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Feminist Perspectives on *Bostock v. Clayton County*

ANN C. MCGINLEY, NICOLE BUONOCORE PORTER, DANIELLE WEATHERBY, RYAN H. NELSON, PAMELA WILKINS, AND CATHERINE JEAN ARCHIBALD

*This jointly-authored essay is a conversation about the Supreme Court's recent and groundbreaking decision (*Bostock v. Clayton County*) that held that discrimination based on sexual orientation or gender identity is discrimination based on sex, and therefore prohibited by Title VII of the Civil Rights Act of 1964. While many scholars are writing about this case, we are doing something unique. We are analyzing this decision from feminist perspectives. We are the editors and four of the authors of a book recently published by Cambridge University Press:* Feminist Judgments: Rewritten Employment Discrimination Opinions. *This book contains fifteen Supreme Court and Courts of Appeals employment discrimination cases that have been rewritten using feminist perspectives, along with commentaries for each of the rewritten opinions. Two of those rewritten opinions are Courts of Appeals cases involving gender identity (*Etsitty v. Utah Transit Authority*) and sexual orientation (*Hively v. Ivy Tech Community College*). Because the book was already in production when* Bostock *was decided, we were unable to incorporate this momentous case into our book.*

And yet, given our experiences rewriting and editing opinions from feminist perspectives, we have something to say about Bostock *and its significance for LGBTQ+ employment cases and employment discrimination law more broadly. Accordingly, we wrote this essay, which has three goals: first, to introduce our book; second, to analyze the* Bostock *case and its effect on employment discrimination law as it relates to sexual orientation and gender identity; and third, to discuss more broadly the effect of* Bostock *on employment discrimination jurisprudence through a feminist lens. Throughout the essay, we are attempting to answer the question of whether* Bostock *is a feminist opinion. Our answers are varied and even uncertain; but ultimately, we conclude that even though we, as feminists, might have written it differently, the LGBTQ+ community deserves to celebrate this momentous victory.*

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Feminist Perspectives on *Bostock v. Clayton County*

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INTRODUCTION

On June 15, 2020, the U.S. Supreme Court decided *Bostock v. Clayton County*,[1] holding that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against the gay and transgender plaintiffs based on their sexual orientation and gender identity.[2] This was a momentous decision, and many scholars have and will offer commentary on it. Our goal here is unique. We are analyzing *Bostock* and its implications from feminist perspectives.

Two of us (Ann McGinley and Nicole Porter) are the editors of *Feminist Judgments: Rewritten Employment Discrimination Opinions*, a book recently published by Cambridge University Press. The book includes fifteen federal appellate and U.S. Supreme Court employment discrimination opinions that have been rewritten using feminist approaches and perspectives; each opinion is accompanied by a commentary on the significance of the feminist rewritten opinion. The goal of the book is to establish a body of proposed feminist employment discrimination opinions that would demonstrate how the law could have developed (and changed) if courts had approached their opinions by using feminist perspectives. Because we wanted the book to represent a relatively complete body of employment discrimination law, and because (before *Bostock*) there was not a Supreme Court case addressing sexual orientation or gender identity discrimination in the workplace, the book includes two rewritten courts of

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[1] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[2] *Id.* at 1737. For the codification of Title VII, see 42 U.S.C. § 2000e-2 (2012).

appeals opinions: *Hively v. Ivy Tech Community College of Indiana*[3] (addressing sexual orientation discrimination) and *Etsitty v. Utah Transit Authority*,[4] (addressing gender identity discrimination). Our book does not include *Bostock* because the opinion came down after the book went to production. We, therefore, offer this analysis of *Bostock* through a feminist lens and how it will likely affect employment discrimination law.

After a brief summary of the *Bostock* decision in Part I below, Part II provides the impressions of *Bostock* by the authors of the rewritten *Hively* commentary and opinion and discusses what *Bostock* might mean for sexual orientation discrimination going forward. In Part III, the authors of the rewritten *Etsitty* commentary and opinion discuss their impressions and the implications of *Bostock* for gender identity discrimination. In Part IV, the editors of *Feminist Judgments* discuss the implications of *Bostock* on employment discrimination as a whole. Finally, Part V attempts to answer the question of whether *Bostock* is a positive opinion from feminist perspectives.

I. *BOSTOCK* SUMMARIZED

The Supreme Court's decision in *Bostock* is nothing short of monumental. In a 6-to-3 decision,[5] the majority held that discrimination based on sexual orientation or gender identity is "sex" discrimination under Title VII.[6] The issue was before the Supreme Court on three consolidated cases—two in which gay men lost their jobs because they were gay, and one where a transgender woman lost her job after disclosing to her employer that she was transgender.[7]

Justice Gorsuch, writing for the majority, first notes that the applicable test—the but-for causation standard—is a "sweeping" standard, and that events can have multiple but-for causes.[8] It does not matter if there are other factors that influenced the defendant's decision (such as the plaintiff's sexual orientation or gender identity); as long as sex is one of the but-for causes, the standard is met and the defendant is liable.[9] Second, the opinion emphasizes that it does not matter if an employer treated both sexes equally,

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[3] Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017) (holding that sexual orientation discrimination is sex discrimination). The *Hively* opinion was rewritten by Ryan H. Nelson, with a commentary by Danielle Weatherby.

[4] Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination against a transgender woman was not sex discrimination). The *Etsitty* opinion was rewritten by Catherine Archibald, with a commentary by Pamela Wilkins.

[5] *Bostock*, 140 S. Ct. at 1734. Two of the normally conservative justices—Justice Gorsuch and Chief Justice Roberts—joined the usual four liberal justices. After the *Bostock* opinion, on September 18, 2020, Justice Ruth Bader Ginsburg passed away, leaving only three justices appointed by Democratic presidents.

