’s bathroom, now, how do you analyze that?”⁷²

The decision in *Bostock*, which put both gender identity and sexual orientation under the umbrella of sex discrimination on the basis of reproductive anatomy simply—but not elegantly—swept the confusion under the rug.

B. Undermining Efforts to Advance Understanding and Recognition of Gender Identity in All Its Complexity

Sexual orientation and gender identity have some commonalities, but also differences. Consolidating *Bostock* and *Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc.* highlighted the similarities, but obscured important differences and fed confusion to policymakers and the public. An unintended consequence of advocacy for transgender rights under Title VII and the favorable decision in *Bostock* is that it will likely hamper a full understanding and recognition of gender identity. At best, it will be of

66. Transcript of Oral Argument at, *supra* note 23 at 13.

67. *Id.* at 11-12.

68. *Id.* at 12.

69. *Id.*

70. *Id.*

71. *Id.* at 13-14 (emphasis added).

72. *Id.* at 5.

value with significant exceptions and for a limited time until true equality, regardless of gender identity, is fully realized.

Gender may be a combination of biology, environment, and social construction. These components work together to create what many perceive today a “woman” or “man.” While it may be obvious that biology establishes anatomical and physiological sex characteristics, gender identity may be explained in whole or in part by biological variations between male and female brains.⁷³ Research shows that there is a “hard-wired, neural basis for an individual’s gender-specific body image down to the precise details of external sexual anatomy.”⁷⁴ Sexual differentiation in the brain happens independently from sexual differentiation of the genitals and body, likely in response to hormonal influences.⁷⁵ So, it is possible that the two independent processes may have a “mismatch,” leading to a what some call “gender dysphoria.”⁷⁶ The biological nature of “sex” is not only about reproductive organs, but includes gender identity, a fact that was rejected in *Bostock*.⁷⁷

Another blind spot in *Bostock* was its failure to recognize, much less address, the non-binary nature of gender.⁷⁸ Gender identity exists on a spectrum, like sexual orientation, and much other human behavior.⁷⁹ Neuroscientists have found that transgender individuals have different brain structures (white matter microstructure) from cisgender individuals, providing some proof that gender identity not only has a biological basis,

73. See Georg S. Kranz, et al., *White Matter Microstructure in Transsexuals and Controls Investigated by Diffusion Tensor Imaging*, 34 J. NEUROSCIENCE 15466-15475 (2014). See also SCIENTIFIC REPORTS, *supra* note 28. See *infra* p. 33 for a discussion about the controversy around the assertion of intrinsic differences in male and female brains.

74. V.S. Ramachandran & Paul D. McGeoch, *Phantom Penises in Transsexuals: Evidence of an Innate Gender-Specific Body Image in the Brain*, 15 J. CONSCIOUSNESS STUD. 5, 10 (2008). See also Murat Altınay & Amit Anand, *Neuroimaging Gender Dysphoria: A Novel Psychobiological Model*, BRAIN IMAGING & BEHAV. 1281, 1292 (2019) (“[b]rain development can be separate from the genitalia, leading to the development of brain gender . . .”).

75. Kranz et al., *supra* note 73, at 15466.

76. *Id.* at 15466-67.

77. See *Bostock*, 140 S. Ct. at 1739. (“the employers say that, as used here, the term ‘sex’ in 1964 referred to ‘status as either male or female [as] determined by reproductive biology.’ . . . we proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.”)

78. See *id.*

79. See Williams, *supra* note 35 at 25-36. See also, Christina Richards et al., *Non-binary or Genderqueer Genders*, 28 INT’L REV. PSYCH 95, 99 (2016); Friedman, *supra* note 37 (“gender dysphoria fits well within the range of human biological variation . . .”).

but is non-binary.⁸⁰ It is not a matter of one of two choices: gender identity in adults is variable and largely unmalleable.⁸¹

Some countries recognize this reality. India has recognized non-binary gender identity under its constitution by considering transgender a third gender.⁸² Germany, Austria, and Belgium have also made moves to recognize a person's self-identification beyond male and female, as well as gender-free self-identification.⁸³ In these countries, civil status laws permit a gender entry to be left blank or allow the option of a third gender.⁸⁴ Some states in the U.S. have permitted people to select something other than "male" and "female" on identification documents, like driver licenses.⁸⁵

In general, though, we have been slow in the U.S. to recognize the multifaceted nature of gender and so try to contort ourselves into the tools and categories available when trying to advance transgender equality. In some sense, we are trying to fit a square peg in a round hole: gender identity is not binary but Title VII must see it as such in order to encompass it.⁸⁶ In light of the traditional binary conception of sex adopted by Title VII,

80. Kranz et al., *supra* note 73, at 15471. *But see* Soh, *supra* note 28, at 114-15 (asserting that many transgender individuals are homosexual—using birth biology as the marker—so the conclusion from neurological may be tied to sexual orientation rather than gender identity).

81. Ira B. Pauly, *Male Psychosexual Inversion: Transsexualism*, 13 ARCHIVES GEN. PSYCHIATRY 172, 179 (1965) ("Core gender identity is established early and is difficult, if not impossible, to reverse."). *Contra* Friedman, *supra* note 37 ("gender dysphoria in young children is highly unstable and likely to change.").

82. *See* Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438 (India). *See generally* Jeffrey A. Redding, *The Rule of Disgust?: Contemporary Transgender Rights Discourse in India*, in EMPIRE OF DISGUST: PREJUDICE, STIGMA AND DISCRIMINATION IN INDIA AND THE U.S. (Zoya Hasan et al. eds., 2018).

83. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order of the First Senate of Oct. 10, 2017 - 1 BvR 2019/16 – para. 50, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html (Ger.) [hereinafter BVerfG 2019/16]; Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 14, 2018, docket No. E2918/2016-29, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] (Austria); Cour Constitutionnelle [CC] [Constitutional Court], n° 99/2019, June 19, 2019, para. B.7.3 (Belg.).

84. *See* BVerfG 2019/16, para. 54 (requiring the option of adding a third gender to the already-existing option of leaving a blank sex entry on documentation).

85. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/identity_document_laws (last visited Apr. 20, 2021). *See also* Amy Harmon, *M, F or X? Added Option Makes States Rethink Nature of Gender*, N.Y. TIMES, May 29, 2019 at A1.

