Striking the Balance of Fairness and Inclusion: The Future of Women's Sports After the Supreme Court's Landmark Decision in Bostock v. Clayton County, GA

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STRIKING THE BALANCE OF FAIRNESS AND INCLUSION:
THE FUTURE OF WOMEN’S SPORTS AFTER THE
SUPREME COURT’S LANDMARK DECISION IN
BOSTOCK V. CLAYTON COUNTY, GA

I. RIGHT OFF THE BAT: AN INTRODUCTION TO THE
EFFECTS OF BOSTOCK

On June 15, 2020 the Supreme Court in Bostock v. Clayton County, Georgia ruled that sexual orientation and transgender discrimination qualifies as “because of sex” discrimination under Title VII of the Civil Rights Act of 1964. In this 6-3 decision, both the majority and dissent recognized the weighty implications the Court’s ruling may have on other state and federal laws that prohibit sex discrimination. Justice Alito warned in his dissent that one issue that may arise under both Title VII and Title IX is the “right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.” The Court concluded, however, that the textual interpretation of the law is of greater importance than analyzing the potential consequences that may result from the decision.

1. See Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”). Under Title VII, it is “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” See 42 U.S.C. § 2000e-2(a)(1) (1991) (stating Title VII language).

2. See Bostock, 140 S. Ct. at 1753 (discussing dissenting opinion’s concerns about consequences that might follow ruling for employees, such as issues concerning “bathrooms, locker rooms, or anything else of the kind”).

3. See id. at 1778-85 (Alito, J., dissenting) (flagging potential consequences Court’s decision may have on other sex discrimination statutes, but not suggesting how these issues will play out under Court’s reasoning); see generally 20 U.S.C. § 1681 (Title IX of Education Amendments of 1972) (“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 . . . .”).

4. See Bostock, 140 S. Ct. at 1753 (“The place to make new legislation or address unwanted consequences . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law’s demands as faithfully as we can in the cases that come before us.”).

(415)
justifications under other provisions of Title VII are questions for future cases, not these.”5

The Supreme Court may not have to wait long before having to address the impact of the Bostock decision beyond the employment law context.6 Just as Justice Alito predicted, in the wake of Bostock, legislators and attorneys have been arguing about the impact that Title VII and Title IX jurisprudence may have on the ability of transgender and transitioning individuals to compete in athletic events.7 Proponents of legislation barring transgender athletes from certain athletic competitions believe that requiring athletes to compete against those that are transgender denies them, particularly women, equal opportunity in athletics.8 Specifically, some have argued that athletes who transition from male to female possess physical advantages over those assigned female at birth.9 In

5. See id. (refusing to weigh-in on other issues that may be presented from this decision).

6. For further discussion of Bostock’s potential effects outside the employment law context, see infra notes 175-202 and accompanying text.

7. See A Glossary: Defining Transgender Terms, APA (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary [https://perma.cc/K67W-4YK2] (defining terms “transgender” and “transitioning”). An individual who is transgender is “an umbrella term encompassing those who gender identities or gender roles differ from those typically associated with the sex they were assigned at birth,” and someone who is transitioning is in the process of “shifting toward a gender role different from that assigned at birth, which can include social transition, such as new names, pronouns and clothing, and medical transition, such as hormone therapy or surgery.” See id. (recognizing language used to describe experience of transgender and gender-nonconforming individuals rapidly evolves). For further discussion of the implications Bostock may have on Title VII and Title IX, see infra notes 183-202 and accompanying text.


contrast, opponents have argued that no unfair advantage has been demonstrated and transgender athletes have a right to participate in athletics consistent with their gender identity.10

This hot topic debate is playing out across the United States.11 In Connecticut, three female high school track athletes filed a lawsuit in federal court against Connecticut school boards and the Connecticut Interscholastic Athletic Conference (CIAC) for adopting a policy to allow transgender students to compete on teams that correspond with their gender identity.12 This case captured the at-bigger muscles, bigger hearts and bigger lungs, as well as a greater capacity to transport and use oxygen, stronger bones and tougher ligaments.); Letting Trans Women Play in Women’s Sports is Often Unfair, ECONOMIST (Oct. 17, 2020), https://www.economist.com/leaders/2020/10/17/letting-trans-women-play-in-womens-sports-is-often-unfair [https://perma.cc/W585-RX7W] (explaining sex-based advantages arise from testosterone, primarily male hormone, and suppressing testosterone only appears to have minor impact to undo advantage male athletes have over female athletes); Gillian R. Brassil & Jeré Longman, Who Should Compete in Women’s Sports? There are ‘Two Almost Irreconcilable Positions’, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html [https://perma.cc/629W-6EEC] (“But some evidence suggests that residual strength and muscle mass advantages largely remain when people assigned as males at birth undergo testosterone suppression for a year.”).

10. See Brassil & Longman, supra note 9 (observing comment from director of Center for Genetic Medicine Research at Children’s National Hospital in Washington saying, “[e]ven if transgender athletes retain some competitive advantages, it does not necessarily mean that the advantages are unfair, because all top athletes possess some edge over their peers”); see also ACLU Responds to Lawsuit Attacking Transgender Student Athletes, ACLU CONN. (Feb. 12, 2020), https://www.aclu.org/en/press-releases/aclu-responds-lawsuit-attacking-transgender-student-athletes [https://perma.cc/6HPJ-XVM2] (mentioning statement from transgender student athlete “[t]he more we are told that we don’t belong and should be ashamed of who we are, the fewer opportunities we have to participate in sports at all”); Katherine Kornei, This Scientist is Racing to Discover How Gender Transitions Alter Athletic Performance – Including Her Own, AM. ASS’N FOR THE ADVANCEMENT OF SCI. (July 25, 2018), https://www.sciencemag.org/news/2018/07/scientist-racing-discover-how-gender-transitions-alter-athletic-performance-including [https://perma.cc/4QS7-H79Y] (challenging assumption transgender women have athletic advantages over non-transgender women with study that found “transgender women who received treatment to lower their testosterone levels did no better in a variety of races against female peers than they had previously done against male runners”).

11. For further discussion of the legislative and legal battles concerning transgender athletes’ rights across America, see infra notes 108-126 and accompanying text.

tention of the U.S. Department of Education, Office for Civil Rights (OCR) who opened their own investigation and found that the transgender participation policy “denied athletic benefits and opportunities to female student-athletes.” In late August of 2020, OCR threatened to withhold millions of dollars of federal desegregation funding if the Connecticut schools kept the transgender participation policy. OCR also delineated that the Bostock holding does not apply to Title IX, and even if it did, Title IX still would not permit biological males to compete against biological females on a sex-segregated team.

While this litigation was pending on the East Coast, Idaho lawmakers passed a bill to make Idaho the first state to ban transgender athletes from participating on girls’ sports teams at the primary events in Connecticut and is a violation of Title IX); Katie Barnes, The Battle over Title IX and Who Gets to Be a Woman in Sports: Inside the Raging National Debate, ESPN (June 23, 2020), https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate [https://perma.cc/3LC8-42F4] (“Connecticut is one of 18 states, along with the District of Columbia, to allow high school transgender athletes to compete in accordance with their gender identity rather than their sex assigned at birth.”).


15. See Letter from Kimberly M. Richey, Acting Assistant Secretary for Civil Rights, to Lori Mizerak, Attorney for Hartford Public Schools, City of Hartford; David S. Monastersky, Attorney for Glastonbury Public Schools and Canton Public Schools, Howel & Ludorf, LLC; Peter J. Murphy, Attorney for Connecticut Interscholastic Athletic Conference and Danbury Public Schools, Shipman & Goodwin, LLP, Linda L. Yoder, Attorney for Connecticut Interscholastic Athletic Conference and Danbury Public Schools, Shipman & Goodwin, LLC; Johanna Zelman, Attorney for Bloomfield Public Schools and Cromwell Public Schools, Ford Harrison (Aug. 31, 2020) (on file with author) [hereinafter Letter to Department of Education], https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf [https://perma.cc/YA7W-Q5AK] (“Even if Bostock applied to Title IX – a question the Supreme Court expressly declined to address – its reasoning would only confirm that Title IX does not permit a biologically male student to compete against females on a sex-segregated team or in a sex-segregated league.”).
mary, secondary, and college levels. More than a dozen states have followed suit and introduced similar legislation. Scholars believe that the “simultaneous activity in so many states means lawsuits opposing new state laws, like Idaho’s or transgender-friendly policies like those in Connecticut, are likely to move up to the Supreme Court.”