[6] *Id.* at 1737.

[7] *Id.* at 1737–38.

[8] *Id.* at 1739.

[9] *Id.*

such as by terminating both men and women who are gay or transgender—the focus of the statute is, and has always been, on the individual.[10] As the Court states, if an employer fired a woman for being insufficiently feminine and a man for being insufficiently masculine, the employer would be liable in both cases for discrimination because of sex: "Instead of avoiding Title VII exposure, this employer doubles it."[11]

Accordingly, "[t]he statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions . . . because it is impossible to discriminate against a person [based on sexual orientation or gender identity] without discriminating against that individual based on sex."[12] The Court uses a simple example to emphasize its point: consider an employer with two employees who are otherwise identical, except that one is a man and one is a woman. If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer has discriminated against him; but-for his sex, he would not have been fired for being attracted to men.[13] And even if the employer would have terminated both male and female employees who are gay, this does not insulate the employer because the focus is on the individual, not on the group.[14]

The Court relies on well-known precedents to support its holding. It cites to *Phillips v. Martin Marietta Corp.*[15] to support the position that it does not matter if a decision is made because of sex plus another characteristic (in *Phillips*, motherhood), just as it did not matter that the employer in *Phillips* tended to favor hiring women over men—it was still discriminatory to refuse to hire some women because of their sex plus their motherhood status.[16]

The Court also relies on *City of Los Angeles, Department of Water & Power v. Manhart*[17] to explain that the focus is on individuals. So even though the employer in *Manhart* required individual women to contribute more of their pay to their pension funds to offset the additional benefits women as a group receive based on their longer life expectancies, this was still sex discrimination under Title VII.[18]

And third, the Court relies on *Oncale v. Sundowner Offshore Services, Inc.*[19] for its often-cited statement that even though male-on-male sexual harassment is certainly not the "principal evil Congress was concerned with

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[10] *Id.* at 1740–41.

[11] *Id.* at 1741.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1742.

[15] *Id.* at 1743 (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

[16] *Bostock*, 140 S. Ct. at 1743.

[17] *Id.* at 1743 (citing City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)).

[18] *Bostock*, 140 S. Ct. at 1743.

[19] 523 U.S. 75 (1998).

when it enacted Title VII," it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[20] Thus, it does not matter that protecting employees against discrimination based on sexual orientation or gender identity was not contemplated by Congress at the time Title VII was passed.

Finally, the Court addresses the employers' various counter-arguments, emphasizing that the legislative history of Title VII does not matter when the text of the statute is clear. As the Court concludes, Congress's broad language prohibiting discrimination based on sex leads to this result: "We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."[21]

II. ANALYZING *BOSTOCK* FROM THE PERSPECTIVE OF REWRITTEN *HIVELY*[22]

In the most significant civil rights victory for the LGBTQ+ community since the landmark decision five years ago in *Obergefell v. Hodges*[23] and after decades of Title VII litigation, the Supreme Court held in *Bostock* that sexual orientation discrimination violates Title VII's sex discrimination prohibition.[24] Its decision finally rectified the post-*Obergefell* paradox that "a gay person could be legally married in any of the fifty states on Saturday and fired from her job because of that marriage on Monday."[25]

While the *Bostock* majority's decision was monumental, it followed a predictable path, echoing much of the reasoning—while curiously omitting parts—of the Seventh Circuit's 2017 decision in *Hively*.[26] Here we highlight the stark similarities and distinctions between the two opinions. We conclude, as we predicted it might in the *Feminist Judgments* book,[27] that the *Bostock* Court's analysis resounds in the same missed opportunities as that of the *Hively* Court's. Indeed, the *Bostock* opinion serves its purpose, but its clear avoidance of anti-essentialist feminist arguments and real-world storytelling minimizes the decades of discrimination and suffering LGBTQ+

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[20] *Bostock*, 140 S. Ct. at 1743–44 (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998)).

[21] *Id.* at 1754.

[22] This part was jointly written by Danielle Weatherby and Ryan H. Nelson.

[23] Obergefell v. Hodges, 576 U.S. 644, 674–76 (2015) (holding that same-sex couples enjoy a fundamental right to marriage under the Constitution).

[24] *Bostock*, 140 S. Ct. at 1754.

[25] Danielle Weatherby, *Commentary: Hively v. Ivy Tech Community College*, *in* FEMINIST JUDGEMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS, 301–11 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020) (citing Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 728–32 (2010)); S. 1006, 115th Cong. (2017); Fair and Equal Housing Act of 2017, H.R. 1447, 115th Cong. (2017)).

[26] Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017).

[27] Weatherby, s*upra* note 25; Ryan H. Nelson, *Hively v. Ivy Tech Community College*, *in* FEMINIST JUDGEMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS, 311–33 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020).

employees have endured in the workplace while other employees enjoyed protection from discrimination based on their sex.

As if joined in chorus with *Hively*, the *Bostock* majority reverberates a familiar refrain. Just like in *Hively*, the *Bostock* majority opinion is a measured, textualist means to an end, silent with respect to the ways in which gender stereotypes involving sexual orientation actually operate in the contemporary workplace. We begin by noting two qualitative parallels.