86. *See* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (interpreting "sex" in Title VII to encompass nothing more than male and female.).

employees would only be protected if they are discriminated against because they are male or because they are female.⁸⁷

The limiting frame of Title VII with respect to gender identity highlights the general insufficiencies of looking at discrimination through categories that then fit neatly into boxes of analysis. Kimberlé Crenshaw famously bemoaned the limitations of discrete categories in anti-discrimination law and coined the term “intersectionality” as a way to address them.⁸⁸ Catherine MacKinnon also criticized the limitations of categories and stress on “sameness”—having women be treated the same as men as the standard to “redress women’s inequality.”⁸⁹ She wrote, “the law of discrimination, to the extent it centers on empirical accuracy of classification and categorization, has targeted inequality’s failures of perception such that full human variety is not recognized, above inequality’s imposition of commonalities, such that full human variety is not permitted to exist.”⁹⁰ Ezra Young criticizes the over-reliance on categories, identifying the phenomena as “frame dispute[s],” a phrase “describ[ing] the process by which particular subgroups are erased within discourse and, in the context of antidiscrimination law, from protections they should be beneficiaries of.”⁹¹

Nevertheless, the advocates in *Bostock* argued Title VII within its frame—seeing sex as binary—and the Supreme Court agreed.⁹² The combined *Bostock* and *Zarda* case hinged on a frame of sex discrimination against men, rather than sexual orientation discrimination against gay

87. See *id.*

88. Kimberlé 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, 139-40; see generally, KIMBERLÉ W. CRENSHAW, ON INTERSECTIONALITY: ESSENTIAL WRITINGS (2017) (discussing the implications of intersectionality in Crenshaw’s signature publication).

89. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1291-92 (1991). See also, NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 18-23 (N.Y.U. Press 2006) (criticizing the sameness/difference paradigm used for “equal treatment theory” analysis).

90. MacKinnon, *supra* note 89, at 1292-93 (criticizing sex discrimination jurisprudence that applies the sameness principle—women should be treated the same as men—as “partial, limited . . . trivializing and even perverse . . . empty.”).

91. Young, *supra* note 29, at 18.

92. Brief for Petitioner, *supra* note 49, at 15 (“When an employer fires a female employee because she is a lesbian—i.e., because she is a woman who is sexually attracted to other women—the employer has treated that female employee differently than it would treat a male employee who was sexually attracted to women.”)

employees.⁹³ During oral argument, Justice Roberts underscored the point: “. . . you emphasize that you need to know the sex of the individuals involved before you can determine whether or not there’s a violation and that that brings it within Title VII.”⁹⁴ Justice Alito tried to tease this out with a hypothetical in which an employer does not know the sex of the employment prospect, but does know that person is homosexual and refuses to hire him or her because of that:

MS. KARLAN: . . . how do they know the person’s sexual orientation?

JUSTICE ALITO: Because someone who interviewed the candidate tells them that.

MS. KARLAN: And they are unable to tell anything about the person’s sex?

JUSTICE ALITO: No

MS. KARLAN: So this is Saturday Night Live Pat? . . . Theoretically that person might be out there. But here is the key: The—cases that are brought are almost all brought by somebody who says my employer knew who I was and fired me because I was a man or fired me because I was a woman. Somebody who comes in and says I’m not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose.⁹⁵

It is worth noting that Karlan identified a non-binary person as—“theoretical[.]”⁹⁶ Similarly, in arguing *R.G. & G.R. Harris Funeral Homes, Inc.*, Ms. Stephen’s attorneys argued the case as sex discrimination against male employee who was treated differently than would be a similarly situated female employee rather than arguing for recognition of non-binary gender identity and protection.⁹⁷

In light of these arguments and as discussed earlier, the decision in *Bostock* indicated that the term “sex” in Title VII is limited to the

93. Brief for Petitioner, *supra* note 48, at 17-18 (“an employer *must* consider the employee’s sex in order to consider his or her sexual orientation, and because the employer necessarily treats the employee differently than it would if she or he were a member of the opposite sex.”).

94. Transcript of Oral Argument, *supra* note 23 at 8.

95. *Id.* at 67-68.

96. *See id.* at 68.

97. Brief for Respondent Aimee Stephens, *supra* note 38, at 14-16. (Arguing that sex was a but-for cause of the firing because she was a sex-assigned male at birth who was going to live openly as a woman); *see* Young, *supra* note 29, at 11 (“For several decades, sex discrimination cases were narrowly litigated and theorized in the image of cisgender victims, making it seem as if transgender workers’ claims were barred. Later, when the claims of transgender women were more aggressively pursued, their lawyers often framed them as if they were not women.”).

biological (reproductive) distinction between two sexes: male and female.⁹⁸ In application, the analysis went as follows:

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.⁹⁹

Justice Kavanaugh, though in dissent, agreed and emphasized that this binary construct runs through our laws and society:

Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two. Political groups distinguish the two. Advocacy groups distinguish the two. Common parlance distinguishes the two. Common sense distinguishes the two.¹⁰⁰

Bostock holds that Title VII prohibits discrimination against all LGBTQ+ women and men within the gender binary.¹⁰¹ Gay men who are treated differently because they are men who love men, rather than women who love men, are covered.¹⁰² But what about a non-binary person who is fired because of their sexual orientation? If one is neither male nor female, what is the comparator for Title VII purposes? Similarly, under *Bostock*, the law covers transgender women since they are "men" who are treated differently in the workplace because they are perceived as "acting" like women and, likewise, transgender men.¹⁰³ The Court fortunately provided

98. 140 S. Ct. at 1741 ("[Title VII] works to protect individuals of *both* sexes from discrimination, and does so equally.") (emphasis added).

99. *Id.* at 1741-42.

100. *Id.* at 1835-36 (Kavanaugh, J. dissenting).

101. *Id.* at 1741-42. ("If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.")

102. *See id.* at 1748.

103. *See id.* at 1746 ("By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today."); *see also id.* at 1741 (making the point that you cannot discriminate against a transgender person without discriminating on the basis of sex, Justice Gorsuch wrote, "... take an employer who fires a

Title VII protection to Aimee Stephens, but they did so to her as a man¹⁰⁴—not only devaluing her status as a woman but erasing the opportunities for non-binary people and transgender people who refuse to be misidentified. This decision creates an unworkable and unsustainable standard and runs the risk of exacerbating, rather than alleviating, the struggle for gender and sexual minorities' equality.

C. *Widening the Frame and Losing Focus*

As sexual minorities in social activism, the causes of the GBL and transgender communities have been linked as the LGBTQ+ movement.¹⁰⁵ And, in fact, there are many areas where their interests dovetail. Both groups have suffered from discrimination, bullying, rejection, and harassment in society and within their own families and communities.¹⁰⁶

There are, indeed, benefits to “big tent” activism.¹⁰⁷ There is strength in numbers and, if one diversifies the claims, then the efforts can be joined and gains can be spread out among more beneficiaries. However, there are dangers and pitfalls. If the frame of the problem is too large, the movement may lose focus.¹⁰⁸ There is also the risk that the least powerful interests

transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth *for traits or actions* that it tolerates in an employee identified as female at birth.”) (emphasis added).