Now this debate has reached the national stage. On December 10, 2020, Democratic Hawaii Representative and former 2020 Presidential candidate Tulsi Gabbard introduced a bill, titled the “Protect Women’s Sports Act,” with Republican Representative Markwayne Mullin. This bill, if enacted, would deny federal funding to schools that permit a biological male to participate in an athletic program or activity that is designated for biological women or girls. In a statement by Rep. Gabbard, she said “Title IX is being weakened by some states who are misinterpreting [it], creating uncertainty, undue hardship, and lost opportunities for female athletes . . . [o]ur legislation protects Title IX’s original intent which was based on the general biological distinction between men and women athletes based on sex.” This proposal runs counter to an executive order signed by Democratic President Joe Biden on January 20, 2021.

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17. See id. (“States that have introduced transgender-exclusion bills this year include Alabama, Arizona, Georgia, Iowa, Indiana, Kansas, Tennessee, and Washington.”).

18. See id. (demonstrating divide in opinion between states increases likelihood this issue will end up before nation’s top justices); see also Dan Avery, State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say, NBC News (Feb. 17, 2021), https://www.nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-say-n1258124 [https://perma.cc/2XGL-TYRN] (finding bills in at least 20 states have been introduced to restrict transgender students’ participation in sports).

19. For further discussion of federal legislation introduced to ban biological male athletes from competing in female sports, see infra notes 108-126 and accompanying text.


21. See id. (“Allowing biological males to compete in women’s sports diminishes equality and takes away from the original intent of Title IX.”).

ary 20, 2021 which prohibits discrimination based on gender identity in sports.\(^{23}\)

Although the Bostock decision has left little guidance for how lower courts should rule on future cases concerning Title VII and Title IX protections of transgender athletes, this Note asserts that the Supreme Court correctly relied on its interpretation of the text of Title VII to find that sex discrimination includes sexual orientation and transgender discrimination.\(^{24}\) Section II of this Note introduces the relevant facts of Bostock and explains the holding of the case. Section III outlines the background of Title VII and Title IX. In addition, Section III examines Title VII’s “because of sex” jurisprudence.\(^{25}\) Section IV summarizes the Supreme Court’s Title VII analysis.\(^{26}\) Section V postulates the Court’s decision is in line with the Court’s statutory interpretation of Title VII and judicial precedent, but recognizes issues may arise from this decision outside of the employment context.\(^{27}\) Finally, Section VI concludes by discussing the impact Bostock may have on transgender participation in girls’ and women’s sports.\(^{28}\)

II. A DEEP DIVE INTO THE FACTS OF BOSTOCK

In Bostock, the United States Supreme Court consolidated three different cases addressing whether an employer can fire an employee because the employee is homosexual or transgender.\(^{29}\) The plaintiffs in all three cases brought Title VII claims against their

\(^{23}\) See Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (stating children should be able to learn without being denied access to school sports and “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation”).

\(^{24}\) For further discussion of the Court’s decision to strictly adhere to the text of Title VII, see infra notes 135-156 and accompanying text.

\(^{25}\) For further discussion of the facts of Bostock, see infra notes 29-54 and accompanying text.

\(^{26}\) For further discussion of Title VII and Title IX, see infra notes 63-104 and accompanying text.

\(^{27}\) For further discussion of the Court’s statutory interpretation of Title VII, see infra notes 76-100 and accompanying text.

\(^{28}\) For further discussion of the Bostock’s decisions impact on women’s sports, see infra notes 176-202 and accompanying text.

\(^{29}\) See Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (explaining how case reached Supreme Court); see generally Bostock v. Clayton Cty. Bd. of Comm’rs, 894 F.3d 1335 (11th Cir. 2018) (examining Title VII lawsuit after employee was fired when employee participated in gay softball league); E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) [hereinafter Harris Funeral Homes] (analyzing Title VII lawsuit after employee was fired when employee changed gender from male to female); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) [hereinafter Zarda] (examining Title VII lawsuit after employee was fired after disclosing sexual orientation to customer).
employers, with each plaintiff alleging unlawful discrimination on the basis of “sex” and arguing that the employer fired the employee for being homosexual or transgender. These cases generated a circuit split between federal appellate courts, each differing in their determination of whether sexual orientation or gender identity discrimination fall under the Title VII protected characteristic “sex.” The Supreme Court in Bostock evaluated the facts of these three cases to resolve the circuit court split and clarify the definition of sex in Title VII, holding that discrimination on the basis of sexual orientation or gender identity constituted discrimination based on sex.

A. Bostock v. Clayton County, Georgia

Gerald Bostock worked for Clayton County for over ten years as a Child Welfare Services Coordinator, and in his tenure as Coordinator he received accolades and good performance evaluations from the County. While working as Coordinator, Bostock became involved with a gay recreational softball league and actively promoted the league for volunteer opportunities. The County terminated Bostock’s employment approximately five months after his participation in the softball league for “conduct unbecoming of a County employee.” Bostock then brought suit against his former employer for violation of Title VII alleging he was discriminated against because of his sex. The case escalated to the Eleventh Circuit, which held “the law does not prohibit employers from firing employees for being gay so his suit could be dismissed as a matter of law.”

30. For further discussion of the cases leading up to the Bostock decision, see infra notes 33-54 and accompanying text.
31. See Bostock, 140 S. Ct. at 1738 (noting courts of appeals decided differently on issue depending on circuit).
32. See id. at 1737-38 (detailing facts of each case that presented same question whether sexual orientation and transgender discrimination is protected under Title VII).
34. See id. (observing Mr. Bostock’s engagement with gay softball league).
35. Id. at *2 (describing employer’s reasoning for terminating Mr. Bostock’s employment with County).
36. See id. (reasoning Mr. Bostock was discriminated against because of his “sexual orientation and identity and participating in the softball league” and that this is discrimination “because of sex”).
37. See Bostock, 140 S. Ct. at 1738 (describing Eleventh Circuit holding).
B. E.E.O.C v. Harris Funeral Homes

Amiee [sic] Australia Stephens, previously known as William Anthony Beasley Stephens, was assigned male at birth and worked as a Funeral Director/Embalmer at R.G & G.R Harris Funeral Home for five years. Prior to transition and during her struggle with a gender identity disorder, Stephens wrote a letter to her employer stating she intended to have sex reassignment surgery and to “live and work full-time as a woman for a year.” Stephens wrote that after a vacation, she would be “as her true self, Amiee [sic] Australia Stephens, in appropriate business attire.”

The employer postponed Stephens’ vacation, during which time she would receive the reassignment surgery. After Stephens had the sex reassignment surgery, the employer stated “this is not going to work out” and fired her. Upon termination from her role, Stephens filed a sex discrimination charge with the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC then issued a letter of determination, stating that the funeral home “discharged Stephens due to her sex and gender identity, female, in violation of Title VII.” The Sixth Circuit determined that Title VII forbids employers from firing employees because of their gender identity.