First, both opinions characterize the question presented as one of "pure . . . statutory interpretation,"[28] stressing that the term "sex" in the Title VII employment statute is unambiguous.[29] Together, the majorities of both courts chastised critics' attempts to assert the ambiguity of the term.[30] Indeed, both courts refused to assign meaning to Congress's failure to anticipate the application of Title VII's sex discrimination prohibition to sexual orientation.[31] Concluding instead that what matters is only "what the correct rule of law is now,"[32] both courts engaged in rather simplistic narratives about how sex is inextricably intertwined with sexual orientation. In *Hively*, Chief Judge Diane Wood asserted that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation,'" concluding that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."[33] As if mirroring her language and reasoning, Justice Gorsuch opined that, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[34] While his matter-of-fact syllogism sets the stage for the desired outcome, it avoids any discussion of what behavior led to the Court's query in the first place, giving short shrift to the human experience at stake. Indeed, Justice Gorsuch began by acknowledging that "[f]ew facts are needed to appreciate

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[28] *Hively*, 853 F.3d at 343; *accord Bostock*, 140 S. Ct. at 1738–39.

[29] *Hively*, 853 F.3d at 343–44 (stating that "[f]ew people would insist that there is a need to delve into secondary sources if the statute is plain on its face," in discussing the word "sex" in the Title VII statute); *Bostock*, 140 S. Ct. at 1743 (stating that "[a]t bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.").

[30] *Hively*, 853 F.3d at 344 (responding to legislative history arguments by stating, "[i]n the end, we have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member's votes, much less what explains the failure of the body as a whole to change this 1964 statute,"); *Bostock*, 140 S. Ct. at 1747 (critiquing legislative history arguments in stating, "[a]ll we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt").

[31] *Bostock*, 140 S. Ct. at 1749 (stating that "[b]ut 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command"); *Hively*, 853 F.3d at 345 (asserting that "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books").

[32] *Hively*, 853 F.3d at 350.

[33] *Id.* at 350–51.

[34] *Bostock*, 140 S. Ct. at 1741.

the legal question [the Court] face[s],"[35] devoting one short page to the combined stories of each of the three plaintiffs in the trilogy.

Second, both the *Hively* and the *Bostock* courts squandered an important opportunity to reflect upon the values originally secured by Title VII. While they discounted the premise that Title VII was concerned solely with the treatment of a protected group as a whole and were unequivocal in their declaration that the emphasis of Title VII is on the individual,[36] they failed to pay homage to the individual person by omitting any real discussion of Title VII's inherent values and the substantive rights at stake.[37] Both courts failed to reaffirm the feminist ideals that ground Title VII, refusing to elaborate as to *why* sex discrimination is a pernicious matter in the first place.

While the *Bostock* and *Hively* opinions share many similarities in their approach, there is one glaring difference between them. *Hively* interweaves the "but for" and sex stereotyping analyses.[38] Nelson's rewritten *Hively* opinion disaggregates the two and puts stereotyping out front as the simplest and most impactful argument that sex discrimination includes sexual orientation discrimination.[39] However, *Bostock* bypasses sex stereotyping as a necessary means to its end.[40]

The argument that discrimination based on sexual orientation reflects sex stereotypes (e.g., women ought to be attracted to men, not women) first appeared in writing in the late 1980s,[41] before the majority of the Supreme Court recognized in *Price Waterhouse v. Hopkins* that Title VII's prohibition on sex discrimination bars adverse employment actions based on an employee's failure to conform to sex stereotypes.[42] However, the argument does not appear in early battles vis-à-vis sexual orientation discrimination as sex discrimination.[43] Occasionally, plaintiffs in this era contended that discrimination based on stereotypically homosexual behaviors and appearances constituted sex stereotypes, but they failed to argue that sexual

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[35] *Id*. at 1737.

[36] *Id*. at 1748 (finding that "Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability").

[37] *Hively*, 853 F.3d at 345 (asserting that "[f]raming the [comparison] that way swaps the critical characteristic (here, sex) for both the complainant and the comparator and thus obscures the key point—whether the complainant's protected characteristic played a role in the adverse employment decision"); *Bostock*, 140 S. Ct. at 1742 ("Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women.").

[38] *Hively*, 853 F.3d at 345–47.

[39] Nelson, *supra* note 27, at 318.

[40] *Bostock*, 140 S. Ct. at 1739.

[41] *See, e.g.*, Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188 (1988).

[42] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (plurality opinion), 259 (White, J., concurring), 261 (O'Connor, J, concurring) (1989); *see also Hively*, 853 F.3d at 346 n.2.

[43] *See, e.g.*, Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir. 1996); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989).

orientation discrimination was, *ipso facto*, sex stereotyping.[44]

It was not until the early 2000s that plaintiffs began to raise, and courts began to embrace, the "discrimination based on sexual orientation is sex stereotyping" argument.[45] By the 2010s, courts and agencies relied upon, or at least debated, that argument at nearly every turn.[46] Hence, it was no surprise to see it in *Hively*, the lower court cases leading to *Bostock*, and the arguments in *Bostock*.[47] It is the argument's ubiquity and persuasiveness that renders its absence in the majority's opinion in *Bostock* jarring. To be clear, the majority reaffirms the sex stereotyping doctrine in *dicta*,[48] and Justice Alito's dissent discusses and rebukes the argument in earnest,[49] but neither the six-justice majority nor Justice Kavanaugh's dissent analyzes whether sexual orientation discrimination reflects sex stereotypes.

Why not? As discussed, *supra*, its absence shortchanges the LGBTQ+ community by muzzling anti-essentialist feminist arguments and real-world storytelling that could have given names, faces, and histories to the countless LGBTQ+ employees who have been subjugated and marginalized for so long. We suspect two possible reasons for the Court's failure to seriously engage with this argument, neither of which portends optimism for feminism or LGBTQ+ rights.