104. *Id.* at 1743 (“For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”). Stephens was discriminated against because she was perceived by her employer as a man. *Id.* at 1738 (“Ms. Stephens wrote a letter to her employer explaining that she planned to “live and work full-time as a woman” after she returned from an upcoming vacation. The funeral home fired her before she left, telling her “this is not going to work out.”) It is the discrimination against her as a man that the decision brings within Title VII’s embrace.

105. *See supra* note 30. There are some problems that arise from this linkage, as described earlier. *Infra* Part I. Some feminist scholars disagree with linking the transgender and gay and lesbian communities in movement politics as well. *See e.g.*, Sheila Jeffreys, *Transgender Activism: A Lesbian Feminist Perspective*, 1 J. LESBIAN STUD. 55 (1997).

106. *See* PEW RSCH. CTR., *supra* note 28, at 41–42.

107. *See e.g.*, Nancy C. Unger, *Legacies of Belle La Follette’s Big Tent Campaigns for Women’s Suffrage*, 36 AM. JOURNALISM 51, 52 (2019); Cornelia H. Dayton & Lisa Levenstein, *The Big Tent of U.S. Women’s and Gender History: A State of the Field*, 99 J. AM. HIST. 793, 794 (2012).

108. A current example of this is the Occupy Wall Street movement, which “splintered” its focus of priorities. *See* Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), <http://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/>. It remains to be seen whether the current Black Lives Matter movement, which coalesced around police misconduct, will succeed in bringing in other issues that impact Black, Brown and poor communities in the U.S and internationally—including broader structural and systemic concerns like corrections, education, income inequality, access to health care, housing, voting

within the big tent will get left behind. For example, early U.S. suffragettes became disconnected from Fifteenth Amendment voting efforts.¹⁰⁹

Some second and third wave feminists internalized the example, including National Organization for Women (NOW) leader Betty Friedan, who controversially coined the phrase “lavender menace,” and claimed that outspoken lesbians were a threat to the feminist movement.¹¹⁰ Friedan and others argued that the presence of lesbian women’s interests distracted from the goals of gaining economic and social equality for all women.¹¹¹ Friedan’s concern did not prevail and has not withstood the test of time.¹¹² In 1971, NOW members adopted “lesbians’ rights as part of the organization’s national agenda.”¹¹³

Recent disputes about widening the frame of feminist causes involves whether and how to include transgender issues—as distinct from sexual orientation—under the feminist umbrella. Among the controversial concerns is that, under the big tent, women will lose control of the right to define themselves and traditional women’s equality issues will take a back seat to trending gender identity matters.¹¹⁴ Take Elinor Burkett, who writes:

rights, and more. See Aldon Morris, *From Civil Rights to Black Lives Matter*, SCI. AM. (Feb. 3, 2021), <http://www.scientificamerican.com/article/from-civil-rights-to-black-lives-matter/> (last visited May 1, 2021); but see Efe Gürçan & Can Donduran, *The Formation and Development of the Black Lives Matter Movement: A Political Process Perspective* 30 SIYASAL: J. POL. SCIENCES 151-67 (2021).

109. U.S. Const. amend XV, § 1. See, *Levit, Feminist Legal Theory* at 3, *supra* note 70 (“An interesting schism occurred among early suffragists between those who believed the causes of emancipation and female suffrage were related and those who believed the causes were at odds.”). See generally JO FREEMAN, *A ROOM AT A TIME: HOW WOMEN ENTERED PARTY POLITICS* 31-32 (2000).

110. See Stephanie Gilmore & Elizabeth Kaminski, *A Part and Apart: Lesbian and Straight Feminist Activists Negotiate Identity in a Second-Wave Organization*, 16 J. HIST. SEXUALITY, 95, 96, 103 (2007).

111. *Id.* at 96.

112. See *id.*

113. *Id.*; see also *LGBTQIA+ Rights*, NAT’L ORG. FOR WOMEN, <http://now.org/issues/lgbtq-rights/> (last visited Apr. 21, 2021).

114. See Elinor Burkett, Opinion, *What Makes a Woman?*, N.Y. TIMES (June 6, 2015), <http://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html>; Michelle Goldberg, *What Is a Woman?*, NEW YORKER (July 28, 2014); see also SHEILA JEFFREYS, *UNPACKING QUEER POLITICS: A LESBIAN FEMINIST PERSPECTIVE* 49-50 (2003); Mary Bernstein, *Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement*, 103 AM. J. SOCIO. 531 (1997); MANUEL CASTELLS, *THE POWER OF IDENTITY* (1997); Leila J. Rupp & Verta Taylor, *Forging Feminist Identity in an International Movement: A Collective Identity Approach to Twentieth-Century Feminism*, 24 SIGNS 363 (1999); Verta Taylor & Nancy E.

For me and many women, feminist and otherwise, one of the difficult parts of witnessing and wanting to rally behind the movement for transgender rights is the language that a growing number of trans[gender] individuals insist on, the notions of femininity that they're articulating, and their disregard for the fact that being a woman means having accrued certain experiences, endured certain indignities and relished certain courtesies in a culture that reacted to you as one.¹¹⁵

She likens bringing transgender issues into the big tent of feminism as a sort of cultural appropriation, which would be objectionable if, say, a white man started “using chemicals to change his skin pigmentation” and adopted cornrows.¹¹⁶ Evidence of their fears is provided with examples like the National Abortion Rights Action League rejecting abortion rights as a women’s issue, since transgender men can give birth.¹¹⁷ Of course, many disagree, believing that all women, regardless of their sex assigned at birth, share an interest in fighting harmful stereotypes and advancing equality for all.¹¹⁸ But the wedge felt by Burkett and others threatens to expand under the *Bostock* Court’s reasoning.

Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 104 (Aldon D. Morris & Carol M. Mueller eds., 1992).

115. Burkett, *supra* note 114.

116. *Id.*

117. Home, NAT’L ABORTION RTS. ACTION LEAGUE, <http://www.prochoiceamerica.org/> (last visited Apr. 21, 2021) (“NARAL is powered by our 2.5 million members . . . who believe every body should have the freedom to make the best decision . . .”) (emphasis added). Note that other pro-choice organizations have changed their language to become gender-neutral, including the New York Abortion Access Fund (NYAAF) and Fund Texas Choice—the latter renamed from Fund Texas Women. *About*, NYAAF, <http://www.nyaaf.org/about/> (last visited Apr. 21, 2021); *About*, FUND TEXAS CHOICE, <http://fundtexaschoice.org/index.php/about/> (last visited Apr. 21, 2021). The American Civil Liberties Union and the NRAL Pro-Choice America Foundation continue to focus on abortion as a women’s right. *Issues*, ACLU, <https://www.aclu.org/issues/reproductive-freedom> (last visited May 3, 2021); *About*, NARAL, <https://www.prochoiceamerica.org/about/> (last visited May 3, 2021). *See also*, Alexi Hoffkling et al., *From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers*, 17 *BMC PREGNANCY & CHILDBIRTH* 8-20 (2017).