C. Zarda v. Altitude Express, Inc.

Donald Zarda was a sky diving instructor at Altitude Express, Inc. In this position, he was regularly strapped hip-to-hip and shoulder-to-shoulder with clients. Mr. Zarda sometimes informed

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39. See id. at 568 (explaining facts of case that give rise to ultimate adverse employment action).
40. See id. at 569 (observing employee was forthcoming with her intention to have re-assignment surgery).
41. See id. (noting employer inhibition with Ms. Stephens’ surgery).
42. See id. (discussing adverse employment action).
43. See id. (detailing legal action employee took against employer).
44. See id. (describing EEOC’s claim against employer).
45. See Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020) (recognizing Sixth Circuit found that Title VII does protect employees from gender identity discrimination because of sex); see generally Harris Funeral Homes, 884 F.3d at 567 (concluding Ms. Stephens’ termination was violation of Title VII because of sex discrimination).
46. See Zarda v. Altitude Express, Inc., 885 F.3d 100, 108 (2d Cir. 2018) (describing Mr. Zarda’s former occupation).
47. See id. (illustrating close contact between Mr. Zarda and skydiving clients).
female clients that he was gay to make them feel more comfortable when strapped to him.48 When preparing for a tandem skydive with one client, Zarda told her that “he was gay and had an ex-husband to prove it.”49 After the dive, the client told her boyfriend that Zarda inappropriately touched her and used his sexual orientation as an excuse for his behavior.50 Zarda’s boss immediately fired him when this was reported.51 Zarda denied touching the client inappropriately and filed a discrimination charge with the EEOC for being fired because of his reference to his sexual orientation.52 In this case, the Second Circuit found that sexual orientation discrimination is discrimination based on “sex” protected by Title VII.53

After reviewing the facts of these three distinct cases, the Supreme Court held, “[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex . . . [A]nd that is all Title VII has ever demanded to establish liability.”54

III. THE FIGHT FOR A LEVEL PLAYING FIELD: THE BACKGROUND OF TITLE VII, TITLE IX, AND TRANSGENDER ATHLETES’ RIGHTS

The Bostock case made its way to the Supreme Court following monumental legal victories for the Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) movement in its decades-long history.55 This movement shaped LGBTQ rights in America by eliminating sodomy laws and recognizing same sex marriage.56 Employees have been protected from sex discrimination in the workplace under Ti-

48. See id. (noting Mr. Zarda referencing his sexual orientation with clients).
49. Id. (recounting one incident between Mr. Zarda and client).
50. See id. (explaining situation that created adverse employment action against Mr. Zarda).
51. See id. (establishing exact moment Mr. Zarda’s employer fired him).
52. See id. at 109 (describing action Mr. Zarda brought against his employer for firing him).
54. See id. at 1744 (stating Supreme Court’s holding).
tle VII for more than half a century.\textsuperscript{57} However, this same protection was not afforded to Americans in the workplace who identify as anything other than heterosexual.\textsuperscript{58} The Court granted certiorari in \textit{Bostock} to “resolve at last the disagreement among the courts of appeals over the scope of Title VII’s protections for homosexual and transgender persons.”\textsuperscript{59} Important to understanding the legal backdrop of the \textit{Bostock} case, this Section will discuss Title VII’s legislative history and judicial precedent.\textsuperscript{60} This Section will also explain the formative impact Title VII case law has historically had on other sex discrimination statutes, such as Title IX.\textsuperscript{61} Finally, this Section will conclude with background into the controversial issue of transgender athletes’ rights.\textsuperscript{62}

\textbf{A. Legislative History of Title VII}

In 1963, President John F. Kennedy appealed to Congress in two separate letters stressing the importance of reducing “Negro unemployment” by improving racial discrimination issues in the workplace.\textsuperscript{63} These letters served as a catalyst for Congressional

\textsuperscript{57} See e.g., Amanda Hainsworth, \textit{Bostock v. Clayton County, Georgia}, 64 Bos. B. J. 3, 22 (Aug. 17, 2020) (stating purpose of Title VII of Civil Rights Act is to guarantee employees protections from discrimination).

\textsuperscript{58} See id. (stating courts historically have not recognized protections for sexual orientation and transgender status discrimination); see generally Evans v. Ga. Reg’l Hosp., 850 F.3d 1248 (11th Cir. 2017) (affirming Fifth Circuit’s decision in \textit{Blum}); Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (holding discharge for homosexuality is not prohibited by Title VII).

\textsuperscript{59} See \textit{Bostock}, 140 S. Ct. at 1738 (addressing federal circuit split on whether Title VII sex discrimination encompasses transgender and sexual orientation discrimination). The Court notes that the Eleventh Circuit held that the law “does not prohibit employers from firing employees for being gay,” but the Second Circuit found sexual orientation discrimination a violation of Title VII and the Sixth Circuit reached a similar holding barring employers from transgender discrimination. See id. (highlighting split in court of appeals opinions on this issue).

\textsuperscript{60} For further discussion of Title VII legislative history and jurisprudence, see infra notes 63-100 and accompanying text.

\textsuperscript{61} For further discussion of Title VII’s impact on Title IX, see infra notes 101-104 and accompanying text.

\textsuperscript{62} For further discussion of controversial cases and regulatory policies concerning transgender participation in sports, see infra notes 105-134 and accompanying text.

\textsuperscript{63} See Francis J. Vaas, Comment, \textit{Title VII: Legislative History}, 7 B.C. L. Rev. 431, 432 (1966) (describing President Kennedy’s message to Congress, saying “the relief of Negro unemployment required progress in three major areas, namely, creating more jobs through greater economic growth, raising the level of skills through more education and training and eliminating racial discrimination in employment”); see also Eric S. Dreiband & Brett Swearingen, \textit{The Evolution of Title VII Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964}. JONES DAY (Apr. 6,
members to submit civil rights bills addressing these employment issues.\footnote{64} One of the bills was H.R. 405, “A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age,” the precursor to Title VII.\footnote{65} This bill was incorporated into the administration’s comprehensive bill H.R. 7152.\footnote{66}

The general debate on H.R. 7152 started on January 31, 1964 and continued for nine days.\footnote{67} During the debate, over forty amendments were proposed to Title VII, and sixteen were adopted by the House.\footnote{68} The Senate began its debate on H.R. 7152 on March 30, 1964, after already spending “seventeen days in debating procedural questions and whether or not it should even consider the bill.”\footnote{69} At the close of the debate, only two of the House’s amendments survived the Senate’s rewriting of the bill.\footnote{70}

Virginia Representative Howard Smith’s amendment adding “sex” as a basis for discrimination is significant because President

\footnote{64. See Vaas, supra note 63, at 433 (“At the outset of the Eighty-eighth Congress various Senators and Representatives submitted a plethora of civil rights bills. Some included comprehensive provisions relating to all areas of civic and economic life where discrimination existed . . . others dealt primarily with equal employment opportunity in both private and public employment.”).}

\footnote{65. See id. at 434 (observing Title VII’s language incorporates equal employment opportunity bill, H.R. 405).}

\footnote{66. See id. at 435 (explaining Title VII of H.R. 7152, as first introduced in Congress, established “Commission on Equal Employment Opportunity” to prevent discrimination on ground of “race, color, religion, or national origin in Government employment”).}


\footnote{68. See Delivering on a Dream: The House and the Civil Rights Act of 1964, History, Art & Archives, (last visited Mar. 2, 2021), https://history.house.gov/Exhibitions-and-Publications/Civil-Rights/1964-Essay/ [https://perma.cc/YAVY-35PQ] (stating two floor managers in debate Representative McCulloch and Celler “spent the next eight days going title by title through the legislation, beating back amendment after amendment intended to weaken the bill, accepting only those agreed to by both men”).}

\footnote{69. See Vaas, supra note 63, at 433 (implying H.R. 7152 was controversial bill that took time to secure passage).}

\footnote{70. See id. at 438 (observing Smith amendment and another House amendment were adopted by Senate).}
Kennedy never mentioned sex discrimination in his appeals to Congress for civil rights reform. Scholars have suggested Representative Smith, a public opponent of civil rights legislation, added the amendment to sabotage H.R. 7152’s passage. It may be likely that Representative Smith believed prohibiting discrimination against women in the workplace would be unacceptable to Representatives who may have voted for the proposed civil rights bill otherwise. However, Smith’s motivations may also be explained by the efforts of the National Woman’s Party (“NWP”) and other women’s advocates who executed a “carefully planned” addition to the civil rights bill. As such, the legislative history is clouded by the social construction of the events that led to the “because of sex” amendment now found in Title VII.