First, perhaps the justices could not agree that all heterosexism (i.e., stereotypes against *all* non-heterosexual orientations)[50] violates Title VII. Indeed, the Court concludes that "[a]n employer who fires an individual merely for being gay or transgender defies the law[,]"[51] and not that discrimination based on *any* sexual orientation or gender identity is unlawful. To reach that conclusion, Justice Gorsuch explains that, when an employer fires a "male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions

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[44] *E.g.*, Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979).

[45] *E.g.*, Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

[46] *E.g.*, Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *7–8 (EEOC July 15, 2015); Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014).

[47] *Hively*, 853 F.3d at 345–47; *see, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018); Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 23, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (Aug. 23, 2019) (Nos. 17-1618, 17-1623), 2019 WL 4014070; Transcript of Oral Argument at 6, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (Oct. 8, 2019) (Nos. 17-1618, 17-1623).

[48] *Bostock*, 140 S. Ct. at 1742–43.

[49] *Id.* at 1763 (Alito, J., dissenting).

[50] Gregory M. Herek, *Psychological Heterosexism in the United States*, *in* LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES 321, 321 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995).

[51] *Bostock*, 140 S. Ct. at 1754. Elsewhere in the opinion, Justice Gorsuch uses the outdated term "homosexual" instead of "gay." *Id.* at 1742.

it tolerates in his female colleague."[52] Hence, all that appears to matter is whether the employee's sex, if altered, would have caused a different result.

Given that analysis, it is possible that *Bostock* bans discrimination based on bisexuality because bisexuality can be defined by the employee's sex (i.e., firing a male employee because he is attracted to, *inter alia*, men, a trait or action the employer tolerates in his female colleagues). However, it is also possible that *Bostock* does not prohibit discrimination based on bisexuality because bisexuality can just as easily be defined without regard to the employee's sex (i.e., firing an employee for being attracted to individuals of either binary sex). Even less clear is whether *Bostock* bans discrimination based on pansexuality (i.e., attraction to individuals regardless of sex), asexuality (i.e., no sexual attraction), or demisexuality or graysexuality (i.e., limited sexual attraction),[53] all of which manifest the sex-based stereotype of heterosexism but none of which definitionally rely on the sex of the employee. We will have to wait and see whether lower courts apply *Bostock* to these forms of discrimination and, if not, whether they find alternative bases for applying Title VII to them, as Nelson's rewritten opinion does.

Second, Justice Kavanaugh's dissent's silence concerning sex stereotyping raises the specter that a growing minority on the Court questions whether sex stereotyping constitutes sex discrimination at all. To that end, Justice Alito's dissent states that sex stereotyping can evince sex discrimination but sex stereotyping does not necessarily violate Title VII,[54] notwithstanding that six justices in *Hopkins* hold otherwise.[55] In contrast, the majority in *Bostock* confirmed that employers who fire employees "for failing to fulfill traditional sex stereotypes" violate Title VII,[56] demonstrating that this foundational conclusion is safe for now. But Justice Kavanaugh declined to take sides. With replacement justices on the Court likely in the coming years, it is paramount that the President nominate and the Senate confirm justices who recognize that sex stereotyping constitutes sex discrimination to ensure that Title VII is accurately interpreted to bar all forms of sex-based essentialism.[57]

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[52] *Id.* at 1741.

[53] Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES, https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html (June 7, 2019).

[54] *Bostock*, 140 S. Ct. at 1763 (Alito, J., dissenting).

[55] *Hopkins*, 490 U.S. 228, 250 (plurality opinion), 259 (White, J., concurring), 261 (O'Connor, J, concurring).

[56] *Bostock*, 140 S. Ct. at 1742.

[57] Justice Barrett has neither issued public opinions vis-à-vis sex stereotyping nor publicly opined about sex stereotyping, so her views are just as uncertain as those of Justice Kavanaugh.

III. ANALYZING *BOSTOCK* FROM THE PERSPECTIVE OF REWRITTEN *ETSITTY*

A. Bostock *Is a Disappointment*[58]

For me, *Bostock* is a disappointment.

Don't get me wrong. I like the result. And having approached the case with equal parts hope and dread, I am relieved that the Court did not eviscerate *Price Waterhouse*.[59] Moreover, *Bostock* almost certainly reflects a compromise among the justices, with Justice Gorsuch writing a textualist opinion. Had the opinion taken any other form and been assigned to any other justice, the result may have been different. In short, the advocates' shrewd and pragmatic focus on textualism likely cemented the employees' victory. A 6-3 vote in favor of LGBTQ+ rights? I will take it.

But still. Though it achieves a feminist result, *Bostock* is not really a feminist judgment. Rather, the opinion reads as a clumsy, pedantic, and—I hate this—*unconvincing* exercise in Textualism 101.

There are three reasons for my disappointment in Justice Gorsuch's textualist opinion.

First, as noted above, the majority's textualism feels clunky and unconvincing. It especially suffers in comparison to the dissenting Justice Kavanaugh's textualist rebuttal. Perhaps Justice Kavanaugh is simply a more talented writer and rhetorician. Certainly, Justice Gorsuch could not match Justice Kavanaugh's elegant use of metaphor (e.g., "Seneca Falls was not Stonewall"[60]); of repetition (e.g., "To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions"[61]); of zeugma[62] ("Judges may not update the law merely because they think that Congress does not have the votes or the fortitude.")[63] And so forth. What is worse, Justice Kavanaugh's dissent more effectively—and, at times, more convincingly—defends a specific textualist methodology,[64] marshals precedent in support of his argument, and situates the legal question within a set of broader concerns (separation of powers, most notably).

This first objection to the majority opinion may not rest on specifically

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[58] This sub-part was written by Pamela Wilkins.

[59] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[60] *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

[61] *Id.* at 1835 (Kavanaugh, J., dissenting).