118. *See* Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 *PIERCE L. REV.* 1, 24 (2007) (“Although at first glance it might seem that the two groups are working at cross purposes, when viewed from a slightly different angle it can just as easily be said that both of us are trying to achieve escape velocity from the expectations and limitations imposed on us by virtue of the assignment of gender at birth. Ultimately, trans and non-trans alike are attempting to navigate the gender system in the hope of finding space to live.”); *see also* Kelly. J. Hunnings, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism by Sheila Jeffreys (Review)*, *ROCKY MOUNTAIN REV. LANGUAGE & LITERATURE* 283 (2015) (criticizing Jeffries’ presentation of “feminism as that which is exclusively meant to honor women, not transgendered women” and her failure to acknowledge the suffering of transgender women by presenting them as “enjoy[ing] residual male privilege.”).

Bringing sexual orientation and gender identity issues together under the same tent presents additional problems distinct from those described above that may harm the transgender community.¹¹⁹ Over time, differences in sexual orientation have become the norm.¹²⁰ Same-sex marriage is the law of the land.¹²¹ And, while there are still serious problems with discrimination and violence against gay people, progress has been made when U.S. presidential candidate Pete Buttigieg can kiss his husband on national television.¹²² This has been largely accomplished over time through popular culture, activism and organization, the courts, and legislatures.¹²³

The public has more recently become aware of gender identity differences, but few understand what they mean. A majority of Americans still deny the existence of transgender identities, believing that gender is decided by the sex assigned at birth.¹²⁴ Before *Bostock*, eleven federal courts of appeal considered whether sexual orientation discrimination was protected under Title VII over the span of forty years.¹²⁵ However, transgender rights advocacy on this question has been

119. See Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L.S. J. HUM. RTS. 589 (2000).

120. Polls reveal a steady increase in public support for gay, lesbian and bisexual rights. See, Gay and Lesbian Rights, GALLUP, <http://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Apr. 21, 2021).

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

122. Jerry Davich, *Pete Buttigieg's Public Kiss Reflects Much More Than Another Political Photo Op*, CHI. TRIB. (Apr. 16, 2019), <http://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-davich-mayor-pete-buttigieg-public-kiss-st-0417-story.html>.

123. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating laws that criminalize same-sex intimacy); *U.S. v. Windsor*, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act's exclusion of same-sex marriages as recognized under federal law); *Obergefell*, 576 U.S. at 647 (finding same-sex marriage to be a "fundamental right"); *id.* at 685-686 (listing State Legislation and Judicial Decisions Legalizing Same Sex Marriage as of 2015 in Appendix B); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (permitting gay, lesbian, and bisexual people explicitly to serve openly in the U.S. Armed Forces); WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY, 85-100 (2014) (reviewing cultural, political and legal developments).

124. Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RSCH. CTR. (Nov. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/11/08/trans-gender-issues-divide-republicans-and-democrats/>.

125. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 144 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *Vickers v. Fair-field Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006), *cert. denied*, 551 U.S. 1104 (2007); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003); *Hively*

more limited, as only five federal circuits have weighed in—three before 1985.¹²⁶ Bringing together sexual orientation and gender identity issues in advocacy and in *Bostock* limited protections for each identity in the LGBTQ+ population. Joining these unique identities together, which hold different levels of public awareness, created disparities with regard to ripeness for consideration by the Court.

In *Bostock*, the Court's decision linked both with a textualist's interpretive method: "But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."¹²⁷ The Court explicitly avoided arguments about implementation of the holding in circumstances where rights conflicts will arise,¹²⁸ many of which will be in the context of gender identity rather than sexual orientation discrimination, as described below.

D. *Balancing Civil Rights Protections for Communities*

Hitching the wagons of sexual orientation and gender identity issues also exposes certain gay rights to arguments that uniquely arise from gender identity equality objections—including concerns that protecting transgender rights may complicate other interests. More specifically, the fear that recognizing transgender people as a protected class will complicate efforts to advance cisgender women's rights and reinforce harmful female stereotypes.¹²⁹ This is not to say that these arguments should win the day and limit transgender rights. Arguments that same-sex marriage undermines traditional marriage and that military cohesion is

v. Ivy Tech Community College of Indiana, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), *cert. denied*, 493 U.S. 1089 (1990); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 333 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans v. Georgia Reg'l Hospital*, 850 F.3d 1248, 1256-57 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

126. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

127. 140 S. Ct. at 1747.

128. *Id.* at 1753-54.

129. Appendix C of Justice Alito's dissent in *Bostock* lists over one hundred federal statutes, many of which were enacted to advance women's rights and could turn on the Court's interpretation of the word "sex." *Id.* at 1791-96.

destabilized by the presence of gay fighters ultimately fell as we tilted towards equality regardless of sexual orientation.¹³⁰ The point being made here is that bringing the two issues together in hearings at the Court and deciding them together opens gay rights up to challenges it could otherwise avoid. And, while the narrow holding in *Bostock* dodged many of these arguments, it invites the future development of exceptions potentially related to gender identity matters that might diminish the gains from the holding for all LGBTQ+ people.

The employer's attorneys claimed, and Justice Alito's dissent in *Bostock* accepted, that if Title VII is interpreted to cover the fired employees, a "parade of horrors"¹³¹ would ensue. The list was long and diverse, including consequences for personal privacy and safety as well as equality.¹³² They included claims that "interpreting sex discrimination in Title VII to include transgender employees would effectively outlaw single sex bathrooms and locker rooms,¹³³ weaken protections for victims of sexual assault and domestic violence,¹³⁴ portend the end of women's

130. See *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015) ("developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. . . . These new insights have strengthened, not weakened, the institution of marriage.").

131. Transcript of Oral Argument, *supra* note 23, at 31, 36.

132. Petition for A Writ of Certiorari, *supra* note 46, at 45-56; Reply Brief for Petitioner, *Harris Homes* at 11; *Bostock*, 140 S. Ct. at 1778-83 (Alito, J. dissenting).

133. Brief for the Petitioner at 4, R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (2019) (No. 18-107) [hereinafter Brief for the Petitioner, *Harris Funeral Homes*] ("redefining sex discrimination in Title VII will prohibit employers from maintaining sex-specific privacy in overnight facilities, showers, restrooms, and locker rooms."); See also *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) ("[A] person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time.")

134. See Transcript of Oral Argument, *supra* note 23, at 28. (protecting transgender women, under Title VII would mandate that "a women's overnight shelter must hire a man who identifies as a woman to serve as a counsellor to women who have been raped, trafficked, and abused and also share restroom, shower, and locker room facilities with them."). See also *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) ("For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.").

sports,¹³⁵ and undermine efforts to promote gender equity in the workplace.”¹³⁶

Clearly, these alarming consequences are overstated, at best. How does including *all* women in Title VII’s coverage really endanger any woman, either at work or in sports? If the case had been decided in a way that affirmed Stephen’s womanhood, these and the personal privacy and safety issues could have been decided with the win.