B. Interpretation of “Because of Sex” Discrimination Over the Years

Title VII’s unclear legislative history leaves significant room for debate in interpreting Title VII’s prohibition of sex discrimination. Historically, sex discrimination claims under Title VII generally comprised of women bringing actions against their employer

71. See Dreiband & Swearingen, supra note 63, at 1 (explaining discrimination on basis of sex was not stressed by President as needed civil rights reform).
72. See Michael Evan Gold, Comment, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 DUQUESNE L. REV. 453, 459-61 (1981) (observing Representative Green’s remarks on sex discrimination amendment, saying, “[o]n the last day of House debate on the Civil Rights Bill, Representative Smith, a staunch opponent of the Bill, proposed, in jest, the inclusion of "sex" as a prohibited classification in an attempt to make the Bill unacceptable to as many legislators as possible”).
73. See id. at 461 (explaining argument that “the unrepresentative majority hoped to poison [H.R. 7152] with sex, perhaps calculating that votes to take sex out of the bill could not be mustered but that, with sex in the bill, it could not pass”).
74. See Rachel Osterman, Comment, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination was an Accident, 20 YALE J.L. & FEMINISM 409, 410 (2009) (noting “[f]eminists who wanted to ensure gender equality imagined [Smith’s amendment to Title VII of H.R. 7152] as a well-intentioned, carefully planned addition to the bill”). The NWP, an organization devoted to advocating for equal rights, pushed for a sex provision in 1963 and wrote to Representative Smith urging him to include “sex” in H.R. 7152. See id. at 414 (noting another theory why sex was added to provisions of Title VII).
75. See id. at 438 (concluding legislative history is ambiguous concerning intentionality and meaning of “because of sex” discrimination under Title VII).
76. See Courtney E. Ruggeri, Comment, Let’s Talk About Sex: A Discussion of Sexual Orientation Discrimination Under Title VII, 61 B.C. L. REV. 34, 37 (Mar. 9, 2020) (“Oftentimes, the varying interpretations have been attributed to the limited legislative history surrounding the inclusion of “sex” among the statute’s protected classes.”).
alleging disparate treatment. Early Title VII cases, like Holloway v. Arthur Andersen & Company, focused on discrimination because of sex as a biological distinction. Over time the Supreme Court addressed more nuanced cases recognizing “sex” to mean more than the biological distinction between males and females, including sex discrimination generally, sexual harassment, sex stereotyping, and gender based discrimination.

1. Sex Discrimination Generally

The Supreme Court addressed the definition of “sex” in 1971 when it ruled in Phillips v. Martin Marietta Corp. that a company policy to refuse to hire women with preschool age children violated Title VII of the Civil Rights Act of 1964. A few years later, the Court in Los Angeles Dept. of Water and Power v. Manhart found that making women pay more into a pension plan policy violates Title VII because the policy does not “pass the simple test” of asking whether an individual female employee would have been treated the same regardless of her sex. In Manhart, the Court also recognized that a policy may appear evenhanded at the group level but can still be discriminatory at an individual level.

2. Sexual Harassment

Furthermore, although the explicit language of Title VII does not include “sexual harassment,” the Court has recognized it as a violation of Title VII in Meritor Savings Bank v. Vinson. The Court

77. See Anthony E. Verona & Jeffrey M. Monks, Comment, EN/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation, 7 WM. & MARY J. WOMEN & L. 67, 72 (2000) (observing many of first sex discrimination cases were brought by women against employers for disparate treatment, which simply means being subject to conditions or disadvantageous terms other sex was not).

78. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (determining sex discrimination to be understood as protecting biological women from discrimination in employment).

79. See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (reasoning that permitting one policy for women and one policy for men does not comply with Section 703(a) of Civil Rights Act of 1964, which requires that “persons of like qualifications be given employment opportunities irrespective of their sex”).


81. See id. at 708 (stating individuals in respective classes do not always share same characteristics as other members of class).

82. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (defining “sexual harassment” as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . where ‘such conduct has the purpose or effect of unreasonable interfering with an individual’s work
found that discrimination because of sex in the workplace was not restricted to economic or tangible discrimination, but can include the psychological harms that change the terms and conditions of the employee’s employment because of an employee’s sex. The Supreme Court further clarified the definition of sexual harassment in *Harris v. Forklift Systems Inc.* and held that psychological injury is not required to recover under Title VII. The Court in *Harris* found that Title VII claims are actionable if a plaintiff demonstrates that a reasonable person would find the work environment hostile or abusive.

After deciding these seminal cases, the Court then considered if Title VII’s protection from discrimination on the basis of sex also applied to same-sex harassment. The Supreme Court decided in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex harassment is a viable claim under Title VII. The Court in this case reasoned that there is no justification in the statutory language or the Court’s precedents for excluding same-sex harassment claims from the protection of Title VII. The Court also importantly asserted that male-on-male sexual harassment was “assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover performance or creating an intimidating, hostile, or offensive work environment”).

83. *See id.* at 64 (asserting language of Title VII is not limited to “economic” or “tangible” discrimination because statute is intended to strike “the entire spectrum” of disparate treatment in workplace).

84. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993) (stating Title VII is violated “[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” and “[s]uch an inquiry may needlessly focus the factfinder’s attention on concrete psychological harm, an element Title VII does not require”).

85. *See id.* at 368 (declaring standard requires objectively hostile or abusive environment).

86. *See Wrightson v. Pizza Hut of America Inc.*, 99 F.3d 138, 145 (4th Cir. 1996) (“Accordingly, we hold that a same sex . . . sexual harassment claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex.”); *see generally Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (suggesting same-sex harassment claims are not cognizable under Title VII).


88. *See id.* at 80 (defending against argument that recognizing same-sex liability would turn Title VII into “general civility code” for American workplace).
reasonably comparable evils, and it is ultimately the provisions of our laws . . . by which we are governed.”

3. Sex Stereotyping and Gender-Based Discrimination

In addition to issues of sexual harassment, courts were tasked with determining if discrimination based on sex stereotyping constituted discrimination based on sex. The Supreme Court made a ground-breaking decision in *Price Waterhouse v. Hopkins* that allowed sex stereotyping to be used as evidence for sex discrimination in the workplace. The Court held that an employer cannot discriminate against an employee for not conforming to certain stereotypes without discriminating because of sex. Therefore, when an employee suffers from an adverse employment decision because they do not meet certain societal expectations, the employer can be liable under Title VII.

In addressing more recent cases regarding gender identity, circuit courts have leveraged the reasoning of *Price Waterhouse* in tandem with the logic of *Oncale* to find that some same-sex harassment claims can succeed if the plaintiff shows that they were harassed for failing to conform to certain gender stereotypes. In *E.E.O.C. v. Boh Bros. Constr. Co., LLC*, the Fifth Circuit found that the plaintiff provided sufficient evidence that a male supervisor discriminated against the plaintiff because of his “sex” when the supervisor subjected him to verbal and physical harassment for not being “man...
enough." This fact pattern could also form the basis of a claim of discrimination or harassment based on sexual orientation, but before Bostock, lower courts were divided as to whether sexual orientation discrimination is sex discrimination under Title VII.

4. Sexual Orientation and Gender Identity Cases

Historically, plaintiffs have failed to convince courts to interpret Title VII to include protections for sexual orientation and transgender discrimination. These cases may have turned out differently if they were decided after the Supreme Court’s decision in Price Waterhouse, which held “sex” discrimination to include gender identity, rather than solely anatomy, to be a determinant of sex under Title VII. Price Waterhouse set the tone for sexual orientation and gender identity jurisprudence; in its wake, circuit courts acknowledged the harms of discrimination for failing to conform to gender roles. The Ninth Circuit’s decision in Schwenk v. Hartford found that “the initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse.

95. See E.E.O.C. v. Boh Bros. Const. Co., 731 F.3d 444, 457-461 (concluding supervisor discriminated because of sex and it was severe or pervasive enough to be considered hostile work environment).

96. For further discussion of the courts’ divide on this issue, see infra notes 97-100 and accompanying text.

97. See generally Ulane v. Eastern Airlines, Inc., 743 F.2d 1081, 1087 (7th Cir. 1984) (emphasizing Congress never considered broad coverage of homosexuals or transgenders under Title VII, and if term “sex” as used in Title VII is “to mean more than biological male or biological female, the new definition must come from Congress”); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (“Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one’s transsexualism does not fall within the purview of [Title VII].”).


99. See generally Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding sex discrimination may include discriminating against man for feminine attire); Schwenk v. Hartford, 204 F.3d 1187, 1203 (9th Cir. 2000) (stating Title VII protections extend to males who are deemed feminine).

C. Title VII Informing Title IX Policies

The language of Title IX closely follows that of Title VII because both statutes can be used to combat sex discrimination. However, Title VII is concerned with discrimination in the workplace, whereas Title IX prohibits discrimination in educational programs or institutions that receive money from the federal government. Courts historically have looked to Title VII to inform their opinions on Title IX claims because Title VII has case law that “dictates the prohibition of sex discrimination.” Further, because the enabling clause of Title VII and Title IX are indistinguishable, “court decisions under one law typically impact how the other law will be interpreted, i.e., court decisions under one law can set precedents for the interpretation of the other.”