[62] *Zeugma* is the "use of a word to modify or govern two or more words usually in such a manner that it applies to each in a different sense or makes sense with only one (as in 'opened the door and her heart to the homeless boy')." *Zeugma—Definition of Zeugma*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/zeugma (last visited July 18, 2020).

[63] *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting).

[64] Justice Kavanaugh argues that basic principles of statutory interpretation require the Court to consider the ordinary meaning of phrases used in statutes, rather than merely looking at the dictionary definitions of each word standing separately. *Id.* at 1828 (Kavanaugh, J., dissenting).

feminist grounds, but I still think it is important. To say Justice Kavanaugh's dissent is rhetorically stronger than the majority opinion does not mean the dissent is correct. However, it *does* mean that Gerald Bostock, Donald Zarda, and Aimee Stephens—not to mention all LGBTQ+ persons, all Americans, the history books, even the employers—deserved a more compelling articulation of and justification for the holding that Title VII protects those who are LGBTQ+.

So the first thing I might change is the author of the majority opinion. Even if *real-politik* required a textualist approach, Chief Justice Roberts is, in my view, a better match for Justice Kavanaugh. If that change would have cost the majority Justice Gorsuch's vote, so be it. I would prefer an intellectually convincing 5-4 judgment to a weaker 6-3 decision.

Second, I worry about what a strict textualist approach may portend for the future. Textualism has yielded victories for progressives during the Court's 2019–2020 term, most notably in *Bostock* and in *McGirt v. Oklahoma*.[65] I am still skeptical—enough so that I wonder whether textualism can be a feminist method, even when, as in *Bostock*, it achieves a feminist result. (This question—whether textualism can be a legitimate feminist tool—is large enough that I only *pose* it here; actual exploration of the question is well beyond the scope of this project.)

Third—and this is by far the largest disappointment—the majority's textualist opinion never seriously acknowledges what is at stake. And in this lack of acknowledgement, the Court misses what I consider the *real* argument for why Title VII's prohibition on sex discrimination protects persons who are LGBTQ+.

Although the legal issue is correctly defined, the majority opinion is an exercise in missing the forest for the trees.[66] Great attention is paid to the statutory term *sex*, but one still could read whole stretches of the opinion and hardly know that the stakes were any higher than, say, the fate of a dangling participle.[67] In all the parsing of the term *sex*, Justice Gorsuch never cuts to the chase about the real stakes, about why discrimination against persons who are LGBTQ+ is *really and obviously* sex discrimination.

So let me cut to the chase: *Discrimination against persons on the basis of LGBTQ+ status is rooted in and implicitly "justified" by their perceived and actual violation of the patriarchal norms that structure our society.*

In short, discrimination against LGBTQ+ persons cannot be separated

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[65] McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (holding, *inter alia*, that land recognized through an 1833 Treaty as belonging to the Creek Nation remained a Creek reservation, and that the State of Oklahoma could not try Native Americans under state law for crimes committed on that land).

[66] Justice Kavanaugh accused the majority of missing the forest for the trees, *see Bostock*, 140 S. Ct. at 1827 (Kavanaugh, J., dissenting), and he was right (albeit for a different reason from the one I advance here). He was referring to the majority's wrongheaded version of textualism. As my comments make clear, I am referring to something quite different.

[67] *Id.* at 1755–837. Both dissenting opinions seem more aware of the import and stakes of the decision than does the majority. Justice Kavanaugh appears gracious, and Justice Alito churlish, but they both have a sense of the moment.

from gender norms and stereotypes. Indeed, the highly gendered nature of this discrimination—one discriminates against gay men, against lesbians, against transgender women, against transgender men, and *not* against LGBTQ+ persons as an all-encompassing class—becomes even clearer upon closer consideration. For instance, those perceived to violate norms of masculinity—gay men and transgender women—are often policed and punished much more strongly than those who violate norms of femininity.[68] If the discrimination were against LGBTQ+ persons as a class rather than against discrete subgroups (based on gender), one would expect similar levels of "punishment."

Price Waterhouse and its progeny tell us that sex includes gender, and that discrimination for failure to conform to a gender stereotype is sex discrimination under Title VII.[69] I believe the *Bostock* majority should have relied more heavily on the *Price Waterhouse* line of cases. Such an approach would have been rooted in solid precedent, as well as in the virtues of clarity and truthfulness. Reliance on *Price Waterhouse* also would have laid a more solid foundation for future cases, including cases about bathroom rights and about the rights of persons who are gender non-binary. Happy as I am about the outcome, the majority's wooden textualism represents an opportunity missed.

B. Bostock*: Unfinished Progress*[70]

Bostock is almost entirely what I wished it would be, and yet, there are unanswered questions.

1. *What I am Happy About*

Advocates for LGBTQ+ rights waited with bated breath for the Supreme Court's *Bostock* opinion, most of us unsure what to expect and believing that the decision could easily go either way. Therefore, when I read the decision, I was delighted. It was, after all, a 6-3 decision in favor of the LGBTQ+ employees. The *Bostock* Court held that when an employer discriminates against a transgender employee, that employer discriminates on the basis of sex, in violation of Title VII.[71] The Court used the simple, yet hotly contested reasoning that when an employer discriminates against an employee "for actions or attributes it would tolerate in an individual of another sex" the

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[68] Consider, for example, the difference in the rates at which transgender women and transgender men are murdered: Of the thirty-two documented murders of transgender or nonbinary persons thus far in 2020, eighteen were of transgender women (many of whom were African American). *See Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020 (last visited July 18, 2020).

[69] Price Waterhouse v. Hopkins, 490 U.S. 228, 257–58 (1989).

[70] This sub-part was written by Catherine Jean Archibald.