And, perhaps they ultimately will be. The opinion in *Bostock* left for another day the consequences of its decision unrelated to the parties in the consolidated cases.¹³⁷ However, two significant harms have already resulted: the mischaracterization of transgender women as “men” and the likelihood of numerous exceptions to *Bostock*’s protections for LGBTQ+ employees to address the concerns teed-up by Alito’s dissenting opinion. These are likely to come in the form of bona fide occupational qualifications (BFOQs), a statutory defense to employment discrimination, that permits employers to discriminate against employees and potential employees “on the basis of . . . sex . . . in those certain instances where . . . sex, . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹³⁸ While this exception has been narrowly interpreted by the courts to date, there is case law that could sustain non-conforming gender

135. Brief for the Petitioner, Harris Funeral Homes, *supra* note 133, at 50-51. *See also* 140 S. Ct. at 1779-80 (Alito, J., dissenting) (“This issue has already arisen under Title IX, where it threatens to undermine one of that law’s major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court’s reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male.”).

136. Brief for the Petitioner, Harris Funeral Homes, *supra* note 133, at 48 (“[A]dopting Stephens’s position would harm the equal opportunities of women in the workplace. . . . scarce jobs requiring fitness tests, such as police and fire positions, will tend to exclude women as they are forced to compete against men who identify as female.”). *See also* 140 S. Ct. at 1769 (Alito, J., dissenting) ([Title VII was] “part of the campaign for equality that had been waged by women’s rights advocates for more than a century, and what it meant was equal treatment for men and women... not understood as having anything to do with discrimination because of sexual orientation or transgender status.”).

137. 140 S. Ct. at 1753. (“Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.”).

138. 42 U.S.C. § 2000e-2.

identity as a BFOQ.¹³⁹ In *Dothard v. Rawlinson*, the Court found that sex is a BFOQ for a guard position at a men’s maximum-security prison due to the violent nature of the facility, the lack of staffing and the presence of sex offenders in the general population.¹⁴⁰ In that case, females were not eligible to apply for the guard position.¹⁴¹ A transgender applicant for such a position could face the same dangers, whether assigned male or female at birth, likely giving the employer a BFOQ defense and, therefore, the ability to discriminate against them on the basis of sex.

A broader read of BFOQ could address the concerns raised by Justice Alito that the *Bostock* Court left for another day.¹⁴² In his dissent, Justice Alito noted the possibility of a professional sports team claiming biological sex as a BFOQ.¹⁴³ As noted in *Dothard*, courts have found that sex can constitute a BFOQ when safety and privacy interests are at stake.¹⁴⁴

But if the BFOQ defense expands too much, it risks undermining the Title VII protection that LGBTQ+ individuals received from *Bostock*: the exceptions would swallow the rule. The Court in *Dothard*, faced with a similar concern, had a lot of explaining to do when they found that females could be eliminated from contention for positions as security guards for their own safety. The Court recognized that Title VII is intended to permit women to make their own choices about the risks of employment, rather than have a paternalistic state decide what is safe for them.¹⁴⁵ However, Justice Stewart wrote, there is more at stake in this case than the risk to the individual female who chooses to take it: a female guard in these

139. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (“[T]he bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”).

140. *Id.* at 336-37.

141. *Id.*

142. 140 S. Ct. at 1753 (“we do not purport to address bathrooms, locker rooms, or anything else of the kind.”)

143. *Id.* at 1780 (Alito, J., dissenting).

144. *See, e.g.*, *United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206, 224 n.4 (1991) (acknowledging that sex might “constitute a BFOQ when privacy interests are implicated,” such as for an obstetrics nurse that “provide[s] sensitive care for patient’s intimate . . .” concerns); *id.* at 219, 224 n.8 (White, J., concurring) (“The lower federal courts . . . have consistently recognized that privacy interests may justify sex-based requirements for certain jobs”—such as a restroom attendant—and Title VII’s legislative history recognized some examples, including “a female nurse hired to care for an elderly woman” and “a masseur”).

145. *Dothard*, 433 U.S. at 335.

conditions would “pose a substantial security problem” to the facility because she would provoke sexual assaults, among other things.¹⁴⁶

Justice Marshall, dissenting in part, refused to accept the explanation for a BFOQ in this case, asserting that the reason for the “security problem” identified by the majority “perpetuates one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects.”¹⁴⁷

If the statute allows broad generalizations and stereotypes of others to give an “out” to discrimination protection, then we risk destroying the protection for the entire LGBTQ+ community. Consider one of the most powerful scenarios painted by the employers in *Bostock*: that if Title VII included gender identity discrimination, it would require a women’s overnight shelter to hire a transgender woman to serve as a counselor to women who have been victims of rape, sex trafficking and abuse, as well as to share restrooms, showers, and locker rooms with them. At first blush, some may agree that this shelter could refuse to hire her, especially if she has male genitalia.

But, what about an employer who refuses to hire a transgender woman or gay man as a school social worker because the school community is uncomfortable with them meeting alone with their kids? Would this employer have a BFOQ defense? I would hope not: the stereotype of sexual deviance of the LGBTQ+ community should not be permitted or supported. But where to draw the line between this (no BFOQ) and the counselor at the overnight shelter (yes BFOQ)? The BFOQ safety rationale of *Dothard* should not apply to either scenario. Courts should not give their imprimatur to the canard of transgender women being men who dress like women in order to access women’s private spaces to do harm. And there is no danger posed to children by the LGBTQ+ community. If the BFOQ involves taking into consideration the feelings of the female victims in the shelter, perhaps that might distinguish the situations despite being contentious. The fears at the shelter of survivors of sexual assault are different from the constructed, homophobic and transphobic ones of the school community.¹⁴⁸ However, to view it a

146. *Id.* at 335-36.

147. *Id.* at 345.

148. See *Boy Scouts v. Dale*, 530 U.S. 640, 649-50 (2000) (permitting the Boy Scouts to claim the right to dismiss a gay scout leader because homosexuals are not “morally straight” and “clean”). While this case involves a First Amendment defense to a state employment discrimination

different way, the survivors at the shelter would be sex stereotyping if they felt threatened by a transgender woman with male anatomy. All people with penises are not predators, and having this perception—a generalization—guide shelter policies would be impermissible. Allowing a BFOQ defense at the shelter would first require viewing the transgender woman as a man and then accepting the stereotype of the biological male as dangerous, just as the school situation would require accepting the community’s stereotype of a transgender woman or gay man being dangerous to children.