D. Transgender Athletes’ Rights

Transgender participation in athletic competition is not a novel debate. It is one that has sparked controversy and has cre-

101. See Kendyl L. Green, Comment, Title VII, Title IX, or Both?, 14 SETON HALL CIR. REV. 1, 3 (2017) (describing similarities between two statutes).
102. See id. (discussing differences between Title VII and Title IX).
103. See id. (reinforcing interconnection between Title VII and Title IX); see generally Oona R. S. v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998) (applying Title VII to teacher on harassment claim); Preston v. Virginia ex rel. New River Cnty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) (stating Title VII has persuasive authority in Title IX claims); Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (reasoning Title VII is “most appropriate analogue” of Title IX’s standards). But see Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (holding Title VII standards are not authoritative in class action brought by female athletes against university).
104. See Bernice Resnick Sandler, Title IX: How We Got It and What a Difference it Made, 55 CLEVELAND ST. L. REV. 473, 479 (2007) (noting enabling clause of Title IX says “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program receiving Federal financial assistance”). These words cover every activity in an educational institution, including sports. See id. (acknowledging enabling clause covers everything unless there is specific exemption, such as "private undergraduate admissions, the social activities of fraternities and sororities, single sex dormitories, and certain youth organizations such as the Boy Scouts and Girl Scouts"). After Title IX was passed, “a new era had begun, but few realized that this was a landmark bill which would affect millions of girls and women and change our schools and colleges forever.” See id. at 480 (observing impact Title IX has on athletics and doors Title IX has opened for female athletes).
105. See, e.g., Ruth Padawer, The Humiliating Practice of Sex-Testing Female Athletes, N.Y. TIMES (June 28, 2016) https://www.nytimes.com/2016/07/05/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html [https://perma.cc/26R4-EUS8] (describing sports history fraught with disputes about athletes’ gender identity). During the 1936 Berlin Olympics, two runners were rumored to be “male imposters” because of their remarkable athletic talents, and after the track race, the German Olympics examined a runner’s genitalia to con-
ated “deeply divided advocates who are usually in agreement when it comes to female sports, including lawyers, women’s group leaders, athletes, and parents.” A review of recent cases and the NCAA transgender athlete regulatory policy evidences that striking the balance between fairness and inclusion in the transgender sports debate is a difficult task and a goal that is far from being reached.

1. **Soule v. Connecticut Association of Sports**

Before the *Bostock* decision, three high school female athletes sued the Connecticut Interscholastic Athletic Conference (CIAC) for adopting a new policy that allowed transgender student athletes to compete on the team of their “preferred gender identity.” The students filed the complaint in federal court, claiming that they were denied the opportunity for fair competition under Title IX. In Connecticut, two individuals assigned male at birth, but identifying as females, won fifteen women’s state championship firm she was female. See *id.* (noting early example of gender identity dispute in sports). Shortly after the Berlin Olympics, international sports administrators started requiring females to bring “femininity certificates” to confirm their sex. See *id.* (highlighting concern of “masculine” athletes in female sports). In the 1950s, the Soviet Union had major female athlete success in the Olympics, and rumors were spread that the female athletes "were men who bound their genitals to rake in more wins.” See *id.* (showcasing attitudes that superior female athletes must be men). By the 1960s, international sports officials mandated a genital check of every woman competing in international games. See *id.* (noting this practice was coined “nude parade” where women had to appear in front of panel of doctors with underpants down to get examined). After complaints about the genital checks, international officials developed a “chromosome test” to “root out not only imposters but also intersex athletes, who, Olympic officials said, needed to be barred to ensure fair play.” See *id.* (relying on science to determine if athlete “was female enough” to participate).


107. For further discussion of recent issues highlighting the diversity of opinions in the transgender sports debate, see infra notes 108-134 and accompanying text.


track titles. Furthermore, one transgender female set ten state records that were held previously by ten different girls.

In March of 2020, the United States Department of Justice wrote a statement of interest against the CIAC policy, arguing that “sex” in Title IX does not encompass transgender status. Further, the Department argued against making biological females compete against transgender females, as it “deprives those women of the single-sex athletic competitions that are one of the marquee accomplishments of Title IX.” The CIAC argued that their policies are not subject to Title IX. In May 2020, the Department of Education, Office for Civil Rights (OCR) concluded that the CIAC and other Connecticut school districts violated Title IX by adopting the transgender-participation policy and discriminating against female athletes. After Bostock was decided, OCR doubled down on its position that transgender participation policies violate Title IX. A New York Times report released on Sept 18, 2020


111. See Connecticut Students Sue, supra note 108 (discussing 2019 track championship results and track records held by transgender runners).


113. See id. (emphasizing Title IX’s core purpose is to give women equal athletic opportunity in schools and arguing this is done by establishing separate athletic teams for men and women that are on equal footing).


116. See Letter from United States Department of Education to Hartford Public Schools, Glastonbury Public Schools, Canton Public Schools, Connecticut Interscholastic Athletic Conference, Danbury Public Schools, Bloomfield Public Schools and Cromwell Public Schools, Office for Civil Rights (Aug. 31, 2020) (on file with author), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf [https://perma.cc/PW27-KKUH] (“Even if Bostock applied to Title IX – a question the Supreme Court expressly declined to address –
nicated OCR’s threat to several Connecticut schools that it would withhold millions of dollars if the schools do not withdraw from the CIAC because by “permitting the participation of biologically male students in girls’ interscholastic track” the CIAC “has denied female student athletes benefits and opportunities.117

2. *Hecox v. Little*

The OCR letters sent in regard to *Soule* in Connecticut left an Idaho federal district judge unconvinced that transgender girls participating in high school athletics discriminates against biological female athletes under Title IX.118 In August of 2020, the judge in *Hecox v. Little* issued a temporary injunction against the nation’s first state law that prohibited transgender females from playing on biological girls’ and women’s teams.119 Judge Nye believed that “[t]he OCR Letter is . . . of questionable validity given the Supreme Court’s recent holding” in *Bostock*.120 Judge Nye also reasoned that the National Collegiate Athletic Association (NCAA) and high school sports authorities in other states have allowed transgender females to participate in female sports, as long as they undergo testosterone suppression treatment for a given amount of time.121

The *Hecox* case involved a transgender college student, Lindsay Hecox, who wanted to run on the women’s track team at Boise State University.122 She sued Idaho Governor Brad Little for sign-

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117. See Broadwater & Green, *supra* note 14 (reporting Education Department prepared to withhold eighteen million dollars of grants to Connecticut school districts if districts continue to allow transgender students to choose teams they want to compete on).


120. See id. (recognizing Judge Nye’s dismissal of OCR letter).

121. See id. (presenting Judge Nye’s rationale behind temporary injunction). For further discussion of the NCAA’s policy on transgender athletes’ participation, see *infra* notes 128-134 and accompanying text.

ing a law that imposes an outright ban on transgender participation in women’s sports.123 The ACLU of Idaho represented Ms. Hecox in this action, arguing that the Fairness in Women’s Sports Act violates federal law because “it discriminates on the basis of sex and transgender status and invades fundamental privacy rights.”124 The court enjoined the State of Idaho from enforcing this law without deciding whether the law violates Title IX.125 Alliance Defending Freedom, who also represented the female athletes in Connecticut, filed its appeal of the decision to halt enforcement of the Idaho law with the Ninth Circuit.126

3. The National Collegiate Athletic Association (NCAA)

In 2011, the NCAA published guidelines that set forth how the NCAA would permit the inclusion of transgender student-athletes in college athletics.127 These guidelines remain the current policy for the NCAA.128 According to the guidelines, the NCAA’s policy is that transgender males may participate on a men’s team in the NCAA, but transgender females must take testosterone suppression to be able to compete on a women’s team.129 An NCAA spokespers-
son for the 2011 policy noted that the policy “sought fair opportunities for student-athletes from diverse backgrounds while ensuring that women’s sports would be equitably conducted.”

Currently, the NCAA policy does not limit the number of transgender student-athletes who may participate on a team or at an institution. Further, all student athletes are subject to the same division-specific financial aid legislation. If Bostock applies to Title IX, the NCAA’s current policy, which bars female transgender athletes from participating on women’s teams until the athlete completes one year of suppression treatment, might be challenged. If this policy is successfully challenged and the NCAA does not change their transgender participation policy, transgender female athletes who do not undergo suppression treatments may participate on women’s teams with the same opportunities for roster spots and scholarships as biological female athletes on women’s teams.