[71] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

employer violates Title VII.[72] The Court reasoned that when an employer discriminates based on transgender status, the employer necessarily considers the employee's assigned sex at birth in taking the adverse action against the employee; therefore, sex is a but for cause of the discrimination.[73]

2. *Unanswered Questions*

i. Are Non-Binary Transgender People Protected?

The *Bostock* opinion's reasoning mirrors much of my reasoning in the rewritten *Etsitty* opinion.[74] However, the *Bostock* opinion does not go as far as rewritten *Etsitty* because it does not address whether Title VII protects transgender non-binary individuals who identify as something other than exclusively male and female.[75] Although Crystal Etsitty identified as female (rather than non-binary), I incorporated non-binary transgender individuals into my holding when I discussed at length the *Price Waterhouse* case.[76] By contrast, the *Bostock* majority opinion does not discuss *Price Waterhouse* at all, citing to it only once.[77] This failure is disappointing. *Price Waterhouse* held that discrimination because an employee does not conform to sex stereotypes is sex discrimination.[78] Since transgender individuals by definition do not conform to certain sex stereotypes (such as stereotypes that assume that everyone will identify with their assigned sex at birth), *Price Waterhouse* has played a huge part in advancing transgender rights in the courts since it was decided in 1989.[79]

While the dissents characterize the majority decision as holding that Title VII prohibits discrimination based on gender identity and sexual orientation,[80] this is not actually what the majority decision held. Instead, it held that under Title VII an employer may not discriminate against an

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[72] *Id*. at 1740.

[73] *Id.* at 1741.

[74] *See* Catherine Jean Archibald, *Etsitty v. Utah Transit Authority*, *in* FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS, 278–300 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020) (disagreeing with the original *Etsitty* opinion and holding there was a violation of Title VII).

[75] *See GLAAD Media Reference Guide 10th Edition*, GLAAD 11 (Oct. 2016), https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf (defining non-binary as a term for "people who experience their gender identity and/or gender expression as falling outside the categories of man and woman").

[76] Archibald, *supra* note 74, at 281–84.

[77] *See Bostock*, 140 S. Ct. at 1741 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) for the proposition that an "individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees'").

[78] *See* Archibald, *supra* note 74, at 282–83 (discussing *Price Waterhouse* in depth).

[79] *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (citing *Price Waterhouse* in finding for transgender plaintiff).

[80] *See, e.g.*, *Bostock*, 140 S. Ct. at 1757 (Alito, J., dissenting) (characterizing the majority decision as finding that Title VII protects against discrimination based on "sexual orientation" and "gender identity"); *Id.* at 1823 & n.1 (Kavanaugh, J., dissenting) (same).

employee because the employee is "homosexual or transgender."[81] Although the Court uses the term "transgender," a term that includes non-binary individuals,[82] the Court uses examples only of transgender individuals who identify as *either* male *or* female.[83] The Court's reliance on the statutory text protecting an *individual* from discrimination based on that *individual's* sex,[84] and its reasoning based solely on switching the individual employee's sex assigned at birth and asking whether the employer would still have taken the same action against the employee, leaves open the question of whether the Court's reasoning would extend to protect non-binary transgender employees. After all, an employer could claim that it does not care what sex an individual employee is or was identified as at birth: it simply will not tolerate any individual who does not identify as either male or female. This gap in the Court's decision remains for future cases to fill in.

ii. Can Transgender Individuals Use Bathrooms at Work that Correspond to their Gender Identity?

Another gap I wish the Court had addressed is the bathroom issue for transgender workers. Instead, the Court stated that it was not considering bathrooms.[85] Despite this explicit denial, however, the logic of the Court's reasoning should protect transgender workers who use the bathroom that best corresponds with their gender identity, at least when there are only men's and women's bathrooms available. (Whether an employer could require transgender employees to use gender-inclusive bathrooms when available is another question.) Given the choice of men's or women's bathrooms, many transgender people are most comfortable using the bathroom corresponding to the sex they were not assigned at birth.[86] Therefore, if an employer could simply state that it was firing a transgender employee, not for being transgender, but simply for using the "wrong" bathroom, this may be an easy way for the employer to circumvent the Supreme Court's explicit holding that discriminating against an employee simply for being transgender is not permitted under Title VII.

Furthermore, the *Bostock* Court's reasoning logically should mean that an employer may not fire an employee simply for using a bathroom that does not correspond to their sex identified at birth. If the employer allows a person

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[81] *Id.* at 1737.

[82] *See* Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 45 (Dec. 2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF (finding that about one-third of transgender individuals identify as non-binary).

[83] *See, e.g.*, *Bostock*, 140 S. Ct. at 1741 (discussing a "transgender person who was identified as a male at birth but who now identifies as a female").

[84] *Id.* at 1740.

[85] *Id.* at 1753.

[86] *See* James et al., *supra* note 82, at 44 (showing 63% of transgender people identify as either male or female).

identified as female at birth to use the women's restrooms, then it must, under the Supreme Court's logic,[87] allow someone identified as male at birth to also use the women's restrooms, and vice versa. Therefore, as I also opined in the rewritten *Etsitty* opinion[88] (and elsewhere[89]), bathrooms cannot be legally sex-segregated and should instead be gender inclusive.

Bostock is a hugely important and positive decision by the Supreme Court. It is conservatively written and addresses only the precise questions before it—whether two gay employees and one transgender employee may be fired under Title VII because of their sexual orientation or gender identity.[90] Later cases will have to decide the questions still left lingering by this case.

IV. THE IMPLICATIONS OF *BOSTOCK* ON EMPLOYMENT DISCRIMINATION LAW[91]

Here we address some of the broader feminist implications of the *Bostock* opinion, beyond its impact on LGBTQ+ persons.