Bostock deferred these issues and left us with the prospect that what will happen with LGBTQ+ employment discrimination is what is now happening to abortion rights: the exceptions will mount and we will be left with a Potemkin Village of rights.¹⁴⁹

E. Reinforcing Gender Stereotypes

Also left for another day in *Bostock* were concerns arising from sex stereotyping in violation of Title VII as interpreted by *Price Waterhouse v. Hopkins*.¹⁵⁰ *Price Waterhouse* involved the failure to promote a woman because she was not sufficiently “feminine” and held that discrimination against an employee for failure to conform to a sex stereotype is sex discrimination under Title VII.¹⁵¹ The stereotyping claimed in *Bostock* and *Zarda* was that the principle of *Price Waterhouse* “must necessarily protect gay and lesbian employees from discrimination under Title VII, because ‘an employer who acts on the basis of a belief [stereotype] that a woman cannot be [attracted to other women] or that that she must not be, has acted

claim, rather than a BFOQ defense to a federal claim, it illustrates the problem of courts deciding which fears are reasonably related to an organization’s work and mission.

149. See *Roe v. Wade* 410 U.S. 113, 164-65 (1973) (holding that the government has an interest in developing life after viability); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887 (1992) (indicating the government has an interest in developing life from the time of conception and can regulate to advance that interest so long as it does not impose an “undue burden” on the woman); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding ban on late term abortion procedure intending to protect the reproductive health of a woman); Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361 (invalidating a California law requiring licensed clinics to inform patients about free, publicly funded family planning services, including abortion. See also *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (last visited May 6, 2021) (listing out various requirements for state abortion laws).

150. 490 U.S. 228 (1989), *superseded by statute on other grounds*, *Comcast Corporation v. Nat’l Ass’n of African American-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

151. *Id.* at 250-51.

on the basis of gender.”¹⁵² In *R.G. & G.R. Harris Funeral Homes, Inc.*, the stereotyping alleged was more general: it wasn’t about to whom one should be attracted, it was about “the stereotype that individuals will identify, appear, and behave throughout life consistently with their assigned sex at birth.”¹⁵³

What does it mean to “appear and behave” consistent with your assigned sex? The law of discrimination recognizes some distinctions between men and women that make a difference despite these strict categories’ questionable validity as more is now known about the gender spectrum.¹⁵⁴ But the unequal treatment of women through history is built on the social constructs and stereotypes derived from them. At one time, these constructs and stereotypes were affirmed at the highest levels, including the Supreme Court:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, ...indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.¹⁵⁵

“Timidity,” “delicacy,” the “domain and functions of womanhood” in the family and domestic realm, the “mission of women” as “wife and mother” were (and continue to be) some of the most damaging constructs of femininity.¹⁵⁶ Because of the “nature” of women, laws limiting women’s ability to work and participate in civic life had been enacted and upheld by the courts for decades.¹⁵⁷

152. Brief for Petitioner, *supra* note 48, at 27.

153. Brief for Respondent Aimee Stephens, *supra* note 38, at 32.

154. *See, e.g.*, *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (“[T]he different treatment of men and women naval officers under §§ 6382 and 6401 reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.”); *Kahn v. Shevin*, 416 U.S. 351, 353 (1974) (“There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.”).

155. *Bradwell v. State of Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (validating a law barring women from the legal profession).

156. *Id.*

157. *See e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding law limiting women’s work-day to ten hours); *Radice v. New York*, 264 U.S. 292 (1923) (upholding law prohibiting women from working certain jobs between 10 PM and 6 AM); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding law prohibiting women from working as bartender in most situations); *Hoyt v.*

Over time, the Court has sometimes recognized its error.¹⁵⁸ As Justice Brennan wrote in *Frontiero v. Richardson*:

[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members . . . which, in practical effect, put women, not on a pedestal, but in a cage.¹⁵⁹

But, in recognizing that certain “sex characteristics” have no relation to the workplace or ability to contribute to society, the Court did not say that they did not exist. In *Price Waterhouse*, one of the “sex characteristics” at issue was the non-aggressiveness of women.¹⁶⁰ The employer denied Ann Hopkins a partnership because she was too aggressive and therefore considered insufficiently feminine.¹⁶¹ The Court found that to be unlawful under Title VII “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or

Florida, 368 U.S. 57 (1961) (upholding systematic exclusion of women from state juries); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding state denial of pregnancy disability benefits to workers). See also, Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 5-61 (1979).

158. It is now well settled that sex-based generalizations are the basis for Title VII claims. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating, under the Equal Protection Clause of the U.S. Constitution, an Idaho statute automatically giving preference to a father over a mother for appointment as estate administrator since most men would qualify over women); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (finding federal laws that give male armed service-members automatic dependent benefits for their wives, but require female service-members to apply and prove that their husbands are dependent is unconstitutional under the Fifth Amendment’s due process clause); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (invalidating exclusion of women from certain positions based on perceived dangers to their reproductive health in comparison to their economic roles); *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (invalidating requirement that women pay more for pensions plans than men because women on average live longer than men); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (invalidating refusal to employ women with pre-school age children based on stereotypes about women’s role in raising children).

159. 411 U.S. 677, 684, 686-87 (1973).

160. 490 U.S. at 250-251.

161. *Id.* at 256 (“It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’”) Evidence at trial showed that Hopkins was also advised to improve her chances for partnership she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (1985).

that she must not be, has acted on the basis of gender.”¹⁶² Just two years earlier, the Seventh Circuit affirmed a district court’s decision permitting an employment decision on the basis of a similar “sex characteristic” in *EEOC v. Sears Roebuck & Co.*¹⁶³ In that case, the court embraced Sears’ assertion and evidence that women are less interested than men in commissioned sales jobs because, among other things, they “disliked the perceived ‘dog-eat dog’ competition” preferring a more “social and cooperative” work atmosphere.¹⁶⁴ In *Sears Roebuck & Co.*, a lack of aggressiveness was *not* seen as a stereotype, but as a reality tied to gender.¹⁶⁵ And here is the rub with legitimizing “sex characteristics”—even though the results in *Price Waterhouse* and *Sears Roebuck & Co.* were different, both cases courts ultimately had to connect aggressiveness with sex.¹⁶⁶ By treating a symptom of bias (stereotyping), we risk strengthening the disease of sexism by leaving judges to decide on sex characteristics and stereotypes.

Bostock was not decided on *Price Waterhouse* sex stereotype grounds, but it did suggest that under Title VII one looks at whether a transgender person is being discriminated against because they are engaging in “non-conforming” behavior.¹⁶⁷ This means the court decides what “conforming behavior” actually is.¹⁶⁸ This will involve affirming social constructs that may “entrench rather than eradicate them.”¹⁶⁹ What

162. 490 U.S. at 250.