IV. A Play-by-Play: The Supreme Court’s Rationale in Bostock

The Supreme Court ruled in a 6-3 decision that Title VII prohibits sexual orientation and gender identity discrimination. From this decision, the Court resolved the circuit split by reversing the judgment of the Eleventh Circuit (in Bostock) and affirming the gender_Handbook_2011_Final.pdf (stating “A trans male student-athlete who is not taking testosterone related to gender transition may participate on a men’s or women’s team” and “a trans female transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women’s team”).

130. See Ryan, supra note 127 (explaining rationale for NCAA policy).

131. See E-mail from Jean Merrill, NCAA Director of Inclusion, to Jackie Gillen, Staff Writer, Villanova Jeffrey S. Moorad Sports Law Journal (Oct. 21, 2020, 9:45 AM) (on file with author) (explaining NCAA does not have policy for how many transgender athletes may participate on one same-sex team or at one institution).

132. See id. (setting forth no difference in scholarship eligibility for transgender athletes).


134. See Mason, supra note 128 (“Transgender athletes are competing at all levels of sport, from youth club programs to professional leagues . . . yet even as more transgender athletes get into the game, sports leaders, competitors, and fans around the globe still grapple with how to keep contests fair for all.”).

judgements of the Second and Sixth Circuits (in Zarda and Stephens respectively). The Supreme Court started its analysis of Title VII with an examination of the ordinary public meaning of “sex” and concluded with a review of judicial precedent. The Court ultimately determined Title VII’s statutory language and judicial history provide that “sexual orientation and gender identity are inextricably bound up with sex . . . and that discrimination on the basis of sexual orientation or gender identity involves the application of sex based rules.”

A. The Ordinary Public Meaning of “Sex” Under Title VII

It is general practice for the Supreme Court to interpret a statute in accordance with the ordinary public meaning of the statute’s terms when it was enacted. Title VII of the Civil Rights Act of 1964 prohibits an employer from “fail[ing] or refus[ing] 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.” The main statutory term at issue in this case is “sex,” and the parties conceded that the term historically referred to the “status as either male or female as deter-

136. See id. at 1754 (emphasizing importance of Supreme Court’s decision in this case resolving circuit court split whether sexual orientation and transgender discrimination is discrimination because of sex); see also Carlos Arevalo, US Supreme Court to Decide Title VII Sexual Orientation/Transgender Discrimination Cases, JD Supra (Apr. 23, 2019), https://www.jdsupra.com/legalnews/us-supreme-court-to-decide-title-vii-98146/ [https://perma.cc/NEM7-L2GZ] (stating circuit split “set up the stage” for Supreme Court to address issue).

137. See Bostock, 140 S. Ct. at 1747 (detailing Supreme Court’s method and analysis of interpreting Title VII because of sex discrimination).

138. See id. (describing Supreme Court’s rationale for its holding); see also Sheridan King & Joshua Xavier, Defining Sex – The U.S. Supreme Court Finds That Sexual Orientation and Transgender Status Are Protected Under Title VII, JD Supra (June 26, 2020), https://www.jdsupra.com/legalnews/defining-sex-the-u-s-supreme-court-41138/ [https://perma.cc/L9MD-U8RT] (explaining Supreme Court’s decision makes clear that “an employment decision made on the basis of an employee’s homosexuality or transgender status is an employment decision made on the basis of an employee’s sex and is thereby prohibited by Title VII”).

139. See Bostock, 140 S. Ct. at 1738 (stating Court normally interprets statute in accord “with the ordinary public meaning of its terms at the time of its enactment . . . [if] judges could add to, remodel, update, or detract from old statutory terms . . . we would risk amending statutes outside the legislative process reserved for the people’s representatives”); see generally David A. Strauss, Comment, Why Plain Meaning, 72 Notre Dame L. Rev. 1568, 1565 (1997) (observing Supreme Court’s reliance on looking at “plain” or “public” meaning of statute).

140. See Bostock, 140 S. Ct. at 1738 (quoting Title VII’s language).
mined by reproductive biology.” 141 However, to determine the ordinary public meaning of “sex” the Court had to look beyond the historical definition and discern what “sex” means in the context of Title VII. 142

The Court recognized that Title VII prohibits employers from taking an adverse employment action or discriminating against an employee “because of their sex.” 143 This phrase implies a traditional standard of but-for causation, which means if the employer would not have made their decision if the plaintiff were not of a certain sex, the employer may be liable. 144 The Court then examined the ordinary public meaning of the terms “discriminate” and “discriminate against” which meant to “treat an individual worse than others who are similarly situated.” 145 The meaning of “individual” is the same as it was in 1964, which is “[a] particular being as distinguished from a class, species, or collection.” 146

B. The Court’s Interpretation of the Statutory Terms

After examining the ordinary public meaning of the terms in Title VII, the Court argued that a “straight forward rule emerges” which is “an employer violates Title VII when it intentionally fires an individual employee in part on sex.” 147 Applying this rule to the facts of this case, the Court found that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” 148 The Court offered a hypothetical to drive home the point that to discriminate against someone for their transgender status or homosexuality is to

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141. See id. at 1739 (acknowledging difference in opinion about definition of “sex,” but parties conceded that historically it meant biological sex of individual).

142. See id. (reasoning definition of “sex” is not only thing Court considers when determining ordinary public meaning of statutory term).

143. See id. (emphasizing statutory term in question).

144. See John D. Rue, Returning to the Roits of the Bramble Bush: The “But-For” Test Regains Primacy in Casual Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts, 71 Fordham L. Rev. 2679, 2685 (2003) (stating “but-for” inquiry “asks the finder of fact to determine whether the harm would have come to the plaintiff, had the defendant not acted (or failed to act) in breach of her duty”).

145. See id. (analyzing ordinary public meaning of other Title VII terms).

146. See id. (continuing to determine ordinary public meaning of pertinent statutory terms).

147. See Bostock, 140 S. Ct. at 1741 (proposing that ordinary public meanings of terms provide straightforward statutory interpretation of what “because of sex” under Title VII means).

148. See id. (declaring sexual orientation or transgender discrimination is discrimination under Title VII because discrimination is based on sex).
intentionally treat them differently because of their sex.\textsuperscript{149} That is because when an employer fires an employee under these grounds, there are two causal factors that may be in play: “both the individual’s sex and something else (the sex to which the individual is attracted to or with which the individual identifies).”\textsuperscript{150} Thus, when an employer discriminates on these grounds the employer intentionally relies on sex in its decision-making, which is forbidden by Title VII.\textsuperscript{151}

C. Judicial Precedent Interpreting “Sex” under Title VII

To support its conclusions, the Court revisited three leading “because of sex” discrimination precedents, \textit{Phillips}, \textit{Manhart}, and \textit{Oncale}, to confirm the Court’s interpretation of the plain meaning of Title VII.\textsuperscript{152} The Court discerned lessons from these cases that the Court applied to the facts presented in \textit{Bostock}.\textsuperscript{153} The first lesson the Court offers is that it is irrelevant what an employer may call or label a discriminatory practice if the practice intentionally discriminates against that individual in part because of sex.\textsuperscript{154} The next lesson is that a plaintiff’s sex does not need to be the primary cause of the employer’s adverse action.\textsuperscript{155} The final lesson the