A. *"But For" Causation*

Justice Gorsuch's opinion in *Bostock* asserts that "but for" causation is a "sweeping standard" and that the protected characteristic does not have to be the "primary" cause of the decision for liability to attach.[92] This is an important clarification for future employment discrimination cases, especially Title VII retaliation claims and age discrimination claims under the Age Discrimination in Employment Act (ADEA),[93] both of which must be proved using "but for" causation.[94] Before *Bostock*, defense counsel had argued with some success that "but for" means the sole cause in discrimination cases,[95] an argument that is no longer viable. Limiting "but

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[87] The Court reasoned that when an employer discriminates against an employee "for actions . . . it would tolerate in an individual of another sex" the employer violates Title VII. *Bostock*, 140 S. Ct. at 1740.

[88] Archibald, *supra* note 74, at 295–300.

[89] Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom that Matches Gender Identity—Are Co-Ed Bathrooms Next?*, 83 UMKC L. REV. 57, 57 (2014); Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 3 (2009).

[90] *Bostock*, 140 S. Ct. at 1737–38.

[91] This part was written by Ann McGinley and Nicole Porter.

[92] *Bostock*, 140 S. Ct. at 1739–40.

[93] 29 U.S.C. §§ 621–34.

[94] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (holding Title VII retaliation claims must be proven with "but for" causation); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (holding ADEA claims must be proven with "but for" causation).

[95] *See, e.g.*, Johanna T. Wise & Alex Meier, *Causation in Federal Remedial Rights and Alternative Pleading*, SEYFARTH SHAW LLP (Oct. 20, 2015), https://www.laborandemploymentlawcounsel.com/2015/10/causation-in-federal-remedial-rights-and-alternative-pleading (noting that several federal district courts have concluded that "but for" cause means

for" to sole cause would harm not only those plaintiffs bringing ADEA and Title VII retaliation cases, but also those bringing other Title VII cases using the "but for" proof standard.

Moreover, a clarification that "but for" goes beyond sole cause may support intersectional claims in which plaintiffs allege that an adverse employment action or harassment occurred because of two characteristics, such as the plaintiff's sex and race. If plaintiffs prove that both protected traits are "but for" causes of the adverse action, they should prevail.[96]

B. *"Literal Textualism": Dress Codes and Affirmative Action*

All circuits currently permit employers to use sex-specific dress and grooming codes—without proving that the dress codes are a bona fide occupational qualification (BFOQ) for the position in question—so long as the dress and grooming codes impose equal burdens on men and women.[97] The authors of the rewritten opinion in our book, *Jespersen v. Harrah's Operating Company, Inc.*, conclude that the unequal burdens test violates the text of Title VII.[98] *Bostock*'s literal textualism will likely lead to the disavowal of the unequal burdens test because it permits employers to use sex-specific grooming policies that discriminate based on sex. In *Bostock*, for example, the Court emphasizes that discrimination against an individual because of sex cannot be cured by treating the group well as a whole.[99] The Court states, "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups."[100] The "unequal burdens" test cannot survive this conclusion.

Instead, *Bostock* should require employers to prove that a particular sex-specific dress or grooming requirement is a BFOQ for the job. Given the narrow interpretation of the BFOQ defense, very few employers will be able to prove this affirmative defense.

While literal textualism is useful for some feminist approaches to anti-

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"sole cause"); Savage v. Secure First Credit Union, 107 F. Supp. 3d 1212, 1216 (N.D. Ala. 2015), *rev'd on other grounds*, No. 15–12704, 2016 WL 2997171 (11th Cir. May 25, 2016) (per curiam) (concluding that the "but for" requirement in Title VII retaliation claims and ADEA claims means "sole cause").

[96] Scholars have been arguing in favor of sex-plus-age claims for many years. *See, e.g.*, Rebecca Hanner White, *Aging on Air: Sex, Age and Television News*, 50 SETON HALL L. REV. 1323, 1331–37, 1337–38 (2020) (discussing sex plus age claims); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 79 (2003) (arguing in favor of a sex plus age cause of action). And yet, no Court of Appeals had explicitly recognized such a claim until recently when the Tenth Circuit relied on *Bostock* to hold that sex-plus-age discrimination is a viable claim under Title VII. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–48 (10th Cir. 2020).

[97] *See, e.g.*, Jespersen v. Harrah's Operating Co., Inc., 444 F.3d. 1104, 1109–10 (9th Cir. 2006) (holding that the employer's grooming policy that required women to wear makeup at all times did not create an unequal burden on women).

[98] Angela Onwuachi-Willig & JoAnne Sweeny, *Jespersen v. Harrah's Operating Co., in* FEMINIST JUDGEMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS, 136–39 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020).

[99] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740 (2020).

[100] *Id.* at 1744.

discrimination law, it may also create problems. For example, it is possible that *Johnson v. Transportation Agency*[101] will not survive scrutiny after *Bostock*. In *Johnson*, the Court upheld the employer's affirmative action plan.[102] An affirmative action plan that takes sex into account is valid, according to *Johnson*, if it benefits a group (women) that was historically underrepresented in traditionally segregated jobs and does not "unnecessarily trammel" the rights of men.[103] Affirmative action plans remain important because there are still many jobs (including higher-paid/higher-status jobs) that are predominantly held by men. *Bostock*'s emphasis on the text of Title VII, which forbids discrimination against *individuals* based on sex, will likely support a challenge to employers' affirmative action plans. This result would harm women in the workplace and produce an anti-feminist result.