163. 628 F. Supp. 1264, 1307, *aff’d*, 839 F.2d. 302 (1986).

164. *Id.* at. 1307-08.

165. *EEOC v. Sears Roebuck & Co.*, 839 F.2d at 320 (accepting factual finding of district court that “women’s lack of interest in commission selling include a fear or dislike of what they perceived as cut-throat competition, and increased pressure and risk associated with commission sales.”).

166. *Id.*; *see also* 490 U.S. at 256 (“It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’”).

167. *See* 140 S. Ct. at 1748. (explaining that sex discrimination due to non-conformity of gender roles is apparent when a qualified woman who applies for a mechanic’s position is denied).

168. To illustrate the approach’s differences: What if Ann Hopkins, the woman denied partnership in *Price Waterhouse*, were a transgender woman? Under *Bostock*, the aggressive behavior for which she was denied promotion would have been seen as *conforming* to her (male) sex assigned at birth and may have been denied relief. Note that if the Court in *Bostock* considered a sex stereotype argument but retained their definition of “sex,” Ann would still lose. She was denied the promotion because she was an aggressive woman. The employer was found to have discriminated against her because it was applying a sex stereotype of women as being non-aggressive. An aggressive transgender woman would be seen by the Court as a man and the employment decision would then not have been made on the basis of a stereotype but on the actual behavior of a “male” Ann.

169. Petition for A Writ of Certiorari, *supra* note 46, at 32.

is behavior conforming to the female sex? Is it what Lawrence H. Summers, President of Harvard University, asserted when he said that there were few women in top positions in science because of “intrinsic aptitude” as well as “taste differences . . . not easy to attribute to socialization”?¹⁷⁰ Or what Google engineer, James Damore, expressed when he said men and women have intrinsic differences that make them differently interested in and suited to technical, engineering and leadership roles at Google—such as women’s “extraversion . . . agreeableness . . . [and] neuroticism”?¹⁷¹ Or former Olympic athlete Caitlyn Jenner’s expression of womanhood, which involves wearing revealing clothing, polishing her nails, and engaging in “girls’ night” banter about hair and make-up?¹⁷² Which conforming characteristics should be used as the baseline to decide whether an employer took action based upon *non*-conforming appearance or behavior?

It has been part of the feminist project to eliminate gender roles and characteristics that have been used historically to subordinate women.¹⁷³ This leaves us with the question: What can legitimately be considered as “appearing and behaving like a woman” for the conforming/*non*-conforming analysis required by *Bostock*? When defining womanhood, we must take care not to “undermine almost a century of hard-fought arguments that the very definition of female is a social construct that has subordinated [women].”¹⁷⁴

IV. ALTERNATIVES

The decision in *Bostock* forced transgender people to be seen as a negative—they are *not* the gender to which they are assigned at birth, they are *non*-conforming. This is harmful and unnecessary. Individual dignity and respect requires people to be seen for what they *are*—women, men, neither, both; whatever their gender identity *is*, rather than what it is *not*. And the narrow opinion in *Bostock*, while protecting the LGBTQ+ community under Title VII, exposed their interests to limitations as

170. Lawrence H. Summers, *Full Transcript: President Summers’ Remarks at the National Bureau of Economic Research* (Jan. 14, 2005) (transcript available with the Harvard Crimson).

171. Kate Conger, *Exclusive: Here’s the Full 10-Page Anti-Diversity Screed Circulating Internally at Google [Updated]*, GIZMODO (Aug. 5, 2017, 4:30 PM), <http://gizmodo.com/exclusive-heres-the-full-10-page-anti-diversity-screed-1797564320>.

172. Burkett, *supra* note 114.

173. *Id.*

174. *Id.*

litigation invited by the decision ensues. Ultimately, public policy should move towards a focused approach to protecting people from discrimination on the basis of gender identity and sexual orientation. There are several options for doing this.

One is to interpret Title VII differently. This could be done through the courts in future cases or by legislative fiat by adding a broader definition of the term “sex” to the statute. The biological, non-binary nature of gender identity and sexual orientation can be recognized under the umbrella of biological sex, as defined by the Court in *Bostock*. Then, the law would view Stephens as a woman who was being discriminated against for not being sufficiently womanly rather than as a man who was discriminated against for not being sufficiently manly.

Or, in the alternative, the law could see Stephens as a woman and prohibit the firing under Title VII because her employer took sex—the fact that she was a *transgender* woman—into account. No consideration of Stephens’s anatomy would be necessary: there was discrimination on the basis of sex because sex was considered in the employment action, which violates the text of Title VII.¹⁷⁵ Simply interpreting the statute to prohibit employers from making decisions on the basis of sex, would include decisions based on being LGBTQ+ of any kind, rather than a sameness or difference paradigm. An employee’s termination would be unlawful because they are gay rather than because they are men who, if they were women, would not have been fired for loving men. Justice Breyer presented this alternative during oral argument in *Bostock* and *Zarda* when analogized the fact that it would be religious discrimination if an employer fired a Jewish employee who married a Catholic person, not because he hated Jews or Catholics, but because he opposed intermarriage.¹⁷⁶ In such a case, no one would need to prove their bona fides in relation to their religion. Similarly, with sex discrimination, the person need not state that they are a woman or man in order to get protection if there is an adverse reaction by the employer to someone who is transgender or gay, thus avoiding legal the “legal jiu-jitsu”¹⁷⁷ of labeling a transgender woman a non-conforming man and finding discrimination because she would be treated differently if she was a conforming woman.

175. See Young, *supra* note 29, at 17.

176. Transcript of Oral Argument, *supra* note 23 at 19-22.

177. See *id.* at 18.

Another option would be to push for specific legislation that would clearly and explicitly protect employees from sexual orientation and gender identity discrimination and include the exceptions necessary to work in society today, as it is. Such a law would allow for policies that advance women's equality to work as intended, avoid entrenching harmful sex stereotypes, address the safety concerns of victims of sexual assault, and protect the privacy of those who feel comfort in single-sex bathrooms and the like. New and tailored legislation is required. Trying to fit gender identity and sexual orientation discrimination in the box of anti-discrimination laws and policies conceived for society in the 1960s, misguidedly seeks to fit reality to law, when a better approach would be to fit law to reality.¹⁷⁸

New legislation or a major revision of Title VII could also be envisioned to eliminate the sameness/difference paradigm currently used in Title VII jurisprudence.¹⁷⁹ Currently, when similarly situated men are treated differently from women (and vice versa), an actionable employment discrimination has occurred. If men and women are not similarly situated in a particular situation, then there is no discrimination when they are treated differently.¹⁸⁰ But this paradigm has worked poorly for cis and trans women: "on the first day, difference was; on the second day, a division was created upon it; on the third day, irrational instances of dominance arose."¹⁸¹ In particular, it reinforces social constructs.¹⁸² For the transgender community under *Bostock*, using this paradigm to apply Title

178. This idea paraphrases Catharine A. MacKinnon's argument for intersectional which explains that "[p]roviding an alternative to the Aristotelian approach in discrimination law has made intersectionality a method for fitting law to reality, rather than reality to law." Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 *SIGNS* 1019, 1024 (2013). See also MacKinnon, *Reflections on Sex Equality Under Law*, *supra* note 89, at 1287-90 (1991) (identifying the analogous problem encountered when trying to address sex discrimination using legal doctrines established to address race discrimination).