\begin{footnotesize}
\begin{enumerate}
\item[(149).] See \textit{id.} at 1742 (“Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is firing “because of sex” if the employer would have tolerated the same allegiance in a male employee."); see generally Alexa Bradley, \textit{Bostock v. Clayton County: An Unexpected Victory}, \textsc{Marq. Univ. L. Sch. Fac. Blog} (July 17, 2020), https://law.marquette.edu/facultyblog/2020/07/bostock-v-clayton-county-an-unexpected-victory/ [https://perma.cc/9H7U-LR55] (commenting on hypothetical saying, “[the] hypothetical perfectly demonstrates the inseparable link between one’s ‘sex’ and ‘sexual orientation’ and ‘sex’ and ‘transgender status’”).
\item[(150).] See\textit{ Bostock}, 140 S. Ct. at 1742 (finding when employer discriminates against homosexuals or transgenders there are two factors at play, one of them being sex).
\item[(151).] See \textit{id.} (concluding employer intentionally discriminates against someone because of sex when employer discriminates against employee for being homosexual or transgender).
\item[(152).] See \textit{id.} at 1743 (“All that the statute’s plain terms suggest, this Court’s cases have already confirmed. Consider three of our leading precedents.”). For further discussion of the Court’s three leading precedents, see \textit{supra} notes 79-89 and accompanying text.
\item[(153).] See \textit{id.} (using past cases to suggest legal terms in Title VII have plain and settled meanings that support Court’s interpretation of Title VII in \textit{Bostock}).
\item[(154).] See \textit{id.} (“First, it’s irrelevant what an employer might call its discriminatory practice.”). The Court references \textit{Manhart} and \textit{Phillips} to say that labels and intentions do not make a difference if a practice is discriminatory or not. See \textit{id.} (clarifying practice that is neutrally labeled may still be discriminatory).
\item[(155).] See \textit{id.} at 1744 (explaining in \textit{Phillips}, \textit{Manhart}, and \textit{Oncale}, Court has found that sex just needs to be factor in employer’s decision and does not need to be sole cause of adverse action).
\end{enumerate}
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Court emphasizes is an employer cannot escape liability for treating males and females comparably as groups.156

V. PLAY BY THE RULES: A CRITICAL ANALYSIS OF BOSTOCK

The Bostock decision was a battle between textualists.157 One commentator stated that Neil Gorsuch and five other Justices in the majority took a “formalistic textualist” approach which focused on the statutory language of Title VII and downplayed the policy concerns or consequences of the case.158 The dissent in this case offered a more “flexible textualism” approach that allowed the interpretation of Title VII to include considerations such as policy, social context, and practical consequences.159

Before this decision, academics focused more on the difference between “textualism,” “originalism,” and “purposivism,” rather than the divisions within textualism.160 The Court’s ruling in Bostock highlights the tensions within textualism because Justice Neil Gorsuch, who authored the majority’s opinion, and Justice Brett Kavanaugh, who authored a dissenting opinion in the case, both have been known to be “committed textualists” and both were appointed by former President Donald Trump.161 The Bostock case shocked

156. See id. (finding even if employer subjects all male and females to rule that promotes equality at group level, it fails Title VII if it is discriminatory at individual level).


158. See id. (noting majority did not include policy appeals and legislative history in its analysis).

159. See id. (differentiating majority’s formalistic textualism and dissent’s flexible textualism, which includes other factors to interpret text of Title VII).

160. See id. at 3 (“Scholarship on statutory interpretation has largely overlooked the divisions within textualism.”). Textualists identify and enforce the “objective” or “plain” meaning of the statutory text. See, e.g., Caleb Nelson, Comment, What is Textualism, 91 Va. L. Rev. 348, 352 (2005) (explaining textualism as theory of statutory interpretation). Originalists generally contend that the “original intentions of the Framers should guide constitutional interpretation.” See Lawrence B. Solum, Comment, What is Originalism? The Evolution of Contemporary Originalist Theory, GEO. UNIV. L. CTR. 1, 5 (2011) (explaining originalism as theory of statutory interpretation). Purposivists tend to argue that “given the complexity of the legislative process, Congress cannot be expected to put everything in the text, and thus judges should interpret a statute so as to fulfill its overall aims and goals.” See Grove, supra note 157, at 3 (explaining purposivism as theory of statutory interpretation).

161. See Ilya Shapiro, After Bostock, We’re All Textualists Now, NAT’L REV. (June 15, 2020), https://www.nationalreview.com/2020/06/supreme-court-decision-bostock-clayton-county-we-are-all-textualists-now/ [https://perma.cc/2FHR-FAH8] (observing both Justices Gorsuch and Kavanaugh were appointed by President Trump).
the nation because many commenters observed that textualism traditionally upholds conservative political viewpoints, yet this decision is not considered a “win” by many conservatives.162

Between formalistic textualism and flexible textualism, the Court opted to adopt a formalistic textualism approach to interpreting Title VII in Bostock.163 When the Court turns to the plain meaning of Title VII rather than loose appeals to policy concerns, the Court sets guidelines for clearer and more transparent statutory analysis, and in turn helps protect the institutional legitimacy of the judiciary.164 The Supreme Court’s decision that Title VII of the Civil Rights Act of 1964 includes sexual orientation and gender identity discrimination is not surprising.165 It follows naturally from

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163. For further discussion of why adopting formalistic textualism was the right decision, see infra notes 173-174 and accompanying text.

164. See Grove, supra note 157, at 32 (asserting formalistic textualism is “more rule-bound method that promises to better constrain judicial discretion and thus a judge’s proclivity to rules in favor of the wishes of the political faction that propelled her into power.”). It is important for the courts to maintain legitimacy by guarding its reputation of judicial impartiality to the public so that the public continues to respect the court’s authority in making decisions. See also Peter Irons, A People’s History of the Supreme Court, NBC News (Feb. 4, 2019), https://www.nbcnews.com/think/opinion/has-supreme-court-lost-its-legitimacy-ncna966211 [https://perma.cc/E7ZT-VXL7] (“Rather, what matters is whether the public continues to believe the court has the authority to make decisions—and whether those decisions are obeyed by both the debate’s winners and losers.”). Maintaining an image of impartiality has become increasingly difficult in recent decades because politics in the United States have become more partisan and prone to gridlock. See How America’s Supreme Court became so politicised, Economist (Sept. 25, 2018), https://www.economist.com/briefing/2018/09/15/how-americas-supreme-court-became-so-politicised [https://perma.cc/5STR-DC4M] (acknowledging Congress recently becoming more partisan). Problems that in the past may have been settled legislatively are instead being decided by courts, and in the past four decades the Court has had to settle some of the most divisive political issues in American history. See id. (establishing why courts are viewed as more political than they once were). In addition, since the 1980s, it has become commonplace that presidents appoint judges that will decide cases in accord with the president’s side of the partisan divide. See id. (pointing out success of president’s selections in justices who will decide cases that align with president’s political party).

the Court’s interpretation of the plain language of the statute over the years because the Court on multiple occasions has recognized “sex” to mean more than the biological distinction between males and females. Beginning with *Meritor Savings Bank v. Vinson*, the Supreme Court held that sexual harassment in the workplace is a violation of Title VII, when Title VII does not reference sexual harassment at all. The Supreme Court then decided in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex harassment is a viable claim under Title VII. Also, the Court in *Price Waterhouse v. Hopkins* held that an employer cannot discriminate against an employee for not conforming to certain stereotypes without discriminating because of sex. It is clear from its judicial precedents that the Court has been willing to recognize that claims that were not specifically contemplated by Congress may still be actionable under Title VII. In addition, for many courts, “homosexuality and gender nonconformity are seen as interchangeable concepts.” Further, applying the Court’s precedent to trans-gendered individuals, it can be argued that “[d]iscrimination based on gender identity . . . is also a form of sex stereotyping.”

When adopting the formalistic textualist approach in *Bostock*, the Court opined that the text of the law is more important to consider than policy appeals to the consequences this decision could have on many other federal and state discrimination statutes.
Thus, the Court’s decision garnered institutional legitimacy in the eyes of the public because it was non-partisan and rooted in the interpretation of the text of the law. However, inevitably, the effects of this decision are already at play in other contexts outside of employment discrimination, and lower courts are left without guidance of how to apply the Court’s Title VII definition to other federal and state statutes that prohibit sex discrimination.

VI. A Game Changer: Women’s Sports After Bostock

The Supreme Court’s ruling in Bostock has certainly reignited the fight over transgender athletes’ rights. In the wake of Bostock, legislators and attorneys are engaging in high-profile Title VII and Title IX arguments addressing their impact on transgender and transitioning athletes and their ability to compete in athletics. The Court’s decision may provide female transgender professional athletes a right to compete against biological female athletes under Title VII. Furthermore, due to the close links between Title VII and Title IX, there will likely be implications for this decision in amateur women’s sports. This Section will briefly discuss the implications under other provisions of Title VII are questions for future cases, not these.”