C. Bostock *and Religion*

Bostock also lays out what could be a dangerous exception: religion. While the statute explicitly exempts religious organizations from the Act's requirements, the Court mentions two additional protections of religion in the face of anti-discrimination law.[104] First, the Court has created a ministerial exception to discrimination claims, which defines "minister" broadly.[105] Second, and perhaps even more chilling to feminist concerns, the Court states that the Religious Freedom Restoration Act (RFRA)[106] acts as a "super statute" and may therefore "supersede Title VII's commands in appropriate cases."[107] RFRA forbids "the federal government from substantially burdening a person's exercise of religion unless . . . [the government proves] that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest."[108] Thus, private employers who operate secular businesses may use RFRA to argue that it is permissible to discriminate against LGBTQ+ individuals or even cisgender/heterosexual women because hiring these individuals violates the employers' religious beliefs.[109] If these arguments

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[101] Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987).

[102] *Id.*

[103] *Id.* at 631–32, 634, 637–38.

[104] *Bostock*, 140 S. Ct. at 1754.

[105] *Id. See also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (holding a "called" religious school teacher's ADA claim was barred because she was a minister for purposes of the ministerial exception which is based in the Religion Clause of the First Amendment); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2062 (2020) (holding that Catholic school teachers' claims under the ADEA and ADA were barred by the ministerial exception).

[106] 42 U.S.C. §§ 2000bb–2000bb–4 (2018).

[107] *Bostock*, 140 S. Ct. at 1754 (citing to 42 U.S.C. § 2000bb–3 (2018)).

[108] *Id.* (citing to 42 U.S.C. § 2000bb–1 (2018)).

[109] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–12, 719, 726, 728 (2014) (holding that regulations promulgated pursuant to the Patient Protection and Affordable Care Act that

are successful, they would seriously dampen the feminist project to avoid gender as a basis for decision making in employment.

CONCLUSION: IS *BOSTOCK* A POSITIVE OPINION FROM FEMINIST PERSPECTIVES?[110]

As Wilkins explains above, granting equal rights to persons of different sexual orientations and gender identities furthers the feminist project because doing so helps break down the patriarchy and rigid gendered norms that harm individuals. Transgender individuals who self-identify as women suffer much more discrimination than those who self-identify as men.[111] Moreover, although there is a recent increase in acceptance of gay men, many in our society continue to associate masculinity with heterosexuality and gay sexual orientation with being "effeminate," traditionally a derogatory term.[112] These attitudes result from the patriarchy and male supremacy and many persons (including heterosexual women) are oppressed by them. For decades, non-heterosexual and gender non-conforming individuals either silently suffered discrimination in the workplace or cobbled together uncertain and inadequate remedies, where relief depended on the state (or even city) where one worked, or whether the federal courts recognized the discrimination they suffered as sex stereotyping under *Price Waterhouse* and its progeny. The result in *Bostock* challenges these patriarchal views and makes suing employers for sexual orientation and gender identity discrimination much easier.

But, as our *Feminist Judgments* book demonstrates, the end result is not the only goal of a judicial opinion; opinions can be anti-feminist even though their holdings further employment opportunities for subordinated workers. In fact, we chose several cases to rewrite for our book even though their holdings were positive.[113] We did so for several reasons: some avoided

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mandated that employers provide insurance for employees' contraceptive care and counseling violated RFRA).

[110] This part was written by Ann McGinley and Nicole Porter.

[111] *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713, 748–50 (2010) (comparing treatment of transgender women and men in workplaces).

[112] *Id.* at 721–23, 727 (explaining that men compete to prove their masculinity by demonstrating that they are not gay).

[113] *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that direct evidence is not needed in mixed-motive cases); Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that the employer could not prove its BFOQ defense to justify a fetal protection policy that prohibited fertile women from working in certain positions); Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015) (developing a new framework for pregnancy accommodation cases that will make it easier for pregnant workers to obtain accommodations under Title VII); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that hostile environment harassment is actionable under Title VII); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding that same-sex harassment is actionable under Title VII); Hively v. Ivy Tech Cmty. Coll. of Indiana, 53 F.3d 339 (7th Cir. 2017) (holding that sexual orientation discrimination is sex discrimination under Title VII).

describing the very real harm that the plaintiffs suffered, silencing the stories of those women (and men); some left open issues that might create more uncertainty and litigation in the future; and some described the problem in a way that continues to subordinate those individuals that the result was arguably meant to protect.

Some of these problems also exist with *Bostock*. First, as described by Nelson and Weatherby, the Court ignored the stories of the victims of discrimination in these cases. In doing so, the Court also refused to explain why discrimination based on sexual orientation and gender identity is harmful to all workers who have suffered such discrimination. Second, as described by Wilkins, the majority did not confront the implicit bias inherent in sexual orientation and gender identity discrimination. Moreover, we are troubled by the issues the Court either did not address at all or addressed in a convoluted way. Some of these issues have been mentioned above, such as: whether *Bostock* will protect bisexuals or individuals with other sexual orientations; whether individuals who do not identify on the gender binary will be protected; whether courts will broadly apply the religious exemption; and, as Archibald discussed, whether employers may legally continue to discriminate against non-cisgender employees by requiring them to use a bathroom they are not comfortable using.

But, as we discussed in Part IV, there might also be some positive consequences that flow from the Court's decision, including a broader "but-for" test, getting rid of the unequal burdens test, and expanded opportunities for intersectional arguments and coverage.

So, is *Bostock* a positive opinion from feminist perspectives? Yes, and perhaps, no, but it is too early to tell whether any positive or negative consequences will flow from it, and if so, which ones. For now, we think the LGBTQ+ community deserves to celebrate this momentous victory. As feminists, we celebrate getting one step closer to equal opportunity in the workplace for all subordinated workers.