179. See also NANCY LEVIT AND ROBERT R.M. VERCHICK, *A PRIMER: FEMINIST LEGAL THEORY* 12-15 (2016) (explaining that Title VII as well as other statutes and constitutional interpretation have largely followed this "equal treatment theory"). One alternative for anti-discrimination law would use as its basis for interpretation the goal of equilibrium in power, rather than sex, looking to level power differentials in society, in institutions, and among individuals. CATHARINE MACKINNON, *FEMINISM UNMODIFIED DISCOURSES ON LIFE AND LAW* 40-45 (1987) [hereinafter *FEMINISM UNMODIFIED*].

180. See e.g., *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (noting that men and women are not similarly situated when it comes to the draft).

181. *FEMINISM UNMODIFIED*, *supra* note 179, at 34.

182. See generally CYNTHIA DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* (1993) (describing case studies of instances where women as child-bearers were negatively impacted by the law).

VII requires a person to be labeled according to reproductive anatomical body parts in order to show that they are treated differently from a similarly situated person of the opposite birth sex.

Finally, and more radically perhaps, when looking to provide for recognition and equality for the LGBTQ+ population in general, it is worth considering setting as a goal the elimination of gender distinctions in law entirely. Eliminating the social construct of gender has long been a feminist goal. Under a gender neutral regime, biological differences between people tied to sex or gender would be irrelevant, just as it is not relevant in society when someone has no gallbladder or an over-active thyroid. In the long run, gender identity and gender stereotypes would fall away as would any concerns that proving certain cases of transgender discrimination involve reinforcement of sexist norms and stereotypes.¹⁸³

Bostock petrifies sexual orientation and gender identity rights in a binary system. Current laws and policies that conceive only two genders—male and female—require a declaration of one in order to trigger the protection of anti-discrimination law, thus freezing in time an unworkable binary standard with no room for a non-binary conception of gender identity. If gender neutrality became a reality, not only would limitations on gender identity disappear,¹⁸⁴ but sexual orientation distinctions would as well. If one is no longer identified by gender, then there would be no meaning to homosexuality or heterosexuality. There has to be room for the full range of gender identities and sexual orientations: their fluidity and numerosity should make no difference in employment, education, housing and public accommodation, and life in general.

V. CONCLUSION

Bostock was a breath of fresh air for Americans concerned about equality and democracy. A President hostile to LGBTQ+ rights and a moribund legislature had many feeling hopeless and powerless.¹⁸⁵ The

183. See MICHAEL LEWIS, *THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS* 115 (2016) (“the mere act of classification reinforces stereotypes. If you want to weaken some stereotype, eliminate the classification” explaining an aspect of Amos Tversky’s decisional theory).

184. See Sheila Jeffreys, *Transgender Activism*, *supra* note 105, at 58 (“To be transgender you need to believe that there is something to ‘trans.’”).

185. See Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,236 (to be codified at 42 C.F.R. pt. 438, 440, 460 and 45 C.F.R. pt. 86, 92, 147, 155, 156) (removing explicit protections for transgender and GBL people in healthcare programs and activities by excluding protections from discrimination based

Court showed itself to be an effective counterweight, assuring us that the patient (our functioning democracy) is in critical condition, but not yet dead. Sadly, however, the accomplishment was incomplete and the respite will be temporary due to the reasoning of Justice Gorsuch's opinion.

The contortions required to accomplish a textualist's reading of Title VII challenged some important realities about gender identity and added to the confusion about distinctions between GBL and transgender people. The Court's approach was not surprising, since the advocates on both sides argued the case using the most narrow definition of "sex" available and glossed over differences between gender identity and sexual orientation discrimination. Policy making about gender identity and sexual orientation needs to be nuanced and careful in order to truly advance equality, gain acceptance, and be successful. The decision in *Bostock* was not.

There are alternatives—some rather easy—that can be accomplished through minor jurisprudential adjustments. Others will be more difficult, though possible in time, when the problems move up the policy making agenda of what will hopefully be a more functional legislature. One of the ideas being discussed and suggested as an alternative in this Article is gender neutrality or abolition, for it takes many of the equality goals and ideals to their logical conclusions. But, it may be premature, because the question remains: is gender categorization necessary to take positive action for equality in and outside of the LGBTQ+ community?¹⁸⁶

Marginalized communities continue to face discrimination because of sex. Can we eliminate gender categories and continue to protect gender equality as necessary, until the irrelevant distinctions really don't make a difference? A similar debate is occurring on race in the United States where a culture of racism has been built upon a social construction.¹⁸⁷

on sex stereotyping and gender identity); Dep't of Defense, Department of Defense Report and Recommendations on Military Service by Transgender Persons (2018) (reinstating prohibition of transgender persons to serve in the military and retain certain rights and protections). Court challenges to the ban are pending. *See e.g.*, *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir 2019); *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019).

186. *See* Stefano Osella, "De-gendering" *The Civil Status? A Public Law Problem*, 18 INT'L J. CONST. L. 471-75 (2020) (looking at whether seeking new categories of protection for transgender and intersex people is more desirable than abandoning gender identification completely.)

187. *See* DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 3 (2011) ("[T]he *only* way we know which racial designation to assign each person is by referring to the invented rules we have been

And as with race, perhaps we are not ready for gender abolition just yet. Certainly, we need to continue to protect people from wrongful discrimination. The question is whether we can do so while moving society away from gender and sexual orientation distinctions that should make no difference in civil society.

taught since we were infants. And the *only* reason we engage in this exercise is the enormous social consequences of classifying people in this way.”); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (striking down race-conscious admissions policy at public medical school) and affirmative action jurisprudence thereafter. *See also* SpearIt, *Enslaved by Words: Legalities & Limitations of “Post-Racial” Language*, 2011 MICH. STATE L. REV. 705, 742 (2011) (“[T]he scientific emptiness of human racial taxonomy is a great social good which can help undermine the belief that some groups are different from others in the manner of species and subspecies.”); Michael B. Losow, *Personalized Medicine & Race-Based Drug Development*, 20 ST. JOHN’S J. LEGAL COMMENT. 15, 17 (2005) (“[W]e are at the dawn of an age of science and medical treatment where the old social constructs of race will have no place and no meaning.”).