175. For further discussion of the present impact of Bostock, see infra notes 176-202 and accompanying text.


177. For further discussion of the Title VII and Title IX arguments recently brought concerning transgender athletes’ rights, see supra notes 108-134 and accompanying text.


tential impact the *Bostock* decision may have in the professional sports world under Title VII.\(^{180}\) Then, this Section will delve more into the issue of whether the *Bostock* holding applies to Title IX.\(^{181}\) Many scholars who are tracking this area of the law believe Title IX’s interaction with transgender rights will be an issue that will likely move up to the Supreme Court.\(^{182}\)

### A. Title VII Impact on Women’s Sports

The interpretation of Title VII “because of sex” discrimination in the workplace was a monumental decision for LGBTQ employees who no longer need to be afraid of an adverse employment action because of their sexual orientation or transgender status.\(^{183}\) The same logic applies in the world of professional sports teams.\(^{184}\) No women’s leagues exclude transgender individuals from participating, but some leagues require limits on testosterone levels.\(^{185}\) After *Bostock*, testosterone testing policies may be a ground for transgender individuals to bring a disparate impact claim.\(^{186}\) This may permit transgender females to play on professional women’s

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\(^{180}\) For further discussion of the Title VII implications *Bostock* may have on professional sports, see infra notes 183-187 and accompanying text.

\(^{181}\) For further discussion of *Bostock* impacting Title IX sex discrimination claims, see infra notes 188-193 and accompanying text.

\(^{182}\) For further discussion of scholars predicting this issue will move up to the Supreme Court, see infra note 200-202 and accompanying text.

\(^{183}\) See Emmett Witkovsky-Eldred, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NAT’L PUBLIC RADIO (June 15, 2020), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/A88X-XMA] (finding ruling historic because nearly half United States does not have legal protections for LGBTQ employees, and now federal law affords LGBTQ protections).

\(^{184}\) See Kiana Thelma Devara, *Love is love, sports are sports: Title VII and its effect on sports*, DAILY CALIFORNIAN (July 2, 2020), https://www.dailycal.org/2020/07/02/love-is-love-sports-are-sports-title-vii-and-its-effect-on-sports/ [https://perma.cc/2S92-KRZS] (arguing sports are no different than other employment settings, and *Bostock* decision allows professional athletes to not fear discrimination for homosexuality or transgender status).


\(^{186}\) See Marino & Lee, supra note 133 (“In a post-*Bostock* world, however, such limitations – however well meaning – could conceivably qualify as a disparate treatment of transgendered applicants.”).
teams “regardless of testosterone levels or other physiological traits generally considered relevant to fair play.”

B. Title IX Impact on Women’s Sports

After the enactment of Title IX, athletics became a major source of controversy because males and females are expected to compete in the classroom but are segregated in competitive sports. The main justification for the segregation of men and women’s sports is “to maintain competitive fairness and promotion of broad and equal participation.” Justice Alito warned in his dissent in Bostock that applying the same Title VII definition of “sex” to Title IX could “undermine one of that law’s greatest achievements, giving young women an equal opportunity to participate in sports.” The director of the Independent Women’s Law Center said the decision was “a terrible day for women’s sports.”

Title IX prohibits recipients of federal financial assistance from discriminating because of sex, but is silent whether because of sex includes gender identity or discrimination against transgender students. If the Bostock decision applies to Title IX, then it could have an immediate impact on present and future legal battles over the inclusion of transgender athletes in high school and college

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187. See id. (raising questions of fairness that future courts have to balance with inclusion of transgender athletes).


190. See Bostock v. Clayton Cty., 140 S. Ct. 1731, 1780 (2020) (expressing fear that new definition of Title VII applied to Title IX will dismantle purpose of Title IX, creating equal opportunities for women to compete in sports).

191. See, e.g., School Bathroom, Sports Battles Loom After Supreme Court Ruling, BLOOMBERG LAW (Jun. 23, 2020), https://www.bloomberglaw.com/document/XFJO3NS0000002bna_news_filter=US-law-week&jcsearch=BNA%2520000000172c36fdd6a7fac57eac50001#cite [https://perma.cc/8R49-YTSJ]. (“The Women’s Law Center has opposed competition by transgender athletes in women’s sports. Braceras argued that the decision could lead to men seeking to participate in women’s sports like field hockey as well.”).

192. See Title IX’s Application to Transgender Athletes: Recent Developments, CRS (Aug. 12, 2020), https://www.everycrsreport.com/files/2020-08-12_LSB10531_c29e9c5b5dbf6a0ba10f9b5c1a452c8ed40e851cd.pdf [https://perma.cc/3PE3-7Y7W] (stating Title IX regulations uncertain whether there are prohibitions against transgender students participation in athletics).
VII. CONCLUSION

Ultimately, although the Bostock decision was incredibly important to the equality and protection of LGBTQ individuals in the workplace, this decision has inevitably opened the floodgates to litigation in other contexts. One particular area that is already being impacted by the Bostock decision is transgender athletes’ rights. The Supreme Court in Bostock clearly articulated that sex discrimination includes discrimination against transgender individuals. The question now is whether banning transgender girls and women from athletic competition constitutes discrimination under Title VII and Title IX.

This issue reached the national stage with Representative Tulsi Gabbard introducing the “Protect Women’s Sports Act” that would deny federal funding to schools that permit biological males to participate in an athletic program or activity that is designated for biological women or girls. This issue remains prominent in American politics following President Biden’s executive order.

193. See Marino & Lee, supra note 133 (mentioning two cases that may be resolved differently after Bostock decision).

194. See Sharita Gruberg, Beyond Bostock: The Future of LGBTQ Civil Rights, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/ (https://perma.cc/54RM-M9BS) (“[T]he court’s broad holding could advance LGBTQ equality under civil rights statutes that prohibit sex discrimination such as Title IX, the Affordable Care Act, the Fair Housing Act, and the 14th Amendment to the Constitution.”).

195. For further discussion of the impact of Bostock on transgenders’ rights in athletics, see supra 176-193 notes and accompanying text.

196. See Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”).

197. See Kleigman supra note 176 (remarking legal teams will have to prove that banning transgender girls and women from athletic competition is discrimination).

198. See Carlisle, supra note 20 (indicating significance and relevance of issue in current events which will ultimately become future court battles).

199. See Bryan Graham, Joe Biden’s Gender Discrimination Order Offers Hope for Young Trans Athletes, GUARDIAN (Jan. 22, 2021), https://www.theguardian.com/sport/2021/jan/22/transgender-athletes-joe-biden-executive-order [https://perma.cc/M6U4-LDLF] (explaining President Biden’s executive order called on federal agencies to broaden the application of Bostock and specifically used language that referenced the arena of high school and college sports); Bianca Quilantan, States Challenge Biden on Rights for Transgender Students, POLITICO (Jan. 28,
Some experts predict that courts will “allow trans participation, but with caveats – like those instituted by the NCAA and [International Olympic Committee] (IOC) to regulate trans female testosterone levels – and not the blanket inclusion that the court allowed with employment nondiscrimination.”\textsuperscript{200} Other experts believe that a blanket inclusion policy is not out of reach for transgender athletes because the \textit{Bostock} decision provides momentum for people to challenge policies that are excluding transgender athletes, and these cases are on “much stronger footing now” after the Supreme Court’s ruling.\textsuperscript{201} What most experts resoundingly agree on is that this issue will likely end up before the Supreme Court.\textsuperscript{202}

\textit{Jacqualyn Gillen}\textsuperscript{*}

\textsuperscript{200.} See id. (quoting Jami Taylor, University of Toledo political science professor who specializes in transgender issues).

\textsuperscript{201.} See id. (quoting Erin Buzuvis, Western New England University law professor who specializes in gender and discrimination in athletics).

\textsuperscript{202.} See Transgender Athlete Fight to Heat Up as Legislatures Return, \textit{BLOOMBERG LAW}, (Oct. 7, 2020) https://www.bloomberglaw.com/document/X8S052K8000000?bna_news_filter=US-law-week&jcsearch=BNA%2520000000174db04d23ea5f5d6c5a13d0001#jcite [https://perma.cc/4VMU-C44G] (quoting professor at University of Kansas Law School stating, “[t]he heated disputes about Title IX’s protection of trans athletes is one of the next big issues that will go up to the Court for resolution”; see also Kleigman supra note 176 (“Multiple Title IX cases related to trans athletes could end up bouncing around circuit courts with different decisions – which is a recipe for one of them . . . reaching the nation’s highest court.”)).